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Academic Libraries and Copyright: Unveiling Inadequacies of Current Law Through the Analysis of Processes Included in Quality Management Systems

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ABSTRACT

Most information resources that make up university library collections are copyrighted works, which means that conflicts between such rights and the activities of libraries are common. The development of the digital setting has affected both sectors. On the one hand, it has led to changes in copyright legislation; on the other, it has affected the services provided by libraries, as they adapt to the new needs of users and to the characteristics of digital information. This paper aims to discover where the main points of collision between the two sides lie, and to what extent they are adequately resolved by the present legislation governing copyright. To this end we use a list of the main processes of academic libraries taken from *quality manuals* of a sample of Spanish university libraries. The results make manifest that the evolution of both sides is not yet balanced, and important maladjustments interfere with an adequate provision of services in academic libraries. Some are resolved through new legal proposals, but for many others there is no proper solution in sight.

INTRODUCTION

Most information resources contained in the collections of academic libraries are copyrighted, meaning that a good proportion of the everyday activities they undertake comes into conflict with copyright laws. The examples are numerous and varied. If one copies, photocopies, scans or digitizes a work, the right of reproduction becomes an issue. If a work is made available to the public, whether on the Internet or on an intranet, what comes into play is the right of communication to the public. Problems may also arise regarding the norms for the protection of "technological measures", for instance if we wish to access the contents of a work protected by some DRM (digital rights management) system (Fernández-Molina, 2003; Ginsburg, 2005; Agnew, 2008; Iwahashi, 2011). In short, the traditional conflict between the interests of libraries and their users and those of the copyright holders has been amplified and complicated by digital developments (Dreier, 2001; Ferullo, 2004; Gasaway, 2010; Albitz, 2013; Charbonneau & Priehs, 2014; Hansen, 2014).

Not only has digital technology radically transformed how intellectual works are created and disseminated, it has also had a direct impact on copyright law—in recent years it is being modified in the international realm as well as in different national laws. In the international arena, since ratification of the so-called 'Internet treaty' (WIPO, 1996), the activity of the World Intellectual Property Organization (WIPO) has been considerable; especially relevant are the current proposals affecting copyright exceptions and limitations, such as the Marrakesh Treaty (WIPO, 2013a) for the blind and other people with disabilities, or proposals affecting the educational sector (WIPO, 2013b) or libraries (WIPO, 2013c). Within the European Union, intense movement has also been underway, leading to a very recent proposal for a directive (European Commission, 2016) after a lengthy process opened for its study and deliberation (European Commission, 2013, 2014).

The new technological context has likewise affected the activities and services provided by university libraries, which have had to adapt to new user needs and the characteristics of digital information. There has been a variety of changes, from a greater implication in issues surrounding scholarly communication, including the open access movement and the management of research data, to the design of new policies and strategies for collection development, or the intense collaboration in e-learning activities. The commonly shared idea is the library is not simply a place where someone goes when they need to consult materials, but rather an entity that comes into the life of the user to contribute to making learning and research activities as productive and

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successful as possible (Oakleaf, 2010; Dale, Beard, & Holland, 2011; Duke & Asher, 2012; Hernon & Matthews, 2013; Jaguszewski & Williams, 2013; Jaggers, 2014; Bell, Dempsey, & Fister, 2015; Bonn & Furlough, 2015; Brown & Malenfant, 2016; Mackenzie & Martin, 2016).

These changes in both sectors, copyright law and libraries, call for a redefinition of their relations. In the case of the WIPO, the aforementioned—and thus far fruitless—proposal of treaty was preceded by several studies carried out by Kenneth Crews (2008, 2014, 2015). In countries including the United States (The Section 108 Study Group, 2008), Australia (2013) or the United Kingdom (Gowers, 2006; Hargreaves, 2011) studies have also addressed the issue, being particularly relevant in the case of the UK, as the law was reformed (United Kingdom, 2014) with very interesting results. Logically, in this overall process of analysis and the elaboration of new legislation, the representatives of the different sectors and professions involved are all trying to make reforms adequate for their interests. Organizations such as IFLA (International Federation of Library Associations and Institutions), EBLIDA (European Bureau of Library Information and Documentation Associations) or EIFL (Electronic Information for Libraries) are developing a vigorous activity of advocacy in all the related international forums in defense of the interests of libraries, just as the national associations of professional librarians do in the territorial realm of their respective countries.

In order to proceed adequately along these lines it is best to have concrete data about which parts of the law should be modified or broadened so as to face new challenges and demands caused by changes in the library sector. But it is no simple matter to pinpoint the specific maladjustments between current copyright law and a proper functioning and lending of services. Often times one discovers certain maladjustments in light of individual perceptions or concrete cases that arise and are difficult to approach, or defy a broad and reliable perspective. Even professionals of great expertise have trouble getting a full view of the situation, as their area of work or interest may engage a partial viewpoint.

Given this background of insufficient or inadequate methodological approaches for detecting the most problematic legislative points, we considered that one means of avoiding partiality would be to analyze the documents generated by quality management systems, and concretely the *quality manual*. It spells out the scope and objectives of the system, a description of the processes with their procedures, and the interactions among processes (Balagué & Saarti, 2011). This stands as a sufficiently complete document describing all aspects of university library workings, objective enough to not be swayed by the subjective perceptions and opinions of each professional, and updated enough to reflect present-day situations.

The goal of this study, then, is to uncover the main points of conflict between copyright legislation and the adequate workings of academic libraries, analyzing which shortcomings of the present laws impede a totally satisfactory provision of services on the part of academic libraries. As this study was developed in Spain it refers to Spanish legislation, which is however quite representative of European Union legislation in this area, largely because of the process of harmonization underway in recent years. By analyzing the documentation generated by quality management systems, the commonplace processes and usual activities developed by Spanish academic libraries can be outlined. From there, the confrontation with Spanish copyright legislation is studied to determine which laws come into play, which exceptions or limitations might be used to help one perform activities without infringing the law, and which tasks or services cannot be developed due to deficiencies in current legislation.

SPANISH COPYRIGHT LAW AND THE LIBRARIES: AN OVERVIEW

Firstly, however, to facilitate understanding and interpretation of the results obtained, it is advisable to succintly present the sections of law that affect academic libraries under present copyright law, both in Spain itself (Spain, 1996) and in Europe (European Union, 2001)—particularly, the exceptions in favor of libraries and other memory institutions, illustration for teaching, and subsequently, their relationship with contracts and technological protection. In each case we begin by analyzing the European Directive, and then look at the Spanish law, because all member states must follow what is established under Community law.

The exceptions in favor of libraries are based on the defense of public interest, given their essential contribution toward the preservation and diffusion of information for the benefit of society as a whole (Guibault, 2003). Specifically, they are regulated in article 5.2.c of the European Directive in reference to the right of reproduction, and in 5.3.n with regard to communication to the public. The first of these permits specific acts of reproduction executed by libraries that are accessible to the public as long as there is no intention of economic or commercial benefit, whether direct or indirect. What is most noteworthy about this provision is that it does not matter whether the libraries are public or private; the important thing is that they are accesible to the public, and no payment is demanded for the copyright holders. Article 5.3.n is clearly the most relevant for the digital setting, as it refers to the right of communication to the public, that is, the party affected by the acts of digital transmission through internal or external networks. It allows acts of communication to certain persons or making available the works that are contained in a library collection for the purposes of research or private study. But it establishes two very important restrictions: the consultation of the work can only be effected on dedicated terminals on the premises, which is absurdly restrictive in modern libraries, and it only applies to works not subject to purchase or licensing terms, which leaves its scarce utility even more limited. It is remarkable that this exception, key for adaptation of the law to the digital setting, fell so far short of the minimal requirements for effectiveness.

Well behind schedule, the Spanish law (Spain, 2006) was modified to carry out transposition of the European Directive. The library exceptions are regulated in article 37, which has three sections. The first, dedicated to the right of reproduction, was left practically unaltered, except for the introduction of a new purpose, preservation; previously only reproduction for the purpose of research was allowed. The article is very generic, and does not establish anything about the number of copies, if they can be made for preventive reasons, etc. Its section 2, dedicated to the right of distribution, was unchanged, as the directive of 2001 does not address its regulation. The most novel part is, no doubt, the new section 3, dedicated to the right of communication to the public. The text is essentially identical to article 5.3.n of the directive, but unfortunately it adds some additional restrictions. On the one hand, it eliminates the purpose of private study, permitting only that of research; on the other hand, it includes the obligation of payment to the author, a demand that does not appear in the directive.

Illustration for teaching is another of the copyright exceptions and limitations included in the directive, specifically in its article 5.3.a. It embraces both the right of reproduction and that of communication to the public, as long as the works are used for purposes of illustration in scientific works or teaching activities. It also requires that the use made be justified by the non-commercial purpose to be achieved, and that the source be indicated (except when impossible). Unlike other exceptions, such as private copying, in this one a system of economic compensation is not required, which is coherent with European community legislation and the directive on databases (European Union, 1996), which contains a twin exception and does not demand payment. Although it is a very habitual common exception in comparative law, it was not included in the Spanish law, being first introduced in this 2006 reform. However, its regulation was very defective: besides adding new restrictions not included in the directive, it was not applicable to online teaching, making it almost entirely useless. It was again modified in the most recent law reform (Spain, 2014) and now it does include both types of teaching, face-to-face and online.

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