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Copyright Law,
Practice and Fiction

Rights clearance for cultural heritage

in the digital age

with examples from the audiovisual sector.

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1. Introduction

Copyright principles

Within the field of application of the Revised Berne Convention, i. e. almost everywhere in the world, copyright follows clear principles. Initial copyright protection of any given work is usually connected to the author as a person and arises automatically, without any formalities involved. The author can then grant various rights to use the work or, in some jurisdictions, sell the rights for good. Only those who receive these rights one way or the other are allowed use a work, unless an accepted limitation or exception applies.

Older works and legal uncertainties

Limitations and exceptions aside, legal use of a copyright-protected work rests on a gapless sequence of transfers or grants of suitable rights from the creator to the user. This also applies to cultural heritage and thus for works whose exploitation cycle has usually ended long ago. Due to extended protection periods, most works of the 20th century are still under copyright protection. Nevertheless, it is often unclear who today holds which rights in older works – in particular regarding digital uses which weren't even known at the time of the creation of the work.

Adscription and arrogation of rights

These uncertainties prevent many possible and desirable legal uses of older works. They do not, however, necessarily leave older works unused altogether. The legal uncertainties are often rather handled pragmatically. The most frequent method to use a work in spite of legal uncertainties is to ficticiously ascribe the rights involved or to accept arrogation of copyright by others. The adscription of rights is a consensus of the parties involved about who should be accepted as the right holder while the arrogation of rights is a false claim of copyright. Regarding valid transfers or grants of rights both might be entirely without effect, yet it's widespread in practice.

Orphan works

The same can be observed for orphan works, the legal owners of which are entirely unknown. In addition to legal adscription, a common technique is to build loss reserves for copyright claims that might occur later. Against this backdrop it appears doubtful whether regulations on orphan works, based on directive in 2012/28/EU[1] will have any perceptible effect. Rather, there's is ample indication that the established structures of unwarranted copyright allocation described here will not

1 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:DE:PDF

go away.

More litigation over copyright

On the other hand, even those ficticious copyright adscriptions that formerly were widely accepted, are under increasing pressure. For a long time copyright law had been a very special discipline involving only a few experts professionally dealing with the exploitation of creative works. But, mainly due to digitization and the emergence of the internet, copyright law has become more and more important and today concerns almost every citizen. Everyday behaviour like the use of a smart phone can involve copyright-relevant actions. This increased importance of copyright in everyday life tends to remind authors that there might be remaining rights worth claiming. At the same time, companies increasingly ignore formerly accepted rights adscriptions in order to pursue new business models. The resulting disputes are more frequently fought out in court, which in turn raises legal uncertainties and financial risks. Overall the use and exploitation of older works is increasingly hazardous.

Archives, museums and libraries

Archives, museums and libraries are particularly affected by the legal uncertainties surrounding older works. Yet it is them who in many cases have ensured the survival of the disputed works in the first place. They have safeguarded and preserved our cultural heritage and their mission is in the public interest. Therefore the legal framework around this mission must be suitable for these institutions to carry out their tasks under changed conditions in the digital age. Uncertainties regarding the legal status of older works must not impede heritage institutions in their work, work which is done for the public good and funded by public money.

2. Copyright principles and their effects

Legal perspective

Within the scope of the revised Berne Convention the actual legal status of a work is determined by some specific copyright principles.

a. Origin and transference of rights

Origin of rights

Copyright arises with the creation of a work. What is and is not accepted as a work of authorship is defined in detail by the various national legislations. Usually a work requires a personal creation, showing at least some level of originality and creativity.

Since the globalisation of intellectual property law in the 19th century the threshold of originality has decreased and is today very low.

Transfer of rights

Copyright itself can be transferred or at least usage rights to it can be granted – either limited to single actions or kinds of utilisation or in general for all kinds of utilisation, exclusively or non-exclusively, to be further transferable or not, for a certain time or permanently, worldwide or for certain locations only. Thus, rights grants can be very diverse: Which type of rights regarding what kind of use, for how long, to whom etc.

Notices such as „Copyright by ...“ are very common, yet they do not indicate which portion of rights in the protected material they cover. So-called „buy-out“ contracts are widespread, having the creator permanently grant exclusive rights for all types of uses worldwide to an intermediary. This contributes to copyright-type rights being perceived as a unity. Especially regarding older works this is often a fallacy. For various legal reasons certain usage rights may not have been transferred or granted, even if this was intended by the parties involved. Some legal systems even render it impossible to grant rights regarding unknown future forms of usage. Creators may also have intentionally limited the rights they granted in a previous contract. Moreover, if there is residual doubt as to what rights were actually granted, the so-called principle of purpose-guided transfer says that only those rights necessary for the purpose of the contract were transferred or granted. And, restrictions regarding the duration and scope of rights transfers are especially common between intermediaries.

Several contributors to an aggregated work

The situation gets even more complicated if the work in question is in fact a combination of different kinds of creative works and achievements by different creators, all merged into an aggregated whole. Motion pictures are typical examples of this. To them as well the principle applies that different contributors (e.g. the director, the cinematographer and the cutter) each acquire their own copyright in the work. Some legal provisions try to unite all these rights, but that is not always possible. This is aggravated by the fact that different national legal systems differ quite extremely on this aspect. Whenever there are many creators involved in a production, the legal situation tends to be very complicated, because a gapless sequence of rights grants from all creators to the user must be established. This means

that if an older film is to be used legally today, the user must check whether the creators initially transferred sufficient rights to the film producer, plus whether the film producer later sold these rights to someone else and whether that happened validly and legitimately. The longer this sequence of legal transactions becomes, the higher the risk that certain rights were not transferred or granted or not to the extent necessary. In order to check this, all contracts entered into over the years would need to be analysed in detail.

b. Differences between copyright law and general property law

No bona-fide aquisition

Unlike in general property law, a notion of valid bona fide transactions is missing in copyright law.[2] Thus, an unauthorised use remains illegal even if the user acts in good faith and maybe even pays a fee to someone claiming to be the rights holder. The only difference between the bona-fide use and a similar scenario where the user actually knows that he doesn't have sufficient rights to use the work is: The latter is in most jurisdictions also a criminal act. Criminal liability for copyright infringement requires the infringing user to be positively aware of the lack of rights or to purposefully accept such a possibility.

Usucapion

Other helpful rules of general property law that can often resolve flawed acquisitions are also missing from copyright law. Most jurisdictions for example know “usucapion" of physical property after a certain time.[3] This old method of civil law is a method by which ownership of property (i.e. title to the property) can be gained by possession of it beyond the lapse of a certain period of time (acquiescence). The idea of this rule is that a flawed – yet for a long time undisputed – allocation of property should become legal at some point.

No healing of flawed transactions

Acquisition in good faith as as well as usucapion in general property law function to legalize flawed transactions in order to reach legal certainty and marketability by effecting clear statutory allocations to heal the defects. There are no

2 See Haimo Schack „Urheber- und Urhebervertragsrecht“, also regarding possible bona-fide acquisition of rights in case a compulsory registry exists.

3 E.g. in France Art. 2262, 2265 CC; in Germany § 937 ff BGB; in Italy Art. 1161 CC and in Luxembourg Art. 2279 CC.

similar rules in copyright law, even though the need for legal certainty and marketability isn't at all smaller in this field.

c. No formalities

No formalities

According to the Revised Berne Convention there are no formalities whatsoever as a prerequisite for copyright in a work to come into existence or be transferred.[4] To abandon the requirement of registration as a condition for effective copyright protection was understood as a big achievement of the (European) copyright system. The US entered into the Revised Berne Convention in 1989 and thereby abolished their own requirement of registering copyrights at the Library of Congress, which till then had been a condition for an effective copyright protection under US law.
While for tangible things like real estate most legal systems have very high formal requirements for allocation of property (land register entry, written contract or even notarial contract etc.), no such formal requirements are installed for a volatile thing as a creative work. As a results we see legal uncertainty and considerable difficulties to prove rights allocation.

Written documentation

In many cases the ownership of copyright hasn't even been explicitly dealt with in any written contracts. There are oral agreements which might be effective but the contents of which are often unclear after many years – in particular if the original partners to the agreement have passed away in the meantime. Or the rights transfer occurred in the form of some kind of note on the creator's invoice. Because invoices are kept only a limited number of years, many of these pieces of evidence are lost.

Inaccuracies

In addition to that, older contracts sometimes didn't state exactly which rights would be transferred and to what extent. The parties may have only envisioned the obvious uses for the time immediately after the agreement was made, and whether rights regarding future uses and ways of exploitation were even contemplated is unclear and up for difficult legal interpretation.

d. Long copyright protection terms

Copyright

To research the copyright status of works is often made difficult by the fact that the

4 Art. 5 par. 2 RBC.

copyright protection term lasts considerably longer than the usual economic recoupment cycles. As long as a work is exploited it remains crucial to regulate who holds what rights in it, who is involved in receiving revenues under what conditions etc. As soon as the economic exploitation is complete and there is no prospect of further revenues, the information about the status of rights loses relevance. From that time on there is little or no (economic) incentive in keeping records and documents about usage rights allocation.

protection terms longer than usual cycle of commercial exploitation

Companies who held copyright as an asset may also have failed economically in the meantime. They may have gone bankrupt or were bought by or merged with others. Frequently, the documentation of copyright gets lost in this process.

Bankruptcies and succession

And in addition to all that, wars and other destructive events have repeatedly caused damage to copyright documentation. Whenever production facilities or administration buildings were destroyed by bombs or fire, documents about the purchase or transfer of copyright are likely to be lost as well.

Wars

e. Legal uncertainties

A lack of contractual accuracy about what was transferred (especially in old contracts), inexact wordings in general, the absence of rules to heal flawed transactions – like in bona fide acquisition or usucapion – plus the absence of formal protection requirements combined with very long protection terms are the most important reasons for considerable uncertainties regarding the copyright status of older works.

Uncertainties

In many cases it is not entirely possible any more to decide all uncertainties and clear the legal status unambiguously. The clearing process gets even more difficult the more time passed since the first publication or use, the longer the work was out of use and the more creators were involved.

f. Use not allowed

Works whose copyright status is not entirely clear and that show no continuous i.e. gapless sequence of rights transfers or rights grants – reaching from the creator to the

Works must not be used

user of today and covering the specific use in question – must not be used in such a way. The use of such works without the consent of the copyright holder is illegal, and may even be prosecutable under criminal law if done in full knowledge of the legal uncertainty.

3. Practice

Fictions substitute chains of rights transfer

The practical handling of the copyright status of older works usually differs significantly from the strictly legal assessment and is often based on some degree of fiction, which substitutes the unknown "actual" copyright status. There are various reasons for this approach:

a. Need for fictions

(New) need for fictions

In spite of significant uncertainties about the rights status of older works, there is great interest to use them. This applies not only to heritage institutions such as archives, museums and libraries, the publicly funded guardians of cultural heritage. It also applies to new commercial opportunities that have emerged with digital technology. "New technologies breathe new value into old content."[5] Digital technology allows for considerably simpler and cheaper ways of production and distribution. This leads to new monetisation opportunities, especially regarding works whose distribution at some point in the past had become economically unprofitable.

Necessity of rights clearing

In order to be able to embrace the new opportunities for commercial exploitations, commercial users heavily depend on rights clearing of historical material.

Adscription of rights instead of rights clearing

However, this clearing often isn't possible anymore. One often cannot identify which rights are actually held by whom (to what extent and for how long). As a consequence, rights are attributed to those who to a high degree of plausibility might be the rights holders.

Correctness of right adscriptions

Whether this attribution or adscription is in fact correct or not, is regarded to be important only in respect to the risk of later being confronted with claims of the

5. Atwood Gailey, in Hugenholtz, Bernt et al. „The Recasting of Copyright & Related Rights for the Knowledge Economy“, European Commission DG Internal Market Study, Institute for Information Law, Amsterdam 2006.

actual rights holders. Even though this – in the end financial – risk exists, the recognition of some plausible rights holder mitigates the theoretical risk of criminal prosecution.

not top priority

Archives, museums and libraries are also interested in the copyright status being at least ostensibly cleared. Prof. Martin Koerber, archive director at the Museum of Film and Television in Germany (Deutsche Kinemathek), explains:

Practice of copyright clearing by museums, archives and libraries

> „We are glad if the copyright holders of the films in our archives are established with certainty, because then one can use these films. Whether these rights are actually held by those who maintain to hold them, is examined by us for plausibility but we cannot decide that in detail - this is particularly the case for new kinds of exploitation."

In the end, even heritage institutions are more interested in being able to work than in correctness of legal attributions. When asked about rights clearing by institutions, Jo Pugh, Research Engineer at the National Archive (UK), says:

> „Organisations have to be pragmatic about rights. If we want to make projects happen (and not just abandon them and curl up in a ball because it's all too difficult) then we have to accept that even if we were as completely scrupulous as we possibly could be, there will be a risk of infringement. We never know everything about our collections. It follows that running such projects is about managing risk."

Copyright risk management

Risk management replaces a proper rights clearing which is often either impossible altogether or involves disproportionate efforts.[6] This applies just as well to commercial users as it does to public archives, museums and libraries. However, commercial users tend to be more prepared to take risks than public institutions who are more tightly bound to act in accordance to the law. Sometimes public memory institutions are ready to incur some risks to fulfil their mission – which is providing

6 See Werner Sudendorf, „Risikomanagement", in Paul Klimpel (Ed.) „Bewegte Bilder – starres Recht?", p. 117 et seq.,,http://www.bloomsburyacademic.com/view/BewegteBilder_9783827090058/chapter-ba-9783827090058-chapter-012.xml

access to cultural heritage. This public mission together with their duty to act in accordance to the law lets them end up in a dilemma which they address in quite different ways.

b. Forms of rights adscription

Forms of rights adscription

For archives, museums, libraries as well as commercial users there are various setups at hand for how to attribute or ascribe copyright in a work to certain rights holders. In some cases the purported rights holder acts in full knowledge of not actually holding the rights claimed. In a subset of the cases, the licensee shares this knowledge but nonetheless accepts it. In other cases both the purported rights holder and the licensee act in good faith.

ba. Fraud

Copyright fraud

A mismatch of rights and claims is particularly evident in the case of fraud. The legal uncertainties in older works are exploited by companies, organisations and individuals in order to claim royalties or license fees, even though they positively know they do not actually hold any rights in the work. Still, this approach is sometimes successful and seems to evolve into a business model of its own. As the addressees of such claims can never be entirely sure whether the alleged rights do exist or not, many of them are willing to pay just to avoid the risk of unpredictable legal proceedings. This particularly applies to heritage organisations who are in a special way dependent on a trustful relationship with rights holders and must avoid any impression that they might flout copyright.

bb. Overstretched scope of rights

Overstretched scope of rights

Illegitimate claims are less obvious where the claimant actually holds some rights in the work and, based on those rights, claims more than he holds. Or where he had the rights only for a certain time, but ignores the fact that this time is over.

A telling example of overstretched scope of rights is the distribution of older films on DVD by video on demand in Germany.[7] The legal status of films is

7 Regarding the legal situation of older films see by the author: Paul Klimpel, „Unter Verschluss“, http://www.vocer.org/de/artikel/do/detail/id/254/unter-verschluss.html, The following paragraph is taken from that publication.

particularly complicated to discern, because many contributors are involved: The director, the cinematographer, the cutter and more. To what extent these numerous co-creators of a film have actually transferred their rights and whether this transfer has also included usage types unknown at the time, can no longer be ascertained in most cases. Contracts and production documents are often lost. For a silent film from the early twenties one can hardly ever trace back all records for all creators involved, including the entire chain of rights transfers needed for the digital use of the film. This basically applies to all films produced before 1966. In that year the so-called „producer's right“ was introduced into German copyright law (Urheberrechtsgesetz, UrhG). With it, the rights of use of all creators involved were bundled in the hands of the film producer, making commercial exploitation much easier. Later it became apparent that the ban on transfer of rights for future types of use – also introduced into German law in 1966 – is a heavy burden for digital accessibility and exploitation of films. Therefore, this ban was lifted in 2008 and in addition a retroactive bundling of the rights necessary for digitization was implemented through §137 l UrhG. This provision, however, only covers films which were produced after 1966, because before that – according to the logic of the legislation – rights for unknown future types of use could have been granted anyway.

In two landmark decisions[8] the German Federal Supreme Court set very high requirements for a valid grant or transfer of rights for these future types of use in regard to films produced before 1966: Such a transaction can only be regarded valid if there were specific negotiations on this point and if the agreement regarding future uses reached through these negotiations became a factor for the agreed price. To merely mention future uses in "terms and conditions" is not sufficient.

But film productions are almost always based on pre-formulated standard terms, and the high formal requirements for an effective transfer of rights are hardly ever met. Thus, someone holding the rights for classic movie theatre use does not at all hold rights regarding new uses and exploitations. Nevertheless many entities claim to hold such rights and distribute pre-1966 films in digital formats. It is hard to believe that they actually and retroactively cleared all rights necessary. Rather, the

8. BGH, 28. 10. 2010, I ZR 18/09, http://www.telemedicus.info/urteile/Urheberrecht/1291-BGH-Az-I-ZR-1809-Der-Frosch-mit-der-Maske.html; BGH, 28.10.2010, I ZR 85/09

film industry ignores the law and often the true copyright owners only get paid if they make their claims (in court).

bc. Invalid conclusion based on physical property in copies

Physical property

Especially archives and museums often assume to have acquired copyright in a work automatically by acquisition of the physical copy of that work. They then quite honestly act in the good faith in being allowed to use the works (at least within the scope of their respective public mission). Oftentimes no arrangements at all were made in related last wills or old contracts about copyright. In some of these cases one might be able to validly make a legal interpretation of the agreements by which authors or their heirs donate a bequest to a memory institution, the result being that it was intended that the institution should be allowed to use the works included. But an interpretation to this end will not always be possible. And even if it is, the persons bestowing material to an institution might be mistaken themselves in thinking that they can actually transfer rights that in fact previously had been transferred elsewhere. Thus, while it's an undisputed rule that memory institutions receive the culturally important works in order to preserve them, it is not at all undisputed that this includes rights regarding economic exploitation. Creators often explicitly reserve rights as they hand over the records of their creative work to an archive.

bd. Assumptions

Assumptions

Many attributions or adscriptions of rights are based on simple assumptions which have a certain plausibility in their favour. As long as other transactions are unknown, the rights are supposed to rest with the creator or his heirs. This isn't necessarily correct. On the one hand the creator in his lifetime may have already transferred exclusive rights to somebody else, without this being apparent or known. On the other hand there might exist an unknown will or testament which may have transferred rights to someone other than the heir.

In other cases copyright is ascribed to production companies or publishing companies who produced the work. It often takes a tremendous effort to only identify the production company or publisher in the first place as well as their legal successors in case the initial company or producer vanished, was converted or merged. However, even if all this can successfully be investigated, this doesn't warrant that the rights

actually are located with the legal successor of the original company, because they might have been transferred in the meantime to other companies.

c. Orphan works

Orphan works

Orphan works are copyrighted works whose rights holders are unidentified or cannot be contacted.

Even if resorting to fictional attributions and assumptions can make the problem look less serious, many cases remain where neither the actual rights holder can be found nor anybody making incorrect claims is present.

According to today's laws orphan works must not be used. The directive 2012/28/EU will change this for a small subset of cases , namely for certain privileged public memory institutions, only regarding non-commercial uses and only regarding uses that occur online.

Commercial users

Especially commercial users have often ignored the impossibility to clear rights for orphan works. In their considerations it is a purely economic risk whether a copyright owner may bring later claims or not. They prepare for this case by building up financial reserves for possible licence fees.

Books

With books, for example, it is general practice to re-publish older works even though not all rights are cleared. Some simple notices are added to the books such as „Although we conducted a careful search not all authors or their legal successors could be found. Should legal titles in the book exist, these are to be brought to the publisher.". Though such wordings are without any legal effect, they nevertheless secure the publisher in certain respects. For example, rights holders usually only raise financial claims but do not demand withdrawal from sale and that all remaining volumes be destroyed (where such legal options exist).

Pragmatic approach for commercial exploitation of films

Films which are orphan or part-orphan have a legal status which is particularly complicated to discern – because of the numerous contributors involved – are nevertheless exploited commercially every day.

The German producer Joachim von Vietinghof helped to build the video-on-demand service „Treasures of the German film". In an interview[9] he explains why he makes films available online even though the legal situation is not clear. Regarding possible claims by rights holders he has set up reserves:

9 See http://www.memento-movie.de/2013/02/interview-mit-joachim-von-vietinghoff/

„We do not want to get rich on other people's property. However, a work which is blocked is dead. This, if we do not have the legal right, is our moral stance and the reason why we make a film accessible online. If anybody thinks they might hold rights, then they should contact us. We have a legal department. Give us proof, the money is here, give me the number of your bank account.“

All this is carried out openly, although it is forbidden under German law and is even prosecutable. Just as any other unauthorised use is illegal under copyright law, the use of orphan works is prosecutable under § 106 UrhG. It is a criminal offence. And to set aside reserves doesn't make it lawful, but would be rather sufficient proof that it was done on purpose.

Use of archive material

Even heritage institutions make orphan works available for use by third (commercial) parties. Due to the state of the law they are in a dilemma anyway: On the one hand their mission is to make cultural heritage accessible and to preserve awareness of cultural traditions. If they fail, important works will be forgotten and disappear culturally, a threat to cultural diversity. On the other hand, the law forbids the use of orphan works. Therefore, heritage institutions are grateful if other, even commercial users take over the risk of making use of orphan works. What they usually ignore is the fact, that from a purely legal point of view, public institutions can never completely hand over the responsibility for the use of their stocks to a third party. Prof. Martin Koerber, director of the archive of the German Film Museum (Deutsche Kinemathek), explains:

„We do have films in our stocks for which nobody knows the actual rights setup. Still, such orphan works are occasionally used by third parties. For example, a film might be broadcast by a television station, but only if in return they contractually agree to secure us against all claims and promise to prepare reserves for possible claims made by rights holders.“

To sum up, heritage institutions (the public ones privileged by directive 2012 / 28 EU) as well as commercial users have in the past often ignored the illegality of making use of orphan works. This practice is not likely to change with commercial users, since the commercial exploitation of orphan works is not regulated by the directive. But it is even doubtful whether public heritage institutions will change their behaviour and really undertake the trouble of an expensive and complex diligent search instead of recognising – as before – dubious legal constructs.

4. Legal provisions that support the adscription of rights

Tension between copyright principles and legal arrangements

There is tension not only between the practical dealing of users and the principle of copyright law, which demands a complete sequence of the transfers of copyright from the creator to the users. There are also a number of legal provisions, aiming at merchantability and legal certainty regarding creative goods, that are partly in conflict with the above principle.

Interpretation rules

Many legal systems have rules on contract interpretation and legal assumptions which effect a certain transaction about copyright – for example, in favour of the employer or producer. In the Anglo-Saxon legal tradition the concept of "work for hire", i.e. the creation of a work on the job or for a client, is very common and says that copyright moves to the principal completely. But also in the continental European legal tradition there are interpretation rules which favour the acquisition of copyright by the employer or producer in case nothing else was agreed. Partly, as for example up to now in Austria, such a copyright transactions is effected by law.

Extended Collective Licensing

Another example is Extended Collective Licensing, common particularly in Scandinavia, which in the interest of legal certainty and sometimes to enable commercial use deviates from the requirement of explicit copyright transfer by every rights holder involved. Under ECL provisions, which may vary considerably between implementations, collecting societies are entitled to represent all rights holders, even those who aren't members of the societies. Based on this, the collecting societies can then validly enter into licensing agreements. The creators, however, usually have the possibility to ”opt out” and withdraw their rights from the arrangement and demand

the use to stop.

5. Increasing gap between law and practice

Gap between law and practise

In summary it can be stated that the principles of international copyright law as embodied in the Revised Berne Convention and the WIPO diverge to some extent from the way older works are dealt with in practice.

No damage done

This gap got little attention, for neither has significant damage occurred nor have the interests of powerful groups been compromised. Ultimately, pragmatic solutions were found in practice, involving fictions and assumptions, where the strict application of the law would have prevented the use and exploitation of older works. Legal regulations which only damage and hinder without bringing any benefits s are being ignored by daily practice. Rights violations are pursued only if someone actually suffered damage or is hoping to benefit from prosecuting infringers.

Consensus gets fragile

For a long time, legal adscriptions were a widespread means to retain the ability to manoeuver in spite of legal uncertainties. This was possible because the parties interested in copyright transactions had mutually accepted such copyright adscriptions as a rule. But this consensus gets fragile today. Increasingly the actual rights holders or their descendants appear on the scene and state their claims. Also, new and innovative companies pursue the possibilities of digital exploitation and get in conflict with traditional business models. These conflicts often circle around the extent to which usage rights also cover new forms of usage.

Increase in litigation

This shakiness of the consensus regarding rights adscriptions lets more and more disputes end up in court. Adscriptions tend to become a matter of proof.

Orphan Works

For orphan works nothing has fundamentally changed, neither for commercial use nor for use beyond the internet. It remains to be seen to what extent the directive 2012/28 EU will bring change in regard to the procedures of archives, museums and libraries. Will they take on the demanding task of diligent search and develop efficient routines for this? Will they ask third parties to do the diligent search, as is expressly permitted by the directive? Will they take the risk to have to pay later, nevertheless? And will they question rights arrogations they accepted in the past? Will they give in to the temptation of accepting copyright fraud, because it is the

easier way?

It seems most likely that many different alternative arrangement will emerge, such as those based on the Memorandum of Understanding on Out-Of-Commerce work[10], following the general principle that any solution has to build upon the consensus of the relevant stakeholders. The Orphan Works directive is without prejudice to "arrangements such as extended collective licences, legal presumptions of representation or transfer, collective management or similar arrangements or a combination of them, including for mass digitisation" (Preamble (24) Directive 2012/28 EU)

It remains to be seen whether such arrangements, outside the scope of the orphan works directive, mean that heritage organisations will invest a lot of money in diligent search if alternatively they can remain able to act by simply paying royalties to a presumed, but widely accepted rights holder? Especially if alternative arrangements are based on laws which limit liability further than article 6 paragraph 5 of the directive, which allows a copyright holder to retroactively end the status of a work as "orphan" and make claims for reimbursement.

Legitimacy of the legal system in question

However, phenomena such as the aforementioned (and up until today quite accepted) gap between the law on the one hand and the practice of rights adscriptions on the other, are likely to increase in the future and, on a European scale, challenge the legitimacy of the legal system. This is particularly true for heritage organisations which, additionally to various fictious claims, may have to rely on a mix of orphan works laws and varying, possibly overriding, alternative arrangements. Questions of representativity of collective management organisations and the goodwill of lawmakers and stakeholders will define what is possible in one Member State but illegal in another.

Such increased fragmentation not only makes the common market seem a distant idea, it also severely undermines the public mission of heritage institutions in the digital age as well as the role of international collaborations and services such as Europeana. It is therefore high time for legislative counter measures.

10 http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20110920-mou_en.pdf

6. Closing the gap between law and practice

There are different options for how to close the gap between law and practice.

Enforcing the law

Certainly the worst way would be to strictly enforce the law without taking into consideration the effects this would have on the use of historical materials. This is not very likely to happen, because while there are considerable, also economic interests in being able to use older works, nobody would really profit from a blind enforcement of rights that would blockade such uses.

Reducing copyright protection terms

Another way to reduce the gap between law and practice would be to reduce the protection term of copyright. Experts and scholars have been advising in this direction for a long time and for various reasons. Nevertheless, the legislation of the EU seems to move in the other way. Recently the protection term of phonograms was extended in the European Union by the directive in 2011/77/EU from 50 to 70 years. It is unlikely that there will be any shortening of protection terms in the near future.

Long protection terms only make sense for long and thus exceptional commercial exploitation periods. If the protection terms would be shortened, these special cases could still be protected by suitable options to extend the term, but this is difficult for literary awards that may be given after a long period of relative obscurity and would of course, require some kind of registration system.

Strengthening legal assumptions

A third possibility would be to strengthen the legal assumptions in copyright law to more consequently protect the bona-fide user against possible claims. Such a ratio legis oriented approach towards the worthiness of protection of bona-fide dealings would somewhat collide with the moral rights of the creator being a strong foundation of continental European copyright tradition. As this tradition sees in every work also an expression of the creator's personality, every flawed transfer of rights can be construed as an injury of the creator's personality. This distinguishes copyright law from, for example, general property law and makes it unlikely that bona-fide uses will ever be made per se permissible. But a strengthening of legal assumptions does seem possible, in particular concerning the extent to which rights were transferred, and also in regard to arrangements such as Extended Collective Licensing.

Copyright registry

To introduce a registration as a prerequisite for copyright protection would be another way to create legal certainty. Such formalities had been renounced in the past

because it was regarded an unreasonable burden for creators to have to undertake the bureaucratic trouble and the costs of registration. In the digital age, however, registration can be made very easy, so that it can be done by everybody any time and from any place. Accordingly, the original argument against registration becomes less convincing.

Sectoral exception for heritage institutions

Another way to release cultural heritage in particular from legal uncertainties would be a general copyright exception for archives, libraries and museums which lets them act freely within the scope of their public mission. The existing special rules implemented often differently in Member States, are not sufficient. They are concerned mainly with the preservation of material in archives. A sectoral exception is necessary for all measures related to archiving, indexing (data mining) and preserving cultural heritage material – regardless of the (technical) means used or methods yet to come.

Heritage institutions meet a public need to not only have our cultural heritage preserved but to also be able to access it. Archives, museums and libraries should be burdened with clearing rights only as insofar as uses occur that go beyond archiving, collecting, preserving, indexing and visualising their material on the internet.

Online visibility

In addition, archives, museums and libraries should generally be allowed to make their collections visible on the Internet. The German Museum Association (Deutscher Museumsbund) has spelled out this demand in January 2012 in a white paper.[11] It states:

> „As a part of the improvements in copyright law, museums that are primarily financed by the public or that serve non-commercial cultural purposes are to be given the opportunity to visually present the cultural objects entrusted to them in an appropriate form via publicly accessible internet databases complementing the text-based metadata, without having to pay royalties."

The central idea of this postulation is the differentiation between the consumption of a work (which is and should remain the object of commercial exploitation) and a

11 See http://www.museumsbund.de/fileadmin/geschaefts/presse_u_kurzmitteilungen/2012/Positionspapier-Kulturelles_Erbe_im_Internet_sichtbar_machen_Januar_2012.pdf

mere illustration of its cultural meaning, i.e. the rather documentary function of previews, trailers or short clips. This basic idea has long been accepted in other areas, e.g. regarding text snippets or thumbnail previews shown by search engines on the internet.

Small steps

To entirely close the gap between law and practice regarding the use of older works would surely question some of the principles of copyright law as it stands. This makes it unlikely. Nevertheless, it is likely that some of the above mentioned alternatives are implemented in a milder form. Rules of assumptions could be strengthened through Extended mechanisms or through clearer interpretation rules regarding the transfer of copyright. It is conceivable also that formalities, though they are unlikely to become a constitutive condition of copyright, will play a more important role: Enforcement of copyright claims could, for example, be made dependent on a registration with collecting societies. Likely to happen are also sectoral exceptions for heritage institutions or at least advanced limitations and exceptions of copyright law concerning cultural heritage.

7. Consequences for today's practice

While there is an urgent need for future legislative action , meanwhile archives, museums and libraries must get on with the existing (legal) situation.

Fiction still necessary

Fictitious arrangements, arrogation and adscription of rights will remain necessary as long as legislation will not provide a clear framework to work with cultural heritage, acknowledging and accepting copyright uncertainties as a matter of fact.

Alternative arrangements

Alternative arrangements of the stakeholders involved, especially with collecting societies acting as representatives of the authors and right holders will strengthen fictitious arrangements. All stakeholders that deal with copyright issues know about the problems to determine copyright holders, and they all seek legal certainty, be for enforcement, cultural or commercial uses. Due to legal recognition of alternative arrangements and Extended Collective Licensing adscription of rights will reach an indirect legitimacy.

Less rights clearance in

Solving legal puzzles is hardly the main work description of archives, museums

and libraries. Thus, they should not be coerced into it on the current level. They receive public funding in order to preserve the remains of creativity and to give access to the richness of our cultural heritage

heritage institutions

Unfortunately, heritage institutions are not at all relieved from the difficulties of rights clearing – rather those requirements get higher. The directive 2012/28/EU on orphan works illustrates this tendency.

Orphan works Directive

Following the directive, a great effort is requested for diligent search and its documentation. Even if this effort does not provide information about the true rights holder, the use of the orphan works still implies financial risks for museums, archives and libraries. Firstly, a rights holder reappearing later can end the status of the work being orphan (article. 5) and forbid further digital use of the work, although the institution may have invested considerably in the work's digitisation. Secondly, a rights holder can demand payment for uses in the past (article. 6 paragraph 5). This two-fold risk could be too high for heritage institutions who instead should be able to spend their public money for preservation and accessibility of cultural heritage.

Alternative arrangements and ECL could resolve this. They are a way to overcome the costly burden of rights clearance within the existing legal system. But further fragmentation of European copyright law and practice plus increased difficulty to achieve cross-border solutions may be the price to pay.

Alternative arrangements as solution