

Digital rights and digital culture

Diritti digitali e cultura digitale
alla luce delle nuove direttive europee

Piero Attanasio
Associazione Italiana Editori
piero.attanasio@aie.it

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Summary

- Some economics of large scale digitisation programmes and copyright
- Economic rationale in the current debate:
 - The Directive on Orphan works
 - The Memorandum of understanding on out of print works
 - Some emerging use cases (Norway, France, UK, Germany)
- Importance of “rights information management”
 - The Arrow case

Economics of large scale digitisation plans: costs

- Digitisation costs: logistic, scanning, etc.
 - In prevalence variable costs
 - Subject to economies of scale
 - Depending on the desired level of quality
- Infrastructure for the making available
 - Relevant fix costs
 - Variable costs for creating / reviewing metadata records
- Copyright cost (when works are not in public domain)
 - Rightholders remuneration
 - Transactional cost
 - o Searching for rightholders
 - o Negotiation

Economics of large scale digitisation plans: funding

- Library digitisation programmes: public funds
- Large scale commercial programmes
 - “Long tail economy”
 - Advertising (e.g. initial Google Books programme)
 - Subscription, sales, others (e.g. envisaged in the Google Books Settlement)
- Other private commercial programmes
 - Subscription, sales, others (usually not so much ads)
 - See (later) the new French law on “out of commerce”

Peculiarities of rights management: the cost side

- Is copyright an “obstacle” towards digitisation programmes?
- Cost = Remuneration + Search + Negotiation ($C = R + S + N$)
 - The digital library dilemma:
 - Individual deals may happen when the value $>$ cost ($V > C$)
 - Whether $S + N > C$
 - No $R (> 0)$ allows $V > C$
 - The digitisation programme becomes impossible
- The “obstacle” is not in copyright, but in transaction costs
- N.B.: It is not just a matter of high cost, but of relation between cost and value
 - V depends on:
 - The type of use requested
 - The individual work

Peculiarities of rights management: the funding side

- Copyright is the only (existing) tool to enable a number of funding schemes listed above
 - Sales, subscription, etc.
- This tends to maximise R (remuneration)
- Decreasing transaction costs is an objective also in this case

Economic interpretation of the current legal debate

- **The Orphan works:**

“A work shall be considered an orphan work if the rightholder in the work is not identified or, even if identified, is not located after a diligent search for the rightholder has been carried out (**Draft European Directive**, art. 2)

- A definition within my approach:

- Cases where $S > V$, for whatever exploitation of the work

- How to regulate?

- The idea is to cap the search cost so to maintain it reasonable

- Full consensus on the principle: so why it is so difficult to wording?

- In my approach: it is difficult to define S and V *ex ante*:

- What is “diligent” enough?

- What is “reasonable”?

- Impossible to understand just with an economic / business approach:

- In the Directive, only non-commercial use is allowed

- Value of access to cultural heritage vs. moral rights

“Out of commerce” (OOC) works

- Libraries often claim that the OW Directive does not fit large scale digitisation programmes
 - $\Sigma(S+N) > \Sigma V$
- Need to move to a different model: agreements on OOC works
- Why commercial status is relevant? When a work is in commerce:
 - V is high
 - (S+N) is low
 - So: for in commerce work the transaction cost issue is not relevant
- Envisaged solution: agreements on OOC based on collective management of rights

The Memorandum of understanding on OOC

- Signed by representatives of European stakeholders associations in books and journals world (Sept 2011)
 - Authors (EWC, EFJ), publishers (FEP, STM, EPC), collective management organisations (IFRRO, EVA), libraries (CENL, EBLIDA, LIBER)
- Main principles:
 - Agreements to manage rights in OOC works can be reached by consent between all the stakeholders
 - VSA = Voluntary Stakeholders Agreement as a broader category of the “Extended collective licenses”
 - Definition and method for determination of the OOC status should be also agreed by the parties
 - A CMO can manage the rights of non members (presumption of representation), assuming that
 - it is genuinely representative of the rightholders category concerned
 - it makes best efforts to alert rightholders in question

New forms of collective management

- Collective management of rights is *the* traditional answer to high transaction cost of individual negotiation
- In the book sector, traditionally used for managing rights for secondary exploitation (e.g. reprography, public lending)
 - Low V of individual transaction, which makes $V < S+N$
- In digitisation programmes the licensed use is very primary:
 - Scanning and making available online is, in the digital era, *the* primary exploitation of a work
- What is “secondary” (from a commercial viewpoint) is the “category of work”, i.e. out of commerce

Hypothesis for future agreements in the digital library field

- Voluntary agreements may have two forms:
 1. Including all works, without limitation e without search, and limitation in the type of uses licensed
 - In my view: not so probable; low value for both users and RHs
 - One example: BokHylla in Norway
 2. Including all rights, but limited to a restricted category of works. For sure out of commerce, possibly limited according to additional criteria: date of publication, genre (fiction / non fiction), etc.
 - In Germany existing agreement between stakeholders not implemented (yet) by legislation
 - In France agreement about out of commerce (1 Feb 2011) implemented by the law on "*l'exploitation numérique des livres indisponibles du XXe siècle*" (23 Feb 2012)
- Voluntary agreements that do not limit the scope neither to uses nor to the type of works are simply impossible

The role of technologies

- A very famous quote by Charles Clarke is still valid for this case
 - **“The answer to the machine is in the machine”**
- Since the problem is in the transaction costs, the objective is to reduce them, which will make more convenient any deal, regardless the institutional / business / legal environment
- Transaction costs are related to rightholders search and negotiation; solutions should be imagined for both
- Technological solutions to transaction costs are complementary and not alternative to legal solutions
 - They may enable legal solutions that better balance the different interests of stakeholders

What we need

- We have advanced infrastructure to deal with book data
 - Descriptive data from library catalogue
 - Commercial data from the books in print database (BIP)
- These are based on well established international standards
 - Identification (ISBB, ISSN, DOI...)
 - Metadata (MARC, DC, ONIX...)
- We need the equivalent for dealing with “right information” about book works
 - Standard based “right information infrastructure”
 - This may enable the existence of multiple, interoperable information source

Arrow as use case of this concept

- Arrow is a ***distributed system*** for ***facilitating rights information management*** in ***any digitisation programme***, scalable to ***further applications***
- **A distributed system:** a network of databases made interoperable through use of standards
- **Facilitating** implies time saving and thus decreasing costs
 - Data from validation survey: Arrow allows 80%+ time saving
 - British Library report: rightholders search from 4hours to 5min per title
- **Rights information management:** conceived as a separate function from (though linked to) “rights management” (the RII = Rights Information Infrastructure)
- **Any digitisation programme:** Arrow is conceived to be neutral to legal frameworks and business models
- **Future applications:** Rights information may be crucial in new digital markets

How Arrow works

- We look for relevant “right information” through querying existing databases (TEL, VIAF, BIPs, RRO repertoires) and manipulate such information for specific purposes
- Definition of right information:
 - Set of metadata including
 - o Unambiguous identification and description of the book (manifestation) concerned
 - o Unambiguous identification and description of the expression(s) and work(s) included in that book
 - o Unambiguous identification of rightholders name
 - o Commercial status of the work (in commerce / out of commerce)
 - o Contact details of the rightholders concerned
- The process enrich pre-existing data and can feed back existing sources
- Everything is based on open standards
 - A key achievement: the messages for information exchange we implemented are now officially part of the ONIX-PL standard

Focus on the French use case

- Main elements of the new French law:
 - The BNF is asked to create an “out of commerce” database
 - The rights on out of commerce works are mandated to a CMO by the law
 - Rightholders may opt out
 - The CMO should offer to the original publisher the rights for commercial exploitation of the work in digital form
 - Need to reach individual publishers
 - If the publisher is not interested, the work is offered to other parties, on non exclusive basis
 - Objective: to stimulate new business models
 - All digitised books are stored and indexed in the BNF “Gallica 2” (and in Europeana)
 - Preview for books that are commercially exploited
 - In the long term, full text access for books that are not commercially exploited

Some tentative conclusions

1. The trade-off between licensing schemes with and without search is misleading
 - As a minimum, the search for identifying the commercial status is needed
 - The Arrow system supports notification to registered rightholders (as recommended in the MoU), which enables informed opt out
 - Lesson learned: the point is not **if** making a search, but **which** search is needed for the specific purpose
2. The transaction cost problem is approached through a combination of technological development and legislative solution
 - Definition of minimum level of search required
 - Decrease of negotiation cost through presumption of consensus if rightholders do not opt out
3. Innovative right management is used to enable multiple funding models to make cultural heritage more accessible online
 - Public and private funding, according to a sort of “subsidiary” model
4. Enabling multiple business model also reduce the risk of the creation of monopolistic positions in the emerging market

- Thank you very much

- Piero Attanasio

- AIE – Associazione Italiana Editori

- piero.attanasio@aie.it