



Rights Information Infrastructures and Voluntary Stakeholders Agreements in Digital Library Programmes

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Definitions

These notes have their starting-point in two parallel discussions.¹ The first is political: there is broad discussion about possible models to solve the issue of "orphan works" in digital library programmes. Some proposals refer to the Extended Collective Licenses (ECL)²

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²Riis and Schovsbo ("Extended Collective Licenses and the Nordic Experience. It's a Hybrid but is it a Volvo or a Lemon?") describe the terms of this debate in Europe and in other countries, with particular reference to Canada. In some key documents on copyright matters recently approved by the European Commission there is explicit mention to this option (*Green Paper on Copyright in the Knowledge Economy*. COM(2008) 466; *Communication on Copyright in the Knowledge Economy*. COM(2009) 532, final 5). At member state level, cf. in particular UK Intellectual Property Office (*©the way ahead: A Strategy for Copyright in the Digital Age*; "The Nordic Model: Extended Collective Licenses and Its Relation to International Instruments").



as a possible solution, others envisage systems with other types of Voluntary Stakeholders Agreements (VSA).³

The second concerns the relationship between the implementation of any system based on voluntary agreements and rights information management, with particular reference to "registries"⁴ and, more generally, to infrastructure to manage rights information for the purpose of digital library programmes. Such infrastructure has been called Rights Information Infrastructure (RII).

Terms like VSA and RII are relatively new in the debate about rights management, so it is worth starting with definitions.

Definition of VSA

I use the term VSA to extend a concept that is historically linked to the Extended collective license model that has been in place in a number of Northern European countries for decades. ECL systems are rooted in that legal and social environment. When proposed as a model for other countries, the problem is to distinguish the abstract

³The concept of VSA is similar but not coincident with "Models based on contractual agreements between stakeholders" as described in Van Gompel ("Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?"). "Contractual agreements" include, in Van Gompel classification, also "mandatory exercise of rights", whilst the emphasis is here on "voluntary" mechanism. However, if a mandatory contractual agreement also allows individual rightholders to opt out, the boundaries between the two categories may be thin from an economic viewpoint.

⁴Varian ("Copyright term extension and orphan works") suggests the creation of "a centralised copyright registry" as a tool to facilitate diligent search, to approach the issues of transaction costs and orphan works. See also Mara ("High Copyright Transaction Costs Cause 'Friction', Google Economist Tells WIPO") who reports the content of a Varian's intervention at the WIPO: "The best solution to the problem of transaction costs caused by intellectual property with regards to orphan works is a clearinghouse that would not only contain a *registry of potential rights holders*, but would also indicate prices different sellers might ask for the licence on their work" (emphasis added).

characteristics that can provide value in different contexts from the elements that are linked to the specific historic experience and hence difficult to replicate.⁵ For these reasons, I propose to be careful with the terminology and to call VSA the abstract model resulting from this analysis. So, I call VSA any type of system, including ECL, featuring the following three characteristics:

- rightholders' associations and/or a Collective Management Organisation (CMO) freely negotiate with users the terms of a license for the particular uses of works they represent. Representation must be actual and genuine for the works in question;⁶
- a CMO is entitled⁷ to issue such a license to individual users;
- the legal system extends the validity of the signed agreement to cover the works of non-mandating rightholders (*i*) holding rights in the same categories of works (*ii*) for the same type of use (*iii*) in the sector for which the agreement has been signed. This is crucial to guarantee the user's legal position, since a contractual solution without such extension can tackle the financial liability but not the criminal liability associated to unauthorised use (Koskinen-Olsson 292).

⁵"ECLs have been successful because of the context in which they function. If one, therefore, would seek to transplant these models one should be very careful to include into the design of the systems not just the rules themselves but also the broader background" (Riis and Schovsbo).

⁶The concrete way to assess if a particular CMO or rightholder association is representative is not relevant here. Instead, the relevant point is that the CMO is accepted as representative by the relevant stakeholders. Cases of gaps between the official procedures to assess the CMO as representative and the actual perception of relevant stakeholders are not treated here.

⁷Using the word "entitled" implies a reference to the existence of an authority that authorises the CMO and a procedure to obtain this. For the limited purpose of this paper, the concrete form of such entitlement is not relevant.

Additional features of VSAs are logical consequences of the characteristics above:

- mandating and non-mandating rightholders shall be treated equally with respect to licensing conditions and distribution of collected fees. Non-mandating rightholders can always claim for their share of remuneration;
- there should be the possibility for a rightholder to opt out, withdrawing totally or in parts his/her works, and licensing the use of the works directly him/herself.⁸

In this view, VSA is seen as different from other collective management schemes. It is different from a mere voluntary licensing because of the extension of the license so as to cover non-mandating rightholders. It is different from legal licenses because the terms and conditions of the licenses are freely negotiated by the parties, while in the statutory license they are (at least in part) pre-defined by the law. One can argue that this last is not too different when the terms of a legal licence are defined after a stakeholders' consultation and there is an opt-out mechanism (see the French case below). Furthermore, in many compulsory license systems some terms of the licenses (starting from tariffs) are subject to negotiation between the parties, so the boundaries between the two systems are not completely clear. At the abstract level that I would like to maintain in this paper, the distinction is that in a VSA all (or most) terms of the license are decided by stakeholders, over the time, through negotiation, while in statutory license, significant part of those terms

⁸This feature is not always present in the current ECL in place, but I consider it as an element of the VSA, since it is necessary to make "voluntary" the mechanism. Furthermore, it makes the model more flexible and thus more acceptable in new contexts.

are defined by the law.⁹ Thus, in theory, it is possible that an actual legal license system is so flexible that it can fall in the proposed VSA definition, and it is also possible that a voluntary system is defined within such a strict legal constrain that cannot be defined as a VSA.¹⁰ Within my definition of VSA, the level of flexibility provided by a mechanism of extension of a voluntary stakeholders agreement is higher than in legal licenses, which require modification of the law to change their terms. In my personal view, mandatory terms of licenses are preferable only if the context of the exploitation of the works is stable over time, and/or if it is important to include any social objective that goes beyond the interest of stakeholders represented in the negotiation. As a matter of fact, the legal tradition – which is an important element at least from a psychological viewpoint – may also influence the decision, making the compulsory licenses model more acceptable by stakeholders themselves. The main characteristics of VSA that I would like to emphasise are “*consensus*” (there should be an agreement that is then extended) and “*representation*” (whenever the CMO or rightholders associations are not representative of the affected works/rightholders, the system cannot be defined as a VSA).

⁹For example, the Italian compulsory license for reprographic rights (Art. 68 of the copyright law) leaves large field to negotiation between rightholders and users associations, mediated by the appointed CMO. However, the fundamental terms of the license are defined by the law: licenses can be issued only for photocopies, up to 15% of each book or periodical issue, and for “personal use” only. So the creation of course-packs or any digital right etc. cannot be included in the negotiation without changing the law.

¹⁰Koskinen-Olsson (293) describes the different models in comparison with the ECL system, identifying a broader range of alternatives. I am using the extremes of the range for explanatory reasons: as Koskinen-Olsson explains, some “compulsory collective license” models, where the only obligation is the collective management, not the terms of the license, are very similar to ECLs, and thus might be included in the VSA definition.

Cases that Fall Under the Definition of VSA

Looking at these three core characteristics, I argue that existing ECL systems are usually VSAs, but also that VSAs cover additional cases. Interestingly enough, the Google Settlement has been compared to an ECL license.¹¹ From a legal viewpoint, this comparison may be incorrect, but I am interested here in emphasising that some key characteristics are the same. Rightholders' representative organisations (the Association of American Publishers and the Authors' Guild) negotiated terms and conditions of a complex license with a large user, and proposed to *extend* this license to a broader community of rightholders.¹² Significantly, many objectors to the agreement emphasised the lack of consensus and the lack of representation of foreign rightholders as key elements that made the settlement unacceptable. The Department of Justice of the US also pointed out this problem and, in the second version of the Settlement, the scope was dramatically reduced to take this objection into account.¹³

Recently, in Germany, the national library and rightholder representatives agreed on a solution for digitisation programmes including in-copyright works. In order to avoid a situation in which such programmes compete with the normal exploitation of works, the parties have agreed to allow the inclusion of in-copyright books

¹¹Tilman Lüder proposed this comparison during the Seminar on copyright and digital libraries organised by the Spanish Presidency of the European Union in Madrid, February 2010. An extended comparison has been proposed by Skarstein ("The bookshelf.no : A matter of Intellectual Property Right"). See also Lang (*Orphan Works and the Google Book Search Settlement: An International Perspective*, INRIA & AFUL).

¹²Since ECLs are not present in the US legislation, they tried to obtain the same effect through the class action procedure. The legal terms of this attempt have been subjected to strong opposition. Here I am interested only in the economic rationale, which seems to me very similar in the two cases.

¹³There are still issues in this respect, and the case has not reached its conclusion as I write these notes. However, this is not important here.

within the digital library programme only under certain conditions: the works must be out of print;¹⁴ they must have been published before a certain cut-off date; the requests must come from particular categories of libraries. Under these conditions, obtaining authorisation from individual rightholders on a title-by-title basis is not necessary, though rightholders can withdraw their works from the agreement at any time. This agreement is based on a modification of the mandate of the CMO. The procedure for this modification contains an opt-out possibility for registered rightholders within a certain time-frame. Once the modification is implemented, any rightholder may withdraw individual titles from the scheme at any time. Extension of this agreement to non-mandating rightholders by way of legislation is a possibility for the future, still under discussion. If such extension becomes a reality, the case will fall under the VSA definition, because it has the three key characteristics: free negotiation, consensus and representation, and extension to non-mandating rightholders of the effects of the agreement.

What an RII Is

Arrow is a European project that is developing a *system to manage rights information* for the purposes of any digital library programme and, in principle, for any other use. In particular, it is conceived to *facilitate diligent search* to identify the rights status of any work that a library wishes to digitise and make available online. *Rights information* is defined as a set of metadata that supports the identification of the rights status of a work. This includes (*i*) identification

¹⁴Here and below I use the term "out of print" to define the situation where the rightholder is not commercialising the work concerned in any form. So, this status should be considered without reference to the "print" form (if a work is available online, it is "in print" under this definition) and is defined at work level (if at least one edition of the work is in print, than the work itself is in print).

of the book concerned, (ii) identification of the work(s) included in that book, (iii) identification of the commercial status of a work, (iv) identification of the publisher, and (v) of contributors¹⁵ name, and finally (vi) the location of the rightholders. Since Arrow was born at a time when orphan works were at the very heart of the political agenda, the purpose of the project is often confused with the very last element of the list above: the location of individual rightholders, or the identification of orphan works when this location fails. This is misleading.

Arrow is instead an open, standard-based system, which is conceived to be used in any context, in order to manage rights information. The main value is to provide interoperability among existing resources and to foster the collection of additional data or enrichment of existing data within a network. This complex system has been named Rights Information Infrastructure (RII). Arrow is just one project. There may be alternatives, at national or global level. Any system that supports rights information management is what I call here an RII.¹⁶ Though the concept of the RII was born within the Arrow experience, I use this term here in a more general sense.

¹⁵The term "contributor", typical of the bibliographic metadata jargon, includes here any creator that may have rights in the work: authors, translators, illustrators etc.

¹⁶The RII does not coincide with the so called "copyright management systems (CMS), [which] are basically databases that contain information about content (works, discrete manifestations of works and related products) and, in most cases, the author and other rightholders. That information is needed to support the process of authorizing the use of those works by others. A CMS thus usually involves two basic modules, one for the identification of content and rightholders, the other for licensing" (Gervais and Maurushat, emphasis added). Here I propose to separate the two modules: rights information management is seen as independent from rights management, though the two modules can be managed by the same organisation. There may be cases, however, where the two functions are managed by different entities. Furthermore, the use of the term "infrastructure" rather than "system" is meant to suggest that the information infrastructure should be neutral and accessible by any interested party.

The announced BRR (Book Right Registry), provided for by the Google Settlement Agreement, falls into this category. If and when the Settlement is approved, the BRR is conceived to manage rights information for the purpose of a large-scale digitisation programme, and has been conceived by the US rightholders associations to serve also alternative initiatives; therefore it is an RII in the sense referred to in this paper.

Methodological Approach

The arguments and conclusions of this paper are based on an economic approach and do not pretend to be precise from a legal viewpoint. The analysis focuses on a limited target: *the application of the VSA model to deal with rights in digital library programmes targeted at books*. Therefore, it is limited to "text based monographs", without reference to other content (music, images, audiovisual material etc.) or to periodicals. The analysis also makes the following assumptions: *First assumption*: Rightholders associations and CMOs tend to minimise the number of members who opt out. According to this model, those organisations determine the scope of the license not on the basis of "average terms" acceptable by their members, but considering conditions that are acceptable to the vast majority of their members, with particular attention paid to the rightholders' motivation to exploit the work directly. *Second assumption*: rightholders in the book sector tend to prefer direct management of rights for uses that they consider to be "primary exploitation" of their works. As a consequence of this assumption, I define "primary exploitation right" any right that rightholders prefer to manage directly, and "secondary exploitation right" any right that rightholders are ready to mandate

a CMO to manage.¹⁷ So, when I say that VSA are applicable to secondary exploitation rights, this is simply an application of this definition and does not intend to propose any additional limitation of the scope of a VSA.

VSA and Digital Libraries

When looking at the book sector, the scope of collective management varies dramatically between print and digital publishing. Traditionally, secondary exploitation mandated to CMOs is defined according to the authorised uses – for example: “photocopying part of a book for teaching purposes” – and it applies to every book in the CMO repertoire. I believe that for digital libraries (and possibly in the digital environment in general) we need to use a different variable to distinguish between primary and secondary exploitation. Typically, libraries ask for “scanning and making available on the Internet”, which is surely a primary exploitation in terms of uses, and is expected to become the very primary method of exploitation of works in the digital era. Therefore, *when rightholders are actively commercialising their works*, following the stated assumptions, they will never mandate a CMO to license full exploitation of their works, and thus no VSA system can apply (being based on the consensus of the vast majority of rightholders). However, a new type of distinction can apply. In particular, *when rightholders are not actively commercialising their works*, they may be prepared to mandate collective management for their works, if and when the out of print status is correctly identified. The conclusion I propose is that *future*

¹⁷Though similar in the vocabulary, this classification is different than the traditional juridical distinction between “primary” and “secondary” rights. For example, translation rights are “secondary” in a traditional classification but are referred to “primary exploitation” in the usual publishing practice.

applications of VSA will be increasingly based on the distinction between categories of books rather than categories of uses. Therefore, it is likely that new agreements will define their scope in this way: "Scanning and full making available is authorised only for out of print scientific and academic works, whose last edition was published before 1965" (or anything similar). Alternatives such as: "All books are authorised to be scanned and made available only in preview of very limited parts, only in the domestic territory and with no printing or downloading possibility" would seem less realistic.

The Role of a Rights Information Infrastructure

If my conclusion is correct, a title by title search will be necessary *before* the use in order to understand whether the license covers that particular book or not. This is a significant change in the way ECLs – as the most important VSA model in place – are usually seen. The expectation is that, within this system, no prior search is necessary, since the license also covers "non-mandated" works. Because of the difference in the context, however, in the emerging VSAs some form of prior search becomes necessary. ECL systems have always covered only one "category of works" for which rightholders' representatives were able to provide a license, so that – for example – an RRO (Reproduction Rights Organisations, the CMO for literary works) will never be able to license rights in recorded music. However, users can easily distinguish a book from a music record, so there is no need for any search. In the new context, the identification of works that fall within the scope of the license becomes more difficult, and should be inevitably done on a title by title basis. When looking at the actual implementation of the Arrow RII, the

phases devoted to the first part of the search (work identification and in-print status at work level) cover most of the workflow. When those phases have been completed, the proper rightholder search is conducted through querying existing data sources belonging to the network. Possibly – depending on the decisions of the stakeholders – further search is conducted outside the system, and the results are stored in the existing data sources. The first phase of the search is exactly what is needed for the management of any type of VSA system, including an ECL with the characteristics envisaged here. Essentially, an RII helps in determining whether every book belongs to the defined category. For example, it may be necessary to:

- match the library metadata record describing the book with records present in authoritative sources, in order to precisely identify the manifestation concerned;
- precisely identify the work(s) concerned with the scanning of a certain book and all the other manifestations containing the same work;
- identify the publisher(s) and contributor(s) involved;
- determine whether that work (not the book) is still in commerce;
- determine the date of publication at work level (e.g. the publication dates of all the editions of the work, if required);
- determine the genre of the work (e.g. whether it is “scientific” or “academic”, which eventually require precise definition and a way to determine it at title level).

In large-scale digitisation programmes, these data are very expensive to manage and subject to a high level of error, so that having an instrument that reduces costs and increases accuracy can be

very valuable. These functions may also be seen from the opposite viewpoint. The existence of an RII allows stakeholders to negotiate more sophisticated agreements, since it enables them to define categories of works of particular interest for libraries and/or for which rightholders are prepared to license rights for a broader range of uses and/or at lower fees. In other words, an RII allows the creation of a smarter agreement within a VSA environment. Finally, an RII can support CMOs in managing the agreement. A key issue in large-scale digitisation projects is that a library asks for information about *works* starting from a metadata record referred to a *book* (i.e. to a particular edition of that work). There are three fields where an RII provides value:

- a library record may fail to match the CMO metadata record for the same book. In this case, it is perfectly possible that the CMO erroneously considers a book to contain a “non-registered” work (therefore associated with “non-mandating” rightholders) and subsequently starts a procedure to search for the rightholders for distribution purposes;
- whenever a scanned book is an edition of a work that has been registered in the RRO repertoire database through another edition, without metadata at a “work” level, the work will not be recognised and therefore will be wrongly processed;
- if the rightholder decides to withdraw any particular work from the agreement, an incorrect recognition of the work from the initial metadata record that he/she provides may create problems in the relationship between the CMO and rightholder, since he/she will not be happy to see that the withdrawal was not honoured. At best, the lack of recognition of withdrawn works will result in unnecessary costs for

libraries that scan and make available books for which, subsequently, the rightholder will request deletion.

National Repertoires, Foreign Rightholders and the Added Value of RIIs

The extension of an agreement to foreign rightholders is controversial. From my abstract definition of VSA, the agreement signed can bind rightholders (including non-mandating rightholders) if, and only if, they belong to the category that the organisation who signed the agreement genuinely represents. For this reason, the matter is not the nationality of the rightholders concerned, but it is their representation within the association(s) signing the deal. However, in the current circumstances, nationality is a very relevant variable. This is simply due to the fact that CMOs and rightholders' associations are usually country-based organisations. The fact that ECLs usually include foreign works does not contradict the principle as far as the CMOs that sign the agreement have bilateral agreements with equivalent organisations in a significant number of foreign countries, so as to be representative of foreign rightholders (Riis and Schovsbo). Recently the terminology in all Nordic countries laws (except in Sweden, where the change is underway) has been changed to better clarify the point. Nowadays, the representation should be demonstrated in respect to "substantial amount of rightholders whose works are being used" and not, as it was in the past, of "national rightholders".¹⁸ In more general terms, I would argue that the ECL stops belonging to the category of agreements here

¹⁸The change from "representation of national rightholders" to the broader concept of representation of the works that are being used started in Denmark in 2001. "Norway and Finland introduced a similar criterion in the implementation of the Copyright Directive in 2005" (Koskinen-Olsson 292-293).

described, as far as there is lack of representation of rightholders that are bound by the agreement. Similarly, as long as the Google Settlement pretended to bind rightholders that never were involved in the determination of the deal, it was hard to describe it as a genuine VSA. As said, things have been changed in the amended version of the settlement.¹⁹ In the theoretical model, I expect that emerging agreements will limit their scope to national rightholders, thereby maintaining coherence between rightholders representation and scope of the agreement. Therefore, it is realistic that agreements will limit the scope to national works,²⁰ which however can be defined in different ways: books published in that country (or *first* published in that country), or books with national authors, or with at least one national author, and so on. Again, an RII system can support the identification of these categories. In Arrow, this is done through the integration with VIAF.²¹ In general, it requires the use of authority files of publishers and authors. Furthermore, if the RII has transnational coverage, when it receives a request from a library in country A concerning a book published in country B, it will be

¹⁹Another interesting example is the debate concerning the application of the ECL model in Canada. Gervais and Maurushat wrote: "The extended collective licence is an interesting model for countries like Canada where, on the one hand, rightholders are reasonably well organized and informed, and, on the other hand, a great part of the material that is the object of licences comes from foreign countries"(Gervais and Maurushat 24). My position is that if "a great part of the material that is the object of the licences comes from foreign countries", an agreement should be reached with foreign CMOs, unless the "reasonably well organised" Canadian CMO is explicitly mandated to represent also foreign rightholders. Nordic legislations, with the changes, made this principle more explicit.

²⁰By the way, this may correspond to the objectives of a national library, which will usually tend to prioritise the digitisation of national cultural heritage, when considering budget limitations.

²¹The VIAF (Virtual International Authority File - <http://www.viaf.org>) is an initiative to made the authority files (i.e. the authoritative lists of authors' names) of a large number of National Library interoperable worldwide.

able to forward the request to the representative CMO in country B. Representation of rightholders can be established in several ways: through bilateral agreements between CMOs; libraries may ask multiple CMOs to provide licenses; groups of CMOs can be involved in a single negotiation in order to increase the number of represented rightholders; or simply stakeholders may decide to limit the scope of the agreement to their country. Again, an RII can enable any of these solutions, thereby increasing the range of options available to the negotiating parties.

Some Empirical Evidence

To sum up, the theoretical assumption is that concrete applications of VSA (including ECL) will probably be limited to certain categories of works (and rightholders) and will on the other hand be broad in terms of authorised uses. The opposite choice (limiting uses and broadening categories of works) would be less probable, though still possible. An agreement that neither limits its scope (significantly) in terms of uses nor in the affected categories of books is not consistent with my approach. Is this happening in reality? The first empirical evidence I would like to consider comes from Norway and seems to contradict the first statement. The agreement signed for the Bokhylla.no project²² is limited in terms of authorised uses but not in respect to categories of works. As for the first aspect, scanned books are accessible only from Norway, and only for reading on screen without downloading or printing. On the other hand, the only limitation in terms of categories of books is related to the date of publication: only books published in certain decades

²²See <http://www.nb.no/bokhylla>. A description of the project, including a chapter describing the copyright management issues is in Skarstein (“Strategies for a Digital National Library”).

fall within the scope of the agreement. However, I argue that the selection of these dates is done more for experimentation purposes than as a definitive decision, so I would consider the case of the Bokhylla programme as a pilot of the model with restrictions concerning uses but applicable to all books. This model does not enjoy significant value from an RII, since *de facto* it does not require any prior search, though some value may lie in the post management of the agreement. I personally doubt that the effects of such an agreement would be very valuable for both libraries and rightholders. It is probable, in fact, that for certain categories of books rightholders would be prepared to provide much broader licenses, even for free, since they are not interested anymore in commercially exploiting these works.

A consequent forecast is that, in similar cases, libraries will look for additional agreements, either contacting rightholders individually or through a new ECL agreement. The first case would be paradoxical, since starting from an ECL model, users will be then obliged to use title by title licenses, renouncing both to the advantage of having collective management and to the advantage of having an extension of the agreement.

Moving to Denmark, the discussion seems to start on a different basis, confirming the forecasts provided by the theory. In this case, there has been just an initial discussion between stakeholders. One hypothesis on the table is to limit the agreement to scientific and academic works, published before a cut-off date and currently out of print. At that point, the library receiving the license will be authorised to make the digitised works available on the Internet without limitations, for non commercial uses.

These two cases are based on ECL models. It is worth analysing three other cases in different legal frameworks, to see similarities and differences: the Google Settlement, the German agreement between

rightholders and the national library, and the discussion in France between the Ministry of Culture and rightholders representatives. In the Google Settlement it is noteworthy that the solution was to discriminate between in print and out of print books. The uses regulated in the agreement are very broad, and include commercial uses, which are even more sensitive than those usually foreseen in agreements made with libraries. The model required the creation of the BRR to manage the identification of a book as in print / out of print as well as the date of publication, and, in application of the new Settlement, the country of publication. Moreover, it has to manage claiming of rights, including rightholders' withdrawal of their works and to manage subsequent revenue distribution. This confirms that models based on the definition of the scope of an agreement on the basis of categories of books require an RII. The functions of the BRR emerge very clearly: (i) determining whether a book falls under the category included in the agreement scope; (ii) managing the relationship with the rightholders, including to guarantee that every rightholder receives the correct information, has full capacity to claim his/her right and to opt out, if he/she desires so, and receives due payment at the end of the process. Before the agreement enters into force, the BRR does not exist. The same functions are managed by a notification office using a database and a claiming service provided by Google itself. For both tasks, the experience of the Google settlement databases has demonstrated very clearly how complex they are. Initially, the determination of the commercial availability status was systematically wrong even when the system was using the correct data sources (Associazione Italiana Editori).

In Germany, the above mentioned solution (see p. 242) is very similar to that described for the Danish case: the agreement will be limited to works that are (i) out of print, (ii) published before

a cut-off date. It is planned to have a system in place to allow rightholders to withdraw their works at any time.²³ Again: there is a precise limitation of scope in terms of work categories, but not of authorised uses, which will be very broad: full display on the Internet world-wide, though for non commercial uses only. Another element of the agreement is the limitation of its validity to German works (i.e. first published in Germany), which is due precisely to the fact that rightholders' associations are able to speak only on behalf of their own members, and membership is based on national territories (probably it is also due to the fact that German libraries prefer to use German tax-payers' money to digitise and make available the national cultural heritage). Also in this case, I envisage that an RII is needed to support the management of the agreement, and may help in the definition of the agreement itself, since it may enable a more sophisticated selection of books, and thus could decrease the risk of competition between the publications made available by the authorised library and normal exploitation of the works by the rightholders.

In France the Ministry of Culture and the publishers representatives are currently considering an agreement on out-of-print works from the 20th century. The project proposed by the Ministry would be based on four fundamental principles: *(i)* the digitisation of all the collections by the French national library at the expense of the State; *(ii)* an overall agreement on a massive set of works, going beyond the negotiation on a title by title basis, but with flexible mechanisms for opt-in and opt-out; *(iii)* a secure agreement legally binding the three parties (the Ministry, publishers and authors); *(iv)* a model of dissemination and commercial exploitation of works with mechanisms for

²³The broad similarity of the planned Danish and German solutions confirms, in my view, that the VSA concept has some value in the analysis. ECL is just one category of VSA, and may be very similar to other agreement implemented in different legal systems.

income distribution to be defined. Also in this case, the discussion is still at early stages. However, it is interesting that somehow the general scheme is replicated, though the legal technique to implement the agreement – if and when it is reached – would likely be different, following the French legal tradition, so that a compulsory collective management has been envisaged. Terms of the agreement are expected to be largely left to stakeholders negotiation, so also this case will probably falls in the VSA definition.

Conclusions

Rights management within large scale digitisation plans of library collections suffers from the well known phenomenon of high transaction costs. The traditional solution of collective management is still an effective way to approach the problem, but requires re-shaping in comparison to the past. My proposal is to go back to the principles that characterised the collective management of rights, and abandon the individual elements of previous solutions, which instead can be misleading. In my view, in a changing world, models for managing rights based on stakeholders consensus, like the VSAs, are preferable, because *(i)* they are more flexible and thus easier to change when the context changes, and *(ii)* any top-down solution, like an ad hoc copyright exception, is very difficult to define in such a challenging field. The difficulty comes from a peculiar feature of collective management of rights in this context. Digital libraries require licenses for very primary exploitation of the works, including making the content available online. Being aware of this, the definition of the scope of any agreement is very delicate, and can not be done without direct involvement of stakeholders concerned. Recent experiences show that when stakeholders started a negotiation with open mind, they have found solutions, most of the times based on

the distinction between categories of books, and in particular on the distinction between in print and out of print works. It is worth recalling the nature of the transaction cost problem implied in a large scale digitisation programme. Significant costs are related to "search": there may be little incentive for buyers and sellers to look for each other to finalise a deal, when this deal has little financial value for both of them. There may be many mechanisms making such a situation undesirable. Varian ("Copyright term extension and orphan works") provides a comprehensive analysis of the problem and proposes a simple formalisation that helps very much in understanding the points I discuss here. When a work is still actively commercialised, the transaction cost issue simply does not exist for a primary use such as full making available online. The value of the deal fully justifies dedicating some efforts in searching and negotiating. Furthermore, search costs are very small, since publishers actively promote the book, and there are very good information resources (primary the "books in print" databases) that allow to reach the relevant information. Instead, the issue arises when considering out of print works, for which the ratio between the cost of the search and the value of the individual deal may be too high, and sometimes >1 . However, there is a cost also in the identification of the commercial status of a work. All VSAs licensing full making available on the Internet, which have been signed or are under discussion (or, according to my analysis, will be agreed in the future) require this identification and thus imply the related cost. This has two consequences. First, the creation of systems that facilitate rights information management is a prerequisite for the solution of the transaction cost problem. Decreasing costs in this phase enables stakeholders to identify the best solutions for them, since it removes constraints and thus increases the degrees of freedom in the negotiation. Second, prior search for rightholders should be seen as

an additional feature to the search for the commercial status of the work. Any assessment of costs related to rightholders search should take into account this nature. If we consider that *any realistic VSA* requires the identification of the commercial status at work level, it is important to identify the additional cost of a *specific VSA including some rightholders search* as a separate estimate in order to decide if a rightholders search is – in a specific context – desirable. Rightholders searches also have benefits. Some are intangible (a stronger respect of authors' moral rights is the most important), some are tangible, and thus measurable. The most relevant is the extra-cost implied in a process where libraries first scan a book and make it available and later are obliged to delete it when the rightholder asks for withdrawal.

The main conclusion of my analysis is that we need to abandon some obsolete trade-offs that have characterised the discussion around this subject up to now. The first is *whether there should, or should not be a title by title search prior to the inclusion of a book in a digitisation programme*. The analysis shows that some prior search is simply inevitable as far as commercial availability of the work is concerned. The only *realistic alternative*²⁴ is to dramatically reduce the licensed uses, like in the Norwegian experience. Any plan for making the cultural heritage fully available online requires some form of a title by title search. The second trade-off is *whether there should, or should not be a title by title search for rightholders*, once the work has been identified as non commercially available. If a license

²⁴I do not consider realistic the other alternative that is possible in theory: a so broad exception that allows digitisation and full making available online also commercially available works. A jurist would probably say that such an exception violates the three steps test, since it would be in competition with the normal exploitation of the work by the rightholder. In my language, this violation is simply a consequence of the fact that imagining a system that does not require prior authorisation for a primary exploitation of a work that rightholders is actively commercialising simply undermines the economic rationale of copyright.

is implied, and thus there are revenues to be distributed, a search is anyway necessary later for distribution purposes. Therefore, the point is not *if* the search should be conducted, but *when*. Making some prior search seems to be convenient for both users and rightholders, in particular if there is an opt-out mechanism in place, like in the described VSA model. As said, there is a cost associated to the case that a library scans and makes available a book that then it is requested to delete. Anticipating the search allows to save such cost. Furthermore, if an RII is in place that allows querying in an effective way existing resources that are able to provide information about rightholders, it is surely worth to use this opportunity. Considering these elements, I argue that some rightholders search is cost-effective. My suggestion is to switch the discussion from "*if*" to "*how*". How long, how extensively, investing how many resources the search should be conducted. There is not a single solution fitting all cases, since the advantage of prior search depends on actual circumstances in a certain moment and in a certain context. In the ideal world, if an RII exists that is able to provide perfect search results instantaneously, prior and ex post search are equivalent. But in the ideal world, by definition, transaction costs do not exist, so this "utopian RII" is not the answer to the problem. We don't live in the ideal world and thus stakeholders should consider the quality of the existing information resources to set agreement terms that balance effectiveness in dealing with transaction costs and respect for copyright, including moral rights. This is a further argument that makes stakeholders involvement and voluntary agreements preferable to any top-down solution to the problem. From the top, it is very difficult to see the complexity of such a changing environment where the terms of any agreement should be decided.

Works Cited

- Associazione Italiana Editori. "Analysis of commercial availability of important Italian authors' works in the Settlement Database". *European Commission call for comments about the Google Book Settlement*. 2009. DOI: [10.1389/090907_aie_hearing](https://doi.org/10.1389/090907_aie_hearing). Web.
- European Commission. *Communication on Copyright in the Knowledge Economy*. COM(2009) 532, final 5. 2009-10-19. http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20091019_532_en.pdf. Web.
- . *Green Paper on Copyright in the Knowledge Economy*. COM(2008) 466. 2008-07-16. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0466:FIN:EN:PDF>. Web.
- Gervais, Daniel J. and Alana Maurushat. "Fragmented Copyright, Fragmented Management: Proposals to Defrag Copyright Management". *Canadian Journal of Law and Technology* 2. (2003): 15–23. Print.
- Koskinen-Olsson, Tarja. "Collective Management in the Nordic Countries". *Collective Management of Copyright and Related Rights*. Ed. Daniel Gervais. Kluwer Law International, 2006. 283–306. Print.
- Lang, Bernard. *Orphan Works and the Google Book Search Settlement: An International Perspective*, INRIA & AFUL. 2009. <http://pauillac.inria.fr/~lang/ecrits/liste/orphan-gbs.pdf>. Web.
- Mara, Kaitlin. "High Copyright Transaction Costs Cause 'Friction', Google Economist Tells WIPO". *Intellectual Property Watch*. (Sept. 16, 2010). Print.
- Riis, Thomas and Jens Schovsbo. "Extended Collective Licenses and the Nordic Experience. It's a Hybrid but is it a Volvo or a Lemon?" *Columbia Journal of Law and the Arts* 33. (4 2010). Print.
- Rognstad, Ole-Andreas. "The Nordic Model: Extended Collective Licenses and Its Relation to International Instruments". European Free Trade Association, Brussels. Sept. 30, 2010. <http://www.efta.int/eea/eea-news/2010-09-30-efta-copyright-seminar.aspx>. Web.
- Skarstein, Vigdis Moe. "Strategies for a Digital National Library". Aug. 23–27, 2009, Milan. <http://www.ifla.org/annual-conference/ifla75/index.htm>. Web.
- . "The bookshelf.no : A matter of Intellectual Property Right". European Free Trade Association, Brussels. Sept. 30, 2010. <http://www.efta.int/eea/eea-news/2010-09-30-efta-copyright-seminar.aspx>. Web.
- UK Intellectual Property Office. *©the way ahead: A Strategy for Copyright in the Digital Age*. 2010. <http://www.ipo.gov.uk/c-strategy-digitalage.pdf>. Web.

Van Gompel, Stef. "Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?" *International Review of Intellectual Property and Competition Law* 38. (2007): 669–702. Print.

Varian, Hal R. "Copyright term extension and orphan works". *Industrial and Corporate Change* 15. (6 2006): 965–980. Print.

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