The European digital library (Europeana).
Concerns related to intellectual property rights

Professor **Marta-Christina SUCIU**[1]
Associate professor **Mina FANEA-IVANOVICI**[2]

Abstract

The current technological and scientific revolution taking place within the larger context of knowledge and innovation based society and economy has changed all aspects of life, including those related to cultural content consumption, creation, access and distribution. Although art galleries, libraries, archives and museums will continue to exist and function in a physical form, there has been noticed a trend is to preserve and provide access to world cultural heritage by means of digital libraries. Among the European objectives included in the Europe 2020 Strategy we find the digitisation of cultural content and the development of a library that can store and preserve European culture – Europeana. The main objective of this paper is that of debating the main stakes of access to digitised cultural content, such as it is found in digital libraries, A particular focus is set on the issue of intellectual property rights. The study specifically refers to the case of the European Digital Library, Europeana. The main scientific research method used in the paper is the critical analysis of IP legal regulations. Thus, we debate the main implications of these regulations for the process of digitisation, and we next identify the main current legal opportunities for and obstacles in the way of cultural content digitisation.

Keywords: intellectual property rights, digitisation, cultural content, Europeana.

JEL Classification: K11, K19, O34, Z19

1. Introduction

During the last decades of the 20th century we were the witnesses of a significant development of the information society, which led to major changes in the field of *information and communication technologies (ICT)* and to their use in all aspects of economic, social and cultural life[3]. In the European Union[4]

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[1] Marta-Christina Suciu - Bucharest University of Economic Studies, christina.suciu@economie.ase.ro.

[2] Mina Fanea-Ivanovici - Bucharest University of Economic Studies, mina.ivanovici@economie.ase.ro.

[3] *Access to culture* project – *Digital Library of Romania, PODCA.*

[4] *A Digital Agenda for Europe*, COM (2010) 245/ 19.05.2010, Communication of the Commission to the European Parliament, Council, European Economic and Social Committee and Committee of the Regions.

digitisation of cultural resources is considered a key factor that will contribute to the improvement of accessibility and the continuous flow of data and knowledge in a society and economy that are based more than ever on innovation and knowledge. *Digitisation of cultural resources* and the existence of a unique platform within a digital library have a huge economic, social and cultural potential, which can lead to increased competitiveness in Europe. Large scale use of ICT and facilitating access to public services, including to cultural content services, are part of the *Europe 2020 Strategy,* which promotes a smart sustainable and inclusive development.

Creative and cultural sectors are seen as a drive for *smart sustainable and inclusive growth* and are at the heart of the Europe 2020 Strategy. One of the Strategy pillars is the European Digital Agenda, which refers the creation and development of a *European Digital Library, Europeana*

According to *Calimera Guideslines*[5] the digitisation mainly consists in:

- Transposing a document from a traditional format into a digital format;
- Organising digitised documents and including them in databases or systems.

2. The European Digital Agenda and the Digital Economy and Society Index (DESI)

The European Commission prepared an annual report named "*i2010 – a European information society growth and employment ",* which included the 27 EU member states, Norway and Iceland. According to the report, only 18.4% of the Romanians were using the Internet, at the specific time period when the research was organised, on a regularly basis, compared to the European average of 46.7%, which resulted in placing Romania on the 29th position, the last place. In addition, the study illustrated that only one third of the Romanian households had broadband Internet access, which placed our country on the 26th position according to this criterion. Later on, according to the *European Digital Agenda*, a new benchmarking method was adopted in the EU, which ranks EU countries based on the *Digital Economy and Society Index (DESI).*

According to the most recent ranking of 2017, which was published in March 2017, as concerns the *Digital Economy and Society Index*[6], Romania is part of the low performing cluster. The *Digital Economy and Society Index* (*DESI*) is a composite aggregate index[7], and it is calculated by the *European Commission (DG*

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[5] Calimera Guidelines, http://www.calimera.org/lists/guidelines/digitisation (last consulted on 10.11.2017).

[6] http://ec.europa.eu/digital-agenda/en/digital-agenda-scoreboard (last consulted on 10.11.2017).

[7] https://ec.europa.eu/digital-single-market/en/desi (last consulted on 10.11.2017).

CNECT), in order to assess the progress of EU member states towards a digital economy and society.

This index includes a set of relevant indicators, which are structured around five dimensions: *connectivity, human capital, use of Internet, integration of digital technology and digital public services (Figure 1).*

Figure 1. Romania's position in the *Digital Economy and Society Index (DESI)*
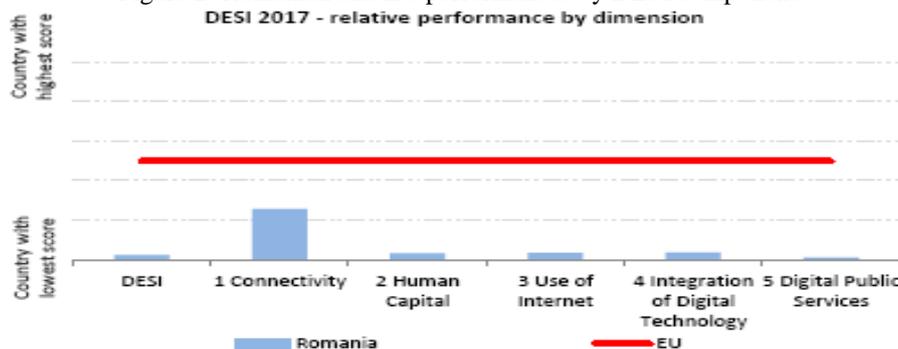

Source: https://ec.europa.eu/digital-single-market/en/scoreboard/romania
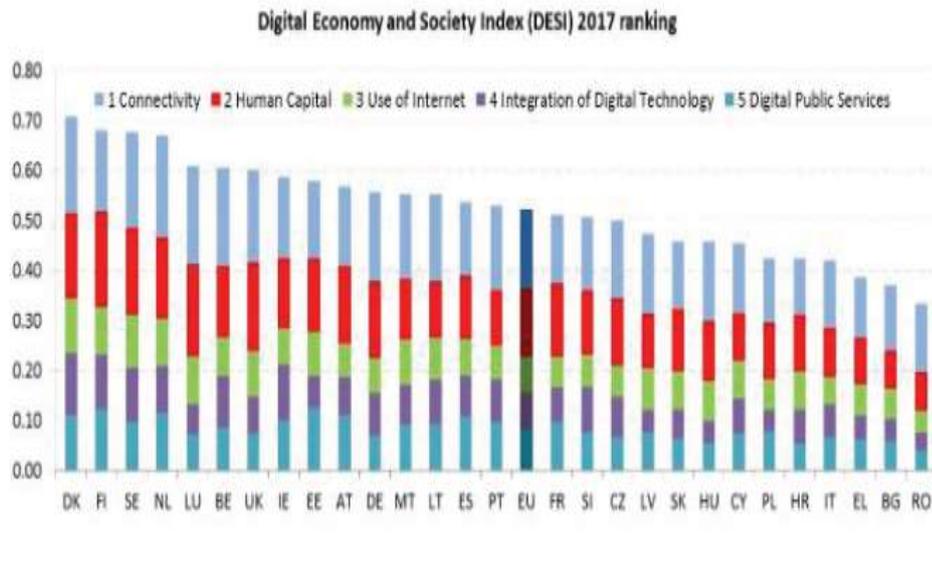
Although its performance is worse than that of all other EU member states (Romania occupies the 28th place among the member states), one can notice that digitisation developed relatively rapid during the last years in our country on the whole. Despite certain progress (Table 1 and Figure 2), Romania is still considered the worst performer in the EU in terms of DESI. This comes to highlight the significant role of digitisation (especially that of cultural resources digitisation) in order to explore the growth and development potential of our country in the medium and mostly in the long term.

**Table 1. DESI comparative analysis for Romania between 2016-2017,
compared to the other values of this indicator within the cluster in which
Romania is included and compared to the EU average score**

	Romania		Cluster	EU
	rank	score	score	score
DESI 2017	28	0.33	0.41	0.52
DESI 2016¹	28	0.31	0.38	0.49

Source: http://ec.europa.eu/digital-agenda/en/digital-agenda-scoreboard

Figure 2. Romanian and EU performances by DESI components

Source: http://ec.europa.eu/digital-agenda/en/digital-agenda-scoreboard

According to the report *"Digital Economy Lab (DELab)"*, presented on April 26th, 2016 at the conference for the educational project launching of Google, "*The Digital Workshop"* 8% of the Romanian population declared that they believe they have enough digital knowledge to cope with and within a competitive workplace. Ploiești city is the 3rd town in the world, after Singapore and Hong-Kong, in terms of Internet speed, as stated in April 2016 by Mrs. Lucan-Arjoca, Deputy General Manager of the *Romanian Office for Copyright (ORDA)* during a conference on a topic related to intellectual property in the digital environment. Nevertheless, according to a *World Bank* study on the degree of digital literacy, and despite the high human potential of Romania in this field, 39% of its inhabitants had never used the Internet. The "*digital divide"* phenomenon mostly affects rural areas.

Romania made progress especially in the field of digital services availability, mainly by promoting "*Open Data*" policies. Romania is ranked 435 out of 700 within the benchmarking method *"European Public Sector Information Scoreboard"*, compared to an average score of 351 out of 700 for the EU (Figure 3).

Figure 3. Romania's position in the *European Public Sector Information Scoreboard (EPSI)*
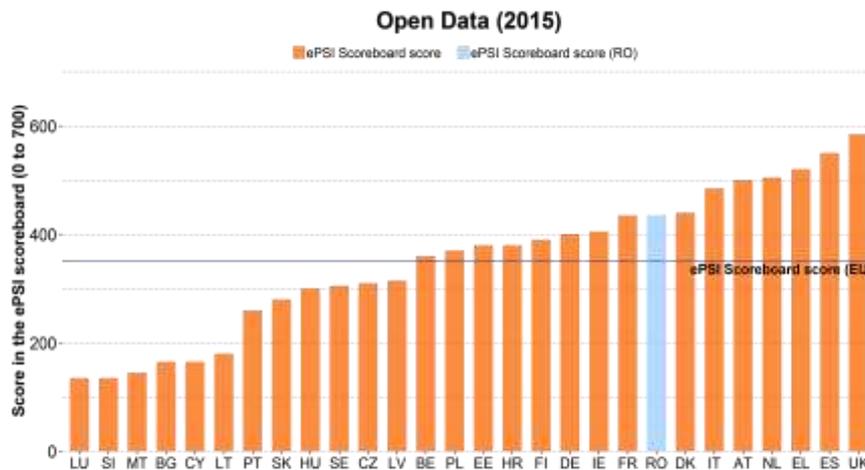
Source: *The Public Sector Information.*

The Public Sector Information Scoreboard (PSI) is a 'crowd sourced' tool to measure the status of Open Data and PSI re-use throughout the EU.

The digitisation process also encompasses the creation and development of the European Digital Library, called *Europeana*, as well as the creation of a single European digital market.

3. The Romanian Digital Library, part of the European Digital Library

In Europe, *the European Digital Library - EDL*[8] is deemed as an adequate means to provide easy online access to as much information as possible to users, under adequate technical conditions[9].

According to the recommendations of the *European Commission (2006/585/EC)* and to the *Conclusions of the European Council (2006/C 297/01)* a digital library should be created in each EU member state.

In Romania, international circuits and flows are not yet clearly defined, and the interoperability is quite reduced. Under such conditions, we are witnessing a situation in which several cultural institutions run and manage separately different databases (*The National Heritage Institute, The National Archives, national and university libraries*). The existing databases are somehow redundant, their content is in part overlapping. Moreover, these databases are updated using different

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[8] Matei, Dan, *Spre Europena.eu : o introducere în bibliotecile digitale,* CIMEC, Bucharest, 2009

[9] National Library of Romania, *Studiu de fezabilitate privind digitizarea, prezervarea digitală şi accesibilitatea on-line a resurselor bibliotecilor, 2007.*

information sources and at a different frequency due to lack of formalised documents and lack of information flow standardisation. Such distortions arise as a result of inexistent adequate channels to transmit the information and due to lack of a set of unitary rules and regulations, to which poor communication among the institutions concerned is added. Most digital cultural resources are recorded in libraries, but the dimensions of the collections vary depending on the type of library and locally, on the budget approved for its functioning. The IT infrastructure and the digitisation projects in libraries vary depending on the budget of each library.

The electronic resources purchased by libraries are scarce, for instance: Romanian legislation databases, *Oxford Journals* database, EBSCO etc.[10].

At national level, digitisation occurs through small-scale initiatives achieved by several public institutions and seldom by *amateurs*. Below are just a few examples of digitisation*:*

- The national project "*ProEuropeana. The Digital Library of Cultural Publications*", *(http://biblioteca.cimec.ro/?despre-proiect)* initiated by *CIMEC-Institute of Cultural Memory,* which had a separate way in 2011 within *The National Heritage Institute*, connected to the on-line documentation, digitisation and dissemination.
- Bucharest Digital Library (www.digibuc.ro.)
- *Locloud. Cloud for Culture. EuropeanaLocal Romania*, local project hosted by *"Octavian Goga" County Library of Cluj (http://www.bjc.ro/new/index.php?locloud* [11]*)*;
- Other initiatives such as: *Wikisource* (http://ro.wikisource.org); *Wiki Loves Monuments* (http://wikilovesmonuments.ro); *Forgotten Monuments* (http://monumenteuitate.ro).

In 2008, the Ministry of Culture, Cults and National Heritage *developed a public policy in the field of digitisation, which was approved by* Decision *1676 dated 10/12/2008* on the creation of the *National Programme for the digitisation of cultural resources and the creation of the Romanian Digital Library*.

The main objective of such initiatives was to preserve and promote national cultural resources in a digital format, as well as to broaden and facilitate national, European and international access to a database of representative national cultural resources.

An essential objective of the public policy in the matter of digitisation is the creation of the Romanian Digital Library, the Romanian component of the *European Digital Library*. It would facilitate the coordination and stimulation of digitisation activities that are taking place in the country. It is necessary to continue the efforts in the direction of adopting a coherent set of measures at national level that are meant to support digitisation and the Romanian presence within the *World*

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[10] National Library of Romaina, *Studiu de fezabilitate privind digitizarea, prezervarea digitală şi accesibilitatea on-line a resurselor bibliotecilor,* Bucharest, 2007

[11] http://www.slideshare.net/locloud/romanian-digital-collections-in-europeana (last consulted on 10.11.2017).

Digital Library (WDL)[12] and the *European Digital Library "Europeana.eu"*. In this way are ensured the freedom to information and universal access to information. At the same time the national intellectual heritage preservation is supported[13]. According to the available data, Romania's presence in *"Europeana.eu"* is made through a little more than 151,000 digital items coming from around 30 institutions[14].

The National Heritage Institute (INP) was conferred the quality of national aggregator institution in the year 2011 following the taking over of *The Institute of Cultural Memory (CIMEC)*. CIMEC and INP provided digital objects comprising mostly mobile goods included in the national cultural heritage, but also images of historic monuments included in the *International Contest "Wiki loves monuments"* as well as images of archaeological sites that can be found in the *"Chronicles of Archaeological Researches"*, administered by CIMEC and INP. Another contribution to Europeana.eu made by INP is a collection of theatre plays posts that were transmitted through the project *"Athena Plus"*.

In Romania, the digitisation process and that of developing the national digital library take into account the creation of synergies between cultural resources digitization initiatives on five pillars, as illustrated in Figure 4:

- *Written heritage (libraries),*
- *Immovable heritage (monuments, archaeology),*
- *Audio-visual heritage (audio-visual archives),*
- *Mobile heritage (museums, collections),*
- *Archives heritage (archives).*

Figure 4. The contribution of the national portal to *the European Digital Library "Europeana.eu"*

Source: http://biblioteca.cimec.ro/?europeana

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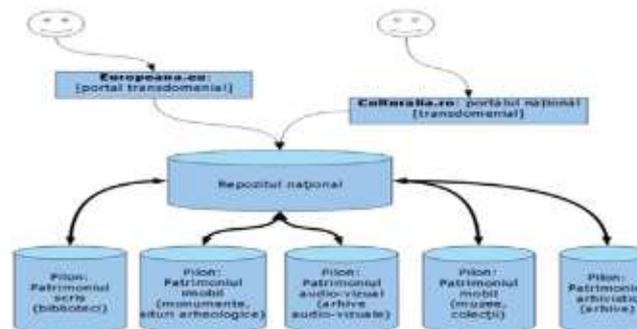
[12] The library is a UNESCO project, launched in 2009. WDL focuses on the quality of materials and exhibits "only" 12,320 cultural resources originating from 193 countries, going back to 8000 B.C. and the yera 2000, all described in seven languages. WDL does not confine itself to texts, but also includes partitions, maps, photographies and videograms. http://www.wdl.org/en (last consulted on 10.11.2017)..

[13] http://biblioteca.cimec.ro/?europeana (last consulted on 10.11.2017).

[14] http://biblioteca.cimec.ro/?europeana (last consulted on 10.11.2017).

The creation of the *Romanian Digital Library* will ensure the preservation in digital format of the cultural resources of the country and the facilitation of the public access via the Internet to a database of representative national cultural resources[15]. We consider that it is also necessary to connect to the various existing cultural resources digitisation initiatives, both within the aforementioned projects and within those institutions that host cultural resources as part of their specific activity. The *Romanian Digital Library* is one of the 27 national hubs, which are the components of the *European Digital Library* "*Europeana.eu*".

The main purpose of a national digital library development is to preserve and protect the existing national cultural heritage that is found in the libraries of the national libraries system and to promote collections and broaden the public access to information.

A relevant indicator for the degree of cultural resources digitisation of Romania is their *contribution to the European Digital Library* (Europeana.eu). According to available data, so far Romania has a slim contribution in terms of number of items exhibited in the *European Digital Library*. Compared to Romania, other EU member states included a much higher number of digital objects, as can be seen in Figure 5.

During May 11th-12th, 2016, in Belgrade, Romania participated at a meeting with representatives of seven national libraries from the South and Eastern Europe, occasion on which the foundations of a collaboration for the project *Collections of South and Eastern Europe in Europeana (CSEEE)* were laid. This event was dedicated to the inclusion within "*Europeana.eu*" of the collections originating from this area of Europe.

The European Commission also sets forth to increase the confidence degree and the security of digital services, ensuring a higher protection degree to citizens. The amendment of the "*ePrivacy*" Directive is one of the key initiatives that were proposed within the Strategy "*EU Digital Single Market strategy*"[16]. On August 4th, 2016 the European Commission published a preliminary report in relation to the public consultation concerning the European Directive "*ePrivacy*"[17].
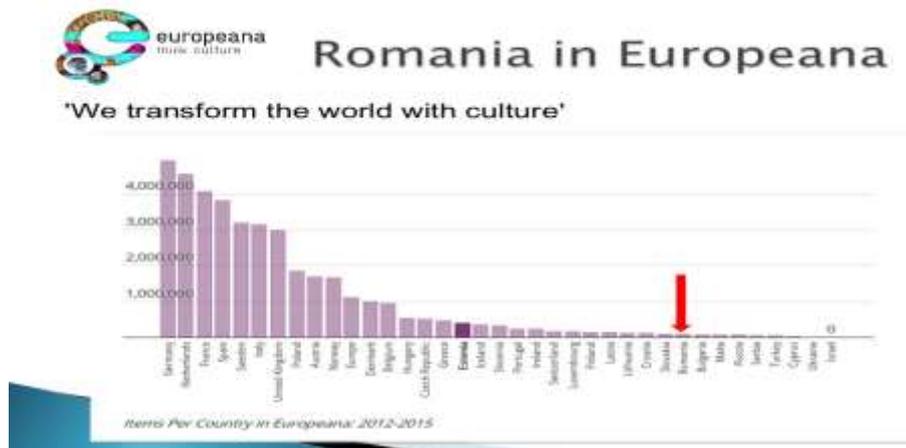
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[15] Ciurea, C & Filip, FG (2016). The Role of Virtual Exhibitions in Cultural Heritage Digitization, Preservation and Valorization. In Boja, C et al. *International Conference on Informatics in Economy.* Paper presented at the International Conference on Informatics in Economy, IE 2016: Education, Research & Business Technologies, Cluj-Napoca, Romania (79-83). Bucharest, Romania: Bucharest University of Economic Studies.

[16] https://ec.europa.eu/digital-single-market/en/scoreboard/romania (last consulted on 10.11.2017).

[17] http://europa.eu/rapid/midday-express.htm (last consulted on 10.11.2017).

**Figure 5. The contribution in terms of digitised cultural resources
of the European countries to the European Digital Library, 2012-2015**

Source: Sorina Stanca, Romanian digital collection in Europeana.
http://image.slidesharecdn.com/4-sorinastanca-151007085907-lva1-app6891/95/romanian-digital-collections-in-europeana-4-1024.jpg?cb=1444208525

This legislation[18] applying to ICT services should facilitate a better control of personal data access to all European citizens. A large proportion of the respondents (over one quarter) come from Germany, followed by those from the United Kingdom of Great Britain and Belgium. Around 83% of respondents (considered as individual or, in respect to their belonging to organisations and/or to the civil society) declared that it is important to have clear regulations in the ICT field with a focus on confidentiality and confidence increase. Nevertheless, 76% consider that the *ePrivacy* Directive had not reached its objectives but to a limited extent as concerns protection and confidentiality in ICT.

The digital library is primarily designed to store and preserve the European cultural heritage, on the one hand and also to provide easy access to collections and various other items included therein to the general public, on the other hand. The platform includes works that can be found in galleries, libraries, archives and museums from all around Europe. Thus, it is considered that the multilingual platform is the integrated aggregator of European cultural content at international level.

One of the objectives of this paper was to identify the major challenges faced by the process of cultural content digitisation, which were mainly discussed from a legal point of view, with a focus on *European Digital Library, Europeana*.

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[18] https://ec.europa.eu/digital-single-market/en/europeana-european-digital-library-all (last consulted on 10.11.2017).

4. Intellectual property rights. European Digital Library Europeana Best Practices Guidelines

Intellectual property covers the following areas:

- *Copyright (creative).* Copyrights protect: literary works, musical works, dramatic works, films, artistic works, mass produced artistic works, sound recordings, broadcasts, typographical arrangements. The duration of the copyright varies depending on the type of work. Sometimes, moral rights also apply, which implies the protection the creator's honour or reputation, as well as the integrity of their work.
- *Registered and unregistered design rights (functional and commercial).* They protect the visual appearance of a product or of a part of a product in the country of registration.
- *Trademarks (brands) and patents (inventions).* Trademarks identify the origin of a product and protect misrepresentation from competitors. Patents protects the features and processes involved in the making of products.
- *Database rights*
- *Performers' rights*.

The *Legal Framework concerning the protection of intellectual property rights, copyrights and other regulations for IP enforcement in Romania* includes the following laws:

- *Law no. 8/1996 on copyright and related rights*, ("*Copyright Law")*;
- Law no. 64/1991 ("Patents Law") and Government Decision no. 547/2008 for the approval of the Regulation for implementation of Law on patents;
- *Law no. 84/1998 ("Trademarks Law")* and *Government Decision no. 833/1998 for the approval of the Regulation for implementation of Law no. 84/1998 on trademarks and geographical indications ("Trademarks Regulation").*

Concerning the Romanian state authorities involved in IP enforcement we mention the importance of the *Copyright Office (ORDA)* and correspondingly the *Romanian State Office for Inventions and Trademarks (SOIT).*

The Copyright Office (ORDA) is the sole state authority for regulation, surveys, arbitration and technical-scientific expertise in the copyright and related rights field.

The Romanian State Office for Inventions and Trademarks (SOIT) is the main state institution that is in charge for granting protection for inventions, trademarks.

Generally, the IP rights of an owner may be enforced both in civil and criminal proceedings.

With respect to *the European Digital Library (Europeana)*, according to *the European Data Exchange Agreement:*

- data providers grant Europeana the right to publish image previews provided to Europeana. But such previews may not be re-used by third parties unless such previews are allowed
- for all other metadata provided to Europeana, data providers grant Europeana the right to publish all metadata under the terms of *the Creative Commons Zero Public Domain Dedication*. In such case, all metadata can be used by third parties without any restriction[19].

Europeana has integrated Creative Commons Licences – open licences used internationally, allowing the copying, reuse, distribution and sometimes the modification of the original work, without having to obtain permission every time for each of the above – into the framework of the rights metadata element.

The digitisation of cultural content and publishing into the Europeana imply a very complex and time-consuming process. Firstly, because permission has to be secured from a rights holder. A long list of questions should be answered in this process such as:

- if the work is copyrighted or protected by other type of intellectual property rights;
- when the work was created;
- given that the work is copyrighted, if the use is permitted by any permitted acts;
- if the creator is known;
- what the nationality of the creator is;
- if the work has been published;
- if there is more than one type of IP protecting the work (copyright and design or trademark);
- if the copyright period expired;
- what the legislation on copyright is in the country of origin;
- if the rights holder is unknown or cannot be found.

All the necessary information should be collected under due diligence conditions.

5. The main legal challenges for cultural content digitisation in Europe

The process of digitisation is costly in terms of time and resources. It implies the formalisation of intellectual property rights models, which should

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[19] Europeana Fashion, *Fashion and Intellectual Property 'Best Practice' Guidelines*, 2013. The document is available at http://files.europeanafashion.eu/download/Europeana%20Fashion%20 IPR%20Guidelines.pdf, accessed on November 1st, 2017.

facilitate the intellectual property rights resolution and also avoid the assignment of conflicting rights and permissions during the model formalisation[20].

Another problem of digitisation is the poor quality of originals, compatibility of formats, and financial sustainability in the medium and long term.

Besides such technical specificities, digitisation should take into account certain relevant copyright aspects, which makes the process even more difficult. In order for a platform to provide access to cultural content it is necessary for copyright to be qualified for disclosure. Needless to say, *Europeana* can digitise and include only those items that belong to the public domain, case in which intellectual property rights have already expired[21].

Another challenge of *the European Digital Library, Europeana* is to include and provide access to copyrighted works, orphan works[22] or out-of-commerce works.

We consider that the goal dedicated to the achievement of a digital European single market implies that the access and distribution of copyrighted content takes places outside the borders of a country as well, whence the need to protection intellectual property rights according to national, international and European regulations at the same time.

The copyright tradition has it that the author's rights are somehow limited by the *fair use doctrine*, which implies the achievement of a certain balance between the interest pursued by the public and the interest pursued by the author.[23]

The main purpose of the digitisation process is to make available to the general public as much content as possible, preferably on an open access basis. It currently includes more than 52 million items, but the platform is still far away from the perspective and objectives had in mind to reflect the whole European cultural heritage.

It is estimated that this current number hardly covers 15% of all cultural resources of Europe. Specialists in the field consider that this poor representation is mainly due to the legal barriers and all the research needed to be done before a single piece of work is made public and available online.

6. American lessons that might be learnt by the European Union

Europeana is not the only digital library project underway. On the contrary, Google Books is another such open access library. We consider that this

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[20] Bellini, Pierfrancesco, Bruno, Ivan, Nesi, Paolo, Paolucci, Michaela, *IPR Centered Institutional Service and Tools for Content and Metadata Management*, "International Journal of Software Engineering and Knowledge Engineering", Vol. 25, Issue 8, 2015, p. 1237-1270.

[21] Talllova, Lydie, *Copyright Aspects of Disclosure of Works Within the Europeana Digital Library,* "Political Sciences, Law, Finance, Economics and Tourism, Vol. I", 2014, Bulgaria, p. 561-568

[22] An orphan work is a work protected by copyright, but the holder of which is not known or cannot be found.

[23] Pirnuta, Oana-Andreea, Arseni, Alina-Adriana, *The Legal Challenges Faced by Digital Libraries,* "Edulearn10: International Conference on Education and New Learning Technologies", 2010, Spain, pp. 410-416.

American example can provide valuable lessons for the *Europeana* project. *The US copyright law system* was crucial in supporting the creation and development of innovative, high-tech, value-added services in the field of digital libraries.

Some of the items of the US law that we believe could be adopted by *the European legal framework* are: the transformative use doctrine, the restrictive interpretation of the market harm criterion and the openness towards commercial reuse of works.[24]

The transformative use doctrine originates in the United States Supreme Court, in 1994, in *Campbell v. Acuff-Rose*, and it became the prevailing view in fair use case law[25]. The new paradigm started to dominate the fair use law since 2005, taking the place of *the market-centred paradigm.*

In its turn, the transformative use doctrine can fall into three categories[26]:

- *Transformative* – new works are created based on existing works, but the former emanate new expressions, meanings, insights
- *Productive* – quoting a work in biographies or taking photos of sculptures, on which the author will comment
- *Orthogonal* – using copyrighted works for totally different purposes than those of the work (copying a photo in order to give information or debate about a certain event or copying a book that is going to be used in a litigation that might involve the author).

In the US, the market harm criterion approach and its distinctive interpretation could, in our opinion, be a useful lesson for the EU. The American flexible interpretation proposes to focus only on damages caused by market replacement, as opposed to all possible revenue losses of the right holder[27].

Eventually, the interpretation of commercial use given by the *US Federal Court* was in favour of mass digitisation projects, which can be performed by private entities and public entities alike. The reason invoked is the fact that such digitisation in the absence of the right holder's permission is transformative and serves the public interest.

In the US, the *Federal Court* is the one deciding whether a certain use falls in the category of fair use. There are four factors to be taken into account when resolving fair use disputes. However, the four factors are just guidelines, the court having the freedom to deal with each case separately and differently. Thus, the judge is the one determining the fair use, based on the following factors[28]:

- the purpose and character of use;

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[24] Matulionyte, Rita, *10 Years for Google Books and Europeana: copyright law lessons that the EU could learn from the USA,* "International Journal of Law and Information Technology", Vol. 24, Issue 1, 201644-71.

[25] *Campbell v Acuff-Rose Music Inc* (1994) 510 US 569, 579.

[26] Samuelson, Pamela, *Unbundling Fair Uses,* "77 Fordham Law Review", 2009, p. 2537-2544.

[27] Matulionyte, Rita, *10 Years for Google Books and Europeana: copyright law lessons that the EU could learn from the USA,* "International Journal of Law and Information Technology", Vol. 24, Issue 1, 201644-71.

[28] Measuring Fair Use: The Four Factors. The document is available at https://fairuse.stanford.edu/overview/fair-use/four-factors/, accessed on November 10th, 2017.

- the nature of the copyrighted work;
- the amount and substantiality of the portion taken
- the effects of the use upon the potential market.

The first factor is assessed in terms of transformation – whether the material used from the original work was transformed, adding new values, information, knowledge, perspectives, or if it is just a copy of it. The following could qualify as transformative uses: scholarship, research, development, innovation, education, etc.

The second factor implies that it is more justified to use works in order to disseminate information, facts and knowledge, such as biographies, rather than the use of fictional works (poems, theatre plays, novels, short stories, etc.) because such dissemination would benefit the public with precise data. Also, the use of already published works is more justified than those unpublished, because the author is the one who should decide how, when and where the work should be made public.

As concerns *the third factor*, the lower the portion of a work that is used, the more justified it is. One should also note that the most important part of a copyrighted work should not be reproduced.

The last factor refers to the possible losses in terms of incomes that the owner suffers following use of their work. However, if just a small portion of the work is disseminated or used, the Court could allow it, under the *de minimis* defence.

The District Court in the US found it fair use to digitise books for uses as follows:

- users could have access to materials searched for using specific key words
- users with reading disabilities could have access to digitised books
- digitised copies of books could be made to be used as back-ups if the respective books are lost or damaged (the case *Authors Guild v. HathiTrust*)[29]

A similar US case was that of *the Authors Guild v. Google Book*, where the court decided that snippets of books made public and available was fair use: the court determined the fair use. The Court decided it was fair use because the information provided it benefited libraries, research institutions and users. By making such excerpts available, *Google Library* actually increased the awareness of such works, by making them more visible, and the result was that sales rose, which benefited both their creators and publishers.[30]

In Europe, however, the Court did not approach this topic with the same degree of openness. For instance, *Google* was also sued in Europe, and in France *Google* lost the legal battle, as the court considered that the authors' rights were violated once the content was made available online without their consent being

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[29] *Authors Guild v. HathiTrust,* 755 F3d 87 (2d Cir 2014).
[30] *Authors Guild, Inc. v. Google Inc.* 954 F Supp 2d 282 (SDNY 2013) 22.

previously asked and granted[31]. Germany also sued *Google*, but later on it withdrew the claim. But European Courts did not consider that *Google Books* was entitled to use the works and publish them online.

As a result of such actions, the European Commission reacted and initiated a proposal for a directive that would regulate the use of orphan works, which was adopted later on[32]. At the same time we consider that the regulation of out-of-commerce works was deemed necessary. These are works that are still during the copyright period, but are not available for sale via ordinary channels of commerce. In this respect, a *Memorandum* was adopted - *Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of- Commerce Works*[33].

These two issues – the situation of orphan works and the situation of out-of-commerce works are important achievements in the European Union, which have not yet been resolved in the United States. However, the consider that certain legal achievements of the United States could be also adapted and then adopted in Europe.

For instance, the freedom to digitise content based on the flexible interpretation of fair use doctrine, making available just portions of the work (snippets), making copies for backing up hard copies of books, providing access to digitised books to those having reading difficulties.

We consider that one major impediment in the creation of an all-inclusive European digital library that can fully reflect the cultural heritage is that many works are still protected by copyright and also are in-commerce works, which makes it impossible for *Europeana* to reflect the true dimension of cultural heritage of the European Union.

Despite the legal impediments, one major concern about the development of *The European Digital Library, Europeana* is the existence and continuation of initiatives related to public-private partnerships support, primarily because private companies have the financial resources and technical know-how to conduct the digitisation process.

7. Conclusions

The paper attempts to present the main legal barriers faced by the cultural content digitisation process in Europe, as well as some of the main achievements of *the European Digital Library Europeana* in the field by using a critical analysis

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[31] Lucas-Schloeter, Agnes *Digital Libraries and Copyright Issues: Digitization of Contents and the Economic Rights of the Authors* in Synodinou, Tatiana-Helen, Kapidakis, Sarantos and Iglezakis, Ioannis (eds), *E-publishing and Digital Libraries: Legal and Organizational Issues*, "Information Science Reference 2011", Hershey, PA, 159–79, 167–68.

[32] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L299/5 (Orphan Works Directive).

[33] Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of- Commerce Works, 2011, http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20110920-mou_en.pdf, accessed 6 November 2015.

perspective and a comparative analysis with the situation in the United States of America. Aspects such as fair use, transformative use, market harm, commercial use are discussed.

We have drawn several valuable conclusions as to what a better course of action the European Union should pursue in order to better accomplish the objectives of the *European Digital Library, Europeana* and of *the European Digital Agenda*.

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