Kluwer Copyright Blog

Safeguarding Access to Culture in the Digital Era in European Copyright law

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Digitalization has transformed the way in which we obtain access to copyright-protected content and for how long we can preserve access. Traditionally, the purchase of the tangible copy of a work afforded the buyer or every lawful acquirer of the tangible copy the possibility to enjoy the work as long as the physical object incorporating the work exists. However, the shift from a market of goods to a market of services has changed this paradigm.

There is a dominant personal and temporal dimension to the online access of content. Most digital media and services platforms' terms of service agreements do not allow accounts to be transferred to others. The subscriber's successors in law do not inherit the subscription and, therefore, their access to the content is not guaranteed. Downloads can be used only by the subscriber and often only for a specific period after the download.

The idea of "permanence of use" is vanishing. The user's access to the work is safeguarded as long as the service is offered, and the user often does not have a right to enjoy the work after the subscription contract is terminated. Similarly, perpetual access to digital content by libraries and cultural organizations is guaranteed only as long as the subscription contract is valid or if the subscription enables libraries to obtain their own digital copies or the right to continued access after the cancellation of the subscription.

Much more alarming is that in this dematerialized reality the disappearance of the market entails

the risk of the disappearance of the work itself. The access to a work depends on the willingness of the service provider to continue to offer the work, and this decision is taken on a purely commercial basis. Access to videogames, music or films that are not already part of the public domain may be lost forever if the service provider decides to stop offering it. This could seriously endanger cultural diversity, creativity and the preservation of cultural heritage.

For instance, old videogames can easily become an abandonware game or an out-of-commerce work. While the role of digital video game marketplaces might be significant since they gather thousands of videogames, the range of works found in these marketplaces is dependent on the will of the publisher and the licence agreements between the video game publisher and the digital video game marketplace.

The possession of a copy of the work by private individuals, libraries and cultural organizations has traditionally served an important role in the preservation of the cultural asset and access to it. Indeed, intellectual access to works in the public domain, their enjoyment and their use presuppose prior material access to these works. Material access to works is made possible and regulated either by the right of ownership of the original form of the work, or by concluding a contract with a distributor in order to obtain a material copy of the work.

Nevertheless, nowadays the prototype of a permanent copy of the work for the benefit of the user is replaced by the model of a “user’s right” to access a work for a limited time. This change of paradigm endangers the implicit dogma that copyright law shall ultimately serve access to culture in the long term.

Furthermore, in a dematerialized reality of access to copyright-protected works, it is also important to safeguard the necessary balance between copyright protection and the public domain. The public domain is a necessary and organic component of intellectual property law: only certain intellectual assets may, because they are original or new, be appropriated. This leaves a vast area of unprotected elements that are necessary to creators, inventors, scientists and businesses. It is within this context that the concept of the public domain has been implicitly accepted as a synonym of free access in copyright law. The use of works in the public domain is deemed to be free for all. In other words, no one can control or prevent their reproduction, communication to the public, or any other use that would fall under copyright law.

In light of these considerations, the Directive on Copyright in the Digital Single Market (CDSM Directive) introduced specific provisions aiming to facilitate access to works in the long term. A copyright regime for out-of-commerce works was established by Arts. 8–11 of the CDSM Directive. The new EU legislation has placed an emphasis on the role of cultural institutions (CHIs) in preserving access to dematerialized works. (For an overview, see here and here). Furthermore, for the first time, European copyright law grants a positive status to works belonging to the public domain by prohibiting the regaining of any exclusivity therein, at least for works of visual art, in Article 14 CDSM. This Article prevents the expansion of copyright to “faithful” reproductions of works that are already part of the public domain. In that sense, it supports “access to and promotion of culture” and ensures access to European cultural heritage.

However, the regime for out-of-commerce works is a special one. It is limited to specific types of works (out-of-commerce works) and by the requirement that the out-of-commerce works be permanently in the collection of the institution. The criterion of “works permanently in the collection” of a cultural heritage institution reflects the prototype of access to works in the

analogue world or a model of access of work as product. According to recital 29 CDSM, this is the case when copies of works or other subject-matter are owned or permanently held by an institution, for example, as a result of a transfer of ownership or a licence agreement, legal deposit obligations or permanent custody arrangements.

Furthermore, even if Article 14 is a recognition of the status of public domain, the concept of public domain is still not officially comprehensively defined and robustly guaranteed as a fundamental principle of European copyright law. While access to works within the public domain is by default free, the public is not officially granted or recognized a right to free access to such works. The lack of a positive definition and clearly established legal status of free access to public domain for all categories of works might facilitate the encroachment of the public domain through efforts for its appropriation.

Both the out-of-commerce works regime and Art. 14 of the CDSM Directive are the expressions of a greater sensitivity in European copyright law for the safeguarding of access to cultural goods and the preservation of the public domain. However, they are limited, scattered and sectoral solutions to the larger problem, which is the growing control and appropriation of the cultural sector. Robust mechanisms for preserving access to copyright protected content for the purpose of cultural preservation should be established. It might, therefore, be necessary to reconsider the role of cultural heritage institutions in the preservation and possible dissemination of works for public interest purposes against the danger of the monopolization of access to these cultural assets by private entities. New mechanisms serving the public interest could be explored, such as an obligation for content providers to deposit a digital copy of the work in a cultural heritage institution, at least for preservation purposes.

European copyright law should also take a clear stance in the delineation and the safeguarding of the public domain as a vehicle of creativity and a dynamic part of a sustainable copyright ecosystem. Apart from the temporal dimension of the public domain, its other constituents should be explored. For instance, the appurtenance of an intellectual asset to the public domain due to the non-fulfilment of the criteria for the award of copyright protection has gained a particular importance in the context of AI generated outputs, since the lack of substantial human creative input would lead to the AI generated output belonging to the public domain.

The line of reasoning of Art. 14 could serve as a model for an explicit consecration of the public domain and of the principle of free and unhampered access to works which have fallen into the public domain in European copyright law. In this context, the emergence of a human right to free access to works of the public domain, as a special and organic component of the right of access to culture and of freedom of expression, should also arise through case law.

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