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## H Is For Harmonization: The Google Book Search Settlement and Orphan Works Legislation in the European Union

Katharina De La Durantaye  
*St. John's University School of Law*

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KATHARINA DE LA DURANTAYE

## H Is For Harmonization: The Google Book Search Settlement and Orphan Works Legislation in the European Union

ABOUT THE AUTHOR: Assistant Professor of Law, St. John's University School of Law. I would like to thank Peter Bienkowski, Eric Greenbaum, and Ulrich Simon for their research assistance.

## I. INTRODUCTION

In September 2009, Serge Eyrolles, president of the French publishing association *Syndicat National de l'Édition* (SNE) described Google Books in the following manner: “It is an infernal machine, it never stops. . . . It is a disgrace. It is cultural rape.”<sup>1</sup> Although Mr. Eyrolles’s terms are harsher than those used by most observers of the Google Books case and the two settlement proposals it has produced, he is not alone in his general sentiment. Recent months have seen heated debate in the popular press and academic forums concerning the proposed Google Book Search Settlement agreement, both in its original and in its revised forms.<sup>2</sup> Objections have come from virtually all sides: from possible competitors of Google, authors’ and publishers’ groups, human rights, privacy and general public interest organizations, Attorneys General of various states, and even the U.S. Department of Justice. Opposition has been no less intense, or vocal, in other countries such as France and Germany, both of which have submitted amicus briefs opposing the first settlement proposal.<sup>3</sup>

At present, it is impossible to know what the terms of the final settlement will be. But whatever they prove to be, it is clear that one of the Settlement’s most important consequences will be how it changes the orphan works debate—not only in the United States but also elsewhere in the world. This international resonance is most revealingly on display within the European Union, the United States’ closest ally regarding international copyright law and policy, and it is on the European Union that I will focus the following remarks.

It is clear that international harmonization should play a fundamental role in whatever new orphan works legislation is enacted, just as it is clear that the Settlement offers an unprecedented occasion to address this matter—a sort of silver lining to the international cloud formed by the Settlement. This essay will trace the impact that the proposed Settlement has had in the European Union on attempts to mass-digitize books and other works, as well as on the debate surrounding orphan works legislation. The proposed settlement agreement has highlighted the need for both the United States and for the member states of the European Union to take greater action to resolve the orphan works problem. Moreover, resolution of the orphan works problem is essential to any and all mass-digitization efforts. As recent developments in Europe

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1. Ben Hall, *Paris Court to Hear Case on Google Books*, FIN. TIMES, Sept. 24, 2009, [http://www.ft.com/cms/s/0/5f377278-a869-11de-9242-00144feabdc0.html?ftcamp=rss&nclink\\_check=1](http://www.ft.com/cms/s/0/5f377278-a869-11de-9242-00144feabdc0.html?ftcamp=rss&nclink_check=1).
  2. The agreements will be discussed together and hereinafter collectively referred to as the “Settlement Agreement.” References to the settlement process overall will be made to the “Settlement.” *See* Settlement Agreement, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136-JES (S.D.N.Y. Oct. 28, 2008), *available at* <http://thepublicindex.org/docs/settlement/settlement.pdf>; Amended Settlement Agreement, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136-DC (S.D.N.Y. Nov. 13, 2009), *available at* [http://thepublicindex.org/docs/amended\\_settlement/Amended-Settlement-Agreement.pdf](http://thepublicindex.org/docs/amended_settlement/Amended-Settlement-Agreement.pdf).
  3. Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the French Republic, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136-DC (S.D.N.Y. Sept. 8, 2009), *available at* [http://thepublicindex.org/docs/letters/french\\_republic.pdf](http://thepublicindex.org/docs/letters/french_republic.pdf); Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the Federal Republic of Germany, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136-DC (S.D.N.Y. Aug. 31, 2009), *available at* <http://thepublicindex.org/docs/letters/germany.pdf>.

have shown, however, such efforts are simply not feasible on public funding alone and will require partnerships between public and private institutions.

I will both explain the terms of the debate at the time the first settlement proposal was submitted to the court and discuss new developments directly or indirectly caused by the Settlement with a view toward developing legislative solutions for the future.

## II. THE EUROPEAN UNION: DIGITIZATION AND ORPHAN WORKS BEFORE THE SETTLEMENT

In order to understand how the Settlement proposals have changed the debate concerning orphan works legislation in the European Union, it is necessary to know something of what the status quo in the European Union looked like when the Settlement was first proposed. Noteworthy in this regard are the various attempts to create a centralized digital library and the discussions surrounding (eventual) legislation for orphan works.<sup>4</sup>

### A. *Europeana*

A few days after the first version of the Settlement Agreement was proposed in October 2008, the European Commission launched a centralized digital library named Europeana.<sup>5</sup> The European Commission created it as part of its i2010 Digital Libraries Initiative.<sup>6</sup> Europeana covers textual, visual, and audiovisual works as well as sound recordings.<sup>7</sup> The library was the result of long deliberations over a Europe-wide virtual library that would serve as a “showcase of the cultural heritage of the Member States on the internet,”<sup>8</sup> and which would offer universal access to that heritage.

The process that led to the launch of Europeana began less than a year after Google had announced its Google Print Library Project (which has since become Google Books).<sup>9</sup> On September 30, 2005, the Commission published its Communication

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4. “Orphan Works [is] a term used to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner.” U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS 1 (Jan. 2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.
  5. See *About Us*, EUROPEANA, <http://www.europeana.eu/portal/aboutus.html> (last visited Sept. 28, 2010). Europeana went live on November 30, 2008. The office of Europeana is hosted by the National Library of the Netherlands in The Hague and is run by the European Digital Library Foundation. *Id.*
  6. European Commission, *i2010: Digital Libraries Initiative Europe’s, Cultural and Scientific Riches at a Click of a Mouse*, EUROPA, [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/index_en.htm) (last visited Sept. 28, 2010).
  7. *About Us*, EUROPEANA, *supra* note 5.
  8. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Europeana—Next Steps*, at 2, COM (2009) 440 final (Aug. 28, 2009) [hereinafter *Europeana—Next Steps*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0440:FIN:en:PDF>.
  9. *About Google Books*, GOOGLE, <http://books.google.com/googlebooks/history.html> (last visited Aug. 19, 2010).

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*i2010: Digital Libraries*, which detailed its plans to digitize Europe's collective memory so as to provide both online accessibility and digital preservation of that heritage.<sup>10</sup> A year later, the European Commission issued a *Recommendation on the Digitization and Online Accessibility of Cultural Material and Digital Preservation* in which it emphasized the breadth of the digitization project. The project was to include books, newspaper and journal articles, photographs, museum objects, archival documents, and audiovisual material.<sup>11</sup> The European Council formally endorsed the European Commission plan that same year.<sup>12</sup> At present, Europeana consists of six million digital items provided by over 1000 cultural institutions, such as museums, galleries, archives, libraries, and audio-visual collections.<sup>13</sup>

At first sight, these numbers may seem impressively high, all the more so given that the number of objects has doubled since the launch of the site a little over a year ago.<sup>14</sup> That said, it represents only a fraction of the works to be digitized, and both the number and the type of objects that individual Member States have contributed varies greatly. Almost half of the material gathered so far is in French and was provided by French members of the library's partner network, most notably by the French National Library (the *Bibliothèque Nationale de France*).<sup>15</sup> Eighteen of the twenty-seven Member States have each contributed less than 1% of the library's total holdings.<sup>16</sup> Some countries have linked to books, others to newspaper and magazine articles, and still others to high-resolution images of art works housed in national museums.<sup>17</sup> Consequently, curious lacunae have developed, such as that some classic

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10. *Communication from the Commission to the European Parliament, the Council, the European Economic, and Social Committee and the Committee of the Regions, i2010: Digital Libraries*, COM (2005) 465 final (Sept. 30, 2005), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0465:FIN:EN:PDF>.
  11. Commission Recommendation on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation (EC) No. 585/2006 of 24 August 2006, art. 2, 2006 O.J. (L 236) 28, 29, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:236:0028:0030:EN:PDF>.
  12. Council Conclusions on the Digitisation and Online Accessibility of Cultural Material, and Digital Preservation, 49 O.J. (C 297/1).
  13. One hundred seven of these are participating in the library's partner network. See *About Us*, EUROPEANA, *supra* note 5. According to the European Commission, "the Commission's policy target is to have 10 million objects accessible through the site in 2010. The number should multiply in the years thereafter." *Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions*, at 4, SEC (2009) 1124 final (Aug. 28, 2009).
  14. See *About Us*, EUROPEANA, *supra* note 5 (explaining that the site launched on November 20, 2008 and is a prototype).
  15. See Press Release, European Comm'n, Europe's Digital Library Doubles in Size but Also Shows EU's Lack of Common Web Copyright Solution (Aug. 28, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1257&format=HTML&aged=0&language=EN&guiLanguage=en>.
  16. *Id.* France contributed 47% of the objects in Europeana's collection, followed by Germany, which contributed 15.4%. Next is the Netherlands, which has contributed 8%. Interestingly, Norway, a non-Member, contributed 4.3% of the content, which makes it the sixth-highest contributing country. *Id.*
  17. *Europeana—Next Steps*, *supra* note 8, at 4.

works of European literature are available in multiple translations, but not in the original. Goethe's works, for example, can be found in French, Polish, and Hungarian, but not in German.<sup>18</sup>

Varying levels of Member State participation is obviously one central problem, but it is far from the only obstacle the digital library has to overcome. Since its inception, Europeana, like other digital libraries, has struggled in vain to find a way to include in-copyright works in its database and thereby avoid what the European Commission calls a "20th century black hole" in its collection.<sup>19</sup> The reasons for this are twofold. The first reason is of a financial nature. Europeana operates with an annual budget of 2.5 million Euros, 80% of which is provided by the European Union's *eContentplus* Programme. Member States and their cultural institutions must provide for the rest of the funding.<sup>20</sup> It is next to impossible to pay royalties on such a tight budget. Unsurprisingly, the collection to date, for the most part, consists of works in the public domain.<sup>21</sup> The second reason for this "20th century black hole" is of a legal nature. For legal reasons, neither out-of-print nor orphan works can be included in its collection.<sup>22</sup>

#### *B. (Proposed) Orphan Works Legislation*

When the European Commission first launched the Digital Libraries Initiative, it was aware that orphan works would create an obstacle to the creation of a comprehensive digital library.<sup>23</sup> The European Commission needed only to observe Google's efforts to resolve the orphan works dilemma while scanning books on a mass-scale in the United States for confirmation of this fact. In trying to resolve the problems surrounding orphan works, the European Commission has closely followed the procedures that the United States has used to evaluate the extent of, and possible solutions for, the orphan works problem.<sup>24</sup>

In the United States, the procedures began when Congress asked the Copyright Office to conduct a study on the extent of the problem and to propose a legislative

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18. *Id.*

19. *Id.* at 5.

20. The program runs until 2010. More information on *eContentplus* as well as its successor program, Information and Communications Technologies Policy Support Programme (ICT PSP), is available on the European Commission's website. *eContentplus*, EUROPEAN COMM'N, [http://ec.europa.eu/information\\_society/activities/econtentplus/index\\_en.htm](http://ec.europa.eu/information_society/activities/econtentplus/index_en.htm) (last updated Feb. 3, 2010).

21. See *Europeana—Next Steps*, *supra* note 8.

22. Press Release, European Comm'n, *supra* note 15.

23. See *i2010 High Level Group Discussion Paper, The Challenges of Convergence* (12/12/2006), available at [http://ec.europa.eu/information\\_society/eeurope/i2010/docs/high\\_level\\_group/i2010\\_hlg\\_convergence\\_paper\\_final.pdf](http://ec.europa.eu/information_society/eeurope/i2010/docs/high_level_group/i2010_hlg_convergence_paper_final.pdf) ("[T]he traditional model of libraries services based on authorized lending of the physical items owned by libraries or archives is not easily translatable to the online environment.").

24. See, e.g., *Commission of the European Communities, Green Paper on Copyright in the Knowledge Economy*, at 10, COM (2008) 466/3, available at [http://ec.europa.eu/internal\\_market/copyright/docs/copyright-info/greenpaper\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/copyright-info/greenpaper_en.pdf).

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solution (if such legislation was warranted).<sup>25</sup> Similarly, at the end of 2005, the European Commission commissioned the Institute for Information Law (IViR) at the University of Amsterdam to conduct a study on the extent of the orphan works problem and to determine whether a European Union-wide legislative solution would be in order.<sup>26</sup> In addition, the European Commission created a High Level Expert Group on European Digital Libraries, including a Copyright Subgroup, which was comprised of various stakeholders<sup>27</sup> and was charged with the task of identifying and proposing solutions for IPR challenges surrounding, among other things,<sup>28</sup> orphan and out of print works.<sup>29</sup>

The IViR study concluded that the orphan works problem was real and significant, but that it would be best for Member States to address the issue individually because no significant impact on the internal market could be proven (which is necessary to trigger the European Union's legislative competence).<sup>30</sup> In response to the study's findings, the European Commission issued a recommendation in 2006 urging its Member States to create mechanisms that would facilitate the use of orphan works.<sup>31</sup> Because of potential problems involving cross-border licensing of copyrighted works,

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25. Marybeth Peters, *The Importance of Orphan Works Legislation*, U.S. COPYRIGHT OFFICE (Sept. 25, 2008), <http://www.copyright.gov/orphan/>.
  26. See BERNT HUGENHOLTZ ET AL., *The Recasting of Copyright & Related Rights for the Knowledge Economy*, U. OF AMSTERDAM INST. FOR INFO. L. (Nov. 2006), [http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd2005imd195recast\\_report\\_2006.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf).
  27. *European Commission High Level Expert Group—Copyright Subgroup, Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works* (Jun. 4, 2008) [hereinafter *HLEG Final Report*], available at [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/reports/copyright/copyright\\_subgroup\\_final\\_report\\_26508-clean171.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf). The Copyright Subgroup consisted of the president of the Federation of European Publishers (FEP), the chief executive of the British Library, the director of Deutsches Filminstitut, and president of Association de Cinématèques Européennes (ACE), the honorary president of International Federation of Reproduction Rights Organisations (IFRRO), the president of Institut National de l'Audiovisuel (INA), and, as chair of the subgroup, a professor at the University of Turin. *Id.*
  28. See *id.* at 4–5. The High Level Expert Group was also responsible for dealing with intellectual property rights challenges concerning the digital preservation of cultural material more generally, including web harvesting.
  29. See *id.* at 5.
  30. See HUGENHOLTZ, *supra* note 26. The orphan works problem is discussed as part of the following two IViR studies: *Recasting of Copyright and Related Rights for the Knowledge Economy*, *supra* note 26; *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Final Report*, U. OF AMSTERDAM INST. FOR INFO. L. (Feb. 2007), [http://ec.europa.eu/internal\\_market/copyright/studies/studies\\_en.htm](http://ec.europa.eu/internal_market/copyright/studies/studies_en.htm).
  31. Commission Recommendation of 24 Aug. 2006 on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation, 2006/585, 2006 O.J. (L 236) 28–30 [hereinafter Commission Recommendation 2006/585]. See also Agnieszka Vetulani, European Commission, GD Information Society and Media, *The Problem of Orphan Works in the EU: An Overview of Legislative Solutions and Main Actions in This Field* (Feb. 2008), available at [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/report\\_orphan\\_stagiaire\\_2/report\\_orphan\\_vetulani%20%28corrected%20version%29%20%282%29.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/report_orphan_stagiaire_2/report_orphan_vetulani%20%28corrected%20version%29%20%282%29.pdf).



the European Commission strongly recommended that individual Member States find common or compatible solutions.

While the United States and the European Union employ similar procedures for assessing the orphan works problem, their proposed solutions differ significantly. The various orphan works bills introduced into Congress over the past few years (all of which have failed to pass) provide for a limitation of remedies for users of orphan works who have conducted a reasonably diligent search for the work's copyright owner.<sup>32</sup>

The proposals made by the European Commission do not focus on such a limitation of remedies. Instead, the Commission followed a threefold approach, thereby attempting to reduce the number of future orphan works while creating mechanisms for dealing with currently existing orphan works.<sup>33</sup> The Commission recommended that Member States create interlinked national databases where users of orphan works would post any ownership information they possessed about the works they wished to use, describe the works as well as possible, and describe the intended use of the orphan works.<sup>34</sup> The American bills did not provide for any centralized databases. They instead relied on market forces for the creation of such databases.<sup>35</sup>

In addition, EU Member States were urged to establish a system of collective licenses that would be granted by national Rights Clearance Centers. Interestingly, these national Rights Clearance Centers, while having no counterpart in American orphan works bills, resemble the Books Rights Registry that the proposed Google Book Search Settlement envisions.<sup>36</sup> Finally, like Congress, the Commission recommended that only users who have conducted and documented a "diligent search" be eligible for an orphan works license and that sector-specific European Union-wide guidelines for a "diligent search" be established.<sup>37</sup>

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32. Orphan Works Act of 2006, H.R. 5439, 109th Cong. § 514 (2006); Orphan Works Act of 2008, H.R. 5889, 110th Cong. § 514 (2008); Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. § 514 (2008). These three bills provide for the introduction of a new § 514 into the remedies section of the Copyright Act. The limitation on remedies would apply to "infringers" who have conducted and documented a "qualifying search," that is, a "diligent effort" to locate the rights holders, who have "provided attribution," and who have "give[n] notice that the infringed work has been used under this section [514]." Users who fulfill this requirement—who assert in the initial pleading eligibility for the orphan works limitation and who give a "detailed description and documentation of the search"—would only be subjected to "reasonable compensation" if the copyright holder reappears. In particular, he or she will not have to pay statutory damages. However, injunctive relief remains available, except in cases where the infringer has created a derivative work, in which case the rights holder is only entitled to receive reasonable compensation and attribution, and in which case the infringer can claim copyright in the derivative work or compilation he or she created. Orphan Works Act of 2006, *supra* § 2; Orphan Works Act of 2008, *supra* § 2; Shawn Bentley Orphan Works Act of 2008, *supra* § 2.

33. See Commission Recommendation 2006/585, *supra* note 31, at 29–30.

34. See *id.*

35. See Orphan Works Act of 2008, *supra* note 32, § 3 (2008) (proposing a certification process for databases).

36. Amended Settlement Agreement, *supra* note 2, art. VI.

37. See *Commission Green Paper for Copyright in the Knowledge Economy*, at 10, COM (2008) 466 final (July 16, 2008); see also *HLEG Final Report*, *supra* note 27 (noting that the Commission uses the term "reasonable search" in its Green Paper and the i2010: Digital Libraries High Level Expert Group—



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Between 2006 and 2008, few Member States made any significant progress with respect to orphan works legislation. Limited solutions exist in some Member States (e.g., the collective licensing schemes of the Nordic countries, limited solutions in France and the U.K.),<sup>38</sup> but only Hungary has enacted comprehensive orphan works legislation since 2006.<sup>39</sup>

Frustrated with the lack of progress by the individual Member States, the European Commission began to resort to a host of new measures. As part of its *eContentplus* Programme in 2007, it approved funding for ARROW (Accessible Registries of Rights Information and Orphan Works towards Europeana).<sup>40</sup> ARROW is the project of a consortium of national libraries, publishers, and collective management organizations. It was formed to find common ways for clarifying the rights status of possible orphan or out-of-print works, and to share information held by its various partners.

The following year, in 2008, the Commission issued its *Green Paper on Copyright in the Knowledge Economy* in order to “foster a debate on how knowledge for research, science and education can best be disseminated in the online environment.”<sup>41</sup> In this document, the Commission invited interested parties and the general public to answer questions on whether the enactment of European Union-wide legislation regarding orphan works is necessary and on how to address potential cross-border issues raised by the orphan works problem.<sup>42</sup> The Commission itself indicated that it was strongly considering the implementation of a European Union-wide legislative measure despite the findings of the IViR report that such legislation was not necessary, both because of the lack of action on the national level and because of potential cross-border issues.<sup>43</sup> “The majority of Member States,” the Commission wrote, “have not yet developed a regulatory approach with respect to the orphan

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Copyright Subgroup uses the term “diligent search” in its Final Report). It seems that the two terms are used synonymously. *HLEG Final Report*, *supra* note 27.

38. See *HLEG Final Report*, *supra* note 27, at 12–13. In the U.K., a government body may issue a license for the making of a sound recording from a previous recording of a performance. France has a regime for collective licenses of audiovisual works.
39. See Mihály Ficsor, *How to Deal with Orphan Works in the Digital World? An Introduction to the New Hungarian Legislation on Orphan Works*, Comm. on Legal Affairs Pol’y Dep’t C: Citizens’ Rights and Constitutional Affairs (Oct. 2009), <http://www.europarl.europa.eu/document/activities/cont/200911/20091113ATT64497/20091113ATT64497EN.pdf>. The Hungarian orphan works statute was adopted on December 15, 2008 and entered into force on February 1, 2009. It gives the Hungarian Patent Office the authority to grant licenses for the use of orphan works. The regulation that was necessary to implement the new licensing scheme entered into force on May 16, 2009. 100/2009. (V.8.) Korm. r. az árva mű egyes felhasználásainak engedélyezésére vonatkozó részletes szabályokról (Decree 100/2009 (V.8.) of the Government on the Detailed Rules Related to the Licensing of Certain Orphan Works) (Hung.). *Id.*
40. *About Arrow*, ARROW-NET, <http://www.arrow-net.eu/> (last visited Aug. 25, 2010).
41. *Copyright in the Knowledge Economy*, at 3, COM (2008) 466 final (July 16, 2008).
42. *Id.* at 12.
43. *Id.* at 10–11.

works issue. The potential cross-border nature of this issue seems to require a harmonized approach.<sup>44</sup>

That same year, the European Commission's High Level Expert Group on Digital Libraries issued its *Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works*.<sup>45</sup> That report underlined the importance of the solutions proposed by the European Commission—the creation of sector-specific search criteria for diligent searches as well as the creation of Rights Clearance Centers and of orphan works databases.<sup>46</sup> In addition, the Commission simultaneously summoned various stakeholders to sign a Memorandum of Understanding on Diligent Search Guidelines.<sup>47</sup>

### C. Differences Between the European Proposal and Its American Counterpart

If we compare the solutions proposed by the European Commission—the creation of national databases, Rights Clearance Centers, and nationally funded digital libraries—with the solutions proposed by orphan works bills introduced into Congress, all of which propose a limitation on remedies,<sup>48</sup> we see that, unsurprisingly, both sets of proposals clearly reflect the legal systems that produced them.

Simply stated, the United States proposes an essentially market-driven approach which would allow possible users of orphan works to use such works without any costs other than those incurred during their reasonably diligent search. Once the copyright owner reappears or presents himself or herself, he or she would need to notify the user, negotiate a “fair compensation,” and, in cases where no agreement was reached, sue—provided, of course, that he or she has the financial means to do so.<sup>49</sup> The American solution is thus relatively inexpensive to implement and use. Moreover, if the given work is truly orphaned, the American proposal avoids payments of large licensing fees (that will never be claimed) to an organization that would be relatively costly to establish and maintain.

The proposed European solution, on the other hand, relies heavily on public ordering. Its main focus is on the establishment of publicly funded national databases

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44. *Id.* at 11.

45. See *HLEG Final Report*, *supra* note 27. The final report was the result of more than two years of deliberation, since the High Level Expert Group first met in Brussels on March 27, 2006. *Id.* at 4.

46. See *HLEG Final Report*, *supra* note 27, at 4, 25.

47. See *High Level Expert Group Meetings*, EUROPA, [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/other\\_expert\\_groups/hleg/meetings/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/other_expert_groups/hleg/meetings/index_en.htm) (last visited Aug. 23, 2010). The signatories of the memorandum, authors and publishers associations from the various member states, libraries, etc., agreed to observe the due diligence guidelines established by the European Digital Libraries Initiative in its Joint Report and the relevant Sector Reports. *Id.*; *Memorandum of Understanding on Diligent Search Guidelines for Orphan Works*, at 2 (Jun. 4, 2008), available at [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/orphan/mou.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/mou.pdf).

48. See Orphan Works Act of 2006, *supra* note 32; Orphan Works Act of 2008, *supra* note 32, §§ 1, 2, 514; Shawn Bentley Orphan Works Act of 2008, *supra* note 32. For a short synopsis of the framework envisioned by these bills, see *supra* note 32.

49. See *supra* note 32.

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that are supposed to reduce the orphan works problem by providing information on rights holders.<sup>50</sup> The databases as well as the proposed collective licenses are subject to government supervision. Moreover, EU Member States have taken up the Herculean task of digitizing and making available an almost impossibly vast repository of European culture—consisting not only of books but of images, sound recordings, and videos—on a public budget.

Of special interest in this connection is the extent to which the respective solutions of the United States and the European Union reflect pervasive tendencies and general attitudes in their legal systems—faith in the market in one case and the belief that the preservation of culture should not be governed by market forces in the other.

Equally interesting is the fact that the proposed solutions differ at all. They were both drafted in the digital age with digitization and online availability in mind. And yet, neither party sufficiently took into account that a real and durable solution to the orphan works problem involves a great many cross-border issues and would necessitate as broad a common solution as possible. Even if it is unrealistic to implement a truly global solution, it is not unrealistic to implement one that coordinates American and European legislation. While both parties closely followed the developments taking place on the opposite side of the Atlantic, neither made real efforts toward collaborating on a common solution.

### III. REACTIONS TO THE GOOGLE BOOKS SETTLEMENT IN EUROPE

In hindsight, it is easy to see the extent to which it clearly required pressure from a potent market player to change the approaches (and, perhaps, the mindsets) of the United States and the European Union and to move them closer together in their responses to the orphan works problem. That market player proved to be Google. The company's annual revenue in 2008 was more than \$21.795 billion.<sup>51</sup> That exceeds the Gross Domestic Product (GDP) of some Member States of the European Union—Cyprus's GDP was \$21.277 billion in 2008, and Malta's GDP was, in the same year, \$7.449 billion—and is multiple orders of magnitude larger than Europeana's €2.5 million annual budget.<sup>52</sup>

Given the power and the wealth of this market player, it should perhaps come as no surprise that European reactions to the Settlement have been vehement, as Mr. Eyrolles's statement reflects. A group of EU Member States spearheaded by France and Germany has been particularly outspoken in its opposition to the initial Settlement. Both countries have submitted amicus briefs to Judge Chin in which they argue

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50. See Commission Recommendation 2006/585, *supra* note 31, at 29–30.

51. *Financial Information, 2008 Financial Tables*, GOOGLE, <http://investor.google.com/financial/2008/tables.html> (last visited Oct. 15, 2010). In 2008, Google's revenue was \$21,795,550,000 and its net income was \$4,226,858,000. *Id.*

52. *Gross Domestic Product 2009*, THE WORLD BANK, <http://siteresources.worldbank.org/DATA/STATISTICS/Resources/GDP.pdf> (last visited Oct. 15, 2010); *Cyprus GDP Data & Country Report*, GLOBAL FIN., <http://www.gfmag.com/gdp-data-country-reports/287-cyprus-gdp-country-report.html> (last visited Oct. 15, 2010); *Malta GDP Data & Country Report*, GLOBAL FINANCE, <http://www.gfmag.com/gdp-data-country-reports/223-malta-gdp-country-report.html> (last visited Oct. 15, 2010).

against the inclusion of foreign authors in the lawsuit.<sup>53</sup> In addition, publishers and authors in France have expressed their opposition to the Google Books Search Project by bringing suit against Google for scanning books by French authors and seeking €15 million in damages.<sup>54</sup> On December 18, 2009, a French court ordered Google to pay €300,000 in damages and €10,000 in fines per day until it removed the plaintiffs' books from its online database.<sup>55</sup> In addition, both countries tried to exert diplomatic pressure. All of these measures have been heavily publicized.<sup>56</sup>

Less publicized, however, is the fact that the European Union's reaction has been different from that of some of its Member States. Despite pressure from Member States such as France and Germany, the European Commission elected not to write an amicus brief on behalf of the European Union in opposition to the original Settlement. Viviane Reding, the former Commissioner for Information Society and Media, and Charlie McCreevy, the Commissioner for the Internal Market and Services, issued a joint statement in which they stressed the necessity of, and potential for, public-private partnerships as a means to effect the digitization of books.<sup>57</sup>

These public-private partnerships could consist of relatively conservative forms of cooperation, such as private sponsoring or payments from the private sector for links provided by Europeana, as well as of more far-reaching involvement of private parties that, according to the European Commission, could go so far as turning the management of Europeana over to the private sector.<sup>58</sup> These considerations stand in stark contrast to previous statements made by the European Commission, which envisioned a bigger role for the public sector in the administration of Europeana.<sup>59</sup>

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53. See Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the Federal Republic of Germany, *supra* note 3; Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the French Republic, *supra* note 3.

54. Tribunal de grande instance de Paris [TGI] [District Court of Paris] Paris, Bull. civ. III, Dec. 18, 2009, D. 2009 A.J. (Fr.) available at [http://thepublicindex.org/docs/ec/martiniere\\_french.pdf](http://thepublicindex.org/docs/ec/martiniere_french.pdf), translated at [http://thepublicindex.org/docs/ec/martiniere\\_english.pdf](http://thepublicindex.org/docs/ec/martiniere_english.pdf). La Martinière, the publishers of Le Seuil, and others brought the suit in 2006. It was backed by France's 530 member strong publishing association *Syndicat national de l'édition* (SNE) and the authors group *Société des gens des lettres* (SGDL) and went to trial on Sept. 25, 2009. *Id.*

55. *Id.*

56. See e.g., Robert Darnton, *Google and the New Digital Future*, N.Y. REV. BOOKS, December 17, 2009, available at <http://www.nybooks.com/articles/archives/2009/dec/17/google-and-the-new-digital-future>; Kevin O'Brien and Eric Pfanner, *European Opposition Mounts Against Google's Selling Digitized Books*, N.Y. TIMES, August 23, 2009, [http://www.nytimes.com/2009/08/24/technology/internet/24books.html?\\_r=1&ref=google\\_book\\_search](http://www.nytimes.com/2009/08/24/technology/internet/24books.html?_r=1&ref=google_book_search).

57. Press Release, Viviane Reding, Comm'r for Info. Soc'y and Media, & Charlie McCreevy, Comm'r for the Internal Market & Services, Joint Statement, European Comm'n, It is Time for Europe to Turn Over a New e-Leaf on Digital Books and Copyright (Sept. 7, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/376&format=HTML&aged=0&language=EN&guiLanguage=en>.

58. *Europeana—Next Steps*, *supra* note 8, at 2.

59. *European Commission High Level Expert Group on Digital Libraries, i2010 Digital Libraries Initiative, Digital Libraries: Recommendations and Challenges for the Future* 7 (Dec. 2009).

## H IS FOR HARMONIZATION

There can be little doubt that the Google Books case and the original Settlement have had no small part in leading the Commission to change tack on this issue.

As noted above, the European Commission had for some time expressed frustration with Member States' lackluster efforts to digitize the collections of their national libraries. It is this state of affairs that led the European Commissioner for Information Society and Media, Viviane Reding, to remark:

I find it alarming that only 5% of all digitised books in the EU are available on Europeana. I also note that almost half of Europeana's digitised works have come from one country alone, while all other Member States continue to under-perform dramatically. To me this shows, above all, that Member States must stop envying progress made in other continents and finally do their own homework. It also shows that Europeana alone will not suffice to put Europe on the digital map of the world. We need to work better together to make Europe's copyright framework fit for the digital age.<sup>60</sup>

It is clear that "the progress made in other continents," which Member States "must stop envying," refers to the Google Books Project. Thus far, only circa one percent of the books in European national libraries have been digitized.<sup>61</sup> The fact that the most active national library in this respect—the *Bibliothèque Nationale de France*—was openly exploring the possibility of working with Google (until the French government pressured it to end negotiations) lends added credibility to the Commission's statement in this regard.<sup>62</sup>

In addition, the Commission held an information hearing on the Settlement on September 7, 2009, where it stressed the importance of quickly developing a European framework similar to the one provided for by the proposed Settlement.<sup>63</sup> On October 19, 2009, while presenting a Communication on Copyright in the Knowledge Economy, which summarized the findings of the consultation that followed the *Green Paper on Copyright in the Knowledge Economy* and that yielded 372 responses,<sup>64</sup> Commissioner Reding again noted that:

[i]mportant digitisation efforts have already started around the globe. Europe should seize this opportunity to take the lead, and to ensure that books digitisation takes place on the basis of European copyright law, and in full respect of Europe's cultural diversity. Europe, with its rich cultural heritage,

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60. See Press Release, European Comm'n, *supra* note 15.

61. Reding & McCreevy, *supra* note 57.

62. See Charles Bremner, *Google Bruises Gallic Pride as Nat'l Library Does Deal with Search Giant*, THE TIMES, Aug. 19, 2009, [http://technology.timesonline.co.uk/tol/news/tech\\_and\\_web/the\\_web/article6800864.ece](http://technology.timesonline.co.uk/tol/news/tech_and_web/the_web/article6800864.ece); Benjamin Ferran, *La BNF se laisse séduire par Google* [The BNF is Seduced by Google], LE FIGARO, Aug. 18, 2009, available at <http://www.lefigaro.fr/hightech/2009/08/18/01007-20090818ARTFIG00332-la-bnf-se-laisse-seduire-par-google-.php>.

63. Reding & McCreevy, *supra* note 57.

64. *Copyright in the Knowledge Economy*, at 3, COM (2009) 532 final (Oct. 19, 2009). The replies came from publishers (56), collecting societies and licensing agencies (47), universities (47), libraries, archives and museums (114), industry and commercial federations (30), organizations representing persons with disabilities (4), Member States (11), and others (63). *Id.*

has most to offer and most to win from books digitisation. If we act swiftly, pro-competitive European solutions on books digitisation may well be sooner operational than the solutions presently envisaged under the Google Books Settlement in the United States.<sup>65</sup>

Here, Commissioner Reding again evokes Google Books in order to induce Member States to “act swiftly” and to find “pro-competitive European solutions on books digitisation.”<sup>66</sup> She not only makes her case for a European solution, but also hints at what such a solution might look like. On the one hand, she underlines the importance of ensuring “that book digitisation takes place on the basis of European copyright law.”<sup>67</sup> On the other hand, only a few months earlier, Commissioners Reding and McCreevy stated their intention to find “a truly European solution in the interest of European consumers.”<sup>68</sup> Moreover, they stressed that “we [also] need to take a hard look at the copyright system we have today in Europe,” which includes “finding an online family for orphan and out-of-print works.”<sup>69</sup>

What is especially interesting in this respect is that the Commission stressed the importance of the Settlement “in the interest of European consumers.”<sup>70</sup> Appearances notwithstanding, the term “consumers” is particularly revealing given that it has enjoyed a special status in prior debates on the topic and strikes a special chord with the relevant parties in EU Member States because, in the past, the European Commission has not hesitated to abolish time-honored practices in order to benefit consumers. Because the Commission, in its last statements on the matter, strongly emphasized the cross-border relevance of the digitization of works (which is needed to trigger the European Community’s legislative competence in that area), we might—depending on the outcome of consultations conducted by the Commission and concluding on November 15, 2009—see a proposal for an EU-wide piece of legislation that in all likelihood would deal with the legal status of both orphan and out-of-print works.<sup>71</sup> There is every reason to expect that these changes will be radical.

Alarmed by the fact that Google, in a recent announcement on the availability of Google Books for mobile phones, indicated that it would make over 1.5 million public domain books available in the United States but only half as many in the European Union,<sup>72</sup> the Commission publicly discussed the idea of introducing a cut-off date for copyright protection. That cut-off date would be similar to the one in

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65. Press Release, European Comm’n, European Commission Puts Challenges of Books Digitization for Authors, Libraries and Consumers on EU’s Agenda (Oct. 19, 2009), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1544>.

66. *Id.*

67. *Id.*

68. Reding & McCreevy, *supra* note 57.

69. *Id.* at 2.

70. *Id.*

71. *Europeana—Next Steps*, *supra* note 8, at 6.

72. *Google brings e-books to mobiles*, AFP, Feb. 6, 2009, [http://www.google.com/hostednews/afp/article/ALeqM5h69x\\_B0k4H2ZrbyyiEJn0-dKETIQ](http://www.google.com/hostednews/afp/article/ALeqM5h69x_B0k4H2ZrbyyiEJn0-dKETIQ).



place in the United States for works that were published prior to 1923. For works published before the cut-off date, a lower threshold for a digital search would be required. This would increase the number of works that would be available through Europeana.<sup>73</sup> This was a clear break with the past. Most Member States of the European Union have been members of the Berne Convention for more than half a century, and their copyright laws have never (or at least not for a very long time) had a copyright term that did not take the life of the author as the basis for its calculation.<sup>74</sup> The American cut-off date is itself a date set as much by chance as anything else. That it may now serve as a model for a European orphan works statute is little short of revolutionary.

In mid-January 2010, the European Commission's proposal to form public-private partnerships in order to better deal with the immense financial and administrative obstacles to the digitization of works received strong support from an unlikely partner. France, the country most invested in digitizing its cultural heritage, is currently changing its course. As noted above, the *Bibliothèque Nationale de France* is the European national library that has been by far the most active in digitizing its catalogue.<sup>75</sup> Its website, Gallica, not only grants users free access to public domain material, but also contains links to in-copyright content published by French publishing houses.<sup>76</sup> Being the most active of the European national libraries, it was also the first national library to realize the immense costs that come with mass-digitization. This forced the library to begin talks with Google. Public outcry led the government to put pressure on the library to end its negotiations with Google, commissioning at the same time a *Report on the Digitalization of the Written Heritage*.<sup>77</sup>

This report was released on January 12, 2010. Its findings led France's Minister of Culture, Frédéric Mitterrand, to acknowledge that Gallica, the name of France's national digital library, was problematic: "I'm not . . . sure we should keep that name. It has this 'Asterix'-ring to it that I'm not so fond of. It's both a bit nationalistic and a bit archaic."<sup>78</sup> The report also criticized the current agreements that libraries reached with Google, such as the one struck by the municipal library of Lyon that

73. *Europeana—Next Steps*, *supra* note 8, at 6.

74. See Berne Convention for the Protection of Literary and Artistic Works art. 7, § 2, Sept. 28, 1979, S. TREATY DOC. NO. 99-27; see also *Berne Convention for the Protection of Literary and Artistic Works*, WORLD INTEL. PROP. ORG., <http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf> (last visited Oct. 15, 2010) (listing all contracting parties to the Berne Convention as of July 15, 2010).

75. Press Release, European Commission, *supra* note 15.

76. See GALLICA DIGITAL LIBR., <http://gallica.bnf.fr/> (last visited Oct. 15, 2010).

77. Marc Tessier, *Rapport Sur La Numerisation Du Patrimoine Ecrit* [Report on the Digitization of Written Heritage] at 1, A LA UNE (Jan. 12, 2010), available at <http://www.culture.gouv.fr/mcc/Actualites/A-la-une/Mission-sur-la-numerisation-du-patrimoine-ecrit/Rapport-Tessier>.

78. "Je ne suis pas sûr déjà qu'il faille garder le nom. Il a un côté 'Asterix' qui me gêne. C'est un peu nationaliste et archaïque." Frédéric Mitterrand, *La révolution numérique selon Frédéric Mitterrand* [The Digital Revolution according to Frédéric Mitterrand], LE MONDE (Jan. 12, 2010, 8:33 PM), available at [http://www.lemonde.fr/culture/article/2010/01/12/la-revolution-numerique-selon-frederic-mitterrand\\_1290461\\_3246.html](http://www.lemonde.fr/culture/article/2010/01/12/la-revolution-numerique-selon-frederic-mitterrand_1290461_3246.html).



gives Google exclusive rights to its collection for twenty-five years.<sup>79</sup> Nevertheless, the report advocated partnerships with the company, provided that the government would keep commercial control and digital distribution rights for the works offered to Google.<sup>80</sup> The French government endorsed the report's findings and officially announced the beginning of negotiations with Google. Mitterrand told the French newspaper *Le Monde*:

Google entered the European scene as a conquering hero and many institutions threw open their doors on the basis of agreements which I find unacceptable. Many of these agreements demand excessive confidentiality and a degree of exclusivity which is essentially impossible, as well as clauses that are superbly vague concerning copyright . . . . We propose a quite different dialogue: a truly transparent exchange of files without confidentiality or exclusivity and which respects copyright.<sup>81</sup>

He was uncertain whether Google would accept France's offer and declared that he would travel to the United States to discuss details of a possible deal.<sup>82</sup> If France's conditions proved unacceptable for Google, he claimed that he would then consider negotiating with other possible private partners.<sup>83</sup>

Mitterrand's statement may sound bold, but, ultimately, it represents a capitulation before the realities of the market. Google showed the potential of a potent market player to influence mass-scale digitization of works, be they still protected under copyright or already in the public domain. Even though France's government designated €750 million of its economic stimulus plan last December to the digitization of cultural works, it realized that the task of digitization required the financial strength and the know-how of private companies and that it could not be done on a public budget alone.<sup>84</sup> In that respect, it moved much closer to American thinking as expressed in the proposed orphan-works legislation in the United States. The Library of Congress has its own digital collection (concentrating on its rarest works) and has made it accessible for everyone online but digitization in the United States has not been a highly publicized and politicized government policy.<sup>85</sup>

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79. Tessier, *supra* note 77, at 17.

80. *Id.* at 30–32.

81. Mitterrand, *supra* note 78.

Google est entré en Europe en conquérant et beaucoup lui ont ouvert la porte en signant des accords que je trouve inacceptables. Ils reposent sur une confidentialité excessive, des exclusivités impossibles, des clauses désinvoltes, voire léonines au regard du droit d'auteur . . . . Nous allons leur proposer un tout autre dialogue: un échange de fichiers sans confidentialité ni exclusivité, dans la transparence et le respect des auteurs.

*Id.*

82. *Id.*

83. *Id.* The report mentions Microsoft and Yahoo!, among others. *Id.*

84. *Id.*

85. *About Digital Collections*, LIBRARY OF CONGRESS, <http://www.loc.gov/library/about-digital.html> (last visited Oct. 15, 2010).

#### IV. CONCLUSION

By including foreign authors—one of its most controversial elements—the first Settlement proposal changed the orphan works debate in the United States. It focused attention on the need for a solution that takes into account, and makes provisions for, situations elsewhere—notably, in America’s most natural partner in this regard, the European Union. Interestingly, one of the least controversial parts of the Settlement resembles what the European Commission is proposing in order to deal with the orphan works problem. This feature is one that the proposed American orphan works legislation did not contain—the creation of a national rights registry that would be able to grant collective licenses for the digitization of books.<sup>86</sup> This proposed Book Rights Registry is similar in structure to the creation of national Rights Clearance Centers that the European Commission advocates in its proposals. The Settlement thus may lead to a *de facto* solution for one group of orphan works—*orphan books*—which more closely resembles proposed European solutions than the ones envisioned in the United States.

The Settlement has, however, not only changed the terms of debate in the United States. As the proceeding shows, they have done the same for the European Union, both with respect to possible solutions for the orphan works problem and with respect to mass-scale digitization of books and other works.

Three points of capital importance for the future of orphan works legislation can be seen in the state of affairs detailed here. The first is that the European Commission is increasingly inclined to enact orphan works legislation itself for the simple reason that its Member States have been too slow or too resistant to follow the European Commission’s recommendations. This is, of course, not something that the European Commission can simply decide to do on its own, but Google Books has effectively shown that the orphan works problem may indeed extend across national boundaries—which would fulfill the criterion needed to trigger the European Union’s legislative competence (an effect on the internal market). The second is that the first Settlement proposal has served to underline the importance of Europeana for the European Union and, thereby, the importance of finding a solution for the orphan works problem it presents.

The third point is separate from, but related to, the orphan works problem. The proposed Settlements have led the European Commission to acknowledge that mass-digitization of copyrighted works is not feasible with exclusively public funds. The Google Books Project in general and the Settlement proposals in particular have made the European Commission seriously reconsider the possibility of, and the advantages presented by, cooperating with private companies in creating a digital archive of its cultural heritage. Even France, the Member State that has most earnestly attempted to establish and maintain a digital archive of its culture, has found it impossible to continue its efforts on a public budget alone and has entered into negotiations with Google. There is every reason to believe that what is true of

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86. The precise make-up of the registry and the rights it would grant were subject to much debate, but the creation of the registry itself did not inspire much controversy.

France is, or will prove to be, equally if not more true of the other EU Member States and that, consequently, partnerships between public and private institutions will be the dominant trend in the months and years to come.