Digitization of works and access to culture:
Recent developments in *Google Books* and *Europeana*

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Introduction

The continuous and rapid development on the digitization projects both in the case of Google Books and the Europeana show how access to culture - in whatever form, such as books, music, audiovisual works, photos - has now taken a new dimension through the web. Important issues in relation to copyright law but also regarding culture accessibility, civil rights, competition arise. Additionally, through the globalization process, regional cultures have become integrated through a global network of communication.

Taking as a start the Google Book digitization project one could bring to his mind Nikolai Gogol's story, the *Dead Souls*. Chichikov, its main character, travels around the Russian countryside to buy 'dead souls', so that he can become a wealthy and influential man. In the early 19th century Russian landowners had to pay annual taxes on the number of serfs (counted as 'souls') they owned as of the last census. Chichikov offered to buy 'dead souls' (i.e. serfs who had died since the last census) from the landowners. His plan was to acquire enough of these souls so that he could take out a large loan secured by his portfolio, and thereby to become a wealthy man. In Gogol's story, Chichikov's scheme falls apart. Rumors are spread that the souls he owns are all dead and he flees the town in disgrace. Thus, this story makes one wonder about Google Books' and Europeana's future. Is it possible that Google's digitization project may pay off handsomely, as the Settlement – as we discuss it here later - would, in effect, give Google the exclusive right to commercially exploit millions of orphan books? How could this scheme affect Europeans and their projects?

What is Digitization?

Digitization is the exchange of information, data, or works in a form capable of being processed by a computer, i.e. in binary code communication.

Digitization ensures high quality copies, provides ample opportunities for further processing, helps to copy an unlimited number and is characterized by a high rate of transmission of reproduced material.

In terms of copyright protection, digitization is a reproduction and as such requires the consent of the rightholder.

Why digitize?

There are two main reasons for digitizing material: to provide the widest possible access for the general public; and to ensure their survival.

It is crucial to examine what the types of works are that are interesting for the digitization project. There are three types of works:

1. Works protected by copyright

These works are the ones publishers sell more active and they are available in most bookstores or through the Internet and libraries.

2. Works protected by copyright, but exhausted

The books have been exhausted, can not be issued or sold, so the only way to identify them is in a library or bookstore with used (second hand) books. Included are orphan works, i.e. out of print titles under copyright protection whose rightholder cannot be found.

3. Works that are not protected by copyright

eg duration of protection has expired

The issues resulting from digitization project depend on the nature of works. These will be illustrated on the example of Google's digitization project and the Europeana project.

A. The controversial Google Books project

Google has scanned the texts of more than 10 million books from major university research libraries for its Book Search initiative and processed the digitized copies to index their contents. Google allows users to download the entirety of these books if they are in the public domain (about 1 million of them are), but at this point makes available only “snippets” of relevant texts when the books are still in copyright unless the copyright owner has agreed to allow more to be displayed.

With over 70% of the US search market, Google’s dominance amounts to monopoly power under the antitrust laws. Google’s revenues exceeded $21 billion last year, and through its search results and sponsored links it controls indirectly hundreds of billions of dollars of other companies’ revenues.

Here is how the project works: Once a book is scanned, it is added to Google’s database and categorized depending on the book’s copyright status. “If the text is no longer protected by copyright, the entire book is available for online viewing or download. However, if a book is still under copyright, only ‘snippets,’ or three-four line text sections, are available unless the rights holder has opted out completely or consented to a broader display, such as certain pages or chapters.” Google’s bold strategy was to scan now and negotiate later.

Soon after its inception, the Google Books project provoked a lawsuit claiming largescale copyright infringement. In late 2005, the Author's Guild of America, which at that time had 8000 members and the Association of American Publishers filed a class action lawsuit against Google in the Southern District of New York for copyright infringement. Google raised a fair use defence in answer, arguing that scanning and displaying portions, or snippets, of a book are permitted infringements of the owners' copyrights.
On October 28, 2008, the parties reached a Proposed Settlement Agreement. By the time the Proposed Settlement was submitted to the court, Google had scanned upwards of seven million books.

The U.S. Federal Court decided that a revised text of the Agreement should be presented. In a review meeting held on October 2009, the Court determined the 09.11.2009 as the date for the submission of an amended Settlement and on 13.11.2009 finally the modified version was presented.

The Google Book Settlement

The Settlement consists of the creation of a system that allows for further creation of a database containing the full text of books scanned by Google, for commercial use in different ways. This new system involves giving rightholders the right to decide whether and to what extent it will allow Google to use their works against damages.

The Settlement covers books and inserts (even if a work is part of the Public Property or of Government Documents) which are protected by copyright and are digitized until 05/01/2009.

Excluded are photos, graphic designs, artworks, illustrations (no children) and other visual works included in the book, unless the rights holder of the optic project is the same as the rights holder of the text. Also excluded are journals, personal and government documents and projects that have ended the term of protection by copyright.

The book should either be
a) issued in the U.S. and declared to the Directorate of Intellectual Property (US Copyright Office) until 05.01.2009 or
b) issued in Canada, or Australia, or the UK until 05.01.2009

Distribution

63% (initially 70%) of the digital book sales will go to publishers.
Google will keep the remaining 37%.
Google will pay 63 percent of all revenues earned by such uses into a Settlement Class Fund ("Fund"), administered by the Registry, for the rights holders of the works. Google is required to pay a minimum of $45 million into the Fund for those rights holders whose works will have been digitized prior to the opt-out deadline.
On September 18, 2009 the Antitrust Division of the Department of Justice filed a first Statement of Interest ("Statement") formally objecting to the Proposed Settlement, particularly provisions that raised questions of price-fixing and other cartel-like behaviour under Sherman Act Section 1. In light of the concerns raised by

the Antitrust Division, particularly those related to antitrust law, the parties began to consider amendments. Then on February 4, 2010, the Antitrust Division filed a second Statement with the court raising additional concerns, particularly about the proper bounds of class action settlements and the resulting market entry barriers. The Antitrust Division as well as interested third parties have filed numerous briefs with the court and published commentaries across the Internet. We will discuss briefly the class action question before proceeding to the antitrust issues.

Those authors and publishers who want to refrain from Google Books (opt out) can send a written request for their work to be removed from the Settlement.

According to the Google Book Settlement, if an author opts out, he will not be included in the Settlement, he will not receive the benefits conferred by the settlement and he will retain the right to sue Google and the Participating Libraries.

If he opts out of the settlement, he will neither be eligible for a Cash Payment or to participate in any of the revenue models under the Settlement, nor will the settlement's restrictions or obligations on Google or the Participating Libraries apply to his books and inserts.

Google has advised the Settlement Administrator that its current policy is to voluntarily honor such requests and refrain from digitizing books or, if they have already been digitized, refrain from displaying them.
Google is not able to digitize works of beneficiaries who have published in four countries (US, UK, Canada or Australia) and have expressly stated that they wish to participate in the Settlement. The aforementioned beneficiaries may remain in the Settlement either by not doing anything - which means it automatically covered by the terms of the settlement - or can choose exactly what applications can do with Google works.

1. What is the Book Rights Registry?

The Registry will be a not-for-profit entity that represents the interests of rightholders in connection with this Amended Settlement with Google as well as potential licensing deals with other entities, subject to rightsholders' authorization. The Registry will have equal representation of the Author Sub-Class and Publisher Sub-Class on its Board of Directors, and will include at least one author and publisher representative from each of the US, Canada, the UK and Australia. The Registry will also delegate to an independent fiduciary responsibility for the exploitation of unclaimed Books and Inserts under the Settlement.
The Book Registry will give authors and publishers who give their consent for the digitization of their books a percentage of total revenue from the sale of electronic books and the accompanying advertisements.

In fact - and according to the parties to the Settlement - this register is somehow a new collecting society, which will administrate the rights of the beneficiaries.

2. How will the Registry be funded?

To fund the establishment and initial operations of the Registry, and to pay for the costs of the Class Notice Program and claims administration costs, Google agreed to pay US $34.5 million, of which Google has already paid $12 million. On an ongoing basis, the Registry will be funded by taking an administrative fee as a percentage of revenues received from Google.

3. What will the Registry do?

The Registry will:
- Represent the interests of the rightholders in connection with the Amended Settlement;
- Establish and maintain a database of contact information for authors and publishers;
- Use commercially reasonable efforts to locate rightholders;
- Distribute payments received from Google for the rightholders' share of revenues; and
- Assist in the resolution of disputes between rightholders.

In order to give effect to the Settlement this must be approved by the competent court of the United States (New York). The final hearing is scheduled for early 2010. When the Amended Settlement is finally approved by the Court and no longer subject to any appeal it will be posted on website.

Evaluation of effects on Copyright, Culture and Competition

1. Copyright

The new text books published only in the EU (excluding UK) are excluded from the Settlement. Only books registered in the US Copyright Office (Copyright Division) or published in the UK, Australia or Canada fall within the scope of the Settlement, leaving only the titles of these features will be available through the service of Google.

The message is clear: Books published in countries of the delivery of copyright will be available through the service Google Book, while other jurisdictions in the tradition of droit d 'auteur (Europe and Asia) will remain outside.

Since there are also covered European works that are included in the US Copyright Office until 05.01.2009, this means that also some European rightholders fall under the Settlement. However, there is no data on how many European works have been published in the USA, Canada or Australia or how many are registered at US Copyright Office.

Before 1978 there were no electronic entries in US Copyright Office. So if one wants to determine whether a particular project was registered before 1978 in the US Copyright Office, he should travel to the USA in order to examine the natural records of the Copyright Office.

Until 1989, there are many works that have been filed in the US Copyright Office. This testimony is very helpful to the person who has the burden of proof in a copyright infringement. However, because of the Berne Convention (which provides

copyright protection without any formalities) deposits in the US Copyright Office have been reduced.

A question of adequate representation of beneficiaries in the Register arises (only members of publishers from the UK, Australia, USA and Canada). Rest of beneficiaries will be individually negotiated to become parties to the Service. Disadvantage: The beneficiaries that are not members of the class cannot be part of the Arrangement.

a. Commercial Availability

Another important term is the Commercial availability. In the past it was defined as follows: Only projects that are not commercially available can be fully displayed without the prior authorization.
Now the seller may be anywhere but the channel of trade should be available in the U.S., Canada, Australia, the UK.

A book is commercially available if, at the time in question, the book is offered for sale new by a seller anywhere in the world to a buyer in the United States, the UK, Canada or Australia.

If a book is designated as commercially available then Google will not be authorized to make any display uses of the book unless a rightholder of the book gives express permission to do so.
If a book is designated as not commercially available, then Google will be able to make all display uses of the book unless a rightholder of the book instructs Google to exclude the book from one or more display uses.

Thus there is a grey zone**:** What about books that were digitized before 13.11.2009 with the previous version of the Arrangement, and which (books) belong to publishers who are no longer in this class?
Google's answer: Not any compensation has been paid yet, so there is no question of compensation for damages.

b. Orphan works and undistributed profits

Orphan works are out of print titles with copyright protection, whose rights holders can't be found. Google and its partners would not have to share the revenue for access to these books, which opponents say could number in the millions. Google says the number will be much less.

A broad consensus exists about the desirability of making orphan works more widely available. Yet, without a safe harbour against possible infringement lawsuits, digitization projects pose significant copyright risks.

Profits will be disposed after five years to identify the beneficiaries and will be redistributed among the already known rightholders or for other functions of the Registry.
After 10 years the Registry may ask the court for distribution to nonprofit organizations of beneficiaries.

Also, the Registry will appoint a custodian to represent the beneficiaries and protect their rights and give permission to others to the limit allowed by law.

A further issue which is raised is the question of compliance of the Settlement with international treaties (especially the Berne Treaty), under which the protection is independent of formalities. On the other hand, in the case of the Settlement, which is a private initiative, registration plays an important law.

Another issue that appears is the question of whether further agreements that might exist in other jurisdictions may limit the protection granted in US projects and US beneficiaries themselves with the conditions contained in the revised text of Settlement for non-US projects and non-US rightholders.

2. Culture

Based on an evaluation of the Google Book digitization (Bearman, 2006, p. 2) there are some important issues that derive for digital libraries. These are the following:

1) Google will not be able to digitize everything ever printed, so its selection might favour American or English language sources over other cultures.
2) Google's presentation of texts based on keywords de-contextualizes them in culturally damaging ways and its primary interest in harvesting words to link to advertising permits sloppy imaging of the books at the expense of more carefully executed efforts.
3) The Google search engine promote search results that are not consistent with the rankings that scholars from the cultures in which the literature was written would approve.
4) Permitting a private firm to own the digital library of images and texts is not a sound archival plan for the world's libraries or cultures, and defeats efforts to encourage value-added exploitation of this unique resource.
5) Google's approach to copyright threatens the achievement of a universal digital library.

Over the past two years, Google has adopted downloadable PDFs for out of copyright protection volumes. But the fact that images of books digitized under the Google Book Search project are now visible increases the concern of librarians and scholars. The quality of the scans that have been made public is so poor that one could plausibly argue that they are part of Google's defence against copyright infringement, supporting the claim that the use made by automatic indexing is fundamentally different from making a copy (Bearman, 2006, p. 2).

Librarians seem caught in ambivalence these days about Google Book Search project (http://books.google.com), which is currently rolling up to (or past) 8 million books. The next major event in the project's history - the court's approval or disapproval of Google's settlement terms with authors and publishers over copyright issues - will decide whether millions more of those books will become available to all or part of the public. The American Library Association (ALA) and the Association of Research Libraries (ARL) have already sent a 'hot/cold,' 'yes/no,' 'go, but carefully' recommendation to the court. (http://wo.ala.org/gbs/wp-content/uploads/2009/05/googlebrieffinal.pdf). The document seems to blow hot and

cold, complimenting and congratulating Google on its magnificent gift to the world, while at the same time raising fearsome doubts about Google as a commercial monopoly. The concerns expressed in the ALA/ARL document regarding the settlement are arranged in six sections: a) creates an essential facility with concentrated control, b) could limit access to the institutional subscription database (ISD), c) will heighten inequalities among libraries, d) does not protect user privacy, e) could limit intellectual freedom and f) could frustrate the development of innovative services.

The University of Michigan Libraries, on the other hand, has already made its approval clear by signing a contract that presumes the Settlement Agreement will go through as planned. In that agreement, however, the university has addressed some of the concerns expressed by librarians, which could set a standard for future agreements and allay concerns between librarians and mighty Google.
The Google Book Search program, particularly the library contributions that dominate the collection and include both in-copyright and out-of-copyright protection books, was challenged in the courts by both authors and publishers. Before courts could reach decisions on the matter, a settlement agreement was made by all parties. However, the settlement agreement needs the approval of the court, particularly since part of the settlement involves releasing millions of in-copyright/out-of-print and possibly orphan-works to the general public under subscription arrangements with institutions and a limited, free access route for public libraries. (For details on the settlement agreement, read the NewsBreak, "The Google Book Search Settlement: ‘The Devil's in the Details,'" Nov. 3, 2008, http://newsbreaks.infotoday.com/NewsBreaks/The-Google-Book-Search-Settlement-The-Devils-in-the-Details-51429.asp.)

1. A copyright protection aspect

The attitude that Google took to copyright was obviously not acceptable in Europe, and the disrespect to authors illustrated by Google's actual digitization since then is inconsistent with European notions of the moral rights of authors.
No public body in Europe could do other than engage in a discussion with authors and publishers to arrive at mutually acceptable terms under which to digitize its print heritage.
It has been criticised that Google made too little effort to find a solution that did not require courts to rule on the question of whether what they are doing violates copyright, because either decision will leave us worse off. If Google loses, all sorts of automated processes for adding value to texts could be foreclosed. If Google wins, we can expect future publishers to include more technical and legal methods of protection that permit the copyright owners to allow or disallow various forms of use, including reading, based on contract and protected by the Digital Millennium Copyright Act (DMCA) and similar legislation (Bearman, 2006, p. 4).
Google's project is indeed a brave project in digitizing the world's printed literature. The biggest challenge in this digitization is to keep the balance between copyright and the right of users for access to content.

Beyond Google there are also some other models being realized, in part in opposition to Google, such as the European Digital Library, European Search Engines and model library digitization endeavours.

2. A ‘right to display the work publicly’ aspect

To perform or display a work publicly means to perform or display it anywhere that is open to the public or anywhere that a ‘substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.’ Transmitting a performance or display to such a place also makes it public. It does not matter whether members of the public receive the performance at the same time or different times, at the same place or different places. Making a work available to be received or viewed by the public over an electronic network is a public performance or display of the work (e.g. Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002); Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993).

The law distinguishes between ownership of the work as such (original or copy) and ownership of the copyright. A museum that acquires a painting does not thereby automatically acquire the right to reproduce it. Libraries and Archives commonly receiving books, scripts, or donations of manuscripts generally own only the physical copies and not the copyright.

Copyright is not absolute; it is subject to a number of limiting principles and exceptions. One of these exceptions is for example the exception for certain archival and other copying by libraries and archives. In the USA according to section 108 of the Copyright Act, libraries and archives are permitted to make up to three copies of an unpublished copyrighted work ‘solely for purposes of preservation and security or for deposit for research use in another library or archives’. The work must be currently in the collections of the library or archives and any copy made in digital format may not be made available to the public in that format outside the library premises. Libraries and archives may also make up to three copies of a published work to replace a work in their collections that is damaged, deteriorating, or lost, or whose format has become obsolete, if the library determines that an unused replacement cannot be obtained at a fair price. Copies in digital format, like those of unpublished works, may not be made available to the public outside the library premises.) In the European countries (for example in Greece, according to article 22 of Law 2121/1993 on copyright protection) it shall be permissible, without the consent of the author and without payment, for a non profit-making library or archive to reproduce one additional copy from a copy of the work already in their permanent collection, for the purpose of retaining that additional copy or of transferring it to another non profit-making library or archive. The reproduction shall be permissible only if an additional copy cannot be obtained in the market promptly, and on reasonable terms.

Even if copying a work is not expressly allowed by law, it may still be permitted under the fair use doctrine (USA) or the three step test (Europe). However, the privileges under the fair use doctrine and the three step test do not replace any contractual obligation a library may have with respect to a work that it wishes to copy (Besek, 2003, p. 5). In any case the purpose and character of the use is very essential. Among the considerations is whether the use is for commercial or for non-profit educational purposes. Whereas in the States, under the fair use doctrine, the amount and substantiality of the portion used play an important role (generally, the more that is taken, the less likely it is to be fair use, but there are situations in which making

complete copies is considered fair), in Europe this is irrelevant. Under the three step test applied in Europe the limitations on the economic right shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other protected subject-matter and do not unreasonably prejudice the legitimate interests of the right holder.

3. A 'right of access' aspect

According to the 'Paperboy' decision of the BGH (BGH 17.7.2003, Az. I ZR 259/00, NJW 2003, p. 3406, see also Ott, 2004, p. 32; Ott, 2009, 556) there is no public access to a work taking place through a hyperlink. In another decision of the LG München I in 2007 the court decided differently for the case of a framing link(LG München I, decision 10.1.2007, Az. 21 O 20028/05, MMR 2007, 260) According to this decision it depends on whether the constructor of a webpage makes a work of another author appear as his own one. In that case the person putting the framing link is making the work public accessible and a common user does not recognize that it is actually a work of a third person.

In 2008, in the case 'Rapidshare', the LG Düsseldorf decided that the right of making available to the public is infringed when the download link is published. Before the publication it is very difficult to find the work and the URL cannot be guessed (see also decision of the OLG Köln, Urteil vom 21.9.2007, Az. 6 U 86/07, MMR 2007, 786 ff.). From the 'Paperboy' and the 'Rapidshare' decisions, it is obvious that there are two acts necessary to make a work accessible to the public: upload and putting a link to the page where the uploaded work has been put (for more see: Ott, 2009, p. 359).
The new models indicate the need for increased availability of works protected by copyright in a growing number of consumers. Therefore it is an important step in the digitization and access to culture.

If approved, the Settlement will significantly increase the number of English language books available to U.S. users for online usage.

Financial incentives and obligations of the Registry will reduce the number of orphan works will bear on their surface, their parents.

However, most stakeholders agreed that the Settlement widens the gap between the U.S. and Europe regarding online (online) access to scientific and educational material and cultural heritage. This highlights the urgent need for similar projects (such as that of Google) in Europe.

It is immediate need to intensify efforts to digitize materials and museums, archives and libraries in Europe, to make accessible the material and the Europeans. It is therefore necessary to strengthen the European digital library Europeana and to allow access for Europeans in the protected material on orphan works.

Organizations of European librarians raise the issue in terms of public interest. Though recognizing the importance of the project, they argue that the deposition of global knowledge in the hands of a private company of US interests without the

necessary control has some risks for the freedom of expression, research and cultural diversity.

Others, like James Grimmelman, professor at the New York Law School, argue that the Google Books Settlement contains risks for privacy as it allows Google to gather information about what one is reading.

3. Competition

The Settlement is between Google, publishers and authors. Therefore, theoretically, Google's competitors can not benefit from the Settlement in their relationship with publishers and authors. They will have to make a similar Settlement to ensure similar conditions.
The U.S. Department of Justice conducted a survey on the potential impact of the agreement between Google, publishers and writers and recommended to the court in New York to reject the agreement will allow Google to digitize millions of books to commercial use in Internet.

According to the US Ministry of Justice, the agreement raises issues of copyright but also monopoly issues and should be rejected in its current form because it will give the power of Google on books, of which the holder can still be found and will fail provide adequate protection to foreign recipients.

It is notable that Microsoft, with Amazon and Yahoo! also react because they believe that ratification of the agreement would create a monopoly in the publishing sector worldwide.

Additionally it will give Google the power to limit price competition, which can lead other publishers of digital books off the market.

A competition issue that arrises concerning the Google Books project is whether a class action settlement in litigation between private parties is an appropriate vehicle for making public policy (for more see Peritz, R.J. and Miller M. (2010), An Introduction to Competition Concerns in the Google Books Settlement, New York Law School Legal Studies).

We should admit that if there is actually a need for amendments of the European legal framework, such amendments should be prepared in an open and transparent process with input from all concerned parties. International copyright rules cannot be changed in a settlement among US parties before a US Court.

Opponents say Google could gain a competitive advantage, potentially bolstering the power of Google search using the contents of millions of out of print books.

B. The European response: Europeana (The European digital library)

Google's decision in 2004 to digitize books has been the main cause for reaction from Europe. Specifically, the National Library of France raised the issue first to create something like Google from Europe itself to have a balance.

Virtually the only way Europe would get a comparably broad license as the Settlement would give Google was to start its own project to scan books.

On 20.11.2008 the European digital library Europeana was launched. It is a gateway website that allows internet users to search and get direct access to digitised books, maps, paintings, newspapers, film fragments, and photographs from Europe's cultural institutions. About 7 million digitised objects are currently available and the number is expected to rise to 10 million in the course of 2010.
During 2009-2011, the EU's eContent plus programme will cover about 80% of Europeana's budget (€ 2.5 million per year). The Member States and cultural institutions will contribute the rest. Until 2013 the European Commission can continue supporting Europeana with €9 million through its Competitiveness and Innovation Programme. The office of Europeana is hosted by the National Library of The Netherlands in The Hague and is run by the European Digital Library Foundation.

On September, 30th 2005 the European Commission published the i2010: Communication on digital libraries, where it announced its strategy to promote and support the creation of a European digital library, as a strategic goal within the European Information Society i2010 Initiative, which aims to foster growth and jobs in the information society and media industries. The European Commission's goal for Europeana is to make European information resources easier to use in an online environment. It will build on Europe's rich heritage, combining multicultural and multilingual environments with technological advances and new business models.

Europeana.eu is about ideas and inspiration. It links you to 6 million digital items.
- Images - paintings, drawings, maps, photos and pictures of museum objects
- Texts - books, newspapers, letters, diaries and archival papers
- Sounds - music and spoken word from cylinders, tapes, discs and radio broadcasts
- Videos - films, newsreels and TV broadcasts

Some of these are world famous; others are hidden treasures from Europe's museums and galleries, archives, libraries and audio-visual collections.

The system used by traditional libraries for lending material is not suitable for the digital environment. In addition, the prior consent of the holder of property rights is needed before material can be made available online, except where the material is in the public domain. Consequently, a European library will basically have to concentrate on public domain material. In some cases, the costs of establishing the IPR-status of a work will be higher than the cost of digitizing it and bringing it online. This is particularly true for so-called ‘orphan works’ – films or books for which it is impossible or very difficult to determine who holds the rights.
Improving online accessibility also requires appropriate multilingual services to allow users to explore and work with the content.

In its Recommendation 2006/585/EC on the digitization and online accessibility of cultural material and digital preservation (Official Journal L 236 of 31.8.20060**,** the Commission calls on Member States to speed up the digitization and online accessibility of cultural material (books, films, photographs, manuscripts, etc). To this end, Member States are encouraged to:

- collect information for producing overviews of digitization;
- develop quantitative targets for digitization;
- create public-private partnerships for funding purposes;
- develop facilities for large-scale digitization;
- endorse the European Digital Library;
- improve the conditions in which cultural material is digitized and accessed online.

Furthermore, the Commission is recommending that Member States take steps to further the digital preservation of cultural material by:

- setting-up national strategies and action plans, and exchanging information on these;
- establishing appropriate legislative provisions for the multiple copying and migration of digital material, as well as for the preservation of web-content;
- creating policies and procedures for the deposit of digital material, with due consideration given to the measures of other Member States.

The European Parliament Resolution on 'Europeana, the next steps', based on a report by German MEP Helga Trüpel, underlines the potential of the site as a common access point to Europe's collective heritage and calls on Member States to bring more digitized content into Europeana.
Today, Europeana (www.europeana.eu) gives direct access to 7 million digitized objects from Europe's cultural institutions, up from 2 million at its launch in November 2008. Some 37.4% of the digitized items come from France, followed by Spain with 13.2%, but content from some Member States is very limited, and masterpieces from many EU countries are still missing.
The Parliament's Resolution also addressed other issues that have to be tackled to ensure the success of Europeana, including the need to:

- address a series of copyright related issues to facilitate the digitization and online accessibility of cultural content. The report highlights in particular the issue of orphan works (works for which it is impossible to locate the copyright holders)
- ensure sustainable funding for the site
- raise awareness about Europeana among the general public and potential contributors.

Particular attention was paid to create the legal framework for rapid scanning solution for the so-called 'orphan' works. At the same time the desire has been expressed to extend the digitization and other forms of cultural expression and to support the Arrow system for identifying beneficiaries and certifying so-called orphan works.
It has been stressed that the aggressive policy of Google can be treated effectively by Europe only if we open up the Europeana project throughout the public sector from all over the world, always with a peak view of European culture.

During the meeting of Ministers in Charge of Culture and Audiovisual Policy in the framework of the Education, Youth and Culture Council November 27th, Ministers addressed the wider challenges for digitizing books and other cultural content, and making this material available through Europe's digital library Europeana (online at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/526&type=HTML&aged=0&language=FR&guiLanguage=en).

Governance and funding of Europeana

On 28 August 2009, the European Commission adopted a Communication on "Europeana – next steps" outlining the key challenges that will determine its further development (IP/09/1257).

Following the Commission's Communication on Europeana, the EU ministers will exchange views on a series of key issues, such as the most appropriate financing model for Europeana, the possible involvement of private organizations (eg through sponsoring or advertising), and future governance structures for Europeana.

Orphan works represent a significant part of collections of cultural institutions in Europe (The British Library estimates that 40% of the collections protected under copyright law are orphan works). The Commission will examine this phenomenon through a detailed impact assessment.

The aim is to create a European-wide solution which will facilitate the digitization and distribution of orphan works and common standards of 'diligent search' in order to identify the status of orphan works all over the EU. In this respect there has been some progress with the project ARROW (Accessible Registries of Rights Information and Orphan Works - Accessible records information on rights and orphan works), financed by the European Commission under the eContent plus (2,5 million), which brings together national libraries, collecting societies and publishers.

Copyright Issues

Despite the significant progress made to date, there are still significant problems associated with the process of digitization and copyright law remain and seek an immediate solution.

Currently, Europeana includes mainly digitized books that are public domain, so no longer protected by copyright law (which lasts until 70 years after the death of the author).

The fragmented legal framework in Europe on copyright hinders, according to the experience of Europeana, the licensing of material protected under copyright law.

Thus, for legal reasons, Europeana neither includes versions of projects (about 90% of the books of the national libraries of Europe), nor orphan works (estimated at 10-20% of the collections protected under copyright law), which still protected under copyright, but the author cannot be identified.

According to the *C*ommunication *of the* European Commission *from* 19.10.2009 *there are* three important steps *that* should *be* taken:

1. Setting the right solutions for the legal consequences for digitization, especially those of the orphan works.

2. Working closely with the collecting societies and rightholders to clarify the legal complications in mass digitization and possible solutions to the issue of costs for rights clearance.

3. Finding practical solutions to facilitate rights clearance particularly through linking existing rights record in Europe (eg such as ARROW Accessible Registries of Rights Registration of Orphan Works towards Europeana).

A European digital library doubled its size, but there is no common European solution for online copyright.

Commissioner Reding, in charge of Information Society and Media, said: *"Important digitization efforts have already started all around the globe. Europe should seize this opportunity to take the lead, and to ensure that books digitization takes place on the basis of European copyright law, and in full respect of Europe's cultural diversity. Europe, with its rich cultural heritage, has most to offer and most to win from books digitization. If we act swiftly, pro-competitive European solutions on books digitization may well be sooner operational than the solutions presently envisaged under the Google Books Settlement in the United States."*

References

Draft Report on “Europeana – the next steps” (2009/2158), 11/11/2009. Rapporteur: Helga Trueppel, Committee on Culture and Education, European Parliament

European Parliament resolution of 5May 2010 on "Europeana - the next steps" (2009/2158(INI))

Bearman, D. (December 2006). Jean-Noël Jeanneney's Critique of Google: Private Sector Book Digitization and Digital Library Policy, D-Lib Magazine, Volume 12 Number 12

Elhauge E., Why the Google Books Settlement is ProCompetitive, Winter 2010, Volume 2, Number 1, Journal of Legal Analysis

Ginsburg, J. C., Conflict of Laws in the Google Book Search: A View From Abroad**,** Columbia University School of Law, June 2, 2010

Grimmelmann, G., The ethical visions of copyright law, Fordham Law Review 2009, Vol. 77

Grimmelmann, G., The Amended Google Books Settlement
Is Still Exclusive, New York Law School Legal Studies, Research Paper Series 09/10

Grimmelmann, J. (2010), The Elephantine Google Books Settlement, online at: http://works.bepress.com/cgi/viewcontent.cgi?article=1031&context=james_grimmelmann /accessed 18.06.2010

Karakostas, I. (2003). Law and Internet: Legal Issues of the Internet, Athens, Sakkoulas.

Peritz, R.J. and Miller M. (2010), An Introduction to Competition Concerns in the Google Books Settlement, New York Law School Legal Studies

Renear, A. (1997). The Digital Library Research Agenda: What's Missing - and How Humanities Textbase Projects Can Help. D-Lib Magazine, July/August http://www.dlib.org/dlib/july97/07renear.html

Samuelson P. (2009), Legally Speaking: The Dead Souls of the Google Book Settlement, Forthcoming in 52 Communications of the ACM

Sinanidou, M. (2009). 'Informal publishing interactions': Linking, framing and meta-tagging in the book: Journalists and Publishers of Mass Media: Copyright Issues, (ed. Stamatoudi, I.), Thessaloniki, ed. Sakkoulas

Tenopir, C., & Ennis, L. (1998). The Digital Reference World of Academic Libraries. Online, Vol. 22, No. 4, available in: http://www.onlineinc.com/onlinemag/OL1998/tenopir7.html