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Digital Libraries Under EU Copyright Law: A Relationship Set in Stone?

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Abstract: Digitisation – and its implications for the creation and dissemination of cultural content – has been on the EU policy agenda for decades, notably in the field of copyright law. Yet, despite modernisation efforts from the 1990s onwards, the "library privilege" – *i.e.*, the provisions regulating library functions – persistently focuses on physicality. For instance, the consultation of digital materials remains confined to library buildings. Given the increasing options for remote access to content, it is questionable whether this focus still works in the digital information society. Therefore, this *Article* aims to critically assess, first, whether EU copyright law is currently future-proof taking into consideration digital library developments on the one hand and copyright modernisation efforts on the other. It finds that the most recent addition to the EU copyright *acquis*, the Digital Single Market Directive (2019), offers some openings for interpretative space to accommodate the library's evolving side. Second, in addressing the research and policy agenda for the years to come, the *Article* offers a way of thinking about a copyright law that flexibly balances right holder, library and user interests. Seeing that copyright law and libraries share goals in the organisation and dissemination of information, the argument is made that their relationship should not be "set in stone": rather,

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copyright law should facilitate remote access at least to some extent. While the historical focus on physicality may have been intended to prevent the library privilege from becoming too broad in scope, this delineation rationale should be operationalised differently.

KEYWORDS: Copyright law – Libraries – Digitisation – Library privilege – Modernisation – Balance.

I. Introduction: libraries and copyright law in the digital networked environment

Libraries have become "hybrids", that is, they currently operate in both a physical and digital fashion. For instance, "paperless" libraries are upcoming, but still use physical branches to check out e-readers. Another example is the New York Public Library (NYPL): on the one hand, its iconic building is being renovated since 2018, on the other, the NYPL is heavily involved in digitisation projects.[1] Evidently, library characteristics have evolved over time on a spectrum from physical to fully online. As Library and Information Sciences (LIS, an interdisciplinary field of study focusing on the creation, management and use of information regardless of form)[2] scholar Baker phrased it in 2005: "The 'library' is being de- and re-constructed, with a digital future being seen as the norm in many environments".[3] So, while buildings are unlikely to disappear completely, library characteristics have advanced towards the latter part of the spectrum in accelerating speed, leaving us to wonder: have the characteristics of copyright law kept up? In other words, despite modernisation efforts over the years, is EU copyright law still fit for the digital age when assessed trough a library lens?

Whereas a "library" traditionally designates "A building [...] containing a collection of books for the use of the public [...]",[4] its four stone walls have since long marked the boundaries of the activities that EU copyright law allows without prior right holder permission. For instance, from a historical perspective, consultation of analogue cultural content in the library's traditional reading room did not pose questions of copyright infringement. In this sense, the library walls formed a natural boundary.[5] Strikingly, in the early 2000s, this boundary was retained in the modernised Copyright Directive, which aimed to harmonise

[1] See VE Breemen, *The Interplay Between Copyright Law and Libraries: In Pursuit of Principles for a Library Privilege in the Digital Networked Environment* (Eleven International Publishing 2020) 3-4 and sources mentioned there.

[2] Cf. LS Estabrook, 'Library and Information Sciences' in MJ Bates and MN Maack (eds), *Encyclopedia of Library and Information Sciences* (Taylor and Francis 2010) 3287.

[3] Citation taken from D Baker, 'Combining the Best of Both Worlds: The Hybrid Library' in R Earnshaw and J Vince (eds), *Digital Convergence: Libraries of the Future* (Springer 2008) 95.

[4] Definition taken from the Oxford English Dictionary.

[5] Cf. VE Breemen, *The Interplay Between Copyright Law and Libraries* cit.; VE Breemen, 'Artikel 5 DSM-Richtlijn en de magie van kennisverspreiding: digitaal en grensoverschrijdend onderwijs' (2020) Tijdschrift voor Auteurs-, Media- en Informatierecht 94, 97; see also JI Krikke, *Het bibliotheekprivilege in de digitale omgeving* (Kluwer 2000) 64, 149.

"certain aspects of copyright [...] in the information society".[6] The European Commission had acknowledged that the then existing copyright exceptions needed to be reassessed in light of the new digital information environment.[7] Yet, although the Copyright Directive introduced a library privilege – that is, specific exceptions for libraries in copyright law – the consultation of digital materials remained confined to on site facilities.

In view of the advancing technological possibilities for remote access to cultural materials, it is questionable whether this focus on physicality still works in the digital era. After all, user expectations are changing since the "library" concept has gained a digital dimension. No longer a fixed place only, it has evolved into a structured infrastructure that can be accessed remotely and "walls" are consequently no longer necessarily brick-and-mortar. Given copyright law's limited interpretation of the library concept, the library privilege thus risks to become unusable in the digital domain. Consequently, the debates on a future-proof library privilege centre on challenges of interpretation and delineation of scope.

This *Article* questions copyright law's focus on physicality. To that end, it critically assesses, first, whether EU copyright law is currently future-proof taking into consideration digital library developments on the one hand and copyright modernisation efforts on the other. Following its previous attention for copyright law in the digital networked environment, the European legislator adopted the directive on copyright in the Digital Single Market (hereafter: DSM Directive) in 2019.[8] What does this most recent addition to the EU copyright *acquis*, *i.e*., the existing body of directives, offer to offset the challenges for digital library activities?[9] Second, in addressing the research and policy agenda for the years to come, the *Article* aims to offer a way of thinking about a library privilege which effectively takes into account the interests involved and proposes the new perspective of a "libratory copyright law", *i.e*. a law that flexibly reconciles and balances right holder, library and user interests. Seeing that copyright law and libraries share goals in the organisation and dissemination of information, the argument is made that their relationship should not be "set in stone", *i.e*. confined to physical walls. Rather, copyright law should facilitate remote access at least to some extent. The historical rationale to delineate the library privilege to some extent should be kept in mind, yet be operationalised in a suitable way, *i.e*. as an alternative to the physical boundaries.

The methodology to concretise this proposal will be as follows. Taking a "law and humanities" approach, this *Article* zooms in on the nexus between EU copyright law and LIS. First, an LIS based assessment framework is set forth as an analytical tool. The aim is to examine libraries through a copyright lens and the other way round. This *Article* elaborates

[6] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[7] Cf. art. 5(3)(n) of Directive 2001/29 cit.

[8] Cf. VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 227-229.

[9] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

on the framework I developed in previous research, which consists of three main library characteristics and their traditional and evolving interpretations, notably “institutional organisation”, “purpose” and “functions” (section II).[10] Second, the analytical tool is applied to the DSM Directive, since it introduces new specific and mandatory exceptions for the benefit of cultural heritage institutions, including libraries. Analysing the references to “libraries” in this directive against the background of the existing library privilege in the Copyright Directive of 2001, the *Article* maintains that the privilege should reflect the evolving, digital perception of “libraries” to a greater extent (section III). In addition to traditional criteria such as “premises”, that have persisted in the DSM Directive to some extent, it will be shown that various criteria can be distilled from the library privilege in force that have strong traditional connotations, but do not exclude a broader reading beforehand, such as the criterion that a library must be “publicly accessible” in order to benefit from an exception. In opening up the interpretation of existing terminology lies space for teasing out a number of principles towards a future-proof library privilege in EU copyright law with a scope that fits the modernisation efforts of the EU Commission (section IV).

II. Digital library developments: institutional organisation, purpose and functions

From a historical perspective, libraries have always reflected the societies they are part of, adjusting to societal and technological developments and advancing the functions required at a given time.[11] Arguably, therefore, the same goes for the digital information society, where libraries are operating as hybrids, *i.e*. in both the physical and digital environment.[12] The library’s societal function and close connection to human rights – such as free speech and the right to participate in cultural life – are among the justifications for a privileged position under copyright law, that is, certain library activities are exempted from prior right holder permission.[13] Preceding the legal analysis, this section therefore outlines the main library characteristics which surface in LIS literature. I will summarise the characteristics as “institutional organisation”, “purpose” and “functions”, and place them on the spectrum from traditional to evolving.

First, “institutional organisation” denotes how “the library” operates – conventionally as a fixed place with a centrally located physical infrastructure and organised collections managed by library staff for local users. In other words, from a traditional perspective, this characteristic ties in with the perception of libraries as buildings, as reflected in the dictionary definition cited above. Yet, as we have seen, library operations have

[10] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 124-125.

[11] *Ibid*. 553. See among others also JB Edwards, ‘Symbolic Possibilities’ in JB Edwards and SP Edwards (eds), *Beyond Article 19: Libraries and Social and Cultural Rights* (Library Juice Press 2010) 9-12, 23.

[12] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 553.

[13] See the analysis in *ibid*. 131 ff. and 136 ff. and the sources cited there.

developed. On the other extreme of the spectrum, therefore, "institutional organisation" goes beyond the physical stereotype and indicates that location is no longer fixed. While the library's infrastructure still runs in a structured way, the collection has gained a digital component and remote users can now be served as well. As indicated, many libraries currently function in a hybrid fashion to fulfil their societal missions, hence are positioned somewhere in the middle of the spectrum.[14]

Second, "purpose" signifies the missions libraries see for themselves, as often expressed in mission statements.[15] Briefly put, irrespective of type, the mission of libraries concerns providing useful and organised (long-term) access to diverse information and culture, for instance via their collections – a mission which is relevant both in the analogue and in the digital world and contributes to users' self-development.[16] In addition, a number of recurring values underlie the mission of most/libraries, including accessibility, diversity and trustworthiness. In the digital domain, the latter two gain in importance in light of contemporary challenges – such as fake news – in order to ensure meaningful access.[17] Insofar as the mission constitutes a public task, and increasingly a digital public task,[18] this contributes to justifying the library's privileged position from a copyright perspective.

Third, "functions" indicate what libraries do to operationalise their missions in practice. Put differently, libraries perform what I call "organising" functions on the one hand. These include collection development and classification, which facilitate day-to-day functioning behind the scenes. On the other, libraries have "operationalising" functions to effectuate their missions in relation to users. Two common functions in this regard are preservation, which national libraries focus on mostly, and providing various forms of access, such as consultation and lending possibilities as offered by public libraries.[19] All functions currently have digital dimensions. As already hinted at in the introduction and elaborated in the next section, the physical side of library practices is less likely to encounter copyright implications than the digital dimension.

In sum, libraries nowadays have different manifestations. Their main characteristics of "institutional organisation", "purpose" and "functions" no longer have a physical component only, but entered the digital domain. Either way, libraries can still be regarded as established structures in society: not the designation of an entity as "library" is decisive, but its systematic way of functioning. This *Article* argues that a privileged position is still, or maybe

[14] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 120-121.

[15] Cf. International Federation of Library Associations and Institutions / United Nations Educational, Scientific and Cultural Organization, Public Library Manifesto 1994 and IFLA/Unesco Manifesto for Digital Libraries, *Bridging the Digital Divide: Making the World's Cultural and Scientific Heritage Accessible to All* www.ifla.org.

[16] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 70 ff., 121-122.

[17] *Ibid*. 101 ff., 106 ff.

[18] Cf. Kamerstukken II 2013/14, 33 846, no. 3, Explanatory Memorandum Wet stelsel openbare bibliotheekvoorzieningen, 10 ff.

[19] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 84 ff., 122.

especially, justified in the digital domain to safeguard values such as trustworthiness and diversity. Yet, does EU copyright law sufficiently reflect the digital reality of library functioning? The three main characteristics of libraries are taken to the next section as a tool to analyse the DSM Directive and place it on the spectrum of traditional-evolving.

III. Assessment: digital libraries under the modernised DSM directive: is EU copyright law currently future-proof?

Like libraries, copyright law is continuously evolving in response to technological developments – including in the library context, such as advancing reprography techniques, and, more recently, digital lending possibilities. Discussions on the library privilege are clearly not new, but have intensified as access to protected content becomes easier and easier, leading to right holder concerns as place-and-time-related restrictions disappear in the digital domain. As digital developments pose both opportunities and concerns, a balance between user and right holder interests must be found.[20]

The DSM Directive fits the line of intensified discussions: adopted in 2019 after years of heated debates, the directive addresses stakeholder interests in the online environment in view of new uses and distribution possibilities of protected works, including across borders.[21] As such, the directive intends to strengthen the position of right holders, but also explicitly aims to facilitate digital education, research and cultural heritage interests by introducing mandatory exceptions for, among others, teaching and preservation. Whereas the directive's recitals confirm that the objectives and principles of EU copyright law are still deemed valid, they must be adapted to the new realities.[22] Still, the question remains whether the digital library concept has been truly considered, and, consequently, whether EU copyright law can be regarded as "future-proof" in this context.

This section applies the previously explained LIS assessment framework to EU copyright law, and more specifically, the DSM Directive: where is this directive's "view" on libraries positioned on the spectrum from traditional to evolving? From a legal perspective, scholars such as Dirk Visser have observed for years that people expect the "library without walls" to enable everyone to read everything remotely, but he warns that copyright law likely raises barriers.[23] As Jane Ginsburg put it in a 1993 special issue on future libraries: "Are literary property rights as we have known them inimical to a networked environment? Or can there be copyright without walls?"[24] Thus, using the analytical tool set forth in the previous section, this section assesses how EU copyright law qualifies "libraries", their purpose and functions

[20] Cf. VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 16, 129.

[21] Communication COM(2016) 593 final from the Commission of 14 September 2016 Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, 2.

[22] Cf. among others Directive (EU) 2019/790 cit. Recital 13.

[23] D Visser, 'De auteursrechtelijke bibliotheek-exceptie van morgen' (1997) Informatie Professional 25.

[24] JC Ginsburg, 'Copyright Without Walls?: Speculations on Literary Property in the Library of the Future' (1993) Representations. Special Issue: Future Libraries 53.

on the spectrum of traditional-evolving. At the same time, I explore to what extent the DSM Directive offsets any identified shortcomings. Given the goals underlying the European Commission's copyright modernisation efforts, we might expect space for evolving digital library practice, yet, as we will see, traditional implications also persist.

III.1. Institutional organisation

This section investigates how the DSM Directive views the library's institutional organisation – the first identified characteristic. Against the background of the existing library provisions in the EU *acquis*, where is the DSM Directive positioned at the traditional-evolving spectrum? This will be illustrated by highlighting how different elements of "institutional organisation", ranging from brick-and-mortar cliché to library without walls surface in EU copyright law and the DSM Directive in particular.

To assess the legal perception of "institutional organisation", EU copyright's perception of locality – be it physical or less fixed – offers a starting point. As it turns out, "libraries" are often not defined, but simply mentioned or denoted as "public institutions"[25] or, in the DSM Directive, "cultural heritage institutions".[26] Alternatively, in legislative history, libraries have sometimes been brought under the heading of "establishments which are accessible to the public".[27] Arguably, "institution" and "establishment" are generic terms that are not inherently traditional or evolving but rather context dependent. Therefore, the qualification of "publicly accessible" seems to hinge towards the traditional end of the spectrum, *i.e*. designating a fixed place. Nevertheless, online accessibility might also qualify as "publicly accessible", depending on the concrete modalities. Yet, the EU legislator has presumably not intended to go that far, especially given the persistent reference to the library's "premises", upholding a predominantly traditional view on libraries.

Indeed, the Copyright Directive introduced an exception for consulting digital library content (art. 5(3)(n)), but the scope of this exception is limited to the library's "premises". That is, digital materials may only be consulted via "terminals" in the library. Although neither the provision's text, nor the recitals define "premises" and the term is therefore not traditional *per se*, the exception *de facto* excludes virtual premises at distance, since consultation must take place in the library's *buildings*. So art. 5(3)(n) Copyright Directive, which will be discussed in more detail below (see section III.3.2.), contains both a "spatial" and a "technical" restriction by confining the scope of permitted consultation to the specific equipment on the library's premises.[28] Even if terminals only provide access within

[25] Directive 2001/29/EC cit. Recital 34.

[26] Directive (EU) 2019/790 cit. among others: Recitals 8, 11, 13-15, 22, 25-33, 35, 37-38, 40-41, 43-44, 53, art. 2(3).

[27] Communication COM(90) 586 final of 24 January 1991, Proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright, Recitals 10, 11, art. 2(1)(b).

[28] J-P Triaille and others, *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "Infosoc Directive")* (European Union 2013) 311.

the physical establishment, the notion of "terminals" in my view inherently connects the library's physical and digital infrastructures, moving the perception of the library's locality towards the evolving end of the spectrum but not entirely meeting it.

Notably, this connection also appears in the DSM Directive: references to "premises" are retained in a different yet related context: the exception for teaching purposes in art. 5, the mandatory exception for "use of works and other subject matter in digital and cross-border teaching activities". Art. 5 DSM Directive benefits activities that take place under the responsibility of an "educational establishment", *i.e*. "on its premises" via digital tools in the classroom, such as electronic whiteboards; or "at other venues", so "outside the premises of educational establishments, for example in a [...] library".[29] In addition to the use of digital means in the classroom or at other venues, the exception covers at distance uses, provided that these take place "through a secure electronic environment accessible only by the educational establishment's pupils or students and teaching staff".[30] This construction is something to keep in mind when designing the library privilege's future principles. For now, art. 5 seems to recognise the hybrid nature of libraries and their use of digital tools, yet the exception does not extend to fully virtual libraries.

It must be admitted that the EU legislator has explicitly acknowledged the library's "online presence" since at least 2005.[31] Still, apart from the specific context of orphan works – *i.e*., works of which the right holder is unknown or cannot be found – this has not yet found expression in a general copyright directive.[32] In its consultation on the review of the EU copyright rules (2013), the European Commission addressed "off-premises access to the library collections".[33] Two years later, the European Parliament found that library access "through online platforms" and through "the internet or the libraries' networks" should be promoted.[34] However, the European Commission's proposed DSM Directive (2016) did not go into this. As explained, nor does the final text (2019), confirming limited factual recognition of the library's online operations. In sum, therefore, the notion of "premises" mostly evokes a traditional picture of libraries, and the connection with

[29] Directive (EU) 2019/790 cit. Recitals 20 and 22.

[30] *Ibid*. art. 5(1)(a).

[31] Communication COM(2005) 465 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 30 September 2005, "i2010: Digital Libraries", 4. This has been reiterated in 2015: European Parliament Resolution of 9 July 2015 on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society 2014/2256(INI), paras 39, 53.

[32] Under strict conditions, online access is under strict conditions only possible for orphan works; see Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.

[33] European Commission, Public Consultation on the review of the EU copyright rules of 5 December 2013, 20 ff.

[34] European Parliament Resolution of 9 July 2015 cit. paras 39, 53.

their digital infrastructure has been observed rather than operationalised at the EU level. Can the same be said for the library's evolving collections?

Second clues to search for EU copyright's view on "institutional organisation" indeed regard the collection. The notion of "collection" is as such not indicative for a traditional or evolving copyright view on libraries. Rather, the meaning of "collection" is a matter of context and interpretation. Whereas copyright scholars observe that "the word 'library' is not to be etymologically interpreted as a collection of books",[35] the copyright legislator has at various occasions noted the diversifying character of library collections – both regarding format and content. For instance, under art. 5(3)(n) Copyright Directive, libraries may make available works "which are contained in their collections" via terminals, which includes both born-digital collections and physical works which have been digitised.[36] Still, EU copyright law in this sense seems mainly tailored to physical libraries serving local users. The specific Orphan Works Directive referred to above goes a step further, explicitly allowing online access to orphan works contained in library "collections, including digital collections".[37] This should serve the overall aim of the orphan works regime to create "European-wide access to a comprehensive world class digital library so that every citizen can access the consolidated EU library collections from a computing device anywhere in the EU",[38] so including remote, online collections confirming mostly the evolving end of the spectrum. Both the diverse and potentially digital character of the collections are confirmed in the DSM Directive, which places libraries under the heading of "cultural heritage institutions" "regardless of the type of works" in their collections, while the "variety of works" in "different manifestations" is noted, from physical unique exemplars to works in digital format.[39]

Clearly, at various occasions, EU copyright law refers to physical and digital library collections. For the scope of the library privilege, these references constitute a delineation criterion. That is, for library activities to be permitted under copyright law, works from the "collection" must be involved. In this sense, the collection functions as a natural boundary to the scope of an exception, similar to "premises". The implications of the recognition of collections in multiple formats are further assessed with the functional analysis (see section III.3 below).

All things considered, various aspects of the library's institutional organisation surface in EU copyright law, regarding both traditional and evolving manifestations. As a feature of EU copyright law, traditional interpretations can often be traced back to delineation choices. Yet, apart from the reference to "premises", other concepts such as

[35] S Nérisson, 'The Rental and Lending Rights Directive' in I Stamatoudi and P Torremans (eds), *EU Copyright Law: A Commentary* (Edward Elgar 2014) 149, 164; cf. also M Walter and S Von Lewinski (eds), *European Copyright Law: A Commentary* (Oxford University Press 2010) 1036.

[36] As later confirmed in case C-117/13 *Technische Universität Darmstadt/Eugen Ulmer KG* ECLI:EU:C:2014:2196.

[37] Directive 2012/28/EU cit. Recital 20 and arts 1(2)(a) and 6(1).

[38] Commission Staff Working Paper SEC(2011) 615 final from the European Commission of 24 May 2011, Impact Assessment on the Cross-Border Online Access to Orphan Works, 14-15.

[39] Directive (EU) 2019/790 cit. Recitals 13 and 37.

"institution" or "collection" can potentially be understood in a broader sense, depending on the wording of the relevant provisions, legislative intent, judicial interpretation and political will. As with all delineation choices, a balance of interests must be taken into account. It is clear that, in order to let the legal and "real" reality meet, an altered legal conceptualisation is needed that does not predominantly rely on physical space. What should count under the heading of "institutional organisation", is a structured mode of functioning, which can be operationalised digitally as well. What boundaries might replace "walls" – offsetting the trend in copyright law to erect "walls wherever possible"[40] – will be elaborated in section IV.

III.2. Purpose

The second library characteristic of the assessment framework is "purpose", which is connected to the library's mission. This section examines whether EU copyright law regards the library's mission in a traditional or more evolving sense. Notably, copyright law and libraries are both concerned with organising and disseminating information, knowledge and culture, and of fostering self-development. Furthermore, both have always responded to technological developments, including digitisation. This section focuses on (the legislative history of) the Copyright Directive and the subsequent modernisation efforts, culminating in the DSM Directive, yet also takes a brief look at other contexts.

The library's disseminative purposes and cultural and educational goals colour the justifications for the library exceptions in EU copyright law from the early 1990s onwards. For instance, the cultural dimension was contrasted with commercial parties in the specific context of lending, providing an argument for a privileged lending regime for libraries.[41] In addition, in its 1995 Green Paper, the European Commission recognised that public libraries have the "aim of ensuring the widest possible dissemination of works and data" and thus "play an important role in society" as a "link in the chain running from author to the public" and in permitting "knowledge to be disseminated".[42] Moreover, the European Commission made the case that libraries should be able to "meet their responsibilities in this new digital environment, with as few restrictions as possible", to keep fulfilling their services in support of users.[43] Subsequently, the proposal for the Copyright Directive (1997) realised that online activities would likely play a "major role in the tasks"

[40] JC Ginsburg, 'Copyright Without Walls?' cit. 59; cf. also J-P Triaille and others, *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "Infosoc Directive")* cit. 307.

[41] Communication COM(90) 586 final cit. 15, 32.

[42] Communication COM(95) 382 final from the Commission of 19 July 1995, Green Paper. Copyright and Related Rights in the Information Society, 58-59.

[43] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 246; Communication COM(95) 382 final cit. 58.

of libraries and equivalent institutions.[44] Thus, in the build-up to the Copyright Directive, the EU copyright legislator clearly acknowledged the library's evolving purposes in connecting users to a diverse offering of digital content.

Yet it remains to be seen whether the Copyright Directive as ultimately adopted accommodates these purposes. To some extent, the recitals and provisions show that the library's disseminative purposes and cultural and educational goals are valued. On the one hand, Recital 40 of the Copyright Directive highlights the library's "disseminative purposes". On the other, the European Commission noted increased impact of applying "traditional" exceptions to the "network environment". The need to delineate the scope of the library privilege was thus stressed. Therefore, online dissemination was excluded from the scope of the exceptions and made dependent on licenses to ensure libraries could still act in the online environment.[45] The same goes for the cultural and educational purposes: on the one hand, the legislator aimed to promote, as Recital 14 phrases it, "learning and culture" by both right holder protection and permitting exceptions in the public interest for the purpose of "education and teaching".[46] Both purposes converge in art. 5(3)(n), the exception for making works available on terminals for users' "research and private study", so also in the digital domain. On the other hand, this does again not extend to remote acts of research and private study.

Also after the Copyright Directive's adoption, a number of questions remained. Consequently, the European Commission continuously initiated copyright modernisation efforts, also with an eye to libraries – EU Commissioner Reding even remarked that libraries had to adapt to "challenges in coping with the transition to the digital age", rather than become "the dinosaurs of the future".[47] In its Green Paper of 2008, for instance, the European Commission indicated the public's wish to advance its "knowledge and educational levels by using the Internet", and that wider dissemination of knowledge would contribute to more inclusive and cohesive societies, fostering equal opportunities,[48] which resonates with traditional library values and declares them applicable in the digital domain. And in the process of the most the recent EU copyright reform, the European

[44] Communication COM(97) 628 final from the Commission of 10 December 1997, Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, 31.

[45] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 246; Communication COM(97) 628 final cit. 18.

[46] Directive 2001/29/EC cit. Recital 14. See also R Xalabarder, 'Digital Libraries in the Current Legal and Educational Environment: Towards a Remunerated Compulsory License or Limitation?' in L Bently, U Suthersanen and P Torremans (eds), *Global Copyright: Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace* (Edward Elgar 2010) 230.

[47] V Reding, 'The Role of Libraries in the Information Society' (29 September 2005) CENL Conference (on file with the author).

[48] Communication COM(2008) 466/3 from the European Commission of 16 July 2008, Green Paper on Copyright in the Knowledge Economy, 4.

Parliament underlined that the promotion of "wide-ranging access to cultural heritage", also online, justified the strengthening of the library privilege.[49] The European Parliament thus valued the "importance of libraries for access to knowledge", including digitally.[50] In this view, copyright law should allow libraries to fulfil their purposes in an effective and up-to-date manner. The attention for the library's evolving purpose recurs in the discussion of the actual legal space offered by the new provisions in the DSM Directive, featuring in the next section.

Notably, the DSM Directive pays attention to long-term access as well. In other words, the library's preservation purposes are explicitly endorsed. Whereas the Copyright Directive is silent on general preservation,[51] the DSM Directive elaborately describes the role cultural heritage institutions, including libraries, currently play in preserving their collections for future generations. While the enabling role of digital technologies is noted, these technologies raise challenges as well. In this sense, evolving preservation practices constitute a justification for an updated legal regime: to prevent works from becoming technologically obsolete, the use of appropriate preservation technologies should be allowed. Furthermore, the sharing of means of preservation between libraries should be facilitated, also across borders.[52]

Despite this *Article*'s focus on the Copyright Directive as a backdrop for the DSM Directive, the specific Orphan Works Directive is noteworthy, since it features the various elements of the library's purpose as well. The Orphan Works Directive stems from both Member States' "cultural promotion objectives" and the promotion of "learning and disseminating culture" for which an exception is introduced to facilitate the digital dimension of these purposes.[53] Hence, these objectives, which reflect library purposes (including long-term access, thus preservation), formed the justification to create a legal framework for facilitating both the digitisation and the dissemination of specific categories of works – orphan works – as part of the library's "public interest mission", which is thus confirmed for the digital environment.[54]

In addition to directives, the (digital counterpart of the) library's purpose has also been highlighted in recent cases. First, in *Darmstadt*, the ECJ called the dissemination of knowledge "the core mission of publicly accessible libraries", serving the public interest of education. The Copyright Directive, to which the ECJ assigns similar aims, should therefore be interpreted in such a manner that this library purpose is safeguarded.[55] Second,

[49] European Parliament Resolution of 9 July 2015 cit. para. 39.

[50] *Ibid*. para. 53.

[51] Other than exempting the preservation of ephemeral recordings of works made by broadcasting organisations in art. 5(2)(d) of Directive 2001/29/EC cit.

[52] Directive (EU) 2019/790 cit. Recitals 25-28.

[53] Directive 2012/28/EU cit. Recitals 18, 20.

[54] *Ibid*. Recitals 1, 20.

[55] *Technische Universität Darmstadt/Eugen Ulmer KG* cit. paras 27-28.

in *Vereniging Openbare Bibliotheken/Stichting Leenrecht*, the ECJ reiterated the AG's argument that libraries have fulfilled "cultural dissemination" purposes since time immemorial, something they should, in his view, be able to continue in the advancing digital realities.[56] So, the ECJ has confirmed the library's purposes towards the evolving end of the spectrum and used it to carve out actual legal space as discussed in the next section.

To conclude, one promising feature of EU copyright law is that it has repeatedly recognised the library's evolving purpose to a considerable degree, contributing to a rethink of the role of libraries. In this sense, the library's purpose supports enabling copyright view on libraries. The question remains, however, whether this recognition of purpose has been truly translated into the wording and scope of the relevant directives in force.

III.3. Functions

The third part of the assessment analyses to what extent the EU *acquis* facilitates the acts involved in the library's main functions – preservation and access. What conditions govern their permitted scope? How is author protection balanced with "universal, unrestricted access to culture"? According to Advocate General Szpunar, the reconciliation of rights is copyright law's "chief dilemma", as reflected in art. 27 of the Universal Declaration of Human Rights.[57] This provision covers the right to participate in cultural life on the one hand and the right to the protection of the moral and material author interests on the other. Legislators strive for a balance by introducing exceptions to copyright, such as the library privilege, the scope of which has been subject to debate in the networked digital environment.

Indeed, the European Commission's Green Paper of 2008 set out to stimulate "debate on how knowledge for research, science and education can best be disseminated in the online environment".[58] Though library exceptions were considered of utmost relevance for the dissemination of knowledge, the European Commission identified "two core issues" with regard to libraries: "the production of digital copies of materials held in the libraries' collections" and "the electronic delivery of these copies to users".[59] The European Commission drew attention to the balance that copyright law has traditionally intended to strike, also with regard to library activities.[60] Whereas the Copyright Directive asserts that copyright law should be adapted and supplemented in light of technological developments while maintaining a balance of interests,[61] and the same goes for the DSM

[56] Opinion C-174/15 *Vereniging Openbare Bibliotheken/Stichting Leenrecht* ECLI:EU:C:2016:856 paras 1-3; *Ibid*. para. 50.

[57] Opinion C-470/14 *EGEDA e.a. v. Administración del Estado* ECLI:EU:C:2016:24, opinion of AG Szpunar, paras 1-2.

[58] Communication COM(2008) 466/3 cit. 3.

[59] *Ibid*. 7.

[60] *Ibid*. 4.

[61] Directive 2001/29/EC cit. Recitals 5 and 31.

Directive,[62] the question is how that is reflected in the current library exceptions. Are all interests in the digital reality taken into account in a sufficiently balanced way and are the rationales of the delineation choices still valid?

As will be explained, the EU *acquis* contains not only exceptions for certain forms of access, but, since the DSM Directive, for preservation as well. Apart from legislation, the analysis again includes relevant case law, given the fairly recent move towards a purposive and dynamic interpretation to safeguard the effectiveness of exceptions, notably in the digital domain, away from the principle of strict interpretation.[63]

a) Preservation

The first main library function, preservation, concerns different stages of care for cultural materials and carriers in both analogue and digital format. Until the adoption of the DSM Directive, this function was not regulated by a specific exception in the EU copyright *acquis*. Instead, depending on Member State implementations, libraries could invoke the general art. 5(2)(c) Copyright Directive on "specific acts of reproduction made by publicly accessible libraries". The Dutch legislator, for instance, used art. 5(2)(c) to introduce an exception for three types of preservation activities.[64] By contrast, the DSM Directive now features a specific library exception for (digital) preservation in art. 6. This is a mandatory exception, which meets a number of the issues that art. 5(2)(c) Copyright Directive left open, as discussed below.

First, art. 5(2)(c) Copyright Directive is formulated in a technology neutral way – 'specific acts' does not expressly indicate either traditional or evolving preservation acts – yet the provision does not specify how many copies may be made and when. For digital preservation practices, which inherently involve multiple copies since a work must first be converted in another format or back-up copies are made, the question is whether such additional copies are allowed. And is preventive preservation permitted? For digital works can suddenly become unreadable without visible warnings. Yet, apart from legal uncertainty, which might stifle digitisation efforts, this apparent lack of limitations offers flexibility for preservation practices at the evolving end of the spectrum.

Nevertheless, it is useful that art. 6 DSM Directive now explicitly includes this flexibility: copies may be made "in any format or medium" and "to the extent necessary" for preservation purposes. Admittedly, these open phrases still might raise questions, but digital preservation is now at least covered by a mandatory exception. Preservation being one of the European Commission's areas of "intervention", the envisaged privileged acts

[62] Directive (EU) 2019/790 cit. Recitals 3 and 83.

[63] Cf. European Copyright Society, *Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union. Opinion on The Judgment of the CJEU in Case C201/13 Deckmyn* european-copyrightsociety.org.

[64] Art. 16n Wet van 23 september 1912 (Auteurswet), Stb. 1912, 308 (hereafter Dutch Copyright Act) wetten.overheid.nl, which has in the meantime been altered due to the implementation of Directive (EU) 2019/790 cit.

should address "technological obsolescence or the degradation of original supports".[65] Therefore, as the recitals clarify, reproductions may be made by any "appropriate preservation tool, means or technology, in the required number and at any point in the life of a work […]".[66] Some scholars believe that the new provision might even facilitate mass digitisation projects, whereas art. 5(2)(c) Copyright Directive used to be implemented by Member States in a restrictive way.[67] On the contrary, the scope of art. 6 DSM Directive now generously encompasses the evolving variant of preservation, *i.e*. the different stages of digitisation.

A second issue is that art. 5(2)(c) Copyright Directive lacks cross-border effect: as an optional provision, its effect depends on national implementations. Libraries indicate that the resulting limited level of harmonisation might stifle "digitization projects across countries".[68] In line with the goals of the DSM Directive, the mandatory art. 6 should foster "the sharing of means of preservation", "the establishment of cross-border preservation networks" and more efficient use of resources.[69] Notably, art. 6 cannot be set aside contractually, a characteristic which also contributes to legal certainty across borders.[70]

Third, while preservation activities may contribute to the long-term accessibility of content, it should be borne in mind that art. 5(2)(c) Copyright Directive, though enabling preservation copies, does not automatically allow their dissemination as well. In turn, institutional users indicate that digitisation efforts go beyond preservation goals: they want to be able to make the works "more easily searchable or available across digital networks including across research platforms and infrastructures". Hence, in their view, the prevailing interpretation's focus on preservation is "too narrow".[71] Still, art. 5(2)(c) contains an exception to the *reproduction* right, meaning that "online delivery" is outside the scope.[72] This choice stems from delineation rationales due to the "economic impact at stake". According to the European Commission, an exception encompassing "the making

[65] Directive (EU) 2019/790 cit. Recitals 25 and 27.

[66] *Ibid.* Recital 27 DSM Directive.

[67] C Geiger, G Frosio and O Bulayenko, 'Opinion of the CEIPI on the European Commission's Proposal to Reform Copyright Limitations and Exceptions in the European Union' (Centre for International Intellectual Property Studies, Research Paper No. 2017-09) 5, 25; more critically: European Copyright Society, *General Opinion on the EU Copyright Reform Package* europeancopyrightsocietydotorg.files.wordpress.com 3; also, the ECJ's reasoning in *Technische Universität Darmstadt/Eugen Ulmer KG* cit., which allows for digitisation to ensure the use of works via dedicated terminals under the exception of art. 5(3)(n) of Directive 2001/29/EC cit. was limited to individual works and did not extend to the digitisation of entire collections.

[68] See the responses of institutional users to the European Commission's copyright consultation: European Commission Report on the responses to the Public Consultation on the review of the EU copyright rules of July 2014, 40-42 ec.europa.eu.

[69] Directive (EU) 2019/790 cit. Recital 26.

[70] See *ibid.* art. 7(1).

[71] European Commission Report of July 2014 cit. 40.

[72] Cf. Directive 2001/29/EC cit. Recital 40.

available of a work […] by a library or an equivalent institution from a server to users online" or "making available via a library home page" was not justified at the time.[73]

This issue of (digital) access to preservation copies is however not addressed by the DSM Directive, a gap which might be surprising since the European Commission repeatedly called this a "core issue".[74] Clearly, online access remains one of the thorniest issues in the copyright arena, though progress has been made in specific contexts such as orphan works and, under the DSM Directive, out-of-commerce works (see section III.3 below).

Lastly, it should be noted that, apart from clarifications, art. 6 DSM Directive is narrower in some respects given the conditions it imposes. For instance, art. 6 requires the works to be "permanently" in the institutions' collections, a condition that previously was only implicit. That is, an institution must own or permanently hold the copy, *e.g*. following a transfer of ownership, license agreement or legal deposit obligation.[75] Now, for works that libraries "subscribe to",[76] they are not allowed to make backup copies. Also, the question is how the collection criterion relates to the observed space for cooperation between cultural heritage institutions if works may not be shared. Therefore, the case has been made that the exception should encompass materials that fail to meet this criterion,[77] such as licensed works. Otherwise, the delineation rationale notwithstanding, since cultural materials are increasingly licensed, the new provision will not actually benefit the preservation of all cultural heritage on the evolving side of the spectrum.[78]

In conclusion, EU copyright law enables libraries, under conditions, to digitise their collections. The new, mandatory and specific art. 6 DSM Directive provides an enhanced sense of legal support for evolving preservation practices, since national implementations used to vary greatly in these respects.[79] Shortly after the proposal, first reactions indicated that the flexible exception was satisfying the needs of cultural heritage institutions.[80] That is, with regard to digitisation *sec* – access is another matter.

[73] Communication COM(97) 628 final cit. 31.

[74] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 264; Communication COM(2008) 466/3 cit. 7.

[75] Directive (EU) 2019/790 cit. Recital 29.

[76] European Commission report of July 2014 cit. 40.

[77] C Geiger, G Frosio and O Bulayenko, *Opinion of the CEIPI on the European Commission's Proposal to Reform Copyright Limitations and Exceptions in the European Union* cit. 5.

[78] A Aronsson-Storrier, 'Contractual Override and the New Exceptions in the Copyright in the Digital Single Market Proposal' (30 November 2018) IP Kat ipkitten.blogspot.com.

[79] G Westkamp, *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* (part II, study commissioned by the European Commission's Internal Market Directorate-General 2007) 22 ff.; J-P Triaille and others, *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "Infosoc Directive")* cit. 272 ff.; see also Directive (EU) 2019/790 cit. Recital 26.

[80] P Keller, 'Copyright Reform: A First Look at the Commission's Plans for Cultural Heritage Institutions' (8 September 2016) Europeana Professional Blog pro.europeana.eu.

b) Access

The second main library function is providing access to materials in various ways. The main question is again to what extent EU copyright law currently facilitates evolving access possibilities. This section focuses on consultation, traditionally via on site reading rooms, but more and more via remote browsing options. Admittedly, the distinction between various forms of access is not always clear as lending modalities *de facto* result in temporary consultation as well. In light of the foregoing, two further remarks are in order: first, whereas consultation of tangible materials is possible due to the exhaustion doctrine,[81] it is immediately clear that the discussion will centre around modern – *i.e.*, digital – forms of consultation. Second, lending as such remains outside the scope of this *Article*, also because I mainly focus on the DSM Directive. Despite the hope that copyright modernisation would include digital lending,[82] this issue was not addressed by the European Commission.[83]

On-the-spot consultation is governed by a specific yet optional exception in art. 5(3)(n) Copyright Directive, which remains in force and already appeared in the discussion on institutional organisation above. This section selects some issues which the current regime poses to evolving forms of access and discusses to what extent the DSM Directive plays a role here.

First, art. 5(3)(n) obviously raises traditional connotations where the exception is confined to consultation via "dedicated terminals on the premises" of the library. This delineation constitutes a traditional feature which has been called "extremely" limited and "too narrow" for user needs and technological possibilities, since in practice, "online access from outside the premises and the use of the user's own (laptop) computer are the norm now, but the exception cannot even enable such an exception in national law".[84] It calls to mind the previous discussion of the prohibition of online delivery of preservation copies to users, based on Recital 40. Here, the delineation is inherent in the provision's substance. Yet, the delineation rationale may be still valid and there is still some interpretative space: for instance, if it is about serving users via a "controllable area", then this should be operationalised in a different way that meets the digital realities.[85] We will return to this argument in the next section.

[81] That is, under EU copyright law, right holders can no longer assert control over the further distribution of exemplars of a work they have put on the market; cf. Directive 2001/29/EC cit. art. 4(2).

[82] In the policy discussions resulting in the Directive (EU) 2019/790 cit., the European Parliament had aimed to legally facilitate digital lending, arguing in favor of strengthening library exceptions in this regard. See European Parliament Resolution of 9 July 2015 cit. para. 39.

[83] Instead, it is the European Court of Justice that has created space for certain forms of digital lending; cf. *Vereniging Openbare Bibliotheken v Stichting Leenrecht* cit.

[84] P Torremans, 'Archiving Exceptions: Where Are We and Where Do We Need to Go?' in E Derclaye (ed.), *Copyright and Cultural Heritage: Preservation and Access to Works in a Digital World* (Edward Elgar 2010) 111, 117-118.

[85] Cf. The national court Landgericht Frankfurt am Main of 16 March 2011 2/6 O 378/10, B. III.2 regarding *Technische Universität Darmstadt/Eugen Ulmer KG* cit.

Before turning to the potential added value of the DSM Directive in this regard, interpretative space for digital library access has been sought in case law prior to its adoption. In the *Darmstadt* case, which centred around the effectiveness of the terminal exception, the ECJ did not go as far as allowing online access, but confirmed that libraries have an "ancillary" right to digitise works in their collections if that is necessary to make them available at terminals. Hence, as an extension of the exception, the step preceding the making available of works is now explicitly allowed as a "specific act of reproduction" in conjunction with art. 5(2)(c) Copyright Directive.[86] Although the exception is optional and the effectiveness in practice still depends on member state implementations,[87] the ruling confirms that art. 5(3)(n) goes beyond traditional library functioning, yet does not entirely reach the evolving end of the spectrum as remote access is still off limits.

The *Darmstadt* case is also noteworthy with regard to a second issue raised by art. 5(3)(n): the "subscription" discussion touched on above. One of the exception's conditions is that the works may not be "subject to purchase or licensing terms". The AG Jääskinen argued that the exception's effectiveness and contribution to "promoting learning and culture" would be undermined if a library were prevented from relying on the exception. Therefore, a "simple offer" by a publisher, which might lead to "unilateral decisions", would not suffice.[88] While the ECJ indeed underlined that an agreement must actually have been concluded,[89] the question remains how this reasoning relates to the "collection" criterion in art. 5(3)(n). Especially for born digital works without a physical counterpart, it makes libraries and their users dependent on right holders' willingness to let libraries acquire such works or the conditions imposed with subscription. For analogue works, on the other hand, libraries do not depend on licensing terms, hence can digitise themselves. Whereas a balance between protection and the accessibility of works should be kept in mind, it should be prevented that the terminal exception loses its effectiveness in the digital domain.[90]

The explanatory memorandum to the DSM Directive, in turn, acknowledges that libraries want to offer online access, but the directive's actual text does not translate this into a general exception. Two specific contexts are however noteworthy. First, in addition to the separate Orphan Works Directive (2012), which enables online access to potentially copyrighted works with an unknown right holder under strict conditions, the DSM

[86] *Technische Universität Darmstadt/Eugen Ulmer KG* cit. paras 43-47.

[87] Cf. E Rosati, 'CJEU Says that Member States May Grant Public Libraries the Right to Digitize Works in Their Collections' (2015) Journal of Intellectual Property Law & Practice 6.

[88] Opinion C-117/13 *Technische Universität Darmstadt/Eugen Ulmer KG* [*Eugene Ulmer*] ECLI:EU:C:2014:1795, opinion of AG Jääskinen, para. 24.

[89] *Technische Universität Darmstadt/Eugen Ulmer KG* cit. paras 26, 30.

[90] Cf. L Guibault, G Westkamp and R Rieber-Mohn, *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* (The study was commissioned by the European Commission's Internal Market DirectorateGeneral, and conducted by Institute for Information 2007) 56-57.

Directive now regulates access to out-of-commerce works. Complementing the Copyright Directive, art. 8 DSM Directive prescribes a licensing mechanism with fall-back exception for wider access for European citizens to this cultural heritage.[91] As a result, the use of out-of-commerce work is in first instance governed by a licensing system following the conditions of art. 8(1). Only when these conditions are not met, Member States must introduce an exception or limitation, following art. 8(2) in conjunction with art. 8(3), which would allow libraries to make available out-of-commerce works – again, under conditions.[92] This regime, meant to ensure "wider access to content", also in a cross-border fashion,[93] includes evolving forms of access.

Second, the new teaching exception in art. 5 DSM Directive should be mentioned again, concerning making accessible works under the responsibility of teaching establishments. Libraries are however still mentioned, be it regarding traditional access, since one of the permitted activities is making available works on library premises for teaching purposes. The teaching exception goes on to privilege evolving forms of access, ranging from digital means in the classroom to online uses via secured environments for authenticated users. In this sense, the DSM Directive creates space for access at the evolving end of the spectrum, but outside the library context as such.

All in all, access versus protection discussions in EU copyright law are not new, but have intensified in the digital domain. This section aimed to assess whether the EU legislator's recognition of the library's evolving disseminative purposes has been expressed in the actual library privilege, though it was shown that clearly traditional features still manifest themselves: physical walls as a boundary. Accordingly, it was found that online access to library materials is not generously accommodated by the library privilege in force, though recent cases create space and specific contexts offer inspiration for a way forward. Proposals for solutions are briefly considered in the next section.

III.4. Conclusion

Against the background of the digital networked information environment, this *Article* set out to explore the features of copyright law and libraries on their own, alongside the relationship between both, to examine how future-proof EU copyright law currently taking into consideration digital library developments on the one hand and copyright modernisation efforts on the other. To that end, the library characteristics of "institutional organisation", "purpose" and "functions" were assessed to bring LIS language and narrative into the copyright analysis. So, an LIS lens was used to measure where EU copyright

[91] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC 2016; see critically on license-based versus exception-based approaches: P Keller, 'Copyright Reform' cit.

[92] See on this: SJ van Gompel, "Artikelen 8 tot en met 11 DSM-richtlijn: niet of niet meer in de handel zijnde werken en andere materialen' (2020) Tijdschrift voor Auteurs-, Media- en Informatierecht 3.

[93] Communication COM(2016) 593 final cit. 26.

law – and the DSM Directive more specifically – is positioned on the spectrum between traditional and evolving in a digital sense. We can conclude that libraries and copyright law are both evolving, so their relationship should (and need) not be set in stone, but evolve as well.

IV. Outlook: towards a future-proof library privilege in EU copyright law

For the research and policy agenda for the years to come, the previous discussion on a future-proof library privilege means that EU copyright law should not hold on to traditional views on "libraries" for the sake of convenience, out of sheer habit or due to ignorance. As will be explained in more detail below, certain traditional features persist, but interpretative space offers opportunities to more generally encompass the evolving, digital manifestation of libraries. This way, the principles of a future-proof library privilege move towards a "libratory copyright law", which flexibly balances the various interests involved. These interests include right holder interests in protection and compensation; library and user interests of (digital) access to information on equitable terms; and the interest of society at large in effectuating fundamental rights pertaining to the core values of freedom of expression, education and cultural participation in the digital domain. As copyright law and libraries share goals in the organisation and dissemination of information, the case can be made that copyright law should facilitate the library's task in that regard at least to some extent, also digitally. This way, as an overarching principle, the library privilege functions as a minimum safeguard.

The remainder of this section briefly elaborates starting points for a future-proof library privilege, again connected to the library characteristics, so as to advance (discussion on) the principles that should underlie such a library privilege. A central presumption is that rationales behind the current library privilege that are still deemed valid should be operationalised in an evolving manner. An example is the delineation rationale, which should no longer focus on physicality. This way, copyright's inherent tension, *i.e*. between protection and access, will be better served in the digital reality. For the three characteristics, ensuing principles, that deserve further research, could take the following directions:

IV.1. Institutional organisation

Whereas EU copyright law does not define "libraries", a traditional view emerges where libraries are characterised by their premises, but there is space to move this view to the evolving end of the spectrum. Whereas such notions do not reflect the entanglement of libraries from a fixed place, this is merely a matter of (legislative) choice to determine the scope of the library privilege's beneficiaries. As the delineation rationale is still justified, we should therefore, as a new feature of a digital and future-proof copyright law, consider extending the interpretation of terms that by themselves are not (or need not be) traditional or evolving per se – think of persistent notions such as "institution", "establishment"

and "publicly accessible". Legislators should clarify and update their prevailing interpretations so as to allow the extension of the 'library' notion in copyright law.

Determining the interpretative possibilities requires additional research. For instance, in addition to opening up existing terminology in the library privilege, copyright law could strive to incorporate LIS terminology in order to encompass a broader view of libraries as integrated physical and digital entities for sure, resulting in an enabling copyright law. The Dutch Copyright Act offers an example with the notion of "public library facilities", which stems from the modernised Dutch Library Act (2014) and indeed encompasses the library's dual nature.[94] The notion is currently only used in the specific exemption from payment for lending materials transposed for the visually impaired, but the case could be made that LIS terminology could help shape a future-proof library privilege.[95]

Put differently, given the benefits of flexibility, we could even go as far as stating that copyright law need not define, but characterise "libraries", with their features depending on the context of the privilege, such as the non-commercial objective pursued, meaning that their interpretation may differ according to an exception's purpose. In any case, any interpretation of the term "libraries" should not fix them in the past, but should acknowledge their evolving characteristics, for instance pertaining to locality and collection. So, the focus should not be on physical walls as a natural boundary, but on the structured way of operating and gained authority in the digital domain.

The demarcation could in turn be based on serving a controllable circle of users via the library's closed networked infrastructure, which ties in with the discussion of "purpose" and "functions" below, where the spatial and technical elements will recur and it will become clear that the DSM Directive already offers inspiration in this regard. Another option would be to use the library's "collection" as a delineation criterion for the scope of the library privilege, since we have seen that the collection currently consists of both analogue and digital materials. These collections should benefit both libraries' own users and remote users.

In sum, as a future-proof feature of copyright law, the delineation of the beneficiaries of the privilege should thus be connected to the presence of an organised location or infrastructure to maintain content, possibly a digital environment, and the ability to serve a controllable circle of users, including remotely. It means that, as a result of a widened spatial perception, innovative actors that "function as libraries" in light of their purpose and constitute an established structure in society might also be covered. It is the characteristic of "purpose" that this section now turns to.

IV.2. Purpose

The analyses in section III showed that EU copyright law, including the process leading to the adoption of the DSM Directive in 2019, has definitely recognised the library's

[94] See art. 27 Dutch Library Act; see also Kamerstukken II 2013/14, 33 846, no. 3, Explanatory Memorandum Wet stelsel openbare bibliotheekvoorzieningen cit. 10.

[95] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 574.

disseminative, cultural and educational purposes, also digitally. What is more, these purposes form fundamental rationales or core values behind the library exceptions. Therefore, building on the justification function of 'purpose', purpose could be established as an alternative delineation criterion in itself rather than the focus on physical boundaries. How could such a new feature of EU copyright law, as a fundamental and evolving alternative to the prevailing factor of locality, be operationalised?

One option is to let the purpose of an actor determine its privileged position under copyright law, rather than its premises. In other words, beneficiaries of the library privilege should be defined by their public service – *i.e.*, non-commercial – purpose, functioning as established structures in (the digital) society, in line with the "functional extension of the library concept" as proposed in legal literature, which would centre around the "special purposes" as the decisive criterion for qualifying as a "library" instead of its concrete manifestation.[96] Despite the potential lower foreseeability, the advantage of such a task-oriented description of permitted activities would be that it does not hinge on certain technologies, hence is less likely to become outdated.[97] Though perhaps a bit abstract, this view can be a starting point for copyright legislators to express this stance more explicitly in the library privilege by allowing acts insofar these are necessary for the effectuation of the library mission.[98] This way, this feature is not only embraced by the ECJ, but also by the legislator. Some examples will be provided below with the discussion of functions.

In conclusion, to do justice to the evolving purpose of libraries, their digital side should not only be *recognised* in legislative drafting histories or case law, but should be actually translated to (the scope of) the library privilege for the operationalising functions to offer both legal space and legal certainty. This way, establishing "purpose" as a general feature of EU copyright law contributes to creating space for the evolving library concept, hence an enabling copyright regime and effective exceptions. As such, the aim is not to protect the institutions by themselves, but their societal missions insofar these remain valid in the digital society.

IV.3. Functions

Lastly, the analysis of the EU copyright regime for the library's main functions of preservation and access proved not altogether unpromising with regard to changing traditional features in favour of the library's evolving, digital functions.

First, preservation now has an explicit basis in the mandatory art. 6 DSM Directive, which enables copies to be made "in any format or medium" and "to the extent

[96] Cf. M Duppelfeld, *Das Urheberrecht der Bibliotheken im Informationszeitalter* (Mohr Siebeck 2014) 20.

[97] Cf. T Dreier and others, 'Museen, Bibliotheken und Archive in der Europäischen Union' (2012) Zeitschrift für Urheber und Medienrecht 273, 281.

[98] See in this sense also: J-P Triaille and others, *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "Infosoc Directive")* cit. 321.

necessary" for preservation purposes. Digital preservation is thus covered, although more research on the exception's value in practice is needed. Still, the chosen construction seems to fit the purpose-oriented direction proposed in the previous section and is moreover an example of a flexible and enabling copyright regime in light of evolving library practice, which might even be extended to the library's other function – access.

Second, access being the more pressing issue, another solution to accommodate evolving library practice apart from adopting entirely new provisions lies in utilising interpretative space. Although this *Article* did not focus on lending, inspiration can be drawn from the *Vereniging Openbare Bibliotheken/Stichting Leenrecht* ruling mentioned previously. This ruling extended the conventional concept of lending to encompass certain forms of the digital counterpart, "e-lending", enabling remote users to check out the books, confirming evolving lending practices. Further research should examine how this stance of facilitating a dynamic interpretation of both copyright conditions and library functions can take root regarding other forms of access as well. Admittedly, the ruling only covers e-lending models with "similar characteristics" to traditional lending, such as a 'one copy one user model' which has inherent (technical) limitations as well. Despite the *subjective* differences between e-books and traditional books, for instance due to their different format, the AG regards e-lending as "modern equivalent" of the lending of traditional books for purposes of the (optional) regime established by the Rental and Lending Rights Directive.[99] Given the *objective* similarity that, in both cases, users want to acquaint themselves "with the content of that book, without keeping a copy of it at home", their legal regulation should in his view be aligned.[100] The ECJ followed this view.[101] Hence, the perceived functional equivalence from a foundational perspective has resulted in an interpretation which must guarantee the effectiveness of the law in an evolving context, despite potential criticisms of artificial scarcity in light of digital possibilities and reconciliation with existing practice. A balance between possibilities and concerns is therefore needed.[102]

[99] *Vereniging Openbare Bibliotheken/Stichting Leenrecht* cit. para. 30; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version).

[100] *Vereniging Openbare Bibliotheken/Stichting Leenrecht* cit. para. 31.

[101] *Ibid*. paras 51-54.

[102] VE Breemen, *The Interplay Between Copyright Law and Libraries* cit. 578; see on the discussion of functional equivalence of the supply of books on a material medium and e-books from a technological and economic perspective, against the background of interpretative questions regarding another directive, namely Directive 2001/29/EC cit. of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society: case C-263/18 *Nederlands Uitgeversverbond v Tom Kabinet* ECLI:EU:C:2019:1111. See on this case among others: C Sganga, 'Digital Exhaustion After Tom Kabinet: A Nonexhausted Debate' in T Synodinou and others (eds), *EU Internet Law in the Digital Single Market* (Springer 2021); P Mezei, 'The Doctrine of Exhaustion in Limbo: Critical Remarks on the CJEU's Tom Kabinet Ruling' (2020) Jagiellonian University Intellectual Property Law Review 130-153.

For the context of consultation, the notion of "premises" turned out to be interpreted as accommodating digital access via terminals on site, so this is currently still tied to a fixed location, hence insufficient to cover remote access. Notably, technical possibilities to open up the interpretation of "premises" towards the evolving end of the spectrum are present, while taking note of the delineation rationale: indeed, in conjunction with the library's evolving institutional organisation, we can understand a closed, digital environment as part of the library's premises, provided that the spatial restriction of "terminals" is subsequently abandoned.[103] This would be a step towards the library privilege as a minimum safeguard as libraries would be able to act in the digital networked environment under an exception at least to some extent, via their virtual premises, while the delineation rationale would be honoured. This is something the legislator should explicitly acknowledge. The teaching exception of art. 6 DSM Directive offers interesting parallels in moving forward to facilitate digital access via a comparable construction, serving a closed circle of users via a controllable environment.

Inspiration to operationalise the minimum safeguard approach could also be taken from the regime for out-of-commerce works in art. 8 DSM Directive, but then the other way round: instead of a license with fall-back exception, the exception could be put first and if libraries wanted to go beyond the acts permitted under the exception, the provision should prescribe licenses allowing for access under fair conditions, both part of a statutory solution.

IV.4. Conclusion

All in all, this *Article* critically examined the position of digital libraries under EU Copyright Law. To that end, the *Article* analysed the scope of the existing and modernised library privilege in the EU *acquis*, and more specifically the modernised DSM Directive. Legal (interpretative) space and shortcomings were identified regarding the traditional and evolving manifestation of three main library characteristics, *i.e*. "institutional organisation", "purpose" and "functions". As a result, the *Article* has established various avenues worth pursuing by the EU legislator and ECJ, as well as for further research, to move away from the library privilege's focus on physicality. The aim is to create an enabling copyright law for the evolving side of library functioning, *i.e*. a "libratory copyright law" built on features such as flexibility and interpretative space which at the same time ensures a certain delineation. In future research, it might be worth assessing more in-depth what space national legislators already find in the EU framework to flexibly balance the interests involved, or how legislators elsewhere, for instance in the US, deal with updating copyright law's library privilege to make it future-proof in light of ongoing digitisation.

[103] Cf. J-P Triaille and others, *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "Infosoc Directive")* cit. 317 ff.