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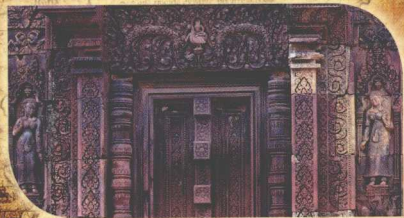**ESTELLE DERCLAYE**

Copyright and Cultural Heritage

PRESERVATION AND ACCESS TO WORKS IN A DIGITAL WORLD

Copyright and Cultural Heritage

Preservation and Access to Works in a
Digital World

Edited by

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Introduction

Estelle Derclaye

This book is the result and prolongation of a conference I organized in March 2009 and which bore the title 'Preserving and accessing our cultural heritage – the role of copyright law, digitisation and the Internet'. It has grown into an even fuller picture including contributions not only from European scholars but from abroad. The idea behind the conference was to explore how to improve the preservation of and access to our cultural heritage. Why? First, it is near impossible to deny the importance of the safeguard of and access to cultural heritage for any country and for the world at large. It reflects a country's intellectual and economic wealth. It ensures that a people's memory is kept alive and thus preserves a country's history, which in turn helps to ensure the avoidance of past mistakes and unnecessary duplications, the progress of education, of science and knowledge, the maintenance of cultural diversity, the mutual understanding between peoples and, hopefully, peace. It also helps increase personal development and sustainable development, all sorts of benefits to humankind but also to all living beings and the planet. Of course this is an idealistic view; not everyone is interested in history or in art and some individuals will never be bothered to learn more about another's culture. However, it is indispensable to conserve our cultural heritage and make it as widely available as possible, especially in schools, to enable these goals.

Second, it has become trivial to say that, in this digital age, things have become very different for cultural heritage. Digitization not only enables us to preserve works in better and generally less costly ways than it used to be, but also to disseminate them cheaply. And now even more so that we have increased bandwidth and downloading capacities which were unavailable to us just a couple of years ago. Once museums, libraries and archives upload scans of their collections on the Internet, people at all four corners of the planet can access the world's cultural heritage at the click of a mouse[1]

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[1]   Of course, there is also the issue of infrastructure. People need to have access to a networked computer and many people in the world are still not connected mainly for financial, but also political, reasons.

even though it may be located miles away from where they live and in the past they would have been unable to ever see it at all. It is the dream of any researcher, of every human being curious about anything, to have easy access to humankind's cultural heritage, the dream of building a modern library of Alexandria come true (with back-ups so it does not get destroyed). So I wanted to explore the – not so utopian anymore[2] – idea of creating a global central online database of cultural heritage. At the time of the writing of this Introduction, the subject has become even more timely and important than at the time of the conference, about a year ago. As I write these lines, the Google Book Search Settlement is being fiercely opposed by many authors and rights holders, while some other digital libraries projects are slowly emerging.[3] In addition, it remains true that current national laws generally do not require that works be recorded in digital format and, apart from Google Book Search (which anyway was born without the consultation of rights holders and only includes books), there is no single global preservation initiative for the vast diversity of our cultural heritage, be they books, maps, music, films, photographs, paintings, sculptures, buildings and all the others.[4]

The universal online repository would of course tend to be comprehensive, so it would include both in copyright and out of copyright works. Thus copyright is heavily involved in this project and the main focus of the book. The concept of a global online archive has by definition two aspects: first, preservation and, second, access. If we only preserve our cultural heritage but do not allow access to it then what is the use? And we cannot have access to it anymore if we let it decay. The overarching question is, is copyright a problem or a solution, an obstacle or an aid to the constitution of such a gigantic knowledge base, or both? The book thus explores both the challenges and possibilities that copyright brings to the creation of such a digital library. As to preservation, first: how do we first know the content of our cultural heritage and which works are in copyright and which ones are in the public domain? This concerns legal deposit schemes,

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[2] Google has, famously or infamously depending, already started such an enterprise (for books only, so far).

[3] See the World Digital Library (www.wdl.org/en) and the HathiTrust (www. hathitrust.org) (unless otherwise provided all websites have been last accessed on 15 February 2010). Thanks to Pamela Samuelson for having informed me of the HathiTrust project. On this date, the WDL had 1235 items including maps, photographs, books and other printed matter available on its website while the HathiTrust had digitized 5 377 699 volumes.

[4] See, however, the WDL above-mentioned initiative which has this aim. Europeana is another example but it only covers the European Union (EU), www. europeana.eu/portal

registers and other solutions to deal with orphan works, reconstruction and restoration of decaying works and procedures in place for preserving works, mainly the relevant exceptions to the right of reproduction and communication the public provided in the copyright laws. Then access: how does the law currently provide access? Are there alternatives such as paying for public domain works? Should the prospective repository obtain copyright or other related rights protection? Who should own it? There are of course other satellite questions relating to the cost, the management and the maintenance of the repository, and the book touches upon them, albeit more briefly. My idea was also to gather many different points of view on the creation of such an online database. The book therefore looks at the issue from the viewpoints of the lawyers of course, but also from those of the cultural heritage specialist, the librarian and archivist, and, implicitly through A. Rahmatian's chapter, the musicologist's. The questions are envisaged from a United Kingdom (UK), European and United States of America (U.S.) perspective.

The rest of this Introduction provides a bird's eye view of the problems tackled in the different contributions. **Tanya Aplin** paints a comprehensive picture of three distinct aspects of the creation of a global online repository of cultural heritage, namely, what already exists and could be used as a start, in other words, the legal deposit schemes, the correlated problem of orphan works and the question of whether copyright and/or other related rights would subsist in the repository and, if so, who would own these rights. Starting with legal deposit schemes, she shows that while the idea of mandating the deposit of copyright works facilitates preservation and access, most current legal deposit schemes do so only partially for three main reasons: the schemes are selective in terms of what must be deposited, the penalties for lack of deposit are not very harsh and most deposit schemes do not include deposit of digital material. She recommends that the law be reformed to require the deposit of digital material as well, as much of our cultural heritage is in now in electronic form. She then reviews the current situation and proposals regarding orphan works in the U.S. and the European Union (EU), which are currently in limbo. Bills are still pending in the US, while in Europe we only have a recommendation from the European Commission to facilitate digitization of orphan works and online access and a list of factors given by the copyright subgroup of the High Level Expert Group on Digital Libraries assisting the Commission in its task on this matter. We will need more time to see this area being legislated upon and any delay will not help the constitution of a global digital archive. Finally, she looks at the different possible ownership models that a global database of cultural heritage could have, namely private or public, highlighting the risk of privatization of culture

and partial selection. She forcefully concludes that '[a]ny reform of copyright law to facilitate preservation of and access to cultural heritage will therefore need to be considered alongside the question of *which* institutions we think ought to be the custodians of our cultural heritage'.

The problem of orphan works is covered in more detail by **Caroline Colin**. One possible way to solve this problem is to have registers or databases; the very idea behind this book might also therefore, by domino effect, solve the orphan works conundrum. First, she rightly makes a difference between register and database: 'A register is only dedicated to keep memory whereas a database aims at manipulating the data registered to generate something new.' One could also add that a register only includes information about the works (metadata) not the works themselves while a database contains both of these, something Steven Hetcher states in his contribution. Next, she proposes two kinds of registers: those dedicated to works already supposed to be orphan and those which aim at preventing works from becoming orphan. She argues that such registers can only be voluntary, thereby refuting proposals to revive registration formalities as a condition of subsistence of copyright as contrary to the Berne Convention. As they would be voluntary, there should be an incentive to register: collecting societies could play a useful role in this respect. She concludes that nevertheless, such registers would not be very useful without authors indicating at least their name on the work and there is, of course, a potential problem of fraud (individuals or companies falsely claiming on the register to be the copyright owners).

Andreas Rahmatian examines the copyright issues associated with restoration, reconstruction and digitization of public domain works. Ironically, while the idea is to preserve something old, generally as precisely as possible, copyright may still attach to the whole or part of this restored/reconstructed work. This definitely preserves the public domain work but potentially denies access to it as the copyright owner may exercise fully his right to exclude or ask an unreasonable licence fee to use the copyright in the work. Andreas Rahmatian identifies six different types of a restoration/reconstruction along a spectrum. The first type – preservation and protection from (further) decay – is the only one where copyright does not arise as this has nothing to do with the substance of the work but only the medium, the five remaining other types (addition of missing parts in the spirit of the work, combination of fragments to form the original whole, creative restorative intervention and creation of whole works in the spirit or style of a lost work, creation of a new work in the spirit or style of an artist/era) can all attract copyright at different degrees. We learn with surprise that the majority of decisions on restoration of works were handed down in author's rights countries although the originality requirement is

higher than the British one. This is because most of the time the restorer has sufficient choice so there is space for his and her personality to be reflected in the restoration/reconstruction. For Rahmatian, as digitization of public domain works does not normally involve a material change of the original, there is insufficient originality to trigger copyright protection. However, in some cases, digitization can give copyright protection indirectly, for example, a sound recording of ancient music. We will see in the next contribution that photographs of out of copyright works can also acquire copyright protection. He concludes with several solutions to the question whether copyright should attach to restored, reconstructed or digitized public domain works. One legislative change could be to broaden the private study and research exception for such works and introduce a new defence for access to works of cultural importance. Another possibility would be to reduce the term of protection for editorial and derivative works based on public domain material. Yet another solution would be to enact a rebuttable presumption that copyright is not infringed if a (restored or reconstructed) public domain work has been used.

Ronan Deazley shows with a powerful historical example that when private companies rather than the state sell photographs of art belonging to the latter's collections to the public, they come at a higher price and thus fewer copies are sold, the obvious consequence being less cultural heritage being affordable and thus available to the public. This is what happened to London's South Kensington Museum in the mid-nineteenth century. Interestingly, the 1862 Fine Arts Copyright Act, which was adopted more or less at the same time the South Kensington Museum experiment ended, included a specific provision to avoid monopolization of works in the public domain by photographs. However, Deazley recounts that since the 1869 *Graves'* case[5] declared that photographs of works of art can be original and thus protected by copyright, it is a reality that photographs of public domain works are generally considered to be protected by copyright. Even if the *Bridgeman* case[6] in effect overruled *Graves*, many museums choose to ignore it and/or override it with contracts. So the author asks whether it is not time for a new experiment on the basis of the recommendation of the High Level Expert Group on Digital Libraries' Copyright Subgroup that 'public domain material in the analogue world should remain in the public domain in the digital environment'. Finally, he reminds us that things have changed and museums are increasingly under

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[5] LR 4 QB 715.
[6] *Bridgeman Art Library* v. *Corel Corp.*, 25 F. Supp. 2d 421 (SDNY 1998) and *Bridgeman Art Library* v. *Corel Corp.*, 36 F. Supp. 2d 191 (SDNY 1999).

government pressure to generate income and one way to do so is to licence the copyright in their collections' photographs. Nevertheless, he believes that museums could benefit in many ways from making available their photographs free of charge.

Paul Torremans scrutinizes UK and EU law regarding the so-called preservation or archiving exceptions. In the UK, the single provision on point (s. 42 of the Copyright Act) is too narrow: among others, it allows only one copy to be made and only applies to literary, dramatic and musical works, and therefore not to artistic works, sound recordings, films or broadcasts. He agrees with the Gowers review that the exception needs to be broadened. The corresponding exception in the Infosoc Directive[7] (reproduction for preservation purposes) is broad enough to encompass those changes. So the good news is that if the UK wants to broaden section 42, it can do so while respecting EU law. He also argues that section 42 is outdated as it only allows access to the physical library or archive, while nowadays students and researchers expect, and sometimes need (distance learners), to access library material from their own computer via the Internet. Indeed, preservation and access are intrinsically linked so a broader exception for communication is necessary for libraries too, as also highlighted by Laura Gasaway. However, the current exception in the Infosoc Directive only applies if the research is done at the premises of the libraries. Paul Torremans also highlights the problem of the three-step test, which has been, mistakenly, written at the bottom of the list of exceptions in the Infosoc Directive so as to apply to all the exceptions contained in it. But the test should not be applied a second time, it has been applied already when the legislature enacted the exceptions. He criticizes the Advocate General's reasoning in *Infopaq*[8] as being very restrictive, because it cumulates the test with each exception. Although the court did not pronounce itself in detail on the test, its short interpretation of it is still restrictive, albeit more flexible than that of the Advocate General, because it does not cumulate the test with each exception. He concludes that there is an urgent need to reform the exceptions applying to libraries and archives so that they can fulfil their role properly in the digital world, and notes that the *Infopaq* ruling contrasts sharply with the more generous stance taken in the Green Paper. The author recounts the alternative, more flexible, approach to the three-step test developed by other authors, an approach

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[7] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

[8] Case C-5/08, *Infopaq International A/S* v. *Danske Dagblades Forening*, available at: www.curia.europa.eu

that could be used to modify section 42 of the UK Copyright Act, along the lines he has described in his chapter. His call, and that of Tim Padfield in his chapter and of those who replied to the first consultation,[9] has been heard recently as the Intellectual Property Office has issued a new consultation document in which it proposes that Parliament adopts many of the changes advocated in his paper.[10]

Laura Gasaway's chapter neatly contrasts with the picture of the UK and Europe painted in the previous chapter. Indeed, the U.S. has attempted to update copyright law to facilitate digital preservation. Even though as she notes, 'the task is far from complete', the situation is much better than on the east side of the Atlantic. Section 108 of the U.S. Copyright Act, which deals with acts of reproduction and communication to the public by libraries and archives for purposes of preservation, was considered by a group (the Section 108 Study Group) to develop recommendations to modify the law. First, the section as it currently stands, does not apply only to libraries and archives but lists a number of criteria that need to be met in order to be able to benefit from the provisions of the section. Therefore, museums and even for-profit organizations can often benefit from it too. Second, three copies of the work (rather than one in the UK) can be made for preservation purposes. Third, it applies to all works. Also, it 'allows a library or archive to reproduce a published lost, damaged, stolen or deteriorating work after the library makes a reasonable effort to obtain an unused copy at a fair price'. This also includes works in a format that has become obsolete (at certain conditions). She then proceeds to highlight the defects of the section, mainly because it has not yet been adapted to the digital environment. For instance, three copies are not enough: 'every time a digital work is viewed by either curatorial staff or by a user, another copy is made'. She then reviews the recommendations from the study group. For instance, as to remote access to replaced works, the group could not come to a consensus. This option is obviously of great concern to publishers, as libraries and archives could become publishers and replace them. So researchers and other users should still need to go to the premises of the establishment in question to access the works. Another problem is what to do when a digital work is protected by a technological protection measure. While the Digital Millennium Copyright Act (DMCA) addresses

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[9]   Gowers report, November 2006, available at: http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf
[10]   See UK Intellectual Property Office, Taking forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions, available at: http://www.ipo.gov.uk/pro-policy/consult/consult-live/consult-gowers2.htm

some issues, it does not give an answer as to what a library, museum or archive can do if it needs to make a copy, for preservation purposes only, of a work which is digitally copy-protected. Unfortunately, she reports that the study group could not come to a consensus about what to do in this situation. She concludes that the group's recommendation, although they do not go far enough, 'would go a long way to facilitating digital preservation in the United States' and we are still awaiting congressional action in this matter.

In his chapter, **Steven Hetcher** seeks to discover if the U.S. experience of registering works can bring something useful to the idea behind this book, namely, creating one single global database containing the world's cultural heritage. But he also raises and addresses many problems generated by the creation of such a repository. Very perceptively, he highlights the problem of territoriality. Which copyright law would apply to this database? That is a tricky question and the answer to it might be that the only law that could apply to it would be the Berne Convention. A second problem is comprehensiveness. In order for the database to be useful, it needs to be as comprehensive as possible, so that an opt-out system may for that matter be better than an opt-in one. He shows that the U.S. experience with registration is not that useful because research shows that the U.S. copyright register is incomplete. He also highlights the problem of cost. He concludes that the simplest (and least costly) way to create a central online digital database is to create it out of the scans already made by Google. As shall be seen, this is already happening with the HathiTrust initiative.[11]

Thereafter, **Delia Lipszyc** and **Carlos Alberto Villalba** give us a thorough lecture on the Argentinean regime of '*domaine public payant*'. According to this system, everyone who wishes to use a work in the public domain must pay a tax to a state fund especially created to manage this revenue. The system is based on two assumptions; the first is that public domain works should not improperly compete with private domain works (that is, works still in copyright) and the second is that the collected monies are used to promote artistic creation and the preservation of historical heritage. The fund does this by granting loans to 'encourage, develop, protect and reward literary and artistic movements' and to support the construction and acquisition of facilities and equipment necessary for the development of artistic activities. Ingeniously, the fund hires the services of the copyright collecting societies to collect the taxes due for the use of public domain works. As they note, this is beneficial as the fund 'uses already

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[11] See fn. 3 above.

existing administrative structures; it keeps costs low, and facilitates the
control of the utilization of works'. This system does not create an online
database of cultural heritage but the taxes collected by the state fund could
be used to do just that. The *'domaine public payant'* is thus a system worth
considering to help finance an online repository of cultural heritage.

The next chapter plunges us in the realities that libraries, museums and
archives, in short cultural sector institutions, face daily. **Tim Padfield**, who
works at the British National Archives, first situates cultural sector institu-
tions for us as the 'middlemen of the cultural world': neither right holders
nor really users, sitting uncomfortably between two chairs, seen by the
right holders as too keen on broadening the copyright exceptions, while
the users find them too restrictive because they respect the exceptions
by the letter for fear of infringement. Tim Padfield envisages the aspects
touched upon by several other contributors but from the perspective of
cultural sector institutions. Like Paul Torremans, he believes one copy is
hardly enough to preserve works in most cases and that there is no reason
why artistic works, sound recordings and films are excluded from section
42 of the UK Copyright Act. He also thinks, and this meets the equivalent
US provision, that museums and galleries are unjustly discriminated. As
to registers for orphan works, he points at a register already in existence
(WATCH) which could easily be enhanced rather than wastefully dupli-
cated. As to the issue of cultural sector institutions' copyright claims on
photographs of public domain works, he considers this as a moral issue
and asks: 'is it proper for a public institution to claim exclusive rights in
a work that is no longer in copyright?' In his view however, while the aim
is a worthy one ('to provide funding so that the institution can continue
to care for its collections and make them available to as wide a public as
it can manage'), for him, it is a pity that they have to rely on exclusivity in
order to achieve it, as was also noted by Ronan Deazley. He convincingly
concludes by saying that cultural sector institutions are under growing
pressure from all sides, politicians, users and right holders, but 'seek to act
properly and responsibly, and are ideally placed to mediate between the
demands of users and rights owners, but need understanding and trust,
and the necessary legal tools, before they can reasonably do so'.

Last but not least, **Lucky Belder** looks at the problem from the cul-
tural heritage specialist's angle. She considers whether cultural heritage
protection and copyright protection are friends or foes. She reviews the
principles and objectives of both and shows that they can be seen more as
friends than enemies. At first sight the idea of making the world's cultural
heritage freely available online might seem properly horripilating to right
holders. But if the constitution of a database of copyright works is based
on licensing or equitable remuneration for right holders, there is nothing

to fear. She adds that such a licence or website could contain technical protection measures that would prevent uses that would interfere with the commercial interests of right holders. In addition, as other contributors have hinted at as well, it could solve the orphan works problem. So the goals of right holders and cultural heritage institutions would coincide. She goes even further and proposes that 'the European legislator could accommodate the process of digitization by the development of a specific immunity in copyright law that allows for the digital copying and digital publication for non-commercial purposes of works in the collections of those heritage institutions that are supported by public funding'.

Ending on this note, all seems too good and beautiful perhaps, but readers will be able to form their own opinion and, while the book provides some answers, it will surely raise more ideas and more questions in the readers' minds and, it is hoped, be conducive to more related research.

A book, all the more so an edited collection, never comes out without the help of several people. First, I would like to thank the contributors and the editor, Tim Williams, without whom this book would not exist. Further thanks to the British and Irish Law, Education and Technology Association (BILETA) which sponsored the conference giving rise to this book, Kings College London which hosted the conference, those who helped me at various stages of the conference, including, in alphabetical order, Tanya Aplin, Ann Chudleigh, Andrea Cordwell-James, Andreas Schuessel, Paul Torremans and the participants to the conference for their interesting comments.[12] Finally, I dedicate this book to my late grand-parents and my nephews, Noé and Elie, who respectively represent my cultural heritage and the guardians of that heritage.

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[12]   These can be read freely on http://works.bepress.com/estelle_derclaye/24

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PART I

The European perspective