I. ABSTRACT

My research plan for this year at NYU is to examine public libraries and the legal implications they face in their transition to the digital era. I wish to concentrate on the future of public libraries that serve different communities by giving them access to a learning space and to a real public service. I will focus on the ground reality of publically accessible libraries that strive to adapt to the digital era. Initially I will be using the New York Public Library as a model given its current projects ensuring a digital future parallel to its strong physical past and present.

My research question is how can libraries within the current copyright framework strategically invest in reaching a broader demographic both on and offline. Do existing copyright rules and exceptions allow i.) engagement in digitization and ii.) investment in new avenues for providing access to digital material? To what extend would such actions push the copyright boundaries in an uncertain and perhaps risky manner?

I frame the questions to fit to a specific research agenda. Together with the legal questions on digitization and access, I will explore the possibility of libraries experimenting with innovative ways to reach a broad online audience, whether they prefer to innovate with online platforms or collaborate with existing ones. I wish to take Wikipedia as a case-study and focus on methods of collaboration between the Wikimedia Foundation and interested public libraries who want to offer new avenues of access to digitized collections. The choice of Wikipedia as a case study stems from the idea that public libraries need to invest in partners that share the same ideas of public access to knowledge. Wikipedia would be a good strategic option for many reasons, most importantly its history, principles, popularity and global outreach as well as its current need for reforms and strategic growth. Since public libraries have traditionally been a space of knowledge commons, it is also easy to conceptualize a link to platforms like Wikipedia, a very successful example of information commons online. Interestingly, this is not something that Wikipedians haven’t thought about.1

Ultimately, I plan to propose a legal framework under which libraries’ collaborations of that sort could begin. For the case-study I will take into account both the legal status of Wikipedia as part of a non-profit organization and the copyright restrictions that libraries would face in accordance to their respective jurisdictions.

The research proposal below provides an overview of the specific set of legal questions on which I will concentrate with respect to this agenda. For my project I plan to combine scholarly analysis with empirical work, outreaching into selected libraries and organizations. I will publish a research paper with my findings and would aim to organize a workshop if possible within the framework of the NYU research center I am affiliated. In

parallel, during the same year I plan to submit my current Ph.D. thesis for publication and link its findings to my post-doctoral research, which I consider a coherent continuance.

II. EXTENDED PLAN:
CRAFTING A DIGITIZATION RIGHT FOR PUBLIC LIBRARIES: THE POSSIBILITY OF STRATEGIC PARTNERSHIPS TO FACILITATE OUTREACH AND ACCESS

For my post-doctoral research as an NYU Global Fellow I wish to concentrate on the future of public libraries. My research plan is to examine the legal implications they face in their transition to the digital era. I will focus on the practical and legal aspects of publically accessible libraries that strive to adapt to the digital era. Within the current copyright framework I will investigate how they can strategically invest in reaching a broader public both on and offline. I frame the legal questions looking at two phases: digitization and access. First, do existing copyright rules and exceptions allow engagement in digitization? Second, can libraries invest in new avenues for providing access to digital material? To what extent would either actions push the copyright boundaries in an uncertain and perhaps risky manner?

I decided to engage with this particular topic after the observation that while ‘brick’ libraries have traditionally played a central role in collecting, organizing and giving access to intellectual resources, existing copyright rules are globally fragmented and drafted mostly in the pre-digital era, and as a result, do not necessarily enable libraries to claim an equivalent central role in the digital era.

In my view, there are many reasons why public libraries deserve separate attention. Their institutional role within small communities is unique. They serve as a learning space for children, young students and adults and they are also among the most favorite public institutions. Their users, unlike those privileged to have access to large university library collections, are not necessarily dedicated researchers. They could be parents with their kids, the occasional user who searches for a good novel or film, or for certain information that cannot be found by a Google search or even someone who simply likes their space for reading. Furthermore, there is a deeper rationale justifying the need for sustaining libraries and providing exceptional policies to allow them realize their role. Publically accessible libraries offer wide and free (or low cost) access to knowledge. Thus, they play a vital role in society in equalizing access to knowledge and enable self-education that is arguably key to social mobility.

If, however, public libraries decided to digitize their collections, like Google or HathiTrust did, what would be the legal implications? Furthermore, under which requirements and restrictions could they offer digital access to their users and to what extend could they partner with online platforms and websites? To craft another fair use or special library exception in favor of their patrons is a question of balancing the effects this would have on book markets and the benefits it would have for the communities served. This is more a question of access than a question of digitization. To investigate how a special copyright exception could work for public libraries in the digital era, one must think of what can a library offer that Google for example cannot, and why it is worth preserving. I want to

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focus on both libraries’ online and offline presence: 1. How and with what limitations can libraries offer content and/or metadata online partnering with specific websites or platforms and whether they can provide links for e-lending (online presence), 2. Access to digitized material in the premises of public libraries and inter-library loans of digital collections (onsite presence).

As part of my research plan I want to investigate how publically accessible, community libraries are affected by the recent legal developments after the final appellate decisions in both Authors Guild v. HathiTrust 1 and Authors Guild v. Google. 4 In the aftermath of these two decisions, there is arguably a shift in the copyright exception regarding digitization, or at the very least an expansive read of the fair use doctrine. 5 In both cases mass digitization of collections, although copyright infringement at least prima facie, was considered a “fair use” under the specific circumstances. Another case originating in the CJEU in Luxemburg followed similar directions, confirming the right of a college library in Germany to digitize and offer restricted access in the library premises to the digital version of a book it owned in its physical collection. 6 This precedent is to be interpreted as a holding under the circumstances of transformative use of the specific projects, the HathiTrust catalogue and the Google Books service, or as applying an exception in the circumstances of a specific case of access within a libraries’ premises. However, I wish to look further at the broader implications that we might abstract if this concerned all public libraries. If Google or the consortium of the most important American University libraries were all allowed to digitize their entire collections for certain uses that were cleared as fair, what uses could justify digitization of public libraries? Also, particularly the HathiTrust case accounts for the collaboration between Google and many University libraries. How could that precedent be applied to public libraries and their potential partnerships?

To frame my research questions in a pragmatic context, I will take a case-study and focus on how the Wikimedia Foundation could collaborate with public libraries who want to offer new avenues of access to their digitized collections. An investment in systematic collaboration could result in a situation beneficial to all stakeholders involved. Wikipedia, among the top ten most visited websites yearly, has achieved a level of integration that could be very useful to public libraries. But also vise versa: libraries can contribute to Wikipedia’s efforts to improve content. Since public libraries have traditionally been a space of knowledge commons, it is also easy to conceptualize a link to platforms like Wikipedia, a very successful example of information commons online. I chose Wikipedia from the many other possible online platforms, first, because it shares the same idea of public outreach and access with libraries and, second, because it is a good strategic option globally. Its popularity and global outreach, together with a continuous investment in many countries and languages make it a very attractive partner. Wikipedia also needs reforms and strategic growth to maintain its popularity. Among the top ten most visited websites yearly, Wikipedia has achieved a level of integration that could be very useful to public libraries. And vise versa, libraries can contribute to Wikipedia’s efforts to improve content. Furthermore, a collaboration with libraries is very realistic if we look at how Nupedia, the project’s predecessor was based on the idea of experts contribution and systematic review of entries. Now that Wikipedia has

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1 755 F.3d 87 (2d Cir. 2014).
2 No. 13-4829 (2d Cir. 2015).
3 See Pamela Samuelson, Possible Futures of Fair Use, 90 Wash. L. Rev. 815 (2015)
4 C-117/13: Technische Universität Darmstadt v Eugen Ulmer KG
achieved the volume that Nupedia could not, it is arguably time to invest more in the possibility of advancing the content with richer sources, which libraries can provide as references. The main principle of crowd-sourcing would remain intact only adding more sources to editors willing to enrich the entries and to the public which consults Wikipedia and wants to be referred further to original material.

For my project I will combine scholarly analysis with empirical work. I plan to conduct interviews within the International Federation of Library Associations and Institutions and its members (library associations) and partners (for example the Online Computer Library Center) as well as the Wikimedia Foundation. To have a better understanding of libraries’ perspective I also want to examine their voice as expressed in global and national or local associations. I will conduct interviews with select public libraries that have engaged with the national regulators in the recent inquiries for comments or consultations, and also with the national courts submitting amicus curiae briefs. I will also focus on the DPLA and its connections to the public libraries across the US as well as Europeana and its equivalent central role within Europe. Additionally, the New York Public Library offers a good model and rather large-scale example of a library that is currently trying to reinvent both its physical presence\(^7\) and its digital future.\(^8\)

I framed my project with the US and EU copyright frameworks in mind – two western jurisdictions which have lots of similarities but also differences in copyright laws (to be more precise the jurisdictions are more than two as the copyright law is not fully harmonized at the EU level). The questions however are not meant to be limited to a specific jurisdiction. Although I use existing laws and case-law of these jurisdictions to understand the real issues that public libraries face, the libraries I have in mind could be anywhere in the world so long as they are publically accessible. The broader picture question is whether we can envision a copyright framework that is favorable to the function of public libraries so that they adapt better to the digital era and also manage the costs of digitization?\(^9\)

Compared to my doctoral thesis this research proposal shifts from a top-down to a bottom-up approach. In my Ph.D. dissertation I investigate the copyright challenges for building digital collections and the infrastructural role that digital libraries can have within the networked environment. My conceptual framework was cyber-theoretical, therefore, as much as possible detached from a specific jurisdiction. The work I have done for my dissertation provides solid ground for the focus to move directly to the library as an institution. All the more, I consider it as an important cause to apply the knowledge I acquired when investigating issues related to digitization such as the orphan works problem and other aspects of copyright legislation at the national and international level, as well as legal developments coming from the courts and the legislators specifically to public libraries.

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\(^9\) The fact that copyright issues become much more complex compared to the framework that was applicable to the traditional brick library was noticed before the millennium. See the foundational work of Pamela Samuelson in Intellectual Property Rights for Digital Library and Hypertext Publishing Systems, 6 Harv. J. Law & Tech. 237 (1993) & Copyright and Digital Libraries, 38 Comm. ACM (1995)
This research agenda is timely. This summer the US Copyright Office issued a notice of inquiry for the issue of mass digitization (due on October 9th, 2015). From the public comments that are available on the Office’s website, one can observe a mix of stakeholders that include many libraries and their consortia, museums, associations of right-holders and other foundations. The purpose of the inquiry was to discuss the creation of an extended licensing program for certain mass digitization activities for research and education purposes. At the same time, the issue of orphan works remains unresolved after two notices of inquiry and a full report on the subject published on the 4th of June 2015. Similarly, in the beginning of December 2015 the EU Commission outlined its vision to modernize copyright rules; in particular, to make EU copyright rules appropriately designed for the digital age. Similar controversy is being mapped around orphans. Secondly, in the beginning of December 2015 the EU Commission outlined its vision to modernize copyright rules; in particular, to make EU copyright rules appropriately designed for the digital age. This comes after a long consultation period with stakeholders towards a future review of the EU copyright rules. An important part of this consultation was about libraries. The Commission has explicitly named education and access to people with disabilities as priorities. In general, accessibility of Europe’s digital culture has been consistently stated as a priority in the Commission’s Digital Agenda. The Commission also monitors the progress made by member-States and works together with Europeana in promoting digitization of libraries’ collections and aggregation of the results in one digital portal. Additionally, on the issue of orphan works, the 2012 EU directive, which gives all public purpose institutions the right to digitize orphan works, is still not assessed and its implementation within the member-States is ongoing. Lastly and even more critically the European Commission just published a proposal for a new directive on Copyright in the Digital Single Market following up on its December 2015 announcements (14.09.2016). In the proposal new rules to adapt mandatory exceptions and limitations also applicable to institutions such as libraries are being introduced. A concrete set of rules applicable to out-of-commerce works used by “cultural heritage institutions” is of particular relevance.

Beyond European and US developments, digitization and access to knowledge in the digital era is utmost a global debate with clear developmental and also humanitarian implications. The momentum is again important, as the WIPO Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled has just entered into force. The importance of this international treaty is major if we think how it will be the first international exception to copyright enabling digitization and access to a specific group of readers. Now that the treaty entered into force, there is a normative ground also at the international level for digitization in mass scale. One could easily imagine a central role for public libraries around the world when thinking about the implementation of this new right to access.

In all, I consider digitization and online access to knowledge a significant global issue with incredible momentum. To understand its significance we must think further about the intersection of law with technology as interplay between law and culture. Today technology shifted the way we understand and experience culture. Furthermore, technology has

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introduced a distinct culture itself, separating generations in those who are born digital and
those preceding them. At the same time, IP laws globally have posed concrete difficulties to
the realization of the full potential of technology. If we see law as a field of cultural
production, the legal culture or to use Pierre Bourdieu’s terminology the ‘juridical field’ is
necessarily affected by other cultures. It is important to assess legal culture and its central
players (legislators, regulators, courts) against cultural norms of a living society and see how
much is the latter reflected or inhibited by the former.

A particularly competitive relationship is observed between copyright and
technology, especially when it comes to online access to knowledge and content. This
relationship has been studied by both IP and cyber-law scholars from many perspectives. An
influential school of thought is that of interpreting copyright in view of its role as serving
rather than inhibiting access. To name only few leading works, Julie Cohen’s Configuring the
Networked Self offered what has been characterized as a “cultural turn” in intellectual
property thinking almost contrasting the utilitarian or law and economics approach of
Landes and Posner’s Economic Structure of Intellectual Property Law. For Cohen, access to
knowledge together with flexibility is important in order for users to realize their full potential
as “netizens” in a networked environment. Thus, she advocates for a more cultural approach
to copyright whereby its protection does not stifle Internet users’ cultural realization. James
Boyle, among others, brought the public domain to the center of attention and warned against
a second enclosure movement. Yochai Benkler has contributed to the same scholarship with
seminal works from a cyber-law perspective. Benkler, in particular, celebrates peer-
production and cooperation in the digital environment in a way that supersedes copyright’s
rationale, which is stuck in the government and markets (property) dipole. There is also a
strong activist perspective associated with the Access to Knowledge movement, a movement
diverse as the many IP and other sectors it covers – education, medicine, software, global
trade and development. Access to Knowledge in the Age of Intellectual Property, edited by
Gaëlle Krikorian and Amy Kapczynski, is a rich collection of works from many scholars and
areas that map the most important arguments of the movement. More recently, attention is
drawn to the possibilities of organizing and governing knowledge commons. Brett
Frischmann, Michael Madison and Katherine Strandburg in their recent work Governing
Knowledge Commons aggregate many successful examples of knowledge commons fostering
research and innovation coming from areas as different as astronomy, the news industry and

13 Urs Gasser and John Palfrey, Born Digital: Understanding the First Generation of Digital Natives,
Basic Books (2008)
(1987) 805
15 Julie Cohen, Configuring the Networked Self: Law, Code, and the Play of Everyday Practice, Yale
University Press (2012)
16 Anupam Chander & Madhavi Sunder, Copyright’s Cultural Turn, 91 Texas L. Rev. 1397.
18 James Boyle, The Second Enclosure Movement and the Construction of the Public Domain, Law &
Contemp. Probs., Winter/Spring 2003, p. 33-74
19 Yochai Benkler, The Wealth of Networks: How Social Production Transforms Markets and
Cooperation Triumphs over Self-Interest Crown Business (2011)
20 Gaëlle Krikorian and Amy Kapczynski (eds.), Access to Knowledge in the Age of Intellectual
Property, MIT Press (2010)
the airplane industry.\textsuperscript{21} On the whole, one can identify a tendency towards questioning enclosure, celebrating access and investigating the possibility of collaboration and perhaps building more and stronger knowledge commons in the information society. I intend to position my research within this school of thought, assessing legislation and policy-making against the benchmark of access to knowledge. Indeed, libraries have an institutional dimension, which I understand as infrastructural in facilitating access to knowledge. Since public libraries have traditionally been a space of knowledge commons, it is easy to conceptualize them in the digital era in connection to existing and successful information commons online as is today Wikipedia. In the long-term I believe that robust information commons will promote access to knowledge and further contribute to a rich and dynamic networked public sphere.

\textsuperscript{21} Brett Frischmann, Michael Madison and Katherine Strandburg, Governing Knowledge Commons, Oxford University Press (2014)