Chapter 9
Digital Libraries and Copyright Issues: Digitization of Contents and the Economic Rights of the Authors

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ABSTRACT
While cultural institutions such as libraries, museums and archives wish to digitize their collections for preservation purposes and make the world’s cultural heritage available to the public, private entities are launching projects to provide access to digitized contents through Internet search engines. This may, however, raise copyright issues, particularly in case of “opt-out” programs such as Google’s Book Search, where rights holders have to specifically request that their copyrighted works be excluded from the project. This chapter highlights the legal challenges involved in the digitization of works from libraries’ collections and the subsequent use of the digital files.

INTRODUCTION
Digital libraries are usually defined as organized collections of digital information, where the information is stored in digital formats and is accessible over a network. A digital library thus implies, except for born digital works, the digitization of analogue collection items, i.e. that digital files be created from physical material. Digitization means the conversion of analogue information in any form to digital form with suitable electronic devices (such as a scanner), so that the information can be processed, stored, and transmitted through digital circuits, equipment and networks.

The digitization of contents by cultural institutions for purposes of preservation and potentially online access of the world cultural heritage raises organizational, financial and technical issues. This chapter, however, focuses only on the legal aspects, more precisely on copyright issues. These issues have become particularly disputed as Google announced on 14 December 2004 its ambitious plan to digitize over fifteen million volumes from five of the world’s leading libraries and to include them in its search database. This project, which has given rise to several lawsuits,
made the digitization of libraries’ collections a discussed topic.

BACKGROUND

On November 11, 2008 the European Digital Library Europeana was inaugurated by Viviane Reding, European Commissioner for Information Society and Media. The website (www.europeana.eu), which is yet a prototype and is still being developed, links the visitor to 4.6 million digital items such as images, texts, sounds and videos, and the Commission expects this number to grow to 10 million by 2010. One key challenge is to include in-copyright material in order to avoid a “20th century black-hole”. The idea for Europeana came from a letter of the French, German, Italian, Spanish, Hungarian and Polish Heads of State and Government to the Presidency of Council and the Commission on 28 April 2005. They suggested “the creation of a virtual European library, aiming to make Europe’s cultural and scientific resources accessible for all”. In reaction to the Google’s Digital Library Project and concerned about the hegemony of Anglo-American resources on the web, the signatories urged the European Commission to coordinate and support the various initiatives taken at national level in order to create a common multilingual access point to digitized resources across Europe.

On 30 September 2005 the European Commission made digital libraries a priority in the i2010 European Digital Libraries Initiative and exposed a strategy for digitization, online accessibility and digital preservation of Europe’s collective memory. The Commission then addressed the issue of digitization in several “soft law” instruments such as recommendations, communications and reports. The initiative of the Commission has received strong support from the European Parliament and the Council.

About at the same time of the inauguration of Europeana, the Commission issued a Green Paper on Copyright in the Knowledge Economy, whose purpose is “to foster a debate on how knowledge for research, science and education can best be disseminated in the online environment”. Even if it does not deal solely with digitization of contents and digital libraries, the Green Paper, however, focuses in its second part on the exceptions to copyright which are most relevant for the dissemination of knowledge and particularly on the exception for the benefit of libraries and archives. While alleging that it will address all issues “in a balanced manner taking into account the perspective of publishers, libraries, educational establishments, museums, archives, researchers, people with a disability and the public at large”, the Green Paper does not mention the authors at all. As this document of the European Commission actually deals with copyright, which is understood in all Member States as “rights of the author”, one may wonder why the situation of the authors is overlooked. Although the Green Paper allegedly only intends to launch a consultation on the issues connected with the role of copyright in the knowledge economy, the questions dealing with the exceptions for libraries and archives clearly evidence the opinion of the drafters that these exceptions should be extended in order for the libraries to make available their collections for the benefits of users and public interest.

Digitization, either undertaken by cultural institutions or by private entities, definitely raises copyright issues. It is certainly not a coincidence that the material accessible through Europeana is mostly from the public domain. Scanning a copyright protected work is first problematic in view of moral rights, but this issue is addressed in another contribution of this work. Digitization may also conflict with the economic rights of the authors. Here, the question is whether scanning a copyright protected work requires the consent of the author. How should digitization be regarded in terms of copyright? Are libraries entitled to make