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14

Thomas Dreier

Towards Consensus on the
Electronic Use of Publications
in Libraries

Strategy issues and recommendations



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Foreword

Research and academic education depend integrally on communication. In the world of print, the publication chain comprises authors (as producers), publishers (as distributors), and libraries (as collectors of material from different sources and long-term archives providing services to users). Booksellers, subscription agents and collecting societies play supporting roles. These roles are not necessarily the same in the electronic environment.

One of the main aims of the TECUP project was to bring together representatives of all the major players in the value chain. The project partners and the members of the Advisory Groups represented libraries, publishers, distribution agencies and collecting societies from across Europe. There were three Advisory Groups, for legal, technical and strategy issues.

The project started in December 1998 to end in February 2001. As a meta project, evolving out of ECUP (the European Copyright User Platform), it gathered information on, analysed and evaluated projects of different kinds concerning digital uses.

As a first step, the TECUP analysed types of publishing and business models in the electronic age. The models analysed included: self-publishing by authors and electronic publishing through commercial publishers or learned societies; subscription against the pay per view model; and permanent access provided by the publisher or by library archives (cf. the report *Providing and controlling access to digital documents – examples of good practice and future perspectives*^{*}).

Towards Consensus on the Electronic Use of Publications in Libraries – strategy issues and recommendations by Thomas Dreier gives an overall analysis of the legal situation. In considering the present development of licensing, one can already find examples of best practice for high use material. Access to low use material has to be improved. Lack of sufficiently standardised technical solutions and authorisation systems is still

^{*} See the project's papers at <http://www.sub.uni-goettingen.de/gdz/tecup/>

an impediment to the full exploitation of the advantages of electronic publishing. Other unresolved issues are permanent access and long-term archiving.

The research and education community and other players are striving co-operatively to find the most viable path from the print tradition to the hybrid publishing world of the future, where electronic and printed versions will exist in tandem. The Memorandum of Understanding (see part 4) describes those areas where consensus has been reached, and sets out the main future co-operative goals for the participants. Those involved in the project are willing to continue the process of open discussion started by TECUP: The European Consensus Forum for Academic Information will start its work in May 2001.

As co-ordinator of the project, I should like to thank all members of the Advisory Groups for their valuable contribution. We are also much indebted to the European Commission and, in particular, to Patricia Manson of Directorate-General XIII for welcome support and for a generous grant to the project.

Elmar Mittler

Executive Summary

The new technologies of digitization and networking have made it possible to produce, keep, access and store published material in a much more efficient way than used to be - and still is - the case in the analog, i.e. the print environment. However, it is also recognised that the new technologies and especially the possibility to copy and distribute copyrighted material in electronic form with such ease, do pose uncertainties for a financial return to the copyright owners.

In view of this, strengthening copyright protection and installing technical safeguards and other measures to control unauthorised copyright-relevant uses would be an obvious answer to this perceived loss of control. Another answer would be an overly cautious approach towards licensing of material protected by copyright. However, it is also generally agreed that the reaction to these uncertainties should not lead to an overly restricted use of electronic information by users and information professionals. In an evolving electronic environment such a reaction could mean that information resources are only accessible to those who are able to pay and that access is denied to those, who are not.

Hence, all those involved in the process of producing, disseminating, storing, making accessible and preserving have to co-operate in order to facilitate access to electronic content by promoting cost effective use and encouraging simple and workable solutions. These participants include authors, publishers, collecting societies, intermediaries, libraries and end users. In view of technological developments, the roles of these participants will change and to some extent converge. This does not make the task of defining the future roles of the participants much easier.

True, some of the issues raised have already been solved and some of the uncertainties removed by emerging business models and examples of good practices. However, an important number of issues still waits to be resolved. In order to help solving these is-

sues by way of consensus, the following "Report on strategy issues and recommendations" was commissioned within the framework of the Testbed implementation of the European Copyright Framework (TECUP) as Deliverable 6.6 of its work package on consensus building (work package 6). The Report shall likewise serve as the basis for the drafting of a common "Memorandum of Understanding" (MoU) by all those involved and represented within the TECUP-project.

In order to achieve its tasks, the Report undertakes in Part 1 to clarify the conflicting interests and issues raised by distributing, archiving and using electronic products from different types of content owners by different types of libraries. Part 2 then contains a legal analysis of the issues thus identified and evaluates the existing legal framework, including currently pending EU-legislation. Part 3 presents and reviews the different business-models in the light of the legal rules described in Part 2. This includes the formulation of certain guiding principles which later on found their way into the Memorandum of Understanding (see Part 4).

In sum, it is the firm belief of this Report that

- ◆ notwithstanding convergence due to digital and networking technology - and notwithstanding the problems this may cause to individual entities - each of the players will as such continue to assume a certain role when it comes to producing, disseminating, granting access to and preserving copyright protected material;
- ◆ whereas the primary role of creating copyrighted works rests with the authors, and it is the task of publishers to produce and distribute these works in a marketable form, libraries - by pooling the demand and the financial resources of corporate bodies such as universities, research organisations, etc. – aggregate resources and collections, which they keep up to date and make available to members of the scientific community. In addition, libraries keep and preserve books which the publisher no longer holds in stock;

- ◆ as a rule, protected material should be licensed to libraries on the basis of copyright, provided the scope of access and access control is agreed upon, in order to maintain the high level of access to information which exists in the print world;
- ◆ the role that libraries already assume in the electronic environment is a legitimate one, especially as regards retro-digitising, providing access and preserving, tasks which cannot always be performed by individual rightholders;
- ◆ in addition, consensus may be furthered by way of differentiating according to the variables which underlie the different business models, such as different library activities and use-intensities, and by organising appropriate rights management, which includes all forms of individual, centralized and collective licensing. It will be possible to agree upon uses which do not threaten the legitimate exploitation interests of rightholders as well as on certain preferences regarding pricing models; and
- ◆ finally, the anonymity of individual users and the confidentiality of their searches must be protected. Likewise, the integrity and authenticity of the material which is made accessible in electronic form must be preserved.

The Report was discussed at three consecutive meetings of TECUP's Strategy Advisory Group (SAG) in May, September and November 2000. Valuable input was provided by the SAG-members. The most important of these documents are reproduced in an *Annex* to this Report, together with some prior policy statements on digitization and storage of print journal material by some of the parties involved.

The discussion process has led to the formulation of the "Memorandum of Understanding" (MoU) already referred to above. Although it forms a separate document, the text of this MoU is reproduced at the end of this Report, in order to demonstrate how far the consensus-approach has been carried so far.

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Introduction

1. - The new technologies of digitization and networking have made it possible to produce, keep, access and store published material in a much more efficient way than used to be - and still is - the case in the analog, i.e. the print environment. However, it is also recognised that the new technologies and especially the possibility to copy and distribute copyrighted material in electronic form with such ease, do pose uncertainties for a financial return to the copyright owners. Strengthening copyright protection and installing technical safeguards and other measures to control unauthorised copyright-relevant uses would be an obvious answer to this perceived loss of control. However, it is also generally agreed that the reaction to these uncertainties should not lead to an overly restricted use of electronic information by users and information professionals, because in an evolving electronic environment such a reaction could mean that information resources are only accessible to those who are able to pay and that access is denied to those, who are not.

2. - Traditionally, such deficiencies regarding access to published information have been remedied by libraries. Publicly accessible libraries purchase print and non-print materials including non-published “grey” materials, store them, make them available to the public and preserve them for the future. Similarly, academic and research libraries build up research tools, which they preserve, keep up to date and make available to members of the scientific community. Other players, such as subscription agents in the field of periodicals and aggregators (to name just two such other players), complete the system.

3. - However, in the emerging digital and networked information society, traditional roles are about to change, if they haven't already done so. Anyone in possession of a data set representing certain information can offer and distribute this particular information to users via the internet. Consequently, the roles of au-

thors, publishers, wholesale and retail sellers, libraries and even users, who can turn into “publishers”, converge.

4. - On a theoretical level, a future situation is conceivable in which this convergence of the roles of the different players involved will be total. But in practice, today (and certainly for the near future), it seems rather unlikely that the change in roles will lead to a complete convergence. Foremost, authors will continue to bear the prime responsibility for creating protected material. Furthermore, publishers will always have other publication resources at their disposal than authors (they can, e.g. maintain portals, and offer value-added services which no individual author could ever provide). Similarly, with their focus on access and preservation, libraries can perform tasks which smaller individual publishers might not be able or willing to undertake (such as, e.g., retro-digitization, aggregating and indexing, running powerful servers, and maintain points of entry to a vast collection of material). The same applies *mutatis mutandis* to intermediaries.

5. - Consequently, it is fair to assume that notwithstanding the loss of control in electronic information and convergence, existing players will continue to exist in the digital and networked environment. This is all the more true in view of the continuing coexistence of both the print and the digital environment. Of course, the continuing existence of the players involved does not preclude a change in the roles they play. Quite to the contrary, these roles might already change dramatically in the not too distant future. A key factor responsible for the future character of those roles is which uses of copyrighted materials will be licensed by content providers to intermediaries and which will not be licensed because the content providers want to reserve a particular exploitation of their protected material for themselves. Hence, the discussion of the future role of the players involved centers on the question of fair and adequate licensing models. It follows that although the change regarding the roles of the players is undoubtedly technology-driven, it is not merely the result of technology. Rather, the outcome of such change will to a large degree depend on how

we shape the rules for such a change and what we want the future digital and networked information society to look like.¹

6. - In view of this fundamental assumption that existing players will continue to exist in the digital and networked environment, and that the future roles of these players will depend on licensing and business models, the central question is: What shall the future situation which we want to live in look like? Or, more precisely, what roles should the parties involved, and especially libraries, assume in the digital and networked environment? What might a possible consensus regarding the division of tasks to be performed between libraries and publishers, including authors and intermediaries, look like, and how does such a consensus fit into the existing or emerging legal framework?

7. - This Report was commissioned within the framework of the TECUP project as part of its consensus building Workpackage 6, in order to assist in answering these questions. Already at this stage, it should be made clear that these questions shall not be answered with respect to all protected material in electronic form; rather, the answers shall focus on a limited array of materials, namely electronic material of scholarly, research and scientific interest.² This is only a small section of the total electronic commerce in protected material. Another consequence of this restriction is that whenever in the present context a library is called a “public” library, the term “public” refers to more or less closed user groups, and does not denote any passerby “on the street”. This is in line with the strategy of libraries to control their users more closely in the digital environment by way of closed and secured networks than used to be the case regarding printed material. Furthermore,

¹ See, e.g., *Lessig*, Code and other laws of cyberspace, Basic books, New York 1999, pp. 24 et seq.

² It follows from this limitation of subject matter discussed in this Report, that educational material such as course packs are outside of the realm of this Report.

it should be noted that in this respect the term “public” may often allude to public funding, but does not necessarily do so, since on the one hand, e.g., privately funded university libraries or libraries of privately funded research institutions would likewise be covered. In addition, it is possible that the same principles of licensing - but not necessarily the same exceptions from copyright - apply to content providers and corporate libraries which form part of an economic enterprise. In sum, it will be the type of use made of protected material collected in, stored, preserved and made accessible by, libraries, which is decisive,³ rather than the modalities of financing. Finally, the main focus will be on the role of libraries and publishers, whereas the role of authors and other intermediaries will only be covered to a somewhat lesser extent.

8. - It is the purpose of this Report to assist the Strategy Advisory Group in formulating a “Memorandum of Understanding”. As a consequence, the Report does not undertake to describe a solution to all the issues raised. Rather, it is to serve as a basis for further discussion, enabling the players to better understand the strategic, policy and legal choices they will have to make.

9. - In order to fulfil its purpose as a reference text for the drafting of the “Memorandum of Understanding”, this Report will

- ◆ try to clarify the conflicting interests and issues raised by distributing, archiving and using electronic products from different types of content owners by different types of libraries (Part I);

³ See also Art. 5 (2) (c) of the Amended proposal for a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the Information Society in its version of the Common Position, agreed upon on 28 September 2000, OJ EU No. C 344 of 1 December 2000, p. 1, which likewise does not differentiate between different types of libraries, but only according to the character of uses made of protected material, which are not for direct or indirect economic or commercial advantage.

- ◆ contain a legal analysis of the issues thus identified, and evaluate the existing legal framework, including currently pending EU legislation (Part 2);
- ◆ review the different business models in the light of the legal rules described in Part 2 in the form of outlining the respective pros and cons (Part 3), and
- ◆ contain recommendations in view of existing and pending legal regulations, in order to prepare the Memorandum of Understanding (Part 4).

Part 1: Clarifying the issues

1.1 Diverging interests

10. - The conflict of interests between authors and rightholders on the one hand, and libraries on the other mainly results from the fact that libraries want to continue to exercise their function of keeping, and for closed regulated user-groups creating access to, published information and protected material in the digital age, whereas authors and rightholders fear that the ease, speed, high quality and low cost of copying sets of digital data by users of libraries which offer material in digital form, will infringe upon their primary markets.

11. - In practice, the gravity of the conflict varies not only regarding different types of activities (e.g., archiving by libraries infringes less upon the publisher's interests than making digital products available by libraries at a time when the publisher offers the product online), but also regarding different types of content (e.g., the book market, the market for pictorial material - both still and animated - and the music market each follow a different economic and behavioral model). Even if the scope of the discussion is limited to academic and scientific journals, the conflicting interests may be different depending on the field (e.g., journals of the humanities follow other publication models than journals in the natural sciences, and even within each of these two fields the publication models may vary from discipline to discipline). Furthermore, the conflict of interest may vary according to who the user is, what use the user makes of the protected material and how limitations to such use can effectively be controlled, monitored and enforced. Finally, the conflict of interests is felt differently depending on the size of the players involved (small publishing house, large media-enterprise, library with limited resources, powerful private or state library).

12. - On the other hand, this list opens up numerous possibilities for differentiation. Already, a differentiation according to subject matter was already made when narrowing down the scope of this Report, which shall not focus on all, but only on a limited array of materials to be kept, made accessible and preserved by libraries.⁴ Furthermore, a distinction according to different users, different uses made and different use-intensities as well as circumstances of use seem to be an appropriate starting point for defining well distinguished, appropriate roles of the parties involved.

13. - Furthermore, at the present stage, technology is not only responsible for a loss of control, but at the same time enables rightholders and also intermediaries to limit the possibilities to use protected material to certain user groups and/or to certain uses and use intensities. This makes the criterion of what kind of use is being made, by whom and in what intensity an especially appropriate criterion for differentiation and fine tuning of the roles of the parties involved. This seems to be of great importance in view of the fact that the manner and intensity of use by players other than the rightholders determine its economic impact on the exploitation undertaken by the rightholders themselves.

14. - Finally, it should be noted that the question of *rights management* depends on the scope of activities undertaken by intermediaries and users as well as on the extent to which individual licensing is possible and collective management of rights can prove to be a viable solution. This dependency works in both ways: on the one hand, the necessary organisation of management of rights depends on which activities are undertaken by intermediaries and end users, because rights clearance will only be necessary for those activities, and not for others undertaken by the rightholders themselves. On the other hand, only if a certain management of rights can effectively be organized, can the respective acts be undertaken by intermediaries and users. In addition, an appropriate answer to

⁴ See the Introduction, above.

the question of effective rights management will depend on the capability of the players to organize rights management on their own, or to have the task performed by a third party. This third party might typically be an existing reproduction rights organisation. They have developed new models of rights management based on a Joint Statement issued by STM and IFRRO, January 1998.⁵ In such new services owners of rights decide individually the remuneration for each work and usage.

1.2 Guiding principles

15. - Nonetheless, or one might better say: Hence, there does seem to be at least some ground for arriving at a consensus.

16. - There is by now a common belief, shared by both publishers and libraries, that the changes brought about by digital and networking technology will not make traditional players disappear. Rather, their functions are likely to change. But in all likelihood even such changes will not affect the fundamental roles: authors will continue to be the source for the creation of protected works; publishers will continue to select, enhance, aggregate and offer contents on their corporate platforms, and libraries will continue to complement dissemination gaps and fulfil archiving tasks.

17. - Consequently, the ECUP+ position paper from December 1998⁶ which was drafted within the framework of the European Copyright User Platform (ECUP) project, recalls that the information systems that libraries have developed should not be replaced by commercial information vendors and that a diminished scope of public access would lead to an increasingly polarised so-

⁵ The full text of this Joint Statement is reproduced in Annex I.

⁶ ECUP+, "Position on User Rights in Electronic Publications", of 15 December 1998. The full text of this Paper is reproduced in Annex III. The text is also available at <http://www.eblida.org/ecup/docs/policy21.htm>

ciety of information haves and have-nots. Rather, the balance established over more than a century should be upheld in the digital environment. As more information becomes available only in electronic formats, legitimate practices in using copyrighted material must be protected. The benefits of new technologies should be available for all - the scientific community, libraries and the copyright owners. In this respect, it is pointed out that libraries can, and already do, provide a uniquely controllable environment through which publishers can make their products available to the scientific and research community.

18. - In order to further define the parameters which will determine what the changed roles of the players could and/or should look like in the electronic environment, there has been an attempt to establish some guiding principles. According to these principles, as a *fundamental principle*, the user should be allowed to access copyrighted material at the library facility and to make one copy for private use and research or scientific purposes. Moreover, it was considered to be the public duty of the library to provide access to copyrighted material and the library should have the possibility to do so as long as it does not infringe the three-step test of Art. 9 (2) Berne Convention.⁷

19. - In addition, the ECUP+ position paper defined what its drafters considered as fair expectancies of the scientific and academic community, libraries, users and rights owners in an electronic environment. According to this definition, provided copyright was

⁷ Art. 9 (2) of the Berne Convention reads as follows: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author". - The full text of the Berne Convention, which is the main legal instrument of international copyright protection, can be found at <http://www.wipo.int/treaties/ip/berne/index.html>

not infringed, the scientific and academic community has a right to expect to read or view publicly marketed copyrighted material at the library facility, and to copy a limited number of pages electronically or on paper for private use and research purposes. Similarly, libraries should be able to use electronic technologies to preserve copyrighted materials in their collections, to index and make one archival copy, to provide access to electronic copyrighted material to members of the institution, library staff and walk-in users, to copy a limited number of pages of copyrighted material for users in electronic form or in paper form. As far as users and libraries are concerned, they should have a right to expect that government publications and public domain material in electronic format are available without copyright restrictions; that the digitization of public domain material can be performed without copyright restrictions; that the terms of the licences for copyrighted materials are reasonable and do not restrict the principles laid down in national copyright laws concerning the lawful activities by libraries and users (fair practices); and that electronic copyright management systems are able to differentiate between legitimate and illegitimate uses. On the other hand, rights owners should be able to expect that libraries will strive to ensure the implementation of technical safeguards to comply with contractual limitations; the notification to rights owners of infringements by users, although they cannot be held responsible for the intentions of the end users once they have acquired the information; and that their users are informed about the copyright restrictions in electronic information.

20. - However, it should be noted that these principles have not met with unanimous consent, but have at times been criticised by rightholders, authors, publishers and reproduction rights organisations (RROs) as representing the libraries' conception of how legal measures should provide exemptions from copyright in order to develop and secure library services.

21. - A more consensual - albeit less far-reaching - compromise of the conflicting positions approach may thus be seen in the state-

ment on incidental digitization and storage of STM print journal articles of 7 November 1998.⁸ In its preamble this joint statement states that it is recognised that common tasks include increasingly the availability of articles from STM print journals and raising the awareness of their availability, as well as facilitating the digitization of individual articles from print journals within a library's own collection of items not currently available in electronic formats. Furthermore, the drafters of this joint statement were of the opinion that only by cooperation between libraries and publishers on the basis of a mutual respect for copyright, will the digitization of non-current print journals be affordable and available for education and research in years to come. In addition, it was appreciated by all parties concerned that scientific information continues to have reference value over time, that the digitization of such information serves important societal, cultural, scientific and technological development goals, including the preservation of scientific effort, and that the use of digitization procedures (i.e. scanning and storing) by libraries is a particularly effective means of archiving⁹ print scientific information.

22. - The joint statement then went on to propose a division of tasks between rightholders and libraries as regards the activities of incidental digitization and other types of uses and licences. As regards incidental digitization, the participants agreed that

⁸ The full text of the EBLIDA/ECUP/STM joint Statement of 7 November 1998 is reproduced in Annex II to this Report. The text is also available at http://www.eblida.org/ebli_stm/jointsta.htm

⁹ It was understood that archiving also involves the maintenance of the integrity of the original work, including the indication of its source(s), and any associated copyright management information; *ibid.*

- ◆ a particular library may scan, store and index (including indexing by using optical character recognition technology) “non-current material”¹⁰ and, in some cases, “current material”¹¹ previously purchased by that library, provided that:
 - a) the relevant publisher has signed the joint statement;
 - b) the library operates under the terms and conditions outlined in the joint statement;
 - c) the material to be included has been done so on an “incidental basis”;¹²
 - d) any exceptions noted by the relevant publisher for particular journals or individual articles are honoured by the library; and
 - e) the terms and conditions of usage are adhered to.
- ◆ The resulting digital material may be then stored on a “permanent basis”¹³ and may be displayed by the library only as page

¹⁰ Defined as “to mean articles from print journals published prior to 1995 that are not listed as exceptions on the STM Web site”.

¹¹ Defined as “articles from print journals published in 1995 and thereafter for which electronic versions are not available for sale or under licence, either directly or indirectly (from subcontractors, licensees, or local reprographic rights organizations).”

¹² Understood “to mean the digitization of Digitisable Material consisting of individual articles from journals (but not substantially the whole of a journal issue) (i) on a non-routine basis and (ii) in response to requests for particular articles (but excluding course packs).”

¹³ “Permanent Basis” means that even if a participating publisher terminates a licence or withdraws from participating in the uses contemplated in this Statement, the library may continue to store and provide access to any material previously digitized in accordance with this Statement until the point of such withdrawal. It also means the digitization in a new technological format of material or information already in digital format (for example to ensure an archival record is kept even in the face of technological change).

images. “Authorised users”¹⁴ are able to download or reproduce individual articles from the resulting archive of material scanned on an incidental basis for personal, educational or research use. Users other than authorised users may also view such material on the library’s premises if normally permitted access by the library, but may only reproduce such material in print format for personal, educational or research use.

- ◆ Participating publishers will indicate through their exceptions list which journals might require further permission from other parties (for example, a scientific society which might have an ownership interest in a journal, or a journal in which the publisher’s rights with respect to backlist issues may be uncertain), and will also indicate whether the publisher will seek such permission if so requested by the library or whether the publisher would prefer instead for the library to seek the permission directly.¹⁵

As far as other types of uses and licences are concerned, projects involving digitization other than on an incidental basis as well as other types of use of any resulting digital archives (such as for article delivery or interlibrary loan purposes) will require negotiation between the library and the publisher or may be addressed in future discussions. Any interest by libraries in digitising works other than digitisable material¹⁶ would also be subject to specific negotiation.

¹⁴ “Authorised users” means (1) for academic institutions: faculty members (including temporary or exchange faculty members for the duration of their assignment); graduate and undergraduate students; staff members; and contractors, and (2) for other organizations, companies and governmental institutions: all staff routinely employed by the institution and contractors.

¹⁵ In addition, libraries must inform users of the terms and conditions of this statement.

¹⁶ According to the Joint Statement, “digitisable material” includes “non-current material” published by those publishers posted on the

23. – However, this rather cautious approach was coupled with a general promise to cooperate in the future by working closely together to discuss and, where appropriate, implement new exploitation and cooperation methods, including digitization of entire volumes or sets of particular journals (Project Digitization); the introduction of standards such as the Digital Object Identifier (the “DOI”); document delivery/interlibrary resource sharing; and archiving and preservation of digital content.

24. - The market place for buying and selling access to electronic journals is very new, immature and even a little unstable, especially since publishers adjust their pricing and access policies from year to year as a reaction to the changed technological and market conditions. There are still significant issues to be solved between publishers and libraries, particularly regarding the commercial implications for the rights holders of interlibrary digital document supply, the issues of access and copyright protection, and from the users’ point of view the value of fair use, continuing access after the licence period has expired and of permanent archiving of digitally created material. Both librarians and publishers have to resolve the issue of archiving, particularly as the content of the digital version of a journal diverges more and more from its printed and textual representation, and with the addition of other forms of media and the dynamism of continuously amended publication. How this can be reflected in commercial values that ensure a fair recompense for the publisher and the greatest degree of functionality for the user is something that both the buyers and sellers of digital journals will need to address.

STM Web site as accepting this statement, and, in some cases, “current material” published by those publishers who have authorised incidental digitization from “current material”. According to the Joint statement, “digitisable material” does not include either “current” or “non-current material” that has been listed as exceptions on the STM or EBLIDA Web sites.

25. - It should be noted, however, that in practice certain licensing models have already been tested and a number of examples of good practice seem to have evolved. Some of these examples of good practice were discussed at a TECUP-workshop of 29 October 1999, and are described in the record of the proceedings of this workshop.¹⁷ Also, a number of issues appears to have been solved by now in view of what may be described as current practices generally accepted by both libraries and publishers.¹⁸ In general, libraries and publishers work on the assumption that their relationship with respect to electronic access to journals is based on licensing. Furthermore, publishers seem to accept that libraries negotiate such licences as consortia. Likewise, most publishers seem to have recognised the need to provide information (also) in electronic form. On the other hand, libraries have accepted that access to material in electronic form has to be somehow restricted and monitored. Hence, licensing agreements usually contain precise rules regarding accessibility of electronic material and monitoring of such access as well as rules regarding the standardisation of the format of electronic material. Also, certain pricing models have evolved. Problem areas include payment models suitable to the financial situation of libraries, the question whether or not university libraries should be allowed to make e-mail copies of the electronic files delivered by the publishers for non-commercial electronic document delivery. Other unresolved issues include, but are not limited to, the status of abstracts and bibliographic data,

¹⁷ TECUP, "Providing and controlling access to digital documents - Examples of good practice and future perspectives", Göttingen 2000. The projects described include the New Journal of Physics, ELEKTRA, Nesli, Decomate II, LAURIN, EZUL, HERON and LINK.

¹⁸ For a detailed and instructive description of both such issues that have been solved and current practices of libraries and publishers on the one hand, and problems and issues that are still in need of further discussion, see the "Evaluation of The Dutch / German Licensing Principles of October 1997: the Current State of Affairs" by *Hans Geleijnse*, reproduced in full text in Annex VI of this report.

specific demands of the library community regarding the local integration of data contained in published material, the question of digital archiving, and, last but not least, different pricing models.

26. - Before these issues will be further discussed in Part 3.2, a brief legal analysis of the use acts involved in the activities at stake is called for.

Part 2: Legal analysis

27. - After having defined the issues raised by digital and networking technologies with regard to the changing roles of publishers, libraries, intermediaries and users, it is the purpose of this part to outline which of the acts undertaken by libraries in a digital and networked environment are subject to copyright, i.e. which acts require the authorisation of the author or the rightholder or at least give rise to a claim for remuneration, and which acts may be freely undertaken. The answer to this question is of importance, since the definition of acts which require the author's or the rightholder's consent (or at least give rise to remuneration), and acts which do not, also determines the respective need for rights management. Finally, the answer to the question who is legally entitled to perform certain acts with regard to the distribution of, providing access to, and storage of electronic information, does have its bearing on how contractual agreements will have to be drafted.

28. - Since there is no worldwide, and no unique EU-copyright, the question of which acts are subject to copyright and which are not can only be answered by looking at international, EU and national legislation together.

2.1 International framework

29. - At the international level, the legal framework is set by international conventions, primarily the Revised Berne Convention (BC), the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and the two WIPO-Treaties of 1996, i.e. the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

30. - This international legal framework has already been examined by prior TECUP-work.¹⁹ Hence, in this Report it is sufficient to recall the major points of international copyright protection, especially regarding the reproduction right, the right of communication to the public and the exceptions thereto.

Reproduction right

31. - The reproduction right is laid down in Art. 9 (1) BC, and by way of reference to the BC, for TRIPS-Members again in Art. 9 (1) (1) TRIPS, which by way of clarification also applies to computer programs and compilations of data. The reproduction right subjects to the consent of the author any act of “reproduction” of protected material, “in any manner or form”.

32. - However, it should be recalled that all International Conventions leave it up to national legislation to adopt certain *exceptions* and *limitations* with regard to the reproduction right, provided the so-called *three-step test* is satisfied. According to this test, exceptions may (1) permit reproduction only “in certain special cases”, the reproduction thus permitted may (2) “not conflict with a normal exploitation of the work”, and it may (3) “not unreasonably prejudice the legitimate interests of the author”.²⁰

33. - It should also be noted that as regards the *implementation on the national level* of both the reproduction right and exceptions thereto, numerous differences exist in the legislation even of EU Member States.²¹ This is particularly true regarding the question

¹⁹ See the “Preliminary analysis of legal aspects in current business models” (TECUP Deliverable 4.2), by Emanuella *Giavarra*, London, February 2000, especially pp. 7 et seq.

²⁰ Art. 9 (2) BC, and following Art. 13 TRIPS, 10 (2) WCT.

²¹ As far as exceptions set out for the benefit of institutions accessible to the public, such as libraries and archives are concerned, several EU Member States such as the UK, Austria, Spain, Sweden, Finland, Denmark, Portugal and Greece have adopted specific provisions; see *Giavarra*, op. cit., at p. 9.

as to which acts have to be considered acts of copyright-relevant reproduction in the digital and networked environment, and to what extent existing exceptions do apply to technical acts of reproduction undertaken in the course of digital use of protected works. Furthermore, national laws²² and hence also EU legislation²³ now tend to exempt certain participants (mainly with regard to content provided by third parties) from legal liability for acts which might be considered as copyright-relevant reproduction acts.

34. - Consequently, the answer to the question whether a particular use of protected information, such as, e.g., temporary storage and copying for private and/or certain non-commercial purposes, requires the rightholder's authorisation or at least gives rise to a claim for remuneration, may vary in different states.²⁴ This seems to be particularly true regarding certain archiving and storing activities typically undertaken by non-profit public and research libraries. Different answers may also exist as to who commits a copyright-relevant act of reproduction when a work is uploaded on a server by the person who makes the work available for downloading by a user.

35. - In addition, whether or not any exception granted to copyright relevant acts of reproduction under national law will be in conformity with international law obligations depends on the outcome of the three-step test. Although the test might be applied by national courts, and will certainly be applied by a Dispute Resolu-

²² See only, e.g., Art. 5 of the German Act on the Utilization of Teleservices, of August 1, 1997.

²³ See Arts. 12 et seq. of the EU Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ EU No. L 178 of 17 July 2000, p. 1.

²⁴ For at least a partial picture of national laws and their application to the digital and networked context on the national level, see below, in this part point 2.3.

tion Panel working under the TRIPS-Agreement, due to the vagueness of the test's criteria it is not easy to foresee its outcome in a particular case.²⁵

36. - However, as early as December 1996 the participants of the Geneva international conference, which lead to the conclusion of both the WCT and the WPPT, agreed that "the reproduction right as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form". In addition, it was "understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention".²⁶ Hence it is reasonable to assume that meaningful library activities with regard to protected information in electronic form invariably touch upon the reproduction right. This is true regarding both retro-digitization of print material and storage of born digital material with the aim of providing access to, and/or preserving this material.

Right of communication to the public

37. - The reproduction right does not cover the act of making protected works available for downloading, nor does it cover the act of transmission. On the international level, the BC contains several rights of communicating protected material to the public, each of which applies to different subject matter and has a slightly

²⁵ See, however, now the extensive discussion in part VI.D.2 of the Report of the WTO Dispute Resolution Panel, Doc.WT/DS160/R of 15 June 2000, regarding the compatibility of Sec. 110(5) of the U.S. Copyright Act with Art. 13 TRIPS (the document can be consulted at the WTO website, www.wto.org).

²⁶ Agreed statement concerning Article 1 (4) of the WCT. - A detailed account of the drafting history which did not give rise to an express formulation of a reproduction right within the WCT is given by *Giavarra*, op.cit. at p. 10 et seq.

different scope.²⁷ In addition, Art. 11^{bis} BC contains a special broadcasting right. Up to the WCT there was no specific right covering the acts of making available protected material for transmission in the digital and networked context. Similarly, on the national level, so far most (if not all) EU member states do not provide for a *specific* right explicitly directed towards the activity of making protected material available online, although it should be noted that in the majority of EU member states this activity is most likely covered by the general right of communication to the public or by a right to broadcast by wire.²⁸

²⁷ See Arts. 11 (1) (ii), (2); 11ter (1) (ii), (2); 14 (1) (ii) BC.

²⁸ The main problem in bringing the online making available of protected works under either the right of communication to the public or the broadcasting right has been that the users are not reached simultaneously and that they are not gathered in one and the same place. Furthermore, under some national legislation it might seem questionable whether online-users form a “broader” audience as may be required in order to qualify under the national broadcasting right. However, it should likewise be noted that much of the debate was obviously inspired by motives of an economic nature rather than by systematic concerns. Thus, it was proposed to bring the making available of protected material under the distribution right, since at least in certain cases online-transmission might substitute for the distribution of material copies. Another way of arguing had as its starting point the fact that according to the Rome Convention and many national laws, performing artists and phonogram producers enjoy an exclusive right regarding communication to the public, but not regarding broadcasting of commercially fixed performances. Depending on the point of view, it was then postulated that making available was covered by the public communication right (view taken by performing artists and phonogram producers) or by the broadcasting right (view taken by broadcasters). It should be noted that the WPPT now grants an exclusive right regarding the online making available of fixed performances, whereas there only a claim for remuneration is prescribed regarding traditional broadcasting of fixed performances (see Arts. 10 and 15 WPPT).

38. - It follows that there was a widely-shared view that the digital exploitation of intellectual property online should not be exempt from copyright. Consequently, Art. 8 WCT now expressly contains a broad right of communication to the public so that authors have the right to authorise such communications including “the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”²⁹ Without doubt, libraries which provide for online-access to their collections, are within the realm of this making available right. Since this right does not presuppose that the work will be downloaded and stored on the computer of the user, the making available right will also be infringed if library collections are made accessible on the premises, and in all likelihood even if this is done for viewing only.

39. - If it is now clear that making available of protected works online will be subject to an exclusive right, it should, however, also be noted that by virtue of Art. 10 WCT the three-step test also applies to this right of making available.³⁰ Hence, what has been said above with regard to permissible exceptions from the reproduction right, applies *mutatis mutandis*.

2.2. EU legislation

40. - Within the EU, all Member States provide for an exclusive right of reproduction as well as of public communication including broadcasting and cable transmission of copyrighted works.³¹ As

²⁹ An agreed statement to Art. 8 WCT makes clear that “the mere provision of physical facilities for enabling or making a communication does not in itself amount to a communication within the meaning of this Treaty or the Berne Convention”.

³⁰ Similarly, the three-step-test which was initially only contained in Art. 9 (2) BC had been declared applicable to all rights granted under the BC by virtue of Art. 13, 9 (1) TRIPS.

³¹ As already mentioned, the picture looks somewhat different for subject matter protected by related rights.

has already been mentioned, all these rights know certain limitations which may vary considerably from country to country.

41. - On the European level, the right of reproduction has already been harmonised for two categories of works (computer programs and databases).³² In order to protect these digital objects in an efficient way against the ease of copying and the misappropriation of the commercial use-value they embody by illegitimate users, the reproduction right has first been rather broadly defined to include “temporary reproductions”. Second, the EU legislator has not granted all too far-reaching exceptions. However, contrary to some national legislation of the time at least as regards computer programs, copying for private purposes has not been totally excluded (although it is in essence limited to the making of back-up copies). However, reproduction of electronic databases for private purposes has not been exempt regarding protected databases, but the database directive contains at least a narrow exception regarding the use for illustration and for teaching or scientific research. There is no doubt that these exceptions are not broad enough to exempt library activities in the digital and networked area from copyright.

42. - Furthermore, since national laws of the EU member states currently do not contain a right specifically tailored to the online making available of protected subject matter, it will be the task of the upcoming EU Directive on copyright in the information society³³ to harmonise the reproduction right, introduce a harmonised making available right and prescribe possible exceptions to both these rights. This directive will thus set the legal framework

³² See Art. 4 of the Directive 91/250/EEC on the legal protection of computer programs, OJ EU No. L 122 of 17 May 1991, p. 42, and Art. 6 of the Directive 96/9/EC on the legal protection of databases, OJ EU No. L 77/20 of 27 March 1996, p. 20.

³³ For the original proposal, which had been preceded by a Green Paper (Doc. COM(95) 382 final of 19 July 1995), see OJ EU No. C 108, of 7 April 1998, p. 6, and the amended proposal OJ EU No. C 180

for the relationship between authors, rightholders, libraries, other intermediaries and users.

43. - In parenthesis, it should be noted that in view of the adoption of the Directive, which is expected in the course of the year 2001, neither this Report nor the consensus aimed at by the TECUP project will be likely to have any bearing on the final wording of the copyright Directive. However, it is to be expected that the final text of the Directive will still leave Member States some scope for national implementation. This will be especially true as far as the exceptions and limitations are concerned. How this scope will be used may well be influenced by the outcome of the TECUP project.

Reproduction right

44. - Like the computer program and database directives, the copyright directive adopts a rather broad definition of the reproduction right, which will cover “direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part”.³⁴

45. - The only mandatory exception shall be the exception for temporary acts of reproduction “which are transient or incidental, which are an integral and essential part of a technological process, whose sole purpose is to enable (a) a transmission in a network between third parties by an intermediary or (b) a lawful use of a work or other subject matter to be made, and which have no inde-

of 25 June 1999, p. 6. - In the meantime, the Council (COREPER, Council of Permanent Representatives) has reached a political agreement on 9 June 2000, and a Common Position has been adopted on 28 September 2000, OJ EU No. C 344 of 1 December 2000, p. 1. The European Parliament is currently preparing for the second reading.

³⁴ Art. 2 of the proposed Directive, as formulated in the Common Position of 28 September 2000, OJ EU No. C 344 of 1 December 2000, p. 1.

pendent economic significance”.³⁵ All other exceptions shall not be obligatory; rather, Member States remain at liberty to introduce them in whole or in part. Nevertheless, the exceptions circumscribed in the Directive set the “outer” framework of those acts which a Member State will be free to exempt from copyright. It should be noted that from the outset, the makers of the Directive were not content to just repeat the rather vague three-step test, but aimed at an exclusive list of possible exceptions which are designed to meet the particular needs of specific intermediaries and users.

46. - The exception benefitting libraries with regard to their handling of both electronic and non-electronic information is contained in Art. 5 (2) (c) of the Directive. According to this subsection, Member states are permitted to provide for exceptions “in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage”.³⁶ In Europe, the future possibilities for libraries to un-

³⁵ Art. 5 (1), Common Position of 28 September 2000, OJ EU No. C 344 of 1 December 2000, p. 1. - This Report cannot undertake to retrace the complete discussion of the controversial issues of this Directive (amongst which there are the exceptions to the exclusive rights) throughout the whole legislative process. Apart from Art. 5 (1) (Exception to the reproduction right for technical copies), Art. 5 (2) and 5(3) (inter alia, private copy exception, exceptions for journalists, libraries, archives, disabled people, broadcasters, etc.) and Art. 6 (interdiction to circumvent technical protection systems) have been the most controversial.

³⁶ Of course, libraries might benefit by other exceptions as well, such as by the “use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that, whenever possible, the source, including the author’s name, is indicated”, Art. 5 (3) (f), or the “use for the purpose of advertising the public exhibition ... of artistic works, to the extent necessary to promote the event”, Art. 5 (3) (j). - However, such exceptions do not cover the core activity of libraries.

dertake acts free of copyright with regard to electronic information will therefore depend on (1) the extent to which the Member States will make use of Art. 5 (2) (c) of the Directive, and (2) on the interpretation which will be given to its wording. As regards such interpretation, it may on the one hand seem doubtful whether there are any acts at all undertaken by libraries which are not at least in some indirect way resulting in an economic advantage. On the other hand, the directive obviously works on the assumption that there are such acts. Hence, it seems that Member States are free to exempt at least “specific” acts; an even wider interpretation of this provision might go as far as to conclude that all the acts which are not for direct or indirect economic or commercial advantage are “specific” acts within the meaning of Art. 5 (2) (c), and can therefore be exempt from copyright by national legislation of the Member States. However, even such a broad interpretation would certainly not cover all the issues addressed in this Report.

47. - Finally, it should be noted that in order to conform with the provisions of the WCT, Art. 5 (5) of the EU Directive takes up the international obligation not to except more than is permissible under the three-step test.

Public communication/making available right

48. - Art. 3 (1) of the EU Directive on copyright in the information society takes up the making available right as provided for in Art. 8 WCT, as part of the general exclusive right of authors to authorise or prohibit any communication to the public of their works, by wire or wireless means.³⁷

49. - As far as exceptions are concerned, the Common Position of 28 September 2000 provides for the possibility to grant an exception

³⁷ Art. 3 (2) grants the same right to objects of protection by related rights, and Art. 3 (3) clarifies that the right does not exhaust by way of an act of communication to the public or making available to the public as set out in this Article.

in the case of “use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject matter not subject to purchase or licensing terms which are contained in their collections.”³⁸ Finally, as prescribed by international law, the three-step test also puts a general limit on the scope of any exception which may be granted to the exclusive communication/making available right.

50. - In sum, it may be concluded that a broad interpretation of the future EU Directive on copyright in the information society certainly covers some activities of libraries with regard to information in electronic form, but undoubtedly not all of them. In essence, the general boundary between the acts protected by copyright and acts which are, or at least could be exempt from copyright, is once again the three-step test, which has evolved from a special provision attached only to the reproduction right to become an internationally accepted general rule. In view of this, the guiding principle formulated by ECUP³⁹ is the proper basis for further defining the proper roles of the players involved in the distribution, making accessible and preserving of information in electronic form. The question then is what this definition (or these definitions) should look like in order to strike an appropriate balance of all interests involved and secure sufficient access to published material. The following section shall briefly retrace national efforts to strike such an appropriate balance.

2.3. National law of EU member states

51. - Due to the imminent adoption of the EU Directive, and in view of the limited time frame, it is not the purpose of this section

³⁸ Art. 5 (3) (n).

³⁹ See above, para. 1.2 of this Report, and for further discussion also *infra*, para 3.2 of this Report.

to contain a comparative law analysis of the national legislation of all EU member states. Rather, the following description of how existing national law is presently interpreted by the courts in the EU Member States shall be limited to the one example of Germany. Of course, a comparative law analysis might be called for, but such a complete analysis would go beyond the framework of the present Report. However, the presentation of only one national situation (which is in no way intended to be understood as a model solution) can help to arrive at a better understanding of how the courts have reacted to the challenges posed by digital and networking technology with regard to library activities, and activities of other players similar to those of libraries, in the field of electronically stored information.⁴⁰

52. - As a starting point, it should be recalled that in recognising a reproduction right, all European national laws subject acts of retro-digitization as well as storage protected material in digital form on a computer to the exclusive reproduction right. However, in most cases, there is uncertainty as to how far exceptions to the reproduction right may reach.

53. - In Germany so far several decisions, some of them handed down by the Federal Supreme Court, have been devoted to questions of archiving protected material and making this material accessible to users. In all these decisions, the Federal Supreme Court, and in some instances also lower courts showed great reluctance to interpret the existing statutory exception regarding private and other personal uses in a broad sense, which would have allowed third parties to use someone else's protected material for purposes of information dissemination in a way made possible by new technology.

⁴⁰ It should be noted that in general, albeit growing, jurisprudence on this topic is still scarce. Hence in some instances decisions which are closest to the problem are reported, also in order to provide for a better understanding of how far the problems raised by digital and networking technology have been solved by the courts.

54. - Thus, corporate archiving of print material by way of analog copying has been held to be beyond the limits of the respective exception, if such copies are (also) intended for use by third parties. Furthermore, making copies of newspaper articles in providing a research service to third parties was held not to be a personal use by the person who had commissioned the research service, since it exceeded the limits of what the legislature intended to exempt from the exclusive right at the time when the exception was drafted in the year 1965.⁴¹ Even in the light of the information interest of the general public, which as such had expressly been recognised by the legislator, a different result was not deemed appropriate.⁴²

55. - Similarly, a service which consisted in digitising printed protected newspaper articles which had been selected by customers, in order to help those customers to create their own digital archive, was held to require the authors' consent. According to this decision, electronic archives which are used by people working within an enterprise are not covered by the personal archiving exception. The decisive motive was that such use is well beyond the limited uses in the analog environment which the legislator of the time wanted to exempt from the exclusive reproduction right.⁴³

⁴¹ Federal Supreme Court, Judgement of 16 January 1997 - I ZR 9/95, GRUR 1997, 459 - CB-Infobank I. - The case also involved abstracting printed newspaper articles, storing these abstracts in an electronic database, and selling copies of articles which had been found in answering research requests by clients of the service. According to the decision, copying which went beyond the commissioned making of single copies of particular articles goes beyond the limits of the copyright exception, because it allows for a use intensity which is far greater than the one which gave rise to the limitation of the author's exclusive right. - The electronic storage of abstracts, however, was not at issue in this case.

⁴² Federal Supreme Court, judgement of 16 January 1997 (I ZR 38/96), GRUR 1997, 464 - CB-Infobank II.

⁴³ Federal Supreme Court, judgement of 10 December 1998 (I ZR 100/96), CR 1999, 213 - Elektronische Pressearchive. - The Court saw the danger that the exploitation reserved to authors of their works might be significantly impaired if such services fell within the archiving exception.

56. - However, the Federal Supreme Court also concluded that a publicly accessible library which made and sent via mail or fax copies of single articles commanded by third parties, did not infringe the rightholders' reproduction rights, provided the third party could avail itself of a privileged use. Contrary to the decision in the CB-Infobank cases, in this case the court did not conclude that the new extended uses transcended the boundaries of the statutory limitation on copying for private purposes. Rather, in the opinion of the court, although not expressly provided for by the current German Copyright Act, such activity gives rise to a claim for remuneration to be collected by a collecting society, in order to secure adequate participation of the author in view of intensified use possibilities.⁴⁴ It seems worth noting in this respect that according to the Federal Supreme Court for this claim to adequate remuneration to arise, the three-step test does not require that the normal exploitation of the works in their present form has already been impaired; rather, in the view of the German court, Art. 9 (2) BC protects the right of the author to participate adequately in the proceeds of the exploitation of his or her works. Consequently, an author is only required to demonstrate that a particular new use has the potential of a mass use; however, the

⁴⁴ Federal Supreme Court, judgement of 25 February 1999 (I ZR 118/96) - CR 1999, 614 - Kopienversand auf Bestellung. - Following this decision VG WORT has started to administer the German legal licence in this area also, on the basis of a tariff which differentiates between different types of end users (educational and research users/private individuals/commercial users). It might seem worth noting that in the UK, document copying and delivery within the library privilege granted by Secs. 37 to 41 of the UK Copyright, Designs and Patents Act 1988 is remuneration-free. In all other cases CLA's CLARCS service allows the fees to be set on a transactional, publication-specific, basis, under which the rightholder can either set the fee or elect for a general "default fee" of about five pounds per article. It should be added that the default fee is reduced in certain cases, and that the CLA-BLDSC agreement does not cover all journals. Furthermore, the British Library has direct agreements with some major STM publishers.

author need not show that this new use has already diminished the author's business revenues.⁴⁵

57. - Finally, fully within the electronic environment two lower German courts had to deal with the question whether or not electronic press clipping services are covered by the existing exception⁴⁶ for the reprint of newspaper articles.⁴⁷ Both courts concluded to the negative, mainly in view of the extended use possibilities created by the electronic form of press clippings and the possible negative effects on the market for print journals. Of course, it should also be mentioned that already press clipping services in their traditional form are not expressly covered by the wording of the German Copyright Act; rather, their treatment as excepted from the exclusive right - albeit with a claim for remuneration to be mandatorily exercised by the collecting society in the field - was tolerated by the legislature and tacitly accepted by the parties involved. Apart from pointing to standing jurisprudence in Germany to the effect that exceptions always have to be interpreted in a narrow way, both courts were of the opinion that exempting

⁴⁵ Op. cit., at 615 et seq.

⁴⁶ Art. 49 of the German Copyright Act of 1965. Article 49 (1) reads as follows: "It shall be permissible to reproduce and distribute ... individual articles from newspapers and other information journals devoted solely to issues of the day in other newspapers or journals of like kind and to communicate such ... articles to the public, if they concern political, economic or religious issues of the day and do not contain a statement reserving rights. The author shall be paid equitable remuneration for reproduction, distribution and public communication, unless short extracts from a number of ... articles are reproduced, distributed or publicly communicated in the form of an overview. Claims may be asserted by a collecting society only."

⁴⁷ Court of appeals of Cologne, judgement of 30 December 1999 (6 U 151/99), CR 2000, 352 - Elektronischer Pressespiegel, and Court of appeals of Hamburg, judgement of 6 April 2000 (3 U 211/99), CR 2000, 658 - Elektronische Pressespiegel und Urheberrecht (see also Court of First Instance [LG] Hamburg, judgement of 7 September 1999 [308 O 258/99], CR 2000, 355).

electronic press clippings from the exclusive right would result in an overly severe restriction of the rights of authors. However, the courts did not discuss the fact that those benefitting from such a restrictive interpretation are the publishers rather than the individual authors.⁴⁸

58. - In sum, although not all of these decisions involved a totally electronic environment, it becomes apparent that German courts tend to be rather cautious vis-à-vis upcoming digital and networking technology, in order to make sure that legitimate exploitation interests of authors and rightholders are not unduly restricted. As a rule, new exploitation possibilities are reserved to the rightholder (irrespective of the fact whether this ultimately benefits the individual authors or their publishers, to whom the authors have already transferred their use rights), and existing exceptions are narrowly interpreted. Of course, from the perspective of users (both intermediate and end users), this means a certain restriction on the free dissemination of, and access to, protected material subject matter in electronic form. Only as long as activities are undertaken by private parties for their personal use and intermediaries do not act on their own, but are contacted in order to help private persons perform their private use acts, are the courts willing to apply existing copyright exceptions as they stand. However, it should likewise be noted that there is an apparent tendency to respect traditional library tasks and to make them possible, and this, as it seems, to a somewhat larger extent than the leeway granted to other commercial (competing) enterprises.

⁴⁸ This follows from the fact that the claim for remuneration for exempted uses is exercised by a collecting society, which distributes the larger amount of the money collected to individual authors, whereas financial benefits from the exploitation of the exclusive right accrue to the publisher who in general is the owner of the exclusive exploitation right. Here, individual authors only benefit indirectly to the extent they have been able to secure for themselves a proportional participation in the proceeds of each exploitation made by their publisher.

Part 3: Evaluation of business models

59. - This part shall now analyse the different business models which have so far been tested in the field of providing access to and preserving of electronic documents by academic and research libraries. To this effect, sub-part 3.1 will try to give a structured description of the variety of business models which have evolved to date. Sub-part 3.2. then undertakes to evaluate existing business models in view of the legal analysis carried out in Part 2 of this Report (the “is”-level), and finally, sub-part 3.3 tries to reconcile existing business models and future possible roles of the parties involved in a fair and reasonable way (the “ought to”-level, or “might”-level, as the case may be).

3.1 Existing business models

60. - As library activities to be considered, the general TECUP project description lists the activities of keeping documents available and making them accessible to the users, with regard to both printed material and materials created in digital form by the publishers. This comprises both the retro-digitization of non-electronic material and so-called born digital material.

61. - Moreover, these “technical” activities may further be differentiated as follows:⁴⁹

⁴⁹ See the list established by E. *Giavarra*, Evaluation and recommendations on contracts and licence, TECUP Deliverable D4.5. An empirical methodology was adopted in the form of a questionnaire and a matrix. From an original list of 70 projects, 46 projects were selected for further analysis. After assembling information about these projects it was agreed on a short list of 25 projects.

- ◆ with regard to retro-digitized material:
 - incidental/on demand digitization of print material (Model A)
 - systematic digitization of print material (Model B), and
- ◆ with regard to born digital material
 - access via library as aggregator (Model C)
 - access via a publisher server (Model D)
 - access via other aggregators (Model E)
 - combining born digital and retro-digitized material, involving libraries and RROs (Model F), and finally,
 - self-publishing (Model G).

62. - Moreover, as far as use acts are concerned, one may distinguish the following activities: viewing on screen, printing onto paper, copying onto disk of part or all of an electronic publication, transmission to enable printing of part or all of an electronic publication, transmission for permanent storage of part of an electronic publication, and posting on a network. In addition, as far as interlibrary loans are concerned, paper-to-paper, paper-to-electronic, electronic-to-paper and electronic-to-electronic transactions can be discerned.⁵⁰

63. - Finally, within each of these uses thus defined, one may further distinguish different user groups and different accessibility of protected material in electronic form. Here, intranet (access allowed for users belonging to a specific organisation), extranet (access allowed for users belonging to a closed group of institutions that share access and information, such as a formal or informal consortium) and, finally, internet (access allowed for individual users, i.e. open user group) have to be distinguished.

⁵⁰ See Fair Dealing - PA/JISC guidelines for electronic publications, and Inter-Library Loan - PA/JISC guidelines, reproduced in Annex IV.

64. - In view of these different possibilities it is hardly surprising that in practice a considerable number of different business models has evolved regarding the dissemination of, and granting access to, scholarly, academic and research journals in the digital and networked environment. Each of these models adheres to the imperatives of its own circumstances. Nevertheless, it seems possible to define a certain number of variables which characterise each single of these business models. Also, the number of basic models underlying each single business model seems to be limited.

65. - As far as the variables are concerned, one may characterise each business model according to the following factors:⁵¹

- ◆ how electronic journals are brought to the market by publishers (e.g., single journal, single-publisher subject cluster of journals, all journals from given publisher, multi-publisher cluster, or multi-publisher offering of all journals);
- ◆ print/electronic combination (electronic subscription only, or a combination of electronic with print subscriptions);
- ◆ granularity (entire journal(s), individual articles, abstracts, and/or supplementary material);
- ◆ how access to electronic journals is purchased (directly by individual libraries; indirectly by individual libraries, from aggregators or subscription agents, directly by groups of libraries [consortia], indirectly by groups of libraries through aggregators or subscription agents, or cost free individual electronic access by the users);
- ◆ linkage outward from electronic journals to items cited in other journals (no linkage, some links in place and access charged for,

⁵¹ For a full text description of these business models see the paper entitled “Business Models for e-journals” by Lex Lefebvre (STM), Maurice Long (BMA), Sally Morris (ALPSP) and Rollo Turner (ASA), of October 2000, reproduced in Annex V at the end of this Report.

some links in place and access free to same publisher's other journals, some links in place and access subject to existing subscriptions/licences, some links in place and access free to same intermediary's other journals, or some links in place and access free of charge);

- ◆ text hosting (on the publisher's own or contracted server, on a single or on multiple aggregators' server[s], on a single or on multiple subscription agents server[s], or on a consortium or national server);
- ◆ back issue access (no access to previous years' issues, access to all previously subscribed issues, or access to all back issues);
- ◆ access in general (through the publisher's e-journals system, a single or multiple electronic intermediary/ies, a single or multiple aggregator[s], a single or multiple subscription agent[s] gateway[s], consortium or national front-end, an individual library's OPAC, portals, A&I services, or other);
- ◆ pricing models regarding both individual journals (based on print subscription price, on electronic subscription price, on some other metric such as, e.g., the number of computers having concurrent access number of institutions in consortium, number of print copies taken, etc., or cost-free electronic access for the user and financing of the journal via an article charge to be paid by the author[s]),
- ◆ and multi-journal (based on previous year or years print subscriptions expenditure, on size of institution, on some measure of user population size, on concurrent users, and on actual usage, i.e. time or quantity); and
- ◆ access control (by IP address only; username and password only, administered by publisher, by intermediary, or locally; IP address plus username/password for remote users only, administered by publisher, by intermediary or locally).

66. - Regarding the general categories of business models in which the variables just mentioned combine (with or without involvement of intermediaries), one may distinguish the basic subscription model, the “database” subscription model, the transactional model and the intermediary model.

67. - In the basic subscription model, the unit of sale is still the individual subscription with or without price differentials for quantity and which are provided as (a) a multi-site licence (essentially a consortium); (b) a site licence (various definitions but essentially seeking to group an organisation in whole or in part into a single licence); (c) a personal licence, or (d) a combination of both.

68. - In the “database” subscription model the unit of sale is a collection of journals in effect forming a database of content which may be (a) a user-defined collection of part of the publisher(s)’s entire output by subject or other interest; (b) a publisher(s)-defined package of part or its/their entire output by number of titles, subject or other interest, and (c) the entire publisher(s)’s output.

69. - In the transactional model the unit of sale is the element read, i.e. generally the article, but it could have finer granularity, such as (a) content available on a pay-per-view/download basis, or (b) content available on a bulk pay-per-view subscription (i.e., prepayment of x downloads from any journal in the collection etc.).

70. - Finally, in the intermediary model, the content is licensed through some intermediary providing added value and access to more than one publisher’s content, (a) under a single licence; (b) under individual publishers’ licences, or (c) under multiple licences depending on content (not necessarily always the publisher’s licence but in agreement with the publisher).

71. - As has already been stated in sub-part 1.2, it becomes apparent from the above remarks that the market place for buying and selling access to electronic journals is still a relatively new and

hence an unstable one. Of course, this instability will not be permanent, but currently publishers follow a multiplicity of diverse business models, each of which responds to a different evaluation of the respective product qualities and the marketing potential in the digital market as well as vis-à-vis the print product. In addition, due to the rapidity with which technology is developing and the still unstable development of the market, publishers tend to adjust their pricing and access policies at much shorter intervals than they usually do for their print products.

72. - But it has likewise been pointed out in sub-part 1.2 that a number of business issues seems to have been solved by now through what may be described as current practices.⁵² The most fundamental of these practices seems to be the general assumption that the relationship between libraries and publishers with respect to electronic access to journals should be based on licensing, and that one appropriate way of licensing is by way of libraries' and publishers' consortia. Furthermore, many parties agree that certain uses should not be in dispute. These uses mainly include unrestricted access for authorised users irrespective of where they are located. In general, access is provided for walk-in users on site. Licences often also permit the "fair use" of all information for non-commercial, educational, instructional, and scientific purposes by authorised users, including unlimited viewing, downloading and printing, provided such use is made in agreement with the provisions in current copyright law. University libraries can make print or fax copies generated from the data delivered by the publishers for non-commercial interlibrary lending purposes within the fair use guidelines. In general, the licensed content is accessible from all currently supported computer platforms and networked

⁵² See the "Evaluation of The Dutch / German Licensing Principles of October 1997: the Current State of Affairs" by *Hans Geleijnse*, reproduced in full text in Annex VI of this report.

environments. In all this, the anonymity of individual users and the confidentiality of their searches is protected. Finally, monitoring the use and gathering relevant management information is a standard issue in most licence agreements, and this information gained is shared between libraries and publishers.

73. - Of course, there are problems and issues that are still in need of further discussion.⁵³ First, the standard licensing principles just described may not be adhered to by all players involved. Second, to date some important issues still wait to be solved. Thus, to cite one example, if at all, university libraries are allowed to make e-mail copies of the electronic files delivered by the publishers for non-commercial electronic document delivery only on an experimental basis. Moreover, the policy of publishers with respect to specific demands of the library community on local integration varies considerably. The same is true regarding the control over, and dissemination of bibliographic data and abstracts of the journals, which some publishers make accessible to libraries, while others want to use them for their own portal or gateway to information. Furthermore, at present, the issue of digital archiving does not seem to be solved amongst publishers, libraries and national archives. And, finally, it is hardly surprising that in practice differences in the publishers' policies with respect to pricing and price increases of journals and with respect to the fees for electronic access to journals are still significant.

74. - Before getting back to these business models and - hopefully - formulating some compromise principles which all parties involved could agree upon regarding licensing principles in the area of dissemination, access, storage and preservation of academic and scientific journals in electronic form, the legal consequences of these different business models shall briefly be evaluated.

⁵³ For detail see also the "Evaluation of The Dutch / German Licensing Principles of October 1997: the Current State of Affairs", op.cit., reproduced in Annex VI of this report.

3.2 Legal evaluation of business models

75. - An evaluation of the legal consequences of these different business models can focus on the use acts involved in existing business models, as well as on the legal consequences of each of the business models themselves.

Use acts involved in existing business models

76. - As far as the legal analysis of the use acts involved in existing business models is concerned, like in subparts 2.1 (analysis of the international legal framework) and 2.2 (analysis of pending EU legislation), due to prior TECUP work⁵⁴ discussion can be limited to recalling the basic results of legal issues involved in the different business models. In addition, some generalisation seems to be called for in view of the multiplicity of different business models.

77. - Besides potential moral rights infringement, which, however, does not play a major role if digitization is carried out in a proper way, the following acts undertaken by libraries within the respective business models qualify as acts subject to copyright:

— Retro-digitization

78. - Regarding retro-digitization, first the act of retro-digitization itself invariably⁵⁵ amounts to a reproduction within the meaning of the exclusive reproduction right (unless the copy at issue would be only of a transient nature⁵⁶). If the digitized material is

⁵⁴ See Giavarra, Preliminary Analysis of legal aspects in current business models, TECUP-deliverable 4.2, February 2000, pp. 21 et seq.

⁵⁵ See also Giavarra, op.cit.: “Digitization without some kind of storage seems to be a contradiction in terms”.

⁵⁶ See Art. 5 (1) of the proposed EU Directive on copyright in the information society, OJ EU No. C 344 of 1 December 2000, p. 1: “Temporary acts of reproduction ..., which are transient or inciden-

then uploaded onto a server, this will be a second copy relevant to copyright. Furthermore, storing digitized copies on a publicly available server with the aim to make them accessible for, and transmit them to, future users constitutes an act of making available protected works.⁵⁷ Although the International Conventions leave it up to the Member States to define what group of people constitutes a “public” - and hence to which group of people a work must be made available -, most national laws would not seem to require that the public which has access to retro-digitized material stored on a server be total mankind, and not even the public at large. Rather, under most national standards a potentially open group, and eventually even a closed group of some size would constitute a “public” for the purposes of the making available right.⁵⁸ Consequently, making protected material available on the

tal, which are an integral and essential part of a technological process, whose sole purpose is to enable (a) a transmission in a network between third parties by an intermediary or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance”, shall be exempted from the reproduction right”.

⁵⁷ See above, subparts 2.1 and 2.2.

⁵⁸ Of course, no case law and no authoritative interpretation exists so far regarding the new making available right. However, in view of the fact that according to the WCT the new making available right forms part of the general right of communication to the public, it may be inferred that the courts will tend to apply the standard of what constitutes a “public” regarding the right to public communication. This is especially true in countries such as the Nordic countries which already at present contain a broad public communication right which expressly includes the making available of protected subject matter to the public. - For the lack of harmonization regarding the notion of the “public” under the EU directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (O.J. EC No. L 248 of 6 October 1993, p. 15, see ECJ, Case No. C-293/98 of 3 February 2000, Egeda ./ Hoasa, OJ No. C 102 of 8 April 2000, p. 4.

internet would certainly qualify as a communication to the public, but in some countries making protected material available in a closed-user extranet and even in an intranet of some size might also qualify.

79. - Hence, it follows that retro-digitization will be subject to the authorisation of the holders of the rights in the material retro-digitized, provided the activity of retro-digitization is not exempt by way of a statutory limitation. However, although such an exception may well apply in particular individual cases, in all likelihood it will not cover the total amount of acts which libraries usually undertake in making retro-digitized material available to the scientific and academic community.

80. - Another question is to what extent acts undertaken by the user are subject to copyright. If the user downloads and stores a digital data set representing a protected work, or makes a paper printout thereof, this activity certainly amounts to a reproduction. However, in many cases such a reproduction will be covered by some sort of personal use exception, provided the user has legally obtained access to the work stored in digital form. Another question is whether already browsing or viewing the work on the end user's terminal constitutes a separate act subject to copyright. However, if the user browses or views properly authorised material, the answer to this question does not matter, since either there is no infringement of copyright (even if the - albeit temporary - reproduction within the user's computer amounts to a copyright relevant reproduction), because the act of browsing or viewing is licensed, or there is a personal use exception. Only in cases of viewing or browsing illegally posted material might the finding of a reproduction help to establish jurisdiction in the forum of the user (and not only in the forum of the person who made the illegal material available on a server outside of the user's jurisdiction).

— Business models involving born digital material

81. - Although from both a technical and an economic point of view, retro-digitized and born digital material may well be distinguished, in legal terms the only difference between the two is that the act of retro-digitization does in itself amount to an act subject to copyright. However, regarding the activities of dissemination, providing access and storing, the original format of the material in question (print or electronic) is of no importance to the copyright relevance of the acts undertaken. Hence, if born digital material is uploaded on to a server, this will be an act of reproduction relevant to copyright. In addition, storing digital copies on a publicly available server with the intention to make them accessible for, and transmit them to, future users constitutes an act of making available protected works.

82. - From this it follows that offering born digital material in the way just described will invariably be subject to the authorisation of the rightholders, provided it does not benefit from a statutory limitation. However, although such an exception may well apply in particular single cases, again in all likelihood it will not cover the total amount of acts which libraries usually undertake in making born digital material available to the scientific and academic community.

— Self-publishing

83. - The analysis is, however, different regarding scientific self-publishing. First of all, the acts necessary in order to self-publish an article are typically undertaken by the original author, and hence not in violation of someone else's copyright. Second, although uploading an article on to a preprint server for transmission and downloading by subsequent readers would qualify as an act of communicating the article to the public (even if it is a limited public of only a few academic colleagues within a particular field of research), one might argue that sending the article via personal e-mail to the same academic friends does not constitute an act subject to copyright.

84. - Regarding downloading by end users, in all likelihood a personal use exception will apply, since the copies stored on the pre-print server have been uploaded by the original rightholder and are hence legitimate copies. Even if this were not the case under the national law of a particular EU Member State, one might assume that downloading an article which has been uploaded by its author to a pre-print server is done with the consent of the author of such an article, and hence does not violate the author's exclusive copyright.

85. - Of course, whenever a third party, such as, e.g. a publisher who wants to add value to a particular selection of the articles stored on the pre-print server⁵⁹ or a library, downloads and redistributes to the public copyrighted material initially stored on a pre-print server, the acts of reproduction and making the protected material available to the public are acts subject to copyright, and hence in need of authorisation by the respective rightholders, provided no statutory exception applies.

Copyright relevance of different business models

86. - It may surprise the non-lawyer that the differences in the business models described above have hardly any bearing on the outcome of the legal analysis of these different business models. A certain, albeit limited, exception is the variable of "granularity", since as a rule, abstracts do not violate the copyright in the original article, at least as long as reading the abstract is not a substitute for the reading of the original article. Furthermore, the copyright relevance of who performs the task of hosting protected material varies depending on whether or not the material is hosted by the rightholder, such as typically the original publisher.

⁵⁹ Already the selection process, which in practice is often coupled with peer-reviewing or another activity of ascertaining quality, may be understood as a value-adding activity.

87. - The reason why different business models are to a large extent irrelevant to the copyright analysis is that ideally copyright law should be, and hence often is intended to be, neutral towards different business models. Rather, instead of business models, copyright focuses on acts of use of protected material. Indeed, the law should not prejudice against one technical and/or economical way of doing business, or prefer it over another. At least, this holds true provided that no other higher ranking interest, such as, e.g., protecting the author as the weaker party to a copyright transaction, becomes involved. Thus, in view of the general principle of freedom of contract and of contractual price negotiation, the law usually does not prescribe a fixed price for a particular copyright transaction, and exceptions are only found where the legislature intends to protect one of the parties concerned, or facilitate the payment transaction.⁶⁰ From this it follows that the different pricing models have no bearing on the copyright analysis of the respective business models.

88. - As a result, it may be noted that all business models require certain acts of reproduction and making available of protected works which under a broad reproduction right and a broad making available right require the authors' and/or rightholders' consent, or at least give rise to a claim for remuneration.

89. - Consequently, the question of a balanced approach to the question at issue (i.e. what the relationship between authors and publishers on the one hand, and libraries on the other hand should look like in order to best meet the needs of the end user) is less one of the copyright relevance of the acts involved, but rather, one of fair and reasonable licensing practices. This includes individual

⁶⁰ An example for the protective approach is mandatory proportionate remuneration to be paid to the author for each single exploitation as prescribed by Art. L. 131-4 (1) of the French Code de la propriété intellectuelle. An example for the fixation of a price by law in order to facilitate transactions may be seen in the levy for reprography and private copying under §§ 53 et seq. of the German Copyright Act.

licensing, centralised licensing (e.g., by way of, but not limited to consortia, since other existing structures, such as collecting societies, might perform a similar task) and traditional collective licensing alike.

90. - Of course, answering the question which licensing practices are fair and reasonable in view of, or in spite of, diverging interests of the players involved, is hardly a legal question any more. In the absence of a statutory licence and doctrines such as copyright misuse or antitrust violations by way of exercising a dominant market position or by other anti-competitive licensing provisions, licensing is an activity not mandated for, and only marginally controlled, by law.

3.3 Towards a definition of “fair” and “reasonable” licensing practices

91. - In view of the situation described in subpart 3.2 (i.e. that both existing and future copyright legislation in the EU member states will only allow for a copyright exception regarding some, but not all activities which libraries intend to exercise with regard to protected material in electronic form), the question remains as to what a fair and reasonable division of roles of the players involved should look like. Obviously, the problem with this question is, where to obtain the criteria, in order to craft a proper answer? And are these criteria legal ones?

92. - Two approaches seem possible. Whereas the first approach would try to take generally agreed upon business principles as its starting point, the second would in turn start from the legal rule of the so-called three-step-test. Of course, both approaches do not contradict, but rather complement each other. Although both approaches would aim at finding a consensus amongst all participants involved, the criteria according to which this consensus is shaped are somewhat different, or at least have a somewhat different starting point.

Business model-oriented general principles

93. - The first of the two approaches just mentioned would start from fundamental principles which all players involved could easily agree upon, in the light of experiences gained with the different business models presently found in the market place.

94. - Of course, in this respect it has to be kept in mind that this Report can by no means relieve the parties involved of the burden of finding such a consensus amongst themselves. In spite of the information input provided by all the parties concerned to the Rapporteur, any such consensus finding activity requires considerably more practical expertise than that on which the present Report is based. Rather, the present Report can provide the parties with some guidelines and arguments which might prove to be useful in the process of finding and formulating such a consensus.

95. - The first of such guidelines aims at the procedural aspect of the consensus finding activity: In order to find such principles, the parties concerned should start with those issues which are not in dispute, and then try in mutual discussions to find additional principles which so far they had not considered susceptible to agreement. Once such principles have been formulated, one will move forward to a less abstract level and try to find a common understanding on this more detailed level. The process is then repeated until at a certain level of further detail the participants are no longer able to agree. The consensus points are then set out in writing, and similarly, a list of points not agreed upon is established. At least this approach clarifies where each of the players stands and how far the participants are willing and able to act together.

96. - As far as the content of a possible consensus is concerned, it should be noted that any principle formulated stays well within the possibilities provided for by the legal framework. The reason is that the exclusive rights granted by law to authors and rightholders do not prejudice a particular licensing practice. Rather, several approaches towards licensing are allowed, provided they do not amount to a violation of bonos mores or antitrust rules. Further-

more, although the overall importance of copyright is increasing in the digital and networked environment, its importance in delineating a “fair” and “reasonable” division of roles of the parties involved are likely to decrease. Having this in mind, such fundamental principles might be:

- ◆ the common belief of all players involved that - notwithstanding convergence because of digital and networking technology, and notwithstanding the problems this may cause to individual entities - each of the players will as such continue to assume a certain role when it comes to producing, disseminating, granting access to and preserving material;
- ◆ the recognition that while the primary role of creating copyrighted works rests with the authors, and while it is the task of publishers to produce and distribute these works in a marketable form, academic libraries - pooling the demand and the financial resources of corporate bodies such as universities - build up collections and research tools, which they keep up to date, preserve and make available to members of the scientific community. In addition, libraries keep and preserve books which the publisher no longer holds in stock;
- ◆ the conviction that the division of roles in producing, disseminating and storing protected works should be such that an optimum number of optimum quality works is produced, disseminated and kept;
- ◆ that in order to achieve this, co-operation between authors, publishers, collecting societies, intermediaries, libraries and end users will have to be strengthened, especially in view of facilitating access to electronic content by promoting cost effective use and encouraging simple and workable solutions, including the definition of common standards;
- ◆ that it will be important to avoid a gap between “information haves” and “information have-nots”, especially with regard to research and knowledge;

- ◆ that rights ownership with its far-reaching exclusive rights does not necessarily lead to an exploitation of protected material by rightholders alone. That, rather, there is a legitimate need for a division of tasks regarding copyrighted material, since otherwise optimal dissemination and optimal access cannot be ensured;
- ◆ that consequently, as a rule, protected material should be licensed to libraries, provided the scope of access and access control is agreed upon, in order to maintain the high level of access to information which exists in the print world (it is in this respect that one might speak of “free” access, i.e. “free” meaning unhindered, and not necessarily cost-free);
- ◆ that, on the other hand, optimal access presupposes optimal production which means that the exploitation interests of rightholders cannot be impaired by licensing to an extent that publishers could no longer sufficiently invest in the production of new material.

97. - Going into further detail, one might probably

- ◆ be able to agree to recognise the role which libraries already assume in the electronic environment as a legitimate one, especially such as regards retro-digitising, providing access and preserving which cannot in all instances be performed by individual rightholders;
- ◆ differentiate according to - at least some of - the variables which underlie the different business models, such as different
 - library activities (in the digital and networked context, libraries use digital technology in order to fulfil traditional tasks in a state-of-the art way, such as, e.g., archiving; they use technology in order to perform traditional tasks in a more efficient way, such as making works available online instead of lending out physical copies; and they provide value-added services to the digital product(s) offered by the publisher, such as, e.g., cataloguing, hyperlinking)

- use intensities (such as expressed by the different business models), and
- the organisation of appropriate rights management, which includes all forms of individual, centralised and collective licensing. In particular, collective licensing seems to be called for whenever the individual management of rights by the rightholders concerned is impracticable, and where collecting societies (reproduction rights organisations, RROs) are able to license libraries, or groups of libraries, as a separate licensing category. In addition, as the practice in some of the EU member states has demonstrated, collecting societies may be able to distinguish between traditional blanket licensing⁶¹ and more individualised forms of transactional licensing.⁶² Of course, up until now, most RROs are not yet in a position to offer digital licensing services to libraries and other users because they are not yet mandated by all relevant rightholders, especially larger publishers, to do so. However some RROs already offer such services,⁶³ and by offering such services on behalf of the authors of the works concerned, as well as the publishers, RROs are in a position to solve the problem created by the fact that ownership of

⁶¹ With blanket licensing the user is authorised to copy within broad defined limits (excluding for example multiple copying or the copying of substantially the whole of a book or journal, or copying for commercial purposes). If the licensed use is limited to a particular location, such as the library premises the licence can be termed a “site licence”.

⁶² With transactional licensing specific copying transactions are individually authorised by the RRO (for example CLA’s CLARCS service).

⁶³ Examples include: CCC in the USA and CANCOPY in Canada license the creation of “electronic reserves” by university libraries; CAL in Australia and KOPIOSTO in Finland are involved in projects involving the digital supply of journal articles to libraries and others; VG WORT in Germany and KOPINOR in Norway license the creation and use of Intranets.

electronic rights may be uncertain and their individual clearance impracticable.

98. - Finally,

- ◆ it might be possible to agree that certain uses do not threaten the legitimate exploitation interests of rightholders, such as, e.g., walk-in use on-site and use restricted to authorised users irrespective of where they are located. Moreover, it might be agreed upon that the use of information for non-commercial, educational and scientific purposes by authorised users, including viewing, downloading and printing should be allowed, provided these acts are undertaken in accordance with copyright law. This might also include the making of print or fax copies by libraries, generated from the data delivered by publishers for non-commercial, inter-library document supply purposes. Agreements to this effect would also include a common understanding which technical standards should be used in order to guarantee and control access to protected material stored, and made available by libraries;
- ◆ likewise, certain preferences regarding pricing models might be agreed upon (e.g., heavily used material might be licensed using the subscription model, whereas the transactional model might be preferable for incidental or low use material, and in order to maintain flexibility, granularity might be fixed at a minimum purchasable unit, so that different levels of usage are possible), and due attention should be given to the present transition from print to digital material;
- ◆ in addition, one might proceed to define the conditions under which libraries could and should exercise certain functions, which - under other conditions - rightholders might be willing to assume (activities, e.g. such as retro-digitization, running a server for providing access, providing a common portal as platform for access by users, preserving and archiving). At any rate, close co-operation seems to be called for in this respect, in order to guarantee permanent access to licensed material; and

- ◆ finally, whilst the gathering of relevant management information is a necessity, the anonymity of individual users and the confidentiality of their searches must be protected, and the integrity and authenticity of the material which is made accessible in electronic form must be preserved.

Legally oriented approach

99. - The second approach, which might be seen as supporting the first one, would take the legal rather than the business model background as its starting point.

100. - The idea is to use the so-called three-step test and especially its decisive second and third criteria, according to which any act undertaken may “not conflict with a normal exploitation of the work”, and “not unreasonably prejudice the legitimate interests of the author.” Of course, as such, the three-step test merely describes the outer limits of exceptions which national legislation may adopt under the law of the International Conventions, whereas the question concerned here focuses on fair and reasonable licensing. However, it is the opinion of this Report that the test might likewise be used in order to define what may be considered a “fair” and “reasonable” distribution of roles, and hence “fair” and “reasonable” licensing practices. The reason is that what the three-step test permits Member States of the International Conventions totally to exempt from copyright, cannot by way of the definition of the same test be regarded as “unfair” and “unreasonable” regarding the interests of rightholders. Moreover, Member States are not obliged to grant exceptions, and in many cases they stay below the maximum level of exceptions allowed for by the three-step test. Hence, in these cases the “outer limit” of possible exceptions as defined by the three-step test is situated where usually licensing takes place.

101. - Of course, the main difficulty with the three-step test is how to define the rather vague notions on which the test is based.

102. - The decisive factor of the second criterion is the “normal” exploitation of a given protected work. But what has to be re-

garded as “normal” in an electronic environment?⁶⁴ To simply say that any exploitation possible with regard to protected material in print and electronic form constitutes the “normal” exploitation would mean that by definition *no* digital exploitation could be privileged. It is obvious that the International Conventions do not embrace such a view, since this would make any limitation illegal, whereas the three-step test just describes the limits of possible limitations.⁶⁵ Rather, the exclusive rights granted by national law need not contain a legal guarantee to totally control the exploitation of a given work, nor could such a result be regarded fair and reasonable. Hence, “normal” exploitation must mean something different. On the one hand, it seems reasonable to assume that a use which is copyright-free by way of an exception does not generally infringe upon the normal exploitation of the protected work, unless an already existing exploitation by the rightholder is

⁶⁴ Similar interpretation problems poses the decisive factors of the third criterion, i.e. the “legitimate” interests of the author, which may “not unreasonably” be prejudiced. However, it has some credibility that what makes sense in a distributed system cannot be as such unfair and unreasonably prejudice the rightholders interests. Of course, at first sight this presupposes that the individual rightholders interest which is protected by law, is not disassociated from the common interest in a fair and reasonable distribution of tasks in the field of providing access to, and preserving, protected material. However, upon closer inspection it becomes apparent that the interest of the individual rightholder and the common interest in a fair and reasonable distribution of tasks in the field of providing access to, and preserving, protected material are not at all disassociated, because as a rule the rightholder also benefits from a distribution of roles in this field.

⁶⁵ Concerning musical rights, the Report of the WTO Dispute Panel, Doc. WT/DS160/R of 15 June 2000 arrives at the same conclusion: “If “normal” exploitation were equated with full use of all exclusive rights conferred by copyrights, the exception clause of Article 13 would be left devoid of meaning. Therefore, “normal” exploitation clearly means something less than full use of an exclusive right.”

impaired in its normal course.⁶⁶ On the other hand, the main problem is how to treat mere exploitation expectancies, especially those which are just about to open up because of the advent of new technology. Here, a distinction is possible between those new exploitations which the rightholder has already embarked on himself and those which are only theoretically within his reach due to the extended possibilities of exercising his exclusive right.

103. - It is therefore proposed to make use of this distinction as one of the guiding factors in deciding which tasks can be performed by libraries, i.e. depending on whether a particular exploitation activity is already undertaken, or is likely to be undertaken in the near future, by the rightholder itself or not.⁶⁷

⁶⁶ This view is in a certain way supported by the fact that the burden of demonstrating the impairment of a normal exploitation is upon the rightholder, or the country which claims that a certain national legislation exceeds the limits of legitimate exceptions under its international law obligations.

⁶⁷ It is the view of this Report that this conclusion does not contradict, but rather further develop the finding of the Panel Report WT/DS160/R: "... in our view, not every use of a work, which in principle is covered by the scope of exclusive rights and involves commercial gain, necessarily conflicts with a normal exploitation of that work. If this were the case, hardly any exception or limitation could pass the test of the second condition and Article 13 might be left devoid of meaning, because normal exploitation would be equated with full use of exclusive rights. We believe that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e., the copyright or rather the whole bundle of exclusive rights conferred by the ownership of the copyright), if uses, that in principle are covered by that right but exempted under the exception or limitation, *enter into economic competition* with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains." (emphasis added).

Part 4: The Result – *Memorandum of Understanding*

104. - As already stated above, the present Report cannot decide in lieu of the players themselves which principles can be agreed upon, and which solution should be given preference in view of criteria such as public policy, legal policy or financing considerations. Rather, the aim of the Report was to create the basis for a better understanding of the legal and policy issues involved.

105. - In line with this, the Report has served as the basis for a discussion process which took place both within and outside of the TECUP Strategy Advisory Group. These discussions resulted in the formulation of the following text of a “Memorandum of Understanding” which forms the consensus amongst the players involved towards the end of the present TECUP project. Although it does not technically form part of the Report itself, the Memorandum of Understanding formulated on the basis of this Report shall nevertheless be reproduced at the end of this Report:

106. - Draft Memorandum of Understanding

It is the aim of the Memorandum to strengthen co-operation between authors, publishers, collecting societies, other intermediaries, libraries and end users particularly in the field of scientific, scholarly and academic material in order to:

- facilitate access to electronic content;
- promote cost-effective use by encouraging simple and workable solutions.

Co-operation and common standards between the different players in the information chain will have an increasingly important role in the production, dissemination, access and preservation of material. In addition, new players will enter the field.

General principles

- ◆ The future division of roles in producing, disseminating and storing material should be such that quality works continue to be made available.
- ◆ The primary role of creating copyright works rests with authors; it is the task of publishers to commission, edit, produce, distribute and thus add value to these works. Libraries also have an important function in pooling demand and financial resources of bodies such as universities, research organisations, etc. They aggregate resources and collections, which they keep up-to-date and make available to the community. In addition, libraries preserve material which the publisher no longer holds in stock.
- ◆ Electronic uses of material should be licensed by rightholders and/or intermediaries to libraries, with due regard to copyright and other relevant laws, in order to maintain and enhance existing levels of access to information.
- ◆ The integrity and authenticity of the work must be preserved.
- ◆ The anonymity of individual users and the confidentiality of their searches must be protected.

Current licensing practice

During the last five years, there has been a huge development in the field of electronic publishing and licensing. The following elements have become generally accepted practice in licence agreements in Europe.

In a typical licence agreement, access is provided to

- ◆ authorised users irrespective of where they are located;
- ◆ walk-in users on-site.

In addition licences often permit

- ◆ the use of all information for non-commercial, educational, instructional, and scientific purposes by authorised users, including unlimited viewing, downloading and printing;
- ◆ libraries to make print or fax copies generated from the data delivered by publishers for non-commercial, inter-library document supply purposes;

Recommendations

- ◆ Licensed content should be platform independent and should conform to generally agreed standards.
- ◆ Publishers should deliver standardised metadata for content.
- ◆ Within a secure network, seamless access should be provided. Individual password access should be avoided where possible.
- ◆ Continuing access to licensed material is highly desirable.
- ◆ Heavily used material should normally be licensed using the subscription model, whereas the transactional model should be available for incidental or low-use material.
- ◆ Granularity should be at a minimum purchasable unit, so that different levels of usage are possible.
- ◆ Licence agreements should contain sufficient indemnities and warranties against copyright infringement.
- ◆ Licences should specify the country of governing law and courts.

Special issues

- ◆ Digitization of printed material will be a special field of cooperation between the players, including especially reproduction rights organisations.

- ◆ There is a need for reasonable business models during the transition period from print to digital material.

Outstanding issues for future co-operation

- ◆ Electronic interlibrary document supply
- ◆ Cross searching and cross linking
- ◆ Rights management systems
- ◆ Continuing access to digital material
- ◆ Long-term archiving
- ◆ Development of new business models
- ◆ Taxation of electronic information

Karlsruhe/Berlin, 1 December 2000

ANNEXES

Annex I: IFRRO - International Group of Scientific, Technical and Medical Publishers (STM) Joint Statement on The Digitization of Printed STM Materials, 24 January 1998

Official representatives of the International Federation of Reproduction Rights Organisations (IFRRO) and of the International Association of Scientific Technical and Medical Publishers (STM) met in Tokyo, 24 January 1998 to discuss the role of national RROs in the granting of licences for digitising, storage and providing access to copyright printed materials by legitimate users. The Statement covers only copyright printed materials from books and periodicals, in or out of print. It is not intended to be specific about the process of digitization, and includes optical character recognition (OCR) and digital page formats.

The following statement was agreed:

1. STM and IFRRO recognise the increasing demand of legitimate users to have access to copyright printed material in suitable digital format, and in certain circumstances to digitize and store printed materials.
2. STM and IFRRO reaffirm their previous Joint Statement on Electronic Storage of STM Material (Sept. 1992) that the primary publishing process of STM material includes digital storage.
3. STM and IFRRO recognise that in certain circumstances, legitimate users wish to make these digitally stored materials available within closed networks to authorised persons.

4. STM and IFRRO recognise the desirability of making the procedures for acquiring digitization, storage and closed network rights as simple as possible.
5. STM recognises that national RROs could provide a non-exclusive digitization rights clearance mechanism.
6. IFRRO recognises that rights holders can reserve to themselves exclusively the role of managing digitization rights clearance. STM and IFRRO support the principle of both direct and centralised digitization licensing, but recognise that centralised management of rights clearance will in many cases be preferable.
7. STM and IFRRO agree that authorisation by rights holders or their authorised representatives should always be a necessary condition for electronic storage of printed works and for retrieval and distribution in whatever form.
8. STM and IFRRO agree that unauthorised electronic use represents substantially greater commercial risk to rights holders than the present damage from unauthorised photocopying.
9. IFRRO recognises that the rights holder should be entirely free to determine the fee, including the right to set by type of content, type of user, or any other consideration deemed appropriate by the rights holder.
10. IFRRO recognises that a rights holder may wish to license certain sectors directly whilst granting licensing rights to the RRO for all other sectors.
11. STM will endeavour to persuade its rights holder members of the desirability of simplified and transparent digitization pricing structures.
12. Unless prohibited by the rights holder, RROs may grant digitization licences even when the printed material is

already available in other digital formats and databases.

13. STM and IFRRO note that moral rights of authors and the contractual and customary rights and interests of authors and publishers must be protected. The contributions of authors and publishers to the authenticity and integrity of information, and the interest of the public in the reliability of digital information, must be appropriately safeguarded.
14. STM and IFRRO will continue to consult regularly and co-operate closely in implementing and developing these principles.

Annex II: EBLIDA/ECUP/STM joint statement on incidental digitization and storage of STM print journal articles of 7 November 1998

Representatives of the European Bureau of Library, Information and Documentation Associations (EBLIDA), the European Copyright User Platform (ECUP), and the International Association of Scientific, Technical, and Medical Publishers (STM), have held a series of meetings beginning in December 1997, aimed at discussing possible areas of consensus with respect to electronic usage by libraries of print journals. This joint statement results from those discussions.

The principles set out below are not intended to replace specifically negotiated licenses between individual publishers and individual libraries and other organizations. These principles have been developed in the context of scientific, technical and medical journal publishing, and different principles may apply to different types of published material and journals. However, the participants involved in the discussions hope that these principles on "digital archiving" for STM journals will be accepted as being useful, by as many organizations and interested parties as possible.

Publishers that accept the principles stated herein will send a letter to STM accepting the statement and indicating any exceptions to their "Digitisable Material" (as defined below). This information will appear on the STM Web site. Only the works of those publishers who have sent such authorisation may be digitized under the terms of this statement.

It should be borne in mind that this joint statement has an interim quality because of the nature of the transition from print media to electronic media and that other business models including the traditional subscription model are still useful in the electronic environment.

The Statement is as follows:

A. Preamble

1. The participants recognize that common tasks include increasing the availability of articles from STM print journals and raising the awareness of their availability, as well as facilitating the digitization of individual articles from print journals within a library's owned collection of items not currently available in electronic formats.
2. The participants recognize that only by cooperation between libraries and publishers will the digitization of non-current print journals be affordable and available for education and research in years to come.
3. The participants mutually affirm their respect for copyright.

B. Introduction

1. Scientific information continues to have reference value over time. The digitization of such information serves important societal, cultural, scientific and technological development goals, including the preservation of scientific effort.
2. The use of digitization procedures (i.e. scanning and storing) by libraries is a particularly effective means of archiving print scientific information. Archiving also involves the maintenance of the integrity of the original work, including the indication of its source(s), and any associated copyright management information.

C. Incidental digitization

1. The participants agree that a particular library may scan, store and index (including indexing by using optical character recognition technology) "Non-Current Material" (as defined below) and, in some cases, "Current Material" (as defined below) previously purchased by that library, provided that: a) the relevant publisher has signed this statement; b) the library operates under the terms and conditions outlined in this statement; c) the material to be included has been done so on an "Incidental Basis" (as defined below); d) any exceptions noted by the relevant publisher for particular journals or individual articles are honored by the library; and e) the terms and conditions of usage as stated below in C.2 are adhered to.
2. The resulting digital material may be stored on a "Permanent Basis" (as defined below), and may be displayed by the library only as page images. "Authorised Users" (as defined below) are able to download or reproduce individual articles from the resulting archive of material scanned on an Incidental Basis for personal, educational or research use. Users other than Authorised Users may also view such material on the library's premises if normally permitted access by the library but may only reproduce such material in print format for personal, educational or research use.
3. Participating publishers will indicate through their exceptions list which journals might require further permissions from other parties (for example, a scientific society which might have an ownership interest in a journal, or a journal in which the publisher's rights with respect to backlist issues may be uncertain), and will also indicate whether the publisher will request such permissions upon request by the library or whether the

publisher would prefer instead for the library to seek the permission directly.

4. Libraries must inform users of the terms and conditions of this statement.

D. Other types of uses and licenses

Projects involving digitization other than on an Incidental Basis as described in Section C above as well as other types of use of any resulting digital archives (such as for article delivery or interlibrary loan purposes), will require negotiation between the library and the publisher or may be addressed in future discussions as noted below in Section F. Any interest by libraries in digitising works other than Digitisable Material would also be subject to specific negotiation.

E. Participation and Withdrawal

Participating publishers and exceptions to their Digitisable Material will be posted on the STM Web site (<http://www.stm-assoc.org>) and the EBLIDA Web site <http://www.eblida.org>. The participants acknowledge that participating publishers may at some point cease participating, in whole or in part, in this program, in which event they shall notify STM which will in turn place this information on the STM Web site and inform EBLIDA which will in turn place this information on its Web site. The libraries operating under the terms of this statement will review the STM or EBLIDA Web sites at least once every quarter for such information, and will cease or limit (as relevant) further digitization of material from a publisher giving such notice.

F. Future cooperation

The participants will also work closely together to discuss and, where appropriate, implement new exploitation and cooperation methods, including:

digitization of entire volumes or sets of particular journals (Project Digitization);

the introduction of standards such as the Digital Object Identifier (the "DOI");

document delivery/interlibrary resource sharing; and
archiving and preservation of digital content.

G. Definitions

1. "Digitisable Material" includes Non-Current Material (as defined below) published by those publishers posted on the STM Web site as accepting this statement, and, in some cases, Current Material (as defined below) published by those publishers who have authorised incidental digitization from Current Material. Digitisable Material does not include either Current or Non-Current Material that have been listed as exceptions on the STM or EBLIDA Web sites.
2. "Non-current Material" will be understood to mean articles from print journals published prior to 1995 that are not listed as exceptions on the STM Web site.
3. "Current Material" will be articles from print journals published in 1995 and thereafter for which electronic versions are not available for sale or under license, either directly or indirectly (from subcontractors, licensees, or local reprographic rights organizations).

4. "Participants" will be understood to mean individual publishers accepting the terms of this statement (or with any exceptions as may be noted by such publishers) and individual libraries that intend to rely on the benefits provided by this statement. Participants may also be understood to mean if the context so indicates the organizations involved in drafting this statement.
5. "Incidental Basis" will be understood to mean the digitization of Digitisable Material consisting of individual articles from journals (but not substantially the whole of a journal issue) (i) on a non-routine basis and (ii) in response to requests for particular articles (but excluding course packs).
6. "Authorised Users" means:
 - i. – For academic institutions: Faculty members (including temporary or exchange faculty for the duration of their assignment); graduate and undergraduate students; staff members; and contractors
 - ii. – For other organizations, companies and governmental institutions: All staff routinely employed by the institution and contractors
7. "Permanent Basis" means that even if a participating publisher terminates a license or withdraws from participating in the uses contemplated in this Statement the library may continue to store and provide access to any material previously digitized in accordance with this Statement to the point of such withdrawal. It also means the digitization in a new technological format of material or information already in digital format (for example to ensure an archival record is kept even in the face of technological change).

Annex III : ECUP+, 'Position on User Rights in Electronic Publications', of 15 December 1998

I. Introduction

This Position Paper is a result of the discussions by the Steering Group of the European Copyright User Platform (ECUP) regarding the user rights in electronic copyright. The European Copyright User Platform consists of the 39 Library Associations which are full members of the European Bureau of Library, Information and Documentation Associations (EBLIDA).

The purpose of this document is to outline and justify the lawful uses of copyrighted works by individuals and libraries in an electronic environment. It is intended to open the discussion with copyright owners and serve as a reference document for information professionals.

A balance should be preserved

Each year, libraries in Europe provide a range of services to millions of researchers, students and members of the public. These services are performed in conformity with the national copyright laws. The new technologies have made it possible to provide these services even more efficiently. Libraries recognise that the new technologies and especially the possibility to copy copyrighted material with such an ease, poses uncertainties for an economic return to the copyright owners.

The uncontrollability of electronic information is a fear which libraries share with the copyright owners. However, this should not mean that the reaction to these uncertainties lead to an overly restricted use of electronic information by users and information professionals. It should not be forgotten

that libraries provide an uniquely controllable environment through which publishers can make their products available to the public at large.

The nightmare future for society is one in which nothing can be looked at, read, used or copied without permission or further payments. In an evolving electronic environment this could mean that information resources are purchased and accessible only to members of the public who are able to pay. The public information systems that libraries have developed would be replaced by commercial information vendors and a diminished scope of public rights would lead to an increasingly polarised society of information have's and have-not's.

Since the last century carefully constructed copyright guidelines and practices have emerged for the print environment to ensure a balance between the rights of the users and the rights of the rights owners in copyrighted material. This balance should remain in the digital environment. As more information becomes available only in electronic formats, legitimate practices in using copyrighted material must be protected. The benefits of new technologies should be available for all - the public, libraries and the copyright owners.

II. Principles

The following principles have served as a point of departure for drawing up this Position.

Guiding principle

The user should be allowed to access copyrighted material at the library facility and to make a copy for private use and research or educational purposes. It is the public duty of the library to provide access to copyrighted material and the library should have the possibility to do so as long as it does not infringe the three step test of Art. 9.2 Berne Convention.

In an electronic environment this means that:

Without infringing copyright, the public has a right to expect at the library facility

- to read or view publicly marketed copyrighted material;
- to copy a limited number of pages electronically or on paper for private use and research or educational purposes.

Without infringing copyright, libraries should be able

- to use electronic technologies to preserve copyrighted materials in their collections;
- to index and make one archival copy;
- to provide access to electronic copyrighted material to members of the institution, library staff and walk-in users;
- to make copies of a limited number of pages of copyrighted material for users in electronic form or in paper form.

Users and libraries have a right to expect

- that government publications and public domain material in electronic format is available without copyright restrictions;
- that the digitization of public domain material can be performed without copyright restrictions;
- that the terms of the licences for copyrighted materials are reasonable and do not restrict the principles laid down in the national copyright laws concerning the lawful activities by libraries and users (fair practices);

- that electronic copyright management systems are able to differentiate between legitimate and illegitimate usage;

Rights owners can expect

that libraries will strive to ensure:

- the implementation of technical safeguards to comply with contractual limitations;
- the notification to rights owners of infringements by users, although they cannot be held responsible for the intentions of the end-users once they have acquired the information;
- that their users are informed about the copyright restrictions in electronic information.

III. Lawful library activities concerning copyrighted material

The point of departure is by four types of library and access by six types of user. Two matrices specifying the activities related to a specific type of user and library are enclosed.

1. Definitions

Libraries: National library, University library, Public library, Other libraries (company, special, school, etc)

Internal activities by library staff: Activities necessary in order to preserve and organise information and publications in printed or electronic format efficiently.

Members of the institution on site: Members of staff employed by or otherwise accredited by the institution and students of that institution, who are permitted to access the secure network and who have been issued with a password or other authentication activities subject to negotiations. The

site has been defined to mean the premises of the institution and other such places where members work and study.

Registered walk-in users by open registration: A registered user is defined as an individual who is a member of a library or who has received a password but who is not a member of the institution.

Unregistered users: An unregistered user is defined as an individual who is not known to the library.

Remote access: Access from outside the library facility.

Allowed: Non-negotiable (fair practices) activities granted by statutory provisions.

Negotiable: Activities subject to negotiations.

Non-current: Articles and journals published prior to 1995.

Viewing: This activity includes accessing, browsing, searching, retrieving.

2. Activities

Internal activities by library staff

To meet the demands of the users, libraries should be allowed to digitize non-current material and permanently store and index that material where it cannot be obtained in electronic format from the publisher. Libraries should also be allowed to permanently store, index and make an archival copy of the electronic publications provided by the publisher.

Members of the institution on site

Libraries should be allowed to provide these users with the possibility to view full text and to copy a limited number of pages electronically or on paper of the material that the library has digitized. For the electronic product obtained from the publisher, libraries should be able to provide the members of the institution with the possibility to view full text

and copy electronically and on paper. Members of the institution are allowed to access these material from within the site. The site has been defined as the premises of the institution and other such places where members of the institution work and study. This could be their lodgings and homes.

Registered walk-in users by open registration

This user group refers to an unidentifiable group of people who become identifiable once they have registered themselves with the library and who are accessing the library electronic collection from the library facility.

National, University and Public libraries should be allowed to provide these users with the possibility to view full text electronic material and to copy a limited number of pages electronically or on paper of material, digitized by the library, or material obtained in electronic format from the publisher. The "Other libraries" category is perceived as not giving access to persons other than their staff or a defined group of people.

Unregistered walk-in users

This user group applies to a library with a public library function where people can walk in and out without identifying themselves. These libraries should be allowed to provide this user group the possibility to view full text electronic material and to copy a limited number of pages on paper of material digitized by the library and material obtained from the publisher.

Remote access by registered users

This user group refers to an unidentifiable group of people who become identifiable once they have registered themselves via a password or by signing an electronic form and who are able to access the library collection from outside the library facility.

Libraries will need to negotiate the provisions under which they are permitted to provide these users with the possibility to view full text, copy electronically or on paper of the material they digitized themselves. Royalties should be paid to the rights owners for Electronic Document Delivery services. These services could be provided on a pay-per-use basis.

Remote access by unregistered users

Libraries will not provide access to the electronic copyrighted resources to remote unregistered users.

IV. Legal arguments

The legal justification for the ECUP Position can be found in the three step test of Article 9 (2) of the Berne Convention. The Berne Convention serves as the world-wide framework for international copyright protection. All EU member states are signatories of the Berne Convention. The Berne Convention sets certain minimum standards of copyright protection. For the purpose of this paper, the important exclusive right under the Berne Convention is the right of reproduction under Article 9 (1).

“Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form.”

Article 9 (1) refers to “the reproduction of these works, in all manner and form”. According to the WIPO Guide to the Berne Convention these words are wide enough to cover all kinds of methods of reproduction, including all other processes known or yet to be discovered. The ECUP Steering Group believes that this includes the making of an electronic copy.

This reproduction right in Article 9 (1) may be limited “in certain special cases”, in accordance with Article 9 (2) of the Berne Convention.

“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author.”

The national legal provisions which permit the photocopying for private use and research or educational purposes are based on Article 9 (2). The most important part of this Article are the words “normal exploitation of a work”. The minutes of the Stockholm conference (1967) give no guidance on what “normal exploitation” is. According to the report of the Drafting Committee, the making of “a very large number of copies” for a particular purpose would conflict with the normal exploitation.

The ECUP Steering Group recognises that the term “normal exploitation of a work” must be interpreted, when in an electronic environment, as permitting a library service which does not compete with a similar service or product obtainable from the publisher. In this case, the “user rights” under copyright must apply. But, for instance, if a library wants to digitize material which is already obtainable in electronic form from the publishers, this activity conflicts with the normal exploitation of the work. It also applies in the case where the library delivers to a remote user an article which the user could have obtained from the publisher. Being in conflict with the normal exploitation of a work should not imply that libraries cannot provide the service. The library should enter into discussions with publishers about the terms and conditions under which these activities can be performed.

The value of the three step test of Article 9 (2) was confirmed in the WIPO Copyright Treaty of 1996. The Agreed Statement to Article 1 (4) made it clear that the reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form.

Moreover, the Agreed Statement to Article 10 allows for the creation of new exceptions and limitations that are appropriate in the digital network environment.

V. Conclusions

The ECUP Steering Group believes that the new technologies and its services do not require a major revision of international and national copyright law at this point in time. Existing copyright laws provide for a basis in which users, libraries and copyright owners continue to be well served. The uncertain times ahead should be used by libraries and publishers to experiment, within the controllable environment of the library, with new products and new technologies by way of pilot projects. Moreover, it is perceived as vitally important that libraries and copyrights owners continue to discuss the challenges of the electronic society.

ECUP+, 15 December 1998

Annex IV: Fair Dealing - PA/JISC guidelines for electronic publications and Inter-Library Loan - PA/JISC guidelines

Fair Dealing - PA/JISC guidelines for electronic publications

Viewing on screen.

Any incidental copying to disk involved in the viewing of part or all of an electronic publication should be considered fair dealing.

Printing onto paper.

Printing onto paper of one copy of part of an electronic publication should be considered fair dealing if done by an individual or by a librarian at the request of an individual for the purpose of research or private study.

Copying onto disk of part of an electronic publication.

Copying onto disk of part of an electronic publication for permanent local storage should be considered fair dealing if done by an individual where the disk is either a portable medium or a fixed medium accessible to only one user at a time, or if done by a librarian at the request of an individual where the disk is a portable medium.

Copying onto disk of all of an electronic publication.

Copying onto disk of all of an electronic publication is not fair dealing and the permission of the rightsholder should be sought in all cases.

Transmission to enable printing of part of an electronic publication.

Transmission by a computer network of part of an electronic publication for the purpose of printing a single copy with only such interim electronic storage as required to facilitate that printing should be considered fair dealing.

Transmission of all of an electronic publication.

Transmission by a computer network of all of an electronic publication is not fair dealing and the permission of the rightsholder should be sought in all cases.

Transmission for permanent storage of part of an electronic publication.

Transmission of part of an electronic publication by a librarian over a computer network to an individual at their request for permanent electronic storage (but not retransmission) should be considered fair dealing.

Posting on a network.

Posting of part or all of an electronic publication on a network or WWW site open to the public is not fair dealing and the permission of the rightsholder should be sought in all cases.

Inter-Library Loan - PA/JISC guidelines

Paper-to-paper

- the provision (whether by post, fax or secure intermediate electronic transmission, using Ariel or its equivalent), for purposes of research or private study, to a user at another library, of a paper copy of a paper original of a specific document.

Permitted, without payment to publishers, under existing restrictions.

Paper-to-electronic

- the provision by electronic means, to a user at another library or elsewhere, of a retained electronic copy of a paper original of a specific document.

Only permitted for copyright material under the terms of a digitization license; such licenses may legitimately prohibit or charge for such use.

Electronic-to-paper

- the provision (whether by post, fax or secure intermediate electronic transmission, using Ariel or its equivalent), to a user at another library or elsewhere, of a paper copy of an electronic original of a specific document.

Permitted without payment to publishers, under existing restrictions, provided that the recipient only receives a paper copy and the electronic file is immediately deleted.

Electronic-to-electronic

- the provision by electronic means, to a user at another library or elsewhere, of a retained electronic copy of an electronic original of a specific document.

Rather than permitting this on an "Inter-Library" basis, an alternative scheme, which benefits both libraries and publishers, is recommended.

Annex V: Business Models for e-journals
by *Lex Lefebvre (STM)*, *Maurice Long (BMA)*, *Sally Morris (ALPSP)*
and *Rollo Turner (ASA)*, of October
2000

Variables

1. How Electronic Journals are brought to the market by publishers:

Options

- Single journal
- Single-publisher subject cluster of journals (usually only applicable to the larger publishers)
- All journals from given publisher
- Multi-publisher cluster (may be made available by agreement between the publishers, or via an aggregator)
- Multi-publisher offering of all journals (as above)

NOTE

Some publishers include access to back issues as a benefit to subscribers to current volumes

There is significantly increased usage reported by projects giving access to previously non subscribed material

Subject clusters may be defined either by the publisher or by the user

2. Print/electronic combination

Options:

- Electronic subscriptions only
- Electronic combined with print subscriptions

NOTE

While some publishers are happy to supply electronic only subscriptions, others will only supply electronic subscriptions if the library also takes a paper subscription for each journal subscribed. In some of these cases, the electronic element of the subscription is deemed as "free". Other publishers impose a surcharge to paper subscribers who want access to the electronic version. Note the availability of offers which include electronic access to all the publisher's other journals, in addition to print + electronic for those which are key for that customer's collection. This is also a useful transitional basis for calculating the price of a licence.

3. Granularity

Options:

- Entire journal(s)
- Individual articles
- Abstracts
- Supplementary material

NOTE

While the basic unit of commerce between librarian and publishers is a subscription (usually annual) to the electronic journal, a growing number of publishers allow "pay per view" for non subscribing

libraries, either from the publisher directly or from or through an intermediary, including specialist document suppliers. Many publishers also allow free access to abstracts of journal articles. Many publishers also allow authors to post their own articles (or links to the published version) either publicly or on a secure intranet, and to reuse them, for example for educational use in their own institution.

4. How access to electronic journals is bought

Options:

- Directly by individual libraries
- Indirectly by individual libraries, from aggregators or subscription agents
- Directly by groups of libraries (consortia)
- Indirectly by groups of libraries (consortia) through aggregators or subscription agents

NOTE

Access to electronic journals is often sold by publishers to consortia at a discount

5. Linkage outward from electronic journals to items cited in other journals

Options:

- No linkage
- Some links in place, access charged for
- Some links in place, access free to same publisher's other journals
- Some links in place, access subject to existing subscriptions/licences

- Some links in place, access free to same intermediary's other journals (e.g. High Wire, Ovid's Core Collections)
- Some links in place, access free of charge

NOTE

While free access to cited items is clearly desirable from the customer's point of view, this has to be a commercial decision by the publishers involved. They may feel that the risk of lost revenue is too great. If access is not free, there is a pressing need for the development of a straightforward and transparent 'e-commerce' layer to support linking such as CrossRef

'Inward' linking, which may be from citations or from databases/indexes, may also come into consideration

6. Text hosting

Publishers may store their text on:

- The publisher's own or contracted server
- Single aggregator's server (e.g. ingenta, CatchWord, High Wire, Ovid, OCLC)
- Multiple aggregators' servers
- Single subscription agent's server (e.g. Faxon, EBSCO)
- Multiple subscription agents' servers
- Consortium (or national) server (e.g. NESLI, OhioLink)

7. Access

Subscribers may access the journal content through one or more of the following

- Publisher's e-journals system
- Single e-intermediary (e.g. ingenta, CatchWord, HighWire)
- Multiple e-intermediaries
- Single e-aggregator (e.g. Ovid, EBSCO)
- Multiple e-aggregators
- Single subscription agent gateway (e.g. SwetsBlackwell)
- Multiple subscription agents' gateways
- Consortium (or national) front-end (e.g. NESLI, OhioLink)
- Individual library's OPAC
- Portals (e.g. BioMedNet)
- A&I services (e.g. Web of Science, Silverlinker)
- Other

NOTE

Hosting and access (i.e. front-end) are distinct issues. Customers rarely mind where the content is actually hosted, but are very anxious to access it through the front-end of their choice.

8. Back issue access

Options:

- No access to previous years' issues
- Access to all previously subscribed issues

- Access to all back issues

NOTE

Access to back issues is sometimes free to all behind a 'moving wall' of x years. In other instances it is limited to subscribers. Access to back issues may be included in licence price, or may require additional fee (or per-article payment)

9. Pricing models - individual journals

Options:

- Based on print subscription price
- Based on electronic subscription price (print may be additional %, or free)
- Where a publisher sells electronic subscriptions not linked with paper subscriptions, it is possible to base the licence on some other metric: e.g. number of computers having concurrent access, Full Time Equivalents likely to access the journal, etc.

NOTE

Most commonly print+ electronic costs print + $x\%$, electronic only costs print - $y\%$ (x and y may or may not be the same. The true cost is distorted by the effect of VAT in the UK and possibly elsewhere.

Other algorithms may sometimes be applied to the baseline print (or other catalogue) price, such as usage, number of institutions in consortium, no of print copies taken, etc.

Some offer print copies, as part of a multi-journal licence, for a relatively small % of the print-only price

10. Pricing models - multi-journal

Options:

- Based on previous year or years print subscriptions expenditure (most common model - usually plus some uplift; annual increases may or may not be capped)
- Based on size of institution (usually in bands - e.g. Carnegie classification)
- Based on some measure of user population size (e.g. FTE students and/or faculty - only applicable to closed user groups)
- Concurrent users (unpopular)
- Actual usage (time or quantity - unusual for journals, less so for databases etc.)

NOTE

Actual usage can only be known in retrospect, hence harder to budget accurately. However, this is already in effect the model for ILL costs, which can be significantly reduced by extensive licences)

11. Access control

Options:

- IP address only
- Username and password only - administered by publisher
- IP address + username/password for remote users only - administered by publisher
- Username and password only - administered by intermediary

- IP address + username/password for remote users only - administered by intermediary
- Username and password only - administered locally (e.g. Athens)
- IP address + username/password for remote users only - administered locally

SUMMARY

The above variables are generally combined in one or more of four broad categories of business models (with or without the involvement of intermediaries):

1. Basic Subscription Model

The unit of sale is still the individual subscription with or without price differentials for quantity and which are provided as:

- Multi site licence (essentially a consortium)
- Site licence (various definitions but essentially seeking to group an organisation in whole or in part into a single licence)
- Personal licence
- Combination of both

2. 'Database' Subscription Model

The unit of sale is a collection of journals in effect forming a database of content which may be:

- User-defined collection of part of publisher(s)'s entire output by subject or other interest

- Publisher(s)-defined package of part of entire output by number of titles, subject or other interest
- The entire publisher(s)'s output

3. E-Commerce Model

The unit of sale is the element read generally the article but could have finer granularity

- Content available on a pay-per-view/download basis
- Content available on a bulk pay per view subscription (i.e. prepayment of x downloads from any journal in the collection etc)

4. The Intermediary Model

The content is licensed through some intermediary providing added value and access to more than one publisher's content

- Under a single licence
- Under individual publishers' licences
- Under multiple licences depending on content (not necessarily always the publisher's licence but in agreement with the publisher)

It will be seen from the above that the market place for buying and selling access to electronic journals is very new, immature and even a little unstable, as publishers adjust their pricing and access policies from year to year. There are still significant issues for debate between publishers and libraries to be solved, particularly on the commercial implications for the rights holders on inter library digital document supply, the issues of access and copyright protection,

and for the users, the value of fair use, continuing access after the licence period has expired and of permanent archive of digitally created material. Both librarians and publishers have to resolve the issue of archiving, particularly as the content of the digital version of a journal diverges more and more from its printed and textual representation, and with the addition of other forms of media, and the dynamism of continuously amended publication. How this is reflected in commercial values that ensure a fair recompense for the publisher and the greatest degree of functionality for the user is something that both the buyers and sellers of digital journals will need to address.

Annex VI: Evaluation of The Dutch / German Licensing Principles of October 1997: the Current State of Affairs

If we compare the situation in August 2000 with the Guidelines and Checklist for Libraries that was drafted by Dutch and German University Libraries in October 1997, significant developments can be identified. Many suggestions from these Guidelines are currently being accepted by the publishers, but some important issues still remain.

Issues that have been solved/current practices of libraries and publishers

1. Libraries cooperate on a regional or national basis and act as a consortium that negotiates license agreements with publishers. The idea of library consortia has been accepted.
2. The relationship between libraries and publishers with respect to the electronic access to journals is governed by contract law (license agreement). Copyright law has become less important in the electronic environment as far as the relationship between libraries and publishers is concerned.
3. At first, only the large publishers were prepared to enter into electronic license agreements. The small and medium-sized publishers have been very reluctant for many years.

Currently, all publishers understand that they have to provide their information both in printed and in electronic form. Publishers know that they will be out of business if they fail to do so.

A limited number of publishers have stopped the

production of the printed journal and have moved to "electronic only."

4. In the standard license agreement, unrestricted access is provided to authorised users irrespective of where they are located.
5. In the standard license agreement access, is provided to "walk-in users" on site.
6. Licenses permit the "fair use" of all information for non-commercial, educational, instructional, and scientific purposes by authorised users, including unlimited viewing, downloading and printing, in agreement with the provisions in current copyright law.
7. University libraries can make print or fax copies generated from the data delivered by the publishers for non-commercial interlibrary lending purposes within the fair use guidelines.
8. Most license agreements include provisions for use in perpetuity. The guarantee for use in perpetuity, however, is connected with provisions on digital archiving.
9. In general, the licensed content is accessible from all currently supported computer platforms and networked environments; in general access is based on current standards.
10. The format of the electronic data has been standardized: real PDF, HTML, SGML.
11. The time span between the availability of the printed version and the electronic files has improved. Although there are variations, an increasing number of publishers are prepared and capable to provide access to the electronic files simultaneously or prior to the availability of the printed editions.

12. According to the Licensing Principles, libraries were prepared to pay an additional fee of 7.5 % for the electronic files of the journals they subscribed to for a period of one year. "After that year, the electronic files should be accessible/delivered at no / limited additional costs."

Although there are significant differences in policy, most publishers are currently offering conditions that are gradually evolving towards these "Principles." An increasing number of smaller and medium-sized publishers provides access to the electronic files with no additional costs if the library holds a subscription to the journal(s).

The conditions of the larger publishers are in general connected with consortium agreements on continuity of turnover/ non-cancellation clauses.

It should be stressed that the "Licensing Principles" only focused on "additional fees for electronic files" and not on "regular price increases of print" which can have a very important impact on the real price that has to be paid.

13. The anonymity of individual users and the confidentiality of their searches is protected. Only the library database administrator is in the position to identify the searches of an individual user, but his competence is focused on delivering aggregated data on usage and on monitoring possible abuse. This information - as far as I know - is not transferred to the publishers.

Most agreements that imply direct access to the publishers' database are based on IP checking.

14. Monitoring the use and gathering relevant management information is a standard issue in most license agreements. This information is shared between libraries and publishers.

Problems and issues that are still in need of further discussions

1. It was the intention of the "Licensing Principles" not to accept "non-cancellation clauses" or "clauses which aim at setting a minimum limit on the number of journals, subscribed to or licensed."

Actually, many consortia licenses cover all journals published by an individual large publisher. These licenses take the actual turnover in Year-0 as a starting point. Libraries have to choose between on the one hand an overall contract covering all journals of a publishers (= more information available for the end-users) with a guaranteed turnover and a low fixed price increase and on the other hand "business as usual" with freedom of cancellation, limited access to well-defined titles and substantial surcharge. In this situation the majority of consortia tend to choose the first option.

The "fixed turnover option" is attractive for libraries with a stable or slightly increasing budget and without double subscriptions.

The "fixed turnover option" is rather problematic for libraries that face budget cuts and have many double subscriptions.

2. University libraries still are not allowed to make E-mail copies of the electronic files delivered by the publishers for non-commercial electronic document delivery.

In the Netherlands, the two large Dutch publishers have agreed to accept this electronic document delivery on an experimental basis.

If a national agreement were to be in place covering all journals of an individual publisher, the issue of document delivery to the "closed user group" would become irrelevant.

3. Only a limited number of publishers are committed to digital archiving. In various countries national libraries are taking up this role, but basically this issue is not "solved" yet.
4. The policy of publishers with respect to specific demands of the library community on local integration varies very much. Article 14 of the Licensing Principles is still of great importance: "Libraries are not in favour of proprietary solutions by publishers or intermediaries. They emphasize a distinction between content and presentation, a separation of data and applications, in order to have full opportunities to integrate the electronic data with current library services, both at a central level and at a local level."
5. The largest publishers are prepared to deliver the bibliographic data and abstracts of the journals to the libraries/the consortium of libraries in electronic form. These data are being provided without additional costs if a license agreement is in place.

Other publishers have a different policy and don't support this approach.

The role of intermediaries is still somewhat unclear. Their general policy seems to be that they would like to act as "the portal" as "the gateway" to information from various source. Some intermediaries are also prepared to "sell" bibliographic data to libraries. The policy with respect to the abstracts seems to depend very much on the policy of the publisher.

6. The differences in publisher policy with respect to pricing and price increases of journals and with respect to the access fees for electronic access to journals are still significant.

7. Various important publishers offer discounts if the library is prepared to move to "electronic only" and to cancel the printed subscription. In general these discounts are about 10%. This means that there is still a gap of 10% with respect to the initial goal of the Licensing Principles (discount of 20 %).
8. In general, publishers are reluctant to offer new service levels such as
 - a flat-fee purchasing of a pre-selected number of articles from an identified list of less frequently used journal titles, and
 - transactional (pay-per-view) delivery of articles from infrequently used journals.
9. Most license agreements fail to contain sufficient warranties. Article 23 of the Principles stated: "A license agreement should require the publishers to defend and indemnify the libraries, not holding them liable for any action based on a claim that use of the resource in accordance with the license infringes any patent or copyright of any third party"
10. Most license agreements are still governed by law of the country of origin of the publisher.

Tilburg, 30 - 8 - 2000

Hans Geleijnse

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