Digital libraries, digital law? A tale of copyright challenges and chances

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Publication date
2016

Document Version
Final published version

Published in
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Citation for published version (APA):

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What do we lose when we lose a library?

Proceedings of the conference held at the KU Leuven 9-11 September 2015

Conference organized by KU Leuven, UC Louvain, the Goethe Institut and the British Council

Conference Chair: Lieve Watteeuw
Proceedings Editor: Mel Collier

Published in cooperation with the German Commission for UNESCO

and

with the support of the Goethe Institut

University Library, KU Leuven 2016
What do we lose when we lose a library? Asking that question implies at least two other issues: what are ‘libraries’? And what does ‘losing’ mean? I recognize that there are many different types of libraries, but for purposes of this paper, I regard ‘libraries’ as established structures in society (both physical and virtual), which are closely linked to their functions (including organizing, disseminating and preserving collections) and act on the basis of normative values (reliability, accessibility, diversity, etc.). In the networked public information environment they are changing functionally (most functions currently have a digital component, while, due to new actors developing similar functions, libraries may no longer be the sole authorities they used to be) and legally (it is questionable if and how the law facilitates digital library activities). As to ‘losing’ therefore, I adopt a legal perspective—what barriers does the law pose to the way libraries function, especially in the digital domain?

When looking at libraries through a legal lens, we could assess whether the law assigns libraries a ‘public task’, and if so, what that task entails. We could talk about user privacy and intellectual freedom. We could discuss the implications of the right to be forgotten for the library’s access and preservation functions (see recently also IFLA 2016). Or we could analyze how copyright law deals with libraries, to name but a few angles. In this paper, I take the first and last options together from a Dutch and European perspective: if libraries have a public task to provide low threshold access to (online) information, shouldn’t copyright law, as a system of exclusive rights and exceptions which shares goals in the organization and dissemination of information (Henry 1975; Grosheide 1986), somehow facilitate that task? This assumption informs the structure of the paper as follows.

First, I observe that the Dutch legislator has lately established something close to a digital public task for libraries in the updated Library Act (2014). Yet, though the envisaged functions clearly imply the involvement of copyrighted content, copyright law as such was kept out of the library policy reform (Zijlstra 2011: 3, 10). Second, I concretize the potential copyright challenges by briefly addressing the current exceptions to copyright’s exclusive rights for the benefit of libraries. The exceptions’ scope turns out to be either limited or unclear in respect of digital library activities. But there are also signs that copyright law recognizes the library’s task and the digital component in particular. Third therefore, I examine two examples of opportunities for accommodating digital library activities that already appear in a legislative initiative and a copyright case respectively: 1) the European Commission’s Orphan Works Directive (2012), which expressly allows for the digitization and online dissemination of works whose right holder is unknown, if those activities serve the library’s ‘public interest mission’; and 2) the European Court of Justice’s decision in the Technische Universität Darmstadt-case (2014), which depicts digitization as an ancillary right for libraries to effectuate the onsite consultation exception and their ‘core mission’ of disseminating knowledge. The fourth section concludes.
If libraries have a digital public task ... 

This paper started with the assumption that (public) libraries have a public task, but is that actually the case? From a user perspective, information is not scarce anymore and new actors may perform similar functions. Yet, as we will see, library functioning is based on fundamental values, such as reliability and accessibility; they remain a go-to source for free (or in any case, low threshold) copyrighted works, which amounts to a public task—a notion I will now illustrate.

A ‘public task’ can follow from various sources, mainly factual conduct, policy documents, library statutes, or the law (Kabel et al. 2001: 14-15). In the Netherlands, the library’s public task used to be based on soft law and has at last made its way into the law: the Library Act 2014. The modernized Dutch library rules have two focus points: 1) to create a national digital library and coordinate the cooperation within a network of libraries; and 2) to provide a proper legal basis for library functions and underlying values (see amongst others Zijlstra 2011).

As a result, the Library Act articulates library functions, gives them a statutory foundation for the first time, and, most notably, extends them to the digital domain. The law follows from the Dutch library system’s reorganization process (initiated in the late 1990s), which aimed to reflect on the library’s functions in the developing information society (Huysmans and Hillebrink 2008: 9). In line with that objective, the law now lists five functions, which previously had been determined only by library policy (see for example the Statuut voor de Openbare Bibliotheek 1990, a self-regulation instrument of Dutch library professionals). The functions are ‘reading and literature’, ‘development and education’, ‘knowledge and information’, ‘art and culture’ and ‘meeting and debate’. Or in short: ‘reading, learning and informing’. Together, they facilitate user education and access to information. As we will see, access is one of the most relevant functions in the light of copyright. Another function with copyright implications is preservation. The Dutch Royal Library, which was already charged with the (digital) preservation and stewardship of national cultural heritage, is now responsible for the national digital collection. That collection is intended to contain both copyrighted and out of copyright materials (Breemen 2014: 141).

To operationalize their functions, libraries are expected to accommodate lending and consultation, to build collections, to provide assistance, to offer study- and meeting places, and to join forces with educational institutions (Richtlijn voor basisbibliotheeken 2005: 6-7). The functions have freedom of expression connotations as they are related to the library’s role of gateway to information and culture, fostering user-participation in a democratic society (see also IFLA/Unesco Public Library Manifesto 1994). In sum, the Library Act focuses on the library’s social functions, irrespective of their manifestation, so both physical and digital (see the explanatory memorandum accompanying the Library Act: 12).

According to another central feature of the Library Act, the library’s public task is supposed to serve the general public on the basis of values: independence, reliability, accessibility, diversity and authenticity. Values are perceived as the criterion that delineates libraries and their functions from other information providers, but their interpretation in the digital domain is different from in the analog world (Huysmans 2006: 23-24; Zijlstra 2011: 4). Scarcity is no longer an issue—on the contrary—and in the information
abundance, quality and assistance gain importance (Huysmans 2009; Weinberger 2011: 191; Cohen et al. 2014: 76). The values are also among the justifications for the library exceptions in copyright law, especially access to a diverse information offer and safeguarding the preservation of cultural heritage by a reliable institution (Dutch House of Representatives 2004: 41-42, 49).

So far, we can conclude that the Dutch legislator still (or: especially now) sees a role for libraries in the information society, which is even extended into a digital public task. Given this acknowledgement, we should assess in more detail how the legislator treats libraries in copyright law. Even though copyright law contains specific exceptions for the benefit of ‘publicly accessible’ libraries, these seem to focus strongly on physical libraries and are accordingly far off from the digital reality. Therefore, I now turn to the copyright consequences for digital library functions.

... which suggests both copyright similarities and challenges ...

If we take the library’s functions as described in the previous section for the analysis below, let’s qualify them concisely as ‘access’ and ‘preservation’. Before assessing the library exceptions in copyright law, I should explain that library activities in the sphere of digital access and preservation easily encroach on the right holder’s exclusive rights, whereas the analog ‘reading room’ function has traditionally been ‘free’ under copyright. The exclusive rights, which give right holders control over the use of their works or a remuneration claim, encompass reproduction, distribution, public performance, broadcasting, and otherwise communicating to the public—also in digital domain. In most cases therefore, as digital use entails acts of reproduction, libraries need prior permission to develop digital activities.

But the exclusive rights are not absolute. The copyright system has inherent limitations (limited duration, ideas are not protected etc.), and statutory exceptions carve out certain public interest uses from the exclusive rights, including library exceptions (Guibault 2002: 15-16). Their specific rationale is connected to the free flow of information and the dissemination of knowledge. In this paper, I focus on those statutory exceptions.

The exceptions for the benefit of libraries have developed as a result of the technological advances to which both copyright law and libraries have been (and are) constantly responding, such as evolving reproduction equipment enabling quick, cheap and good quality copies. Moreover, rising lending numbers led to authors’ calls for remuneration for the increased use of their works, apart from payment for the initial sale. These developments asked for a balance of interests, triggering what we could call the ‘library privilege’ in the European copyright acquis, that is, exceptions to the exclusive author’s rights to accommodate libraries and their functions. Two directives are at the core: the Rental and Lending Rights Directive (1992) and the Copyright Directive (2001). The former facilitates library lending, the latter enables other access related functions (primarily consultation and preservation). Without attempting to be exhaustive, I will hereafter briefly indicate in which respects their scope is limited and unclear with regard to library functions’ digital aspects (see also Breemen 2014).
First, the lending regime. Lending in the legal sense of the word means ‘making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public’. So, the exchange of works between libraries, or between users themselves, does not constitute ‘lending’. The Rental and Lending Rights Directive posits lending as an exclusive author’s right, but allows member states to turn this into a remuneration right. The Dutch legislator has used this opportunity, so libraries don’t need permission for their lending activities if they pay an equitable remuneration.

Conventionally, lending was taken to involve physical works only, which could be new media as long as they were tangible (see the sources mentioned in Van der Noll et al. 2012: 26). Obviously, the question is whether the existing regime extends to ‘e-lending’, which denotes online loan via libraries. This is inevitably a matter of interpretation. Legislative history also shows that the European Commission already recognized the future possibilities of electronic transmission of works to users at various occasions, but ultimately chose to exclude such transmission from the scope of the directive because of the different national approaches that existed at the time (European Commission 1991: 34-35; European Commission 1995: 56-59; Van der Noll et al. 2012: 35-36; Breemen and Breemen 2013). The e-lending issue is however becoming more and more topical with the technological possibilities in place and increasing user expectations in this regard. But even if legally facilitating some form of e-lending were deemed desirable under conditions, changing the current interpretation would initially require action at the European level. One step in the direction of more clarity is the test-case on e-lending that is currently pending before the European Court of Justice (VOB v. Stichting Leenrecht). Paraphrased, central questions concern the legal status and particularities of making available selected categories of works via a ‘one copy, one user’ e-lending model. Even though the Dutch Library Act implies that libraries will make e-content available to their users, the question is nevertheless what the legal possibilities are. Certainly, the present uncertainty does not mean that making available e-books via libraries is impossible; yet that practice currently requires contractual agreements with right holders.

Next, the second set of exceptions featuring in this paper follows from the Copyright Directive. The Dutch legislator decided to implement the two optional library exceptions for preservation and onsite access. The preservation exception (Article 16n Dutch Copyright Act, based on Article 5(2)(c) Copyright Directive) is drafted in a technology-neutral way, thus covers digital preservation and with that, part of the library’s task. But it is unclear how many reproductions may be made and when (a work must be ‘threatened by decay’ - when is that sufficiently established, and is preventive copying covered?), leading to legal uncertainty. The provision does not extend to the making available or other publication of the preserved works, nor is there much room for digitization projects as such.

The onsite access exception (Article 15h Dutch Copyright Act, implementing Article 5(3)(n) Copyright Directive) reveals a strong traditional institutional view from the legislator on libraries: exempted from copyright is the making available of works from the library’s collection by means of a ‘closed network’, via ‘dedicated terminals’ in the ‘institutions’ buildings’. Despite the Library Act’s assumption that libraries will offer information and culture in the digital domain in a structured way, the formulation of this copyright provision seems oriented towards physical libraries - only to some extent recognizing the new dimension of digital libraries (see also Breemen 2014). Again, at
distance access proves to be among the main copyright difficulties as online access is explicitly excluded from the exception. The onsite access exception was central to the Darmstadt-case, where the European court offered a broader interpretation of its scope and effectiveness as will be discussed below.

The picture painted up to now suggests that the ‘library privilege’ in copyright law doesn't actually reflect the changing realities of the digital domain. Yet as we will see, both legislation and case law offer examples of copyright recognizing the library's task.

...then shouldn’t copyright law offer chances to facilitate this task ...

Recalling my description of ‘libraries’ at the beginning of this paper, the mentioned characteristics express that library institutions are characterized by their functions and values and acknowledge the virtual dimension. If we compare this with the European and Dutch legislators’ views in copyright law, it is obvious that they employ much more restricted library descriptions for purposes of the copyright exceptions. Apparently, they consider libraries principally as physical places. Surely, a certain structure or degree of organization is necessary to prevent the exceptions from becoming ‘floodgate’ provisions. But now, copyright law’s perception of libraries doesn't really meet the digital realities. Therefore, following those copyright challenges and in line with the argument that ‘[t]he roles libraries play are shaped by copyright law’ (Henderson 1998), this paper will next explore two recent ‘chances’ for digital library activities under the existing copyright framework. Both examples focus on the permissibility of digitization of copyrighted works and subsequent access in relation to the library’s public task. The section ends with a short perspective on other relevant and ongoing initiatives in the context of copyright and libraries.

The Orphan Works Directive: preservation and access as ‘public interest mission’

A field where the European Commission has already taken action involves so-called orphan works. The uncertain legal status of works whose right holders are unknown impaired the online unlocking of cultural heritage, which spurred calls for the creation of a legal framework to solve this issue (see Recital 3 of the Orphan Works Directive), since, as we have seen, the Copyright Directive doesn't cover online delivery.

Now, the Orphan Works Directive facilitates the digitization and dissemination of orphan works insofar as these activities contribute to the library's (and other cultural heritage institutions') ‘public interest mission’. Presumably, this refers to a public task (as the Dutch implementation does explicitly). As a result, libraries may digitally reproduce and make available works whose right holders cannot be found after a diligent search, especially online. That statutory permission furthers their disseminative, cultural, educational and preservation purposes as well as the cross-border availability of such works. This is of course a positive development, but the condition of a ‘diligent search’ has evoked severe criticism: seeing the number of works involved in digitization projects, how can this criterion be feasible in practice? Substantial efforts and expenses will be required for which libraries may not have the resources. In addition, the directive has been criticized for only addressing a ‘specific and limited part’ of the orphan works problem,
which is not confined to the cultural heritage sector or digitization projects (Van Gompel 2011: 207-208).

The ECJ’s Darmstadt-judgment: dissemination of knowledge as ‘core mission’

Next, the library’s ‘core mission’ was again a central consideration in the Darmstadt-case. The European Court of Justice interpreted the onsite access exception of Article 5(3)(n) Copyright Directive. In doing so, the court displayed a flexible attitude towards copyright in the digital domain, as will be explained next.

The facts of the case are the following. The Technical University of Darmstadt had digitized a book from its collection and placed this version at its users’ disposal via electronic reading points in the library, instead of concluding a license with the publisher. Users could also save and print the book. The publisher objected to this practice taking place under the exception for onsite consultation. When the case ended up before the European Court, questions concerned whether the current copyright exceptions allow libraries to digitize works, and whether they may enable users to print or save the works.

The court answered the first question affirmatively and the second one negatively. The decision largely relied on an ‘ancillary rights’-reasoning which created space for libraries to utilize their digital collections. In short, according to the court, libraries may make works available via terminals under the exception of Article 5(3)(n), which aims to foster the dissemination of knowledge, hence the library’s ‘core mission’ (which presumably denotes a public task, especially given the phrase’s Dutch translation: ‘fundamentele taak’). While the provision only covers the exclusive making available right and not reproduction, the exception’s effectiveness in practice (and the realization of the public task) requires an ancillary right for libraries to digitize the works in question. Consequently, the court made a leap to Article 5(2)(c), arguing that digitization constituted a ‘specific act of reproduction’ which was necessary to effectuate the onsite access exception. The publisher’s licensing offer didn’t lead to a different conclusion. The court’s line of reasoning does however not apply to the digitization of entire collections generally (which would not constitute a ‘specific case’), nor to the printing or downloading via terminals (as the making of new copies would not be ‘necessary’ for onsite consultation purposes), though the latter could be covered by another exception, for example for private copying, provided that the conditions are met. Inevitably, there is still the exclusion of online access.

Outlook

Apart from these two examples, other initiatives are ‘pending’, including the e-lending case mentioned earlier and the European legislator’s efforts to modernize the European copyright framework. In that context, while taking right holder interests into account, the European Parliament supports strengthening and updating copyright exceptions to cover the digital component of libraries, which are seen as ‘institutions of public interest’ with access related functions, also online. Therefore, the Parliament urges the consideration of ‘minimum standards’ to accommodate the library’s ‘public interest duty of disseminating knowledge’ (see the non-binding resolution: European Parliament 2015). Subsequently, the European Commission has also expressed cautious intentions to address some aspects of the exceptions with relevance for access to knowledge, education and research, such as their effectiveness in the digital domain (European Commission 2015). It remains to be seen if, and what, action will ultimately be taken with regard to the library exceptions.
...somehow?

To recapitulate, this paper has illustrated the assumption that libraries have a public task to provide low threshold access to (online) information to everyone with the recent Dutch Library Act. Another part of the assumption asserted that libraries and copyright law share goals of organizing and disseminating information, requiring copyright to, somehow, facilitate the library’s task to reflect this common ground. At the same time, digital library activities easily constitute reserved acts under copyright. Logically, the public task does not give libraries a permit to deny copyright; the potentially increased impact on right holder interests must be taken into account. In turn however, copyright law should cater for the present digital realities, and as we have seen, the prevailing library privilege is limited and unclear.

Indeed, in addition to observing that now of all times the Dutch legislator has given the library’s functions an explicit basis in law, showing the significance of a digital public task, this paper assessed how the legislator treats library functioning in copyright law. Is an exception for the benefit of libraries still justified in the networked public information environment? In this regard, the public task proved to play a role after all. First, the library’s task and the underlying functions and values form the justification of the library exceptions in copyright law. Yet the current exceptions cover the digital component of the library’s functions only to a small degree. As exceptions require their own specifics in the digital domain, their analog counterparts cannot simply be translated to the online environment, as is especially visible with regard to the library’s access related functions. But a balance of interests should be central to copyright exceptions.

Second therefore, the Darmstadt-case and the Orphan Works Directive offered examples where the library’s public task (or something similar) informed a facilitative stance of copyright law toward digitization and, be it solely in the specific orphan works context, online access. Online access clearly remains one of the thorniest issues surrounding the library exceptions in copyright law. The orphan works example has shown that it is possible to design copyright exceptions such as to ensure at distance access, but, as indicated, this concerns only particular works. Beyond that, in line with the European Parliament’s view on modernizing copyright law, a proposal could be made for library exceptions to act as a sort of minimum safeguard for library functioning. With this, I mean that exceptions should enable libraries to perform their public task in any case to some extent in the digital domain, by allowing, as a lower limit and under balanced conditions, some forms of online access, while considering right holder interests. If libraries wanted to go beyond such exceptions, agreements with right holders would be needed. Irrespective of their concrete design, future library exceptions should at any rate avoid that the physical library’s prevalence once more evokes a ‘traditional institutional’ approach. That is, copyright law should support the digital library’s public interest functions too, and we should not risk losing them to legal barriers.
Note

1 The author wishes to thank Lucie Guibault, Bernt Hugenholtz and Kelly Breemen for their useful comments.

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