Armin Talke: Licensing our digital libraries: Which conditions and how to employ them?

What can you do with a book? You can do what the law allows. Civil codes tell us, what we may do with the physical item “book”. Copyright codes tell us what we can do with the contents.

What can we do with a website? Concerning the contents, it´s the same as for the book: The relevant copyright code tells us. With a website, there is no “physical item” that the civil code would deal with. However, contract law and several statutes on media law and data protection are applicable on websites.

Statutory copyright law: How does the user know ?

But let us concentrate on copyright (statutory) law. It applies even though the website or the book do not tell us, which law or article applies or which national legislation is involved. The relevant law applies, even if it´s not communicated on the website or in the book. But which copyright code is relevant? Which articles are applicable here, and how do we interprete them ? Which jurisdiction is relevant ? Especially concerning the world wide web, users of digital libraries are facing a huge mountain of legal issues. For people who do not usually deal with copyright, and even for specialists, these issues are difficult to deal with. In the law of new media there specific reasons for these difficulties: The statutes often are new, so there does not exist any case law on individual articles. Or the technology and methods are so new that there still don´t exist any special statutes or case law.

Concerning an ordinary web page you can usually say: At least parts of it are protected by copyright, because of the text, the graphics, embedded photos or films, or because of the compilation of all these elements. Therefore, it is subject to the relevant copyright law. Visitors of the web page are allowed to use the contents only under copyright exceptions, e.g., for own scientific purposes or for private download. But it is not allowed to upload the contents to their own website, except for quotation.

But how should the visitor of our web site know this, as the rules are not expressed on the web page ?

Copyright and the digital library: How does the user know ?

Now let´s take a look at the materials in the digital libraries: A big part of the digital libraries consist of images of “old” works, e.g. a newspaper from 1863. The newspaper and the articles are not protected by copyright, because the term has expired. Special protection as ancillary copyright in the digital image (the scan) usually is also not given. How does the visitor know that there is no legal protection on the works and the images ? How does he know that every use is allowed, e.g. the upload on his own homepage ?

Until now, it was easy for libraries to ignore this problem. But now, at least in the European Union, just saying nothing is not enough any more. Now we have to take a stand. Because if you want to have your digital images to be visible in Europeana, you must opt for a rights statement[1]. You can choose from different alternatives, depending on the legal status of the digital object: Public Domain Mark[2], CC-Zero[3], various CC licenses[4], and 3 "Europeana Rights Statements": "Rights Reserved - Free Access", "Rights Reserved - Paid Access" and "Rights Reserved - Restricted Access".[5] If you opt for one of the more restrictive alternatives, which excludes commercial use, such as a CC-NC - license or one of the "Europeana Rights Statements", the objects cannot be utilized for the whole range of uses within the Europeana.

Problems with “non commercial” - licenses

Apart from that, there exist other problems concerning “non commercial” – licenses: The term "commercial" is difficult to define. This is very unfavorable for potential customers who do not know exactly whether they are "commercial" users or not. There is a legal limbo around the “non commercial” – licenses, which may cause a decrease of use because of uncertainty or even over – cautious behavior.[6] E.g. it seems uncertain, if “non commercial” – clauses prohibit the use of the digital object by non-profit organizations to recover their costs. It is also uncertain, if uses of private individuals are “non commercial” in general. Especially non-profit organizations are often reliant of commercial uses of the content they offer. One example is Wikipedia: Its content can be integrated by (commercial) search engines, and the encyclopedia can be sold on CD-Rom. This would be forbidden with “non-commercial” - content that is embedded in a Wikipedia – contribution. The mission of the Wikimedia Foundation is to "empower and engage people around the world to collect and develop educational content under a free content license".[7] According to the *Wikipedia terms* (terms of use), all of the contributors are required to make their contents freely applicable for further use, with no restrictions even on commercial uses:

....

"7.Licensing of Content

To grow the commons of free knowledge and free culture, all users contributing to the Projects are required to grant broad permissions to the general public to re-distribute and re-use their contributions freely, so long as that use is properly attributed and the same freedom to re-use and re-distribute is granted to any derivative works. In keeping with our goal of providing free information to the widest possible audience, we require that all submitted content When Necessary be licensed Sun that it is freely reusable by

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[1] http:// pro.europeana.eu/data-exchange-agreement
[2] http://creativecommons.org/publicdomain/mark/1.0/
[3] http://creativecommons.org/publicdomain/zero/1.0/
[4] http://creativecommons.org/licenses/
[5] http:// pro.europeana.eu/data-exchange-agreement
[6] http://wiki.creativecommons.org/Defining_Noncommercial
[7] http://de.creativecommons.org/2012/05/04/ungewollte-nebenwirkungen-von-nc-erklart/

anyone who cares to access it. "
...

According to Art.7c and the terms of use, this also applies to third-party content that a contributor integrates in his article:
…
“c. Importing text: You may import text that you have found elsewhere or that you have co-authored with others, but in case you search warrant that the text is available under terms that are compatible with the CC BY-SA 3.0 license ... "

"d. Non-text media: non-text media on the Projects are available under a variety of different licenses that support the general goal of Allowing unrestricted re-use and re-distribution. When you contribute non-text media, you agree to comply with the requirements for seeking licenses as described in our Licensing Policy.”

Effect of PDM, CC-Zero and CC-Licenses

The PDM and the licences mentioned above, however, do not only have legal significance in strictu sensu. Because of the explicit communication of the legal effect, they also eliminate the incertainty of the users and therefore provide for better circulation of the works.

This is how the Public Domain Mark and the Licenses work:

Public Domain Mark (PDM)
The PDM Mark primarily has no legal relevance, but it communicates clear: “This document is in the public domain”, it´s free from any restrictions of usage and dissemination.

Open content licenses
The difference between open content licenses and PDM is: They are licenses. Through licenses, rights are the granted from somebody to another. They thus have a legal effect strictu sensu. Open Content Licenses can not be used if there exists no right which could be granted, e.g., if work and image are in the public domain.

For example, the key messages of the CC-BY license are the following:
- I am the owner of the rights
- I grant to you the (simple) right to put the work into the net, copy, edit, distribute ..
- When you use the work, you have to put my name on it
- You can only use the work under the same license (CC-BY)

How does that work? Is it possible to grant a license through a one-sided declaration of will ? No, a contract is required (At least in the civil law jurisdictions). A contract consists of two declarations of will, aimed at concluding a legal transaction: Offer and acceptance. The contract offer consists in the communication of the license mark, connected with the license itself and in relation to a specific work. The offer is communicated in the moment the work and license are made available on the Internet.

This means, that the rightsholder makes an offer to unknown persons (Oferta ad incertas personas). The acceptance of this contract offer lies simply in the use of the work by another person, even if the rightsholder, that means, the other part of the contract, does not know about the use.

It´s the same with all other CC licenses, with slightly different conditions. But for all of these licenses apply the same core conditions: Granting of the right to put the work on the internet, copy and distribute it, the obligation to put the rightsholder´s name on the work and to use it under the same license conditions.

CC-Zero
The CC-Zero-"License" is different from the Open Content Licenses. CC Zero says:
- I am the owner of the rights
- I waive all my copyright in the work

So, with CC Zero, anyone who finds the work in your digital library or elsewhere, can exploit it however he likes. He doesn´t even have to mention the rightholders name.

There is one problem left with CC-Zero: In many jurisdictions, waiving all copyright is not possible. E.g. in the continental european "droit d´ auteur" and related systems, instead of waiving copyright, it is necessary to grant copyrights to the users. Therefore, CC-Zero provides a "licence fallback". The "licence fallback" basically is nothing but a "classical" license like the above mentioned open content licenses. The "License fallback" essentially stipulates the following:

- I am the owner of the rights
- I confer on you the (simple) right to put the work into the net, copy, edit, and distribute…

But there are 2 significant disparities between CC-Zero and the other CC-Licenses:

Under CC-Zero,
- *no* attribution is necessary and
- redistribution must not necessarily be done with the same (CC-Zero-) conditions

Additionally, like in the (other) CC-Licenses, a *prohibition of sub-licensing* is stipulated. That means, that the "license fallback" cannot generate further granting of copyrights to third persons. Circulation of the work is interrupted after the first level of use. Copyright can only be granted to persons who download the work from the original platform of the rightsholder.

Problems with large scale digitization

Large scale digitization: Difficult conditions for choosing the right license
Sometimes, the digitizing library does not know the legal status of the work: In large scale digitization, individual works cannot be examined about their copyright status. Therefore, some of the works may still be in copyright. For example, if a library

constitutes a chronologic limit for the works to be digitized: Even if we only take works published before 1910 or even 1900, some may well be still protected. Which Licence or mark shall we choose for these uncertain cases ? If we mark the digital images with PDM as "public domain", there is a risk that other rely on this statement and therefore suffer damage. If we disseminate digitized images with a CC license or CC Zero, we claim to have rights that we actually don´t hold. For with the CC licenses, we affirm to be the owner of copyright or related rights.

Every library has to balance the risk
The use of PDM, CC-Zero and CC licenses with works of which we don't´ exactly know the copyright status is still afflicted with a certain risk. This risk cumulates the low risk that we already take anyway, making the work available on the internet, even without adding a PDM or license. But if we want to have the work´s metadata to be included in EUROPEANA, adding no license or rights statement is no option. A middle ground can be the statement "rights reserved-free access". Every digitizing institution has to ponder the (small) risk to be prosecuted for copyright infriction with the benefits of using one of the more "open" licenses.

Works out of print and orphan works
In the future, we will be expected to also include in our digital library works which are out of print or orphan. Orphan works are still copyrighted works whose rightsholders cannot be asked to grant a license for the use, because the rightsholders could not be identified and located after a diligent search[8]. Referring to the proposal of the EU Commission for the not yet enacted directive, libraries and other cultural institutions will be allowed to put these works on the internet, despite the lack of rightsholder´s consent. But we will have to keep in mind: They are not part of the public domain and the library is also not the copyright holder. So, neither PDM nor CC licenses can be used here. So we will have to leave these works without rights statement or – to contribute them to EUROPEANA – use the "rights reserved – free access" – statement.

Conclusion

As we find works with different copyright statuses in our digital libraries, these is a need for rights management. In order to increase the circulation of the works, the respective user conditions, i.e. the PDM or licenses, should be displayed very clear with each digital object and in machine readable form.

[8] European Commission; Proposal for a directive on certain permitted uses of orphan works , 24.5.2011 (COM(2011) 289 fina),l Art.2 par.1