

Copyright in Cultural Heritage Institutions

Snapshot of the Situation in Switzerland from a national library perspective

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ABSTRACT

This paper outlines some of the most relevant copyright obstacles libraries in the cultural heritage institutions sector currently face, when trying to fulfill their mission in the digital context. For each of the four main activities – collecting, cataloguing, making available and preservation – the essential copyright issues will be outlined against the background of the legal situation in Switzerland. Where possible, short references to a broader copyright context and the laws of other countries will be given.

Particular emphasis will be placed on cataloguing and making available documents as the current ongoing Swiss copyright revision contains some innovative approaches: a catalogue privilege as well as new regulations for the handling of orphan works and mass digitization. Concerning collecting and preserving, at least some relevant questions in relation to copyright will be posed in order to maybe launch further discussions.

Keywords

Digital Heritage Institution ; Library ; Copyright ; Switzerland

1. INTRODUCTION

As the formulation of law usually lags behind technical demands and perspectives it becomes increasingly problematic for libraries to fulfil their mission in the digital context. They must deal with a multiplicity of legal problems especially relating to copyright and data protection, which generates difficulties on two levels, both in everyday practice as well as in the strategic development of an institution. This paper focuses on the matter of copyright.

Copyright issues are becoming more and more important in most libraries, in particular when it comes to the digital context. The variety of problems differ according to the type of the library in question, for example:

- A general public library will most likely deal with questions related to lending rights or the business models for acquiring and lending e-books that are mainly novels and nonfiction.
- Scientific libraries will focus on the development of new publishing models of scientific content, so the keywords for them

are journal rates, licensing models and open access.
- National libraries treat their publications as cultural assets. This generates special copyright questions when cataloguing their collections and making them available to the public as well as preserving them, ideally forever.

Discussing the whole range of copyright issues occurring in different types of library would go far beyond the scope of this short paper. A decision had to be made, so the following explanations focus mainly on *copyright issues in libraries which serve primarily as cultural heritage institutions* [called CHI in the following]. Of course an elaborate presentation and a full enumeration of all the copyright difficulties in CHIs is still not possible within a few pages. But with regard to the ongoing copyright revision in Switzerland¹ (as likewise in numerous countries around the world), it will outline some of the most serious copyright issues relating to collecting, cataloguing making accessible and preserving cultural heritage.

As Switzerland is not a member state of the European Union, it has in some manner a wider range of possibilities to solve specific copyright problems. For example the famous EU-guideline for orphan works has not been implemented in Swiss copyright law. The draft regulations of Swiss copyright outlined below include some alternative and creative approaches regarding the needs of CHIs.

Nevertheless it would of course not make sense to presuppose that Switzerland is completely independent in formulating new copyright rules. Switzerland has also signed the major international copyright treaties² and, considering the internet as a global phenomenon, we need common solutions or at least approaches which once will function in a cross-border way.

The author of the present paper is not a lawyer but has been working in the copyright field in the Swiss National Library for several years. The following explanations have therefore not being developed in a 'legalistic' way. They rather refer to practical questions which evolve out of a practical librarian point of view but which are determined by the legal context.

¹ see
<https://www.ige.ch/en/copyright/modernisation-of-copyright.html> [16/06/2016]

² especially
- Berne Convention for the Protection of Literary and Artistic Works, 1979, Berne.

- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961, Rome.

- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1994, Marrakesh.

2. COLLECTING DIGITAL RESOURCES

When acquiring digital works for their collections, CHIs face already fundamental copyright issues, especially if these works are digitally born and only accessible or available on the internet.

On the federal level in Switzerland there is no legal deposit law, neither for analogue nor for digital publications. Similarly to many other European countries, Swiss copyright law does not include an elaborated fair-use, as known in the United States for instance. Together, these two lacks make it particularly difficult for CHIs to integrate digital works in their collections: for example, e-books which are produced by a publisher in the traditional model usually cannot be bought, but only licensed. Of course licensing models are not an appropriate way of ‘collecting’ with the aim of long-term preservation of digital resources. Moreover, digital products such as e-books are often endowed with technical rights management devices in order to exclude unauthorized uses. Swiss copyright, like copyright law in every country which implemented the WIPO Copyright Treaty³ and the WIPO Performance and Phonograms Treaty⁴ (both signed in 1996), forbids circumventing such technical protection measures.⁵ Besides, there are also publishers which refuse to supply e-books to libraries at all, fearing that this could reduce retail sales.⁶

But collecting digital heritage is not only difficult in a commercial context as is usually the case with e-books or e-journals. Non-commercial websites or blogs, for example, normally combine a lot of copyright protected works of different kinds and from diverse copyright holders. From a copyright view, all of these should give their permission in order that a CHI is legally allowed to collect and preserve their copyright protected content.

Licensing models as provided by Creative Commons and other non-profit organizations provide an interesting approach to improve the situation. If more and more creators put free licenses on their work, efforts for rights clearing processes can be reduced. However, the effectiveness of such licensing systems will depend on how many creators are actually going to use them. It can be expected, that especially rights’ holders of works made for commercial use will rarely use free licenses.

Over all, to really enable cultural heritage institutions to include a multiplicity of copyright protected, digitally born content in their collections, a legal basis is needed, that:

- ▶ allows libraries to get digital publications such as e-books in a long-term and definitive way, without digital protection measures. This could be achieved by the introduction of an appropriate legal deposit or through a specific copyright exception for libraries working in the cultural heritage sector.
- ▶ enables CHIs to legally collect non-commercial digital works available on the internet such as websites in simplifying right clearing processes. A corresponding legal deposit (as some countries already have) is probably the most obvious solution.

3. CATALOGUING AND ACCESS

CHIs always have created inventories for their collections in order to make the works included searchable. Nowadays such inventories exist usually as electronic catalogues accessible on the internet. Their records consist of descriptive metadata such as title, name of the creator, extent, date of origin, etc. Of course, it would be far

more effective and therefore user-friendly to make available online as much useful information as possible about the catalogued works. This could prevent that users be obliged to come on-site (or in case of libraries maybe order) to consult their works of interest – as was the case over the past centuries – to check, if the chosen works meet their expectations.

Both cataloguing and making available copyright protected works on the internet may create copyright problems, which must be taken particularly seriously. On the one hand, it is essential for CHIs to respect the authors’ rights of the works in their collection. On the other hand, providing informative and user-friendly catalogues and making works collected available online are probably the most obvious missions of CHIs, which often are funded by public money. Therefore, new copyright solutions are needed which allow both a fair balance to the rights’ holders as well as practical possibilities for CHIs to make their cultural heritage collections available in the digital age.

3.1 Catalogues

The present copyright draft in Switzerland proposes a completely new and unique regulation, formulated as a legal limitation for CHIs. Accordingly CHIs would be allowed to improve their online catalogues by enriching them with extracts of the catalogued works as long as this does not affect the rights and legitimate interest of the rights’ holders. Regarding publications for instance, CHIs would be authorized to include covers as well as tables and abstracts of contents. Concerning pictorial works such as paintings or photographs, it should be possible to include small pictures in low quality (to avoid their re-use). In case of audio- and audiovisual materials, CHIs would be allowed to integrate limited short excerpts in their online catalogues. According to the drafted regulation, the use of works within this kind of catalogue enrichment neither demands rights clearing processes nor remuneration.

The implementation of this new ‘catalogue privilege’ would mean a real progress for CHIs, as they would be able to provide more informative, attractive and high quality inventories with a deeper insight into the described works. Since users would get a lot more information when searching online, they could decide more easily if it would be useful for them to consult a certain work or not.

There would be still some questions remaining relating to the practical implementation of the catalogue privilege. For example, how to ensure that a ‘small picture in low quality’ will still be good enough to generate the required added value for the users? At least the main content or main point of an image should be made recognizable. Otherwise it would not make sense at all to include it in the catalogue. But how to provide legal security for CHIs? Definition of pixels and size would be maybe the easiest but surely not the most reasonable way. Would it then be wiser to prescribe certain image formats for example – and if yes what kind?

As many CHIs hold millions of photographs in their collections, a more detailed definition of specifications regarding to the practical implementation of the drafted catalogue privilege would be crucial. And surely such specifications would highly influence strategic decisions on bigger retro-digitization projects in CHIs.

³ see <http://www.wipo.int/treaties/en/ip/wct/> [11/04/2016]

⁴ see <http://www.wipo.int/treaties/en/ip/wppt/> [11/04/2016]

⁵ Girsperger, 2007, 118.

⁶ see IFLA principles for library e-lending
<http://www.ifla.org/node/7418> [19/04/2016]

3.2 Obtaining Rights

Libraries' collections are numerous and heterogeneous. They usually contain a mass of works of different kinds and by many different creators. Accordingly the number of diverse copyright holders is immense. The Swiss National Library for example holds around 4.5 million publications, approximately 1.5 million photographs and graphic works, around 45'000 posters, several hundred literary and artistic archives and also a large number of audio works. The biggest part of the collection consists of works which have been created during the 20th century up until today. Most of them are still in copyright and thus cannot be made legally available on the internet without the permission of the rights' holders.

A high percentage of 20th century works are orphaned, which means that the rights' holders are not known anymore or cannot be traced and contacted in order to give the necessary permissions. Other than the catalogue issue described above, difficulties relating to orphan works and individual rights clearance in CHIs are better known, at least within the most relevant communities. Pamela Samuelson, copyright expert and one of the key speakers at iPRES 2015, also discussed this problem and spoke about related legal developments in the United States.

In Switzerland the copyright draft takes a dual approach.

3.2.1 Single Use of Orphan Works

A new draft regulation would allow the use of an orphan work from a CHI's collection after remuneration has been paid and therefore permission obtained from the representing collecting society. Furthermore, some research about the rights' holder must have been carried out, to ensure that the work in question is in fact orphaned. Contrary to the EU-directive⁷ the Swiss approach does not define what sources must be searched. This can be seen as both an advantage and a disadvantage from the CHI's view: the EU-directive has been criticized a lot by CHIs for its very intricate and therefore unrealistic 'diligent search'.⁸ But the non-definition of the necessary research leaves institutional users in legal uncertainty and private users (who according to the Swiss draft would be also allowed to use orphan works) helpless, as they would hardly be experienced in undertaking effective research about rights' holders.

A clear advantage of the Swiss draft over the European regulation is the partial inclusion of integrated works. If an orphan work includes further orphan works, the rights for these must not be cleared separately, as long as integrated works do not determine the character of the work in question. This means for example, if a book of poetry which is orphaned also includes some orphaned illustrations, the latter must not undergo the same copyright procedure as the book itself.

Contrary to the EU-Directive the Swiss draft does not include any kind of a register of works which have once been declared as orphaned. The absence of such an inventory is the main disadvantage over the EU-approach, as one cannot trace for which works research about the rights' holders has already been made. This could result in multiple searches for rights' holders for one and the same work.

To summarize, the Swiss approach could be useful for individual uses of orphan works, if users and collecting societies work

together. But it is surely no help when using a large number of orphan works, for example on the internet, as the efforts and costs for rights clearing processes would be far too high.

3.2.2 Mass Digitization

One of the main problems arising when digitizing large heterogeneous collections from the 20th century (which usually include a lot of orphan works) is that the rights' holders of works created in the first half of the 20th century are often not member of a collecting society, as those were only founded during the 20th century. As a result, all these rights should be cleared individually, which is of course impossible. To solve this problem, the Swiss copyright draft includes a very open version of the Scandinavian extended collective licensing-model [ECL]. According to the ECL-model, collecting societies are enabled to represent not only their members but also non-members, as long as their works correspond to the characteristic types of works represented by the appropriate collecting society.

The ECL outlined in the Swiss copyright draft is very general. Unlike some other European countries which already use the ECL, there is no limitation concerning the range or duration of use under the ECL. Both can be freely negotiated between the user and the appropriate collecting society. Furthermore everybody (not only privileged institutions) would be allowed to negotiate contracts with collecting societies based on the ECL-model. And contrary to the United States the drafted ECL in Switzerland is not seen as a time limited trial.

The actual introduction of such an ECL would of course be crucial for the strategic planning of large digitization projects of collections which include orphaned and other copyright protected works. Without a comparable tool, the results of such projects could not be made available at all. Hence the argumentation for conducting such projects would miss the most attractive key point.

The uptake of the ECL in Swiss law is therefore welcome, not only from the collecting societies' point of view but also from the perspective of larger heritage institutions which could afford such major digitization projects.

Again, success and practicability – or even abuse – of the drafted regulation will depend on the quality of interaction and negotiation between the different stakeholders. From the CHIs' perspective, the negotiated contracts should also undergo checks by an independent instance.

3.3 Text and Data Mining [TDM]

As in other ongoing copyright revisions, text and data mining [TDM] is being also discussed in Switzerland. The current drafted regulation allows text and data mining only for scientific purposes and against remuneration to the collecting societies.

From the user's point of view, remuneration is disputable as the largest part of the data to be mined is usually raw data, which is not copyright protected anyway. Moreover more and more publishers sell regular licenses for text- and datamining of their products. An additional remuneration would therefore go far beyond the objective. These arguments were also crucial in the United Kingdom, where in 2014 a new exception for text and data mining has been introduced – without remuneration. Furthermore, the

⁷ DIRECTIVE 2012/28/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 on certain permitted uses of orphan works.

⁸ see EBLIDA, 2015, 4.

limitation on 'scientific use' could be seen as problematic, especially as long as there is no particular definition of the term 'scientific'. In relation to the missing definition many further questions and uncertainties could arise.

4. LONG-TERM PRESERVATION

Swiss copyright law allows retro-digitization as well as the use of protected works for purposes of archiving and long-term preservation. As long as the works in question will not be made available, retro-digitization and other copyright relevant uses in relation to digital long-term preservation (regarding migration or in the context of emulation) are therefore permitted.

From a strategic point of view, it becomes more and more attractive for CHIs to move long-term preservation into the cloud in order to benefit from lower storage costs as well as to profit from the sustainability of cloud systems. Given the fact that most CHIs do not have sufficient resources to build a cloud on their own and to host the content by themselves, the outsourcing of archiving and long-term preservation of digital material becomes an interesting opportunity. This raises additional legal questions not only in relation to data protection (which will not be treated here) but also in the context of copyright.

4.1 Transmission of Legal Privileges?

The above-mentioned, already existing regulation in Swiss copyright concerning the use of copyright protected works within the scope of archiving and preservation, is limited to special types of institutions such as libraries, educational institutions, museums and archives⁹. Thus the question arises whether these privileged institutions can legally outsource their long-term preservation to a third party such as a commercial company for example, which as such does not profit from the outlined archive and preservation privilege.

At least as long as the rented service could be subsumed under 'Infrastructure-as-a-Service' [IaaS], this is legally possible, supposing that the supplier provides only storage services and does not process the data, as well as access to the data is protected and only possible for the data provider.¹⁰

4.2 Territoriality of Copyright and Clouds?

As in most other countries, Swiss international private law recognizes the 'Schutzlandprinzip' (lex loci protectionis). Accordingly, Swiss law applies to violations that occur in Switzerland and foreign law applies to violations occurring abroad. This 'Schutzlandprinzip' corresponds to the general territoriality of copyright. In consequence, copyright violations will be judged according to the law of the country in which the violation has taken place.¹¹ Out of this evolve further questions, especially regarding to outsourcing long-term preservation to cloud systems. While for example Swiss copyright includes the mentioned exception for long-term preservation under certain circumstances, other countries do not have this kind of regulation in their copyright law.

As the cloud user usually doesn't know in which countries the data will be stored and hosted, he can hardly make sure that the necessary migrations and other copyright relevant uses of the protected material according to long-time preservation are legal in the different countries in which the corresponding servers are located.

⁹ see article 24 paragraph 1^{bis} of the Swiss copyright act.

¹⁰ see Beranek Zanon, de la Cruz Böhringer, 2013.

5. SUMMING UP

CHIs face a wide range of copyright questions, uncertainties and problems when trying to legally fulfill their main tasks: collecting, cataloguing, making available and preserving works from the cultural heritage sector.

Some important ambiguities relating to collecting and making available by now seem to have been taken up by wider communities. Accordingly various legislative processes in a number of countries do integrate first approaches in order to enhance the actual situation for CHIs. Unfortunately, this does not mean that the different attempts we have seen so far would provide real and practical solutions. But at least a start has been made – in Switzerland as well as in many other countries.

At the same time new questions relating to new techniques arise, for example in relation to outsourcing long-time preservation or the use of clouds. One of the biggest challenges is surely dealing with the territoriality of copyright – not only in the case of preservation but also of cross border uses when making available copyright protected digital heritage collections on the World Wide Web.

Making the relevant communities realize the range of copyright problems in CHIs, as well as searching for solutions together with other stakeholders, especially the rights' holders of the works in their collections, is a big task for CHIs nowadays. They must make sure that they won't be forgotten in the diverse ongoing political and economic discussions about dealing with advantages and disadvantages of technical progress or new internet business models. It could finally even be crucial for CHIs to make decision makers aware of the present copyright issues, in order to promote legal approaches which will allow CHIs to continue their cultural mission in the name and on behalf of society and the public itself.

6. ACKNOWLEDGMENTS

My thanks goes to the Swiss National Library, which encouraged and enabled me to make this a contribution to iPRES 2016.

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¹¹ see Fehlbaum, Lattmann, 2009, 381.

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