

digital technologies and cultural heritage: legal questions concerning access to digital archives

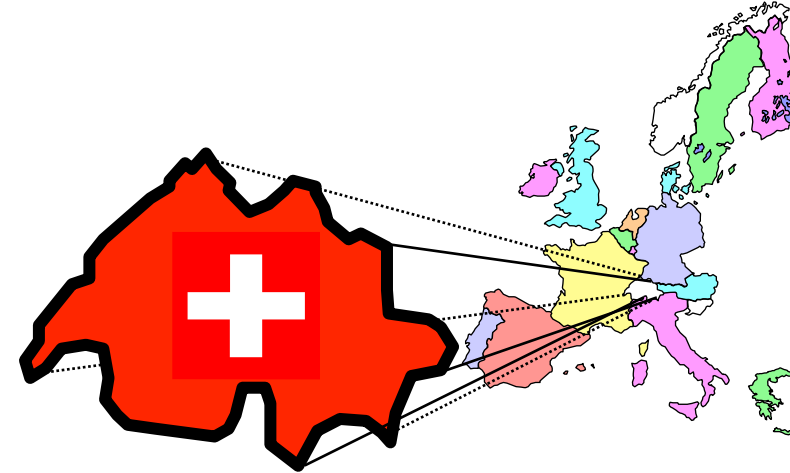
**mira burri, world trade institute
infoclio conference, bern, 2 november 2012**

intro and objectives

- **access to and use of digital archives (in particular for research)**
- **state of affairs under present copyright law**
- **digital technologies' implications**
- **broader conceptual thinking about the current state (and future) of **memory institutions** in the digital networked environment**

principle of territoriality

- protection rights **only**
in the country where you claim it



- **information** is published worldwide



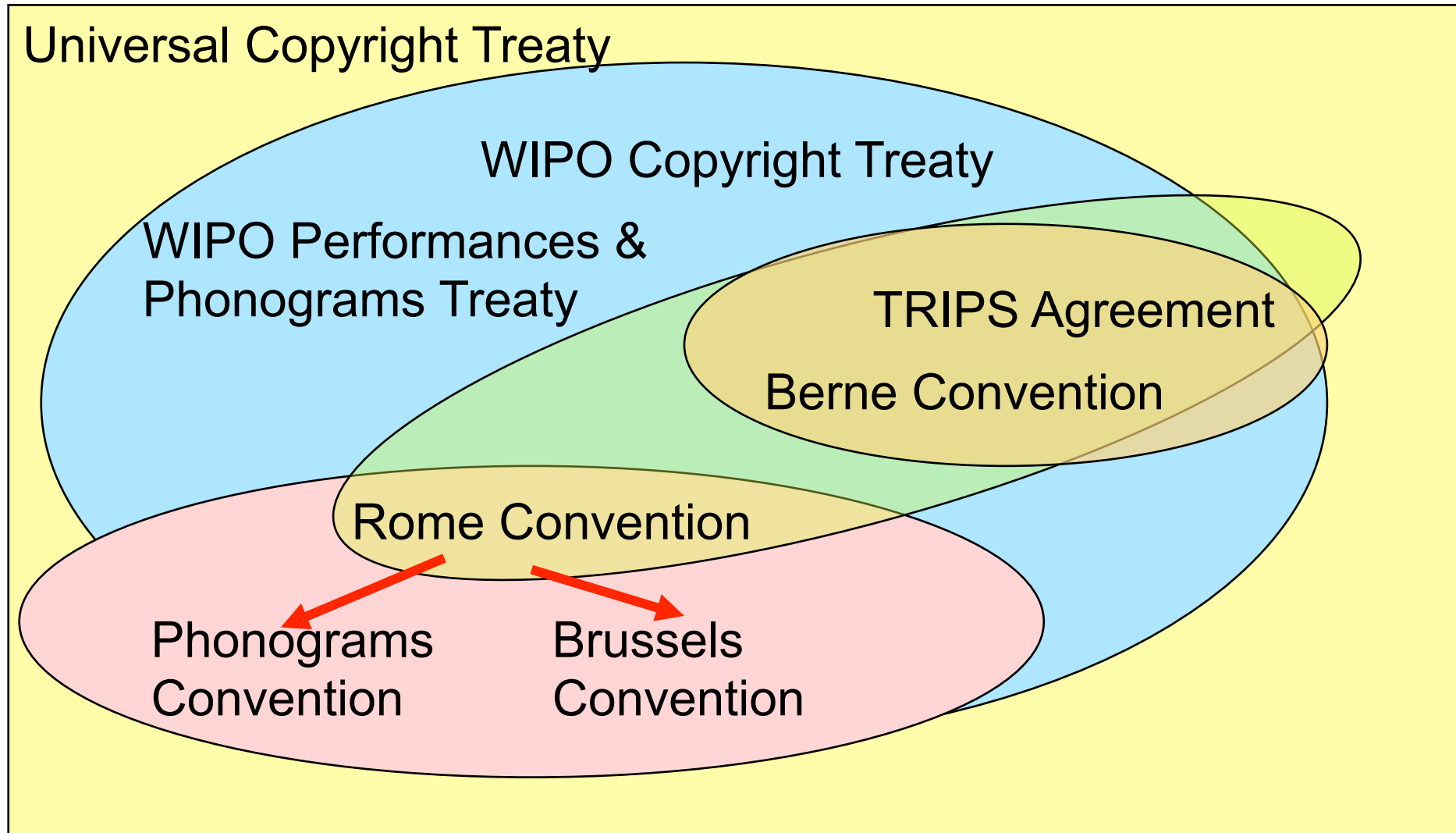
territoriality matters



europæana
think culture

- **over 20 million objects**
- **from more than 2'000 institutions**
- **from 34 countries**
- **metadata released under the least restrictive creative commons licence (CCO; attribution only)**

despite int'l and regional harmonisation



briefly on copyright (i)

- **subject matter:** artistic creations, such as books, music, paintings and sculptures, films and technology-based works such as computer programmes and electronic databases
- **basic rationale:** provide incentives for creators, otherwise not present if free copying allowed
- **but also:** balance between private and public interests
- **US Constitution, art. I, section 8, para. 8:** ‘[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries’.

briefly on copyright (ii)

- **the idea/expression dichotomy:**
protection does not apply to the ideas/
contents of a work
- **every original work of authorship,
irrespective of its literary or artistic merit**
- **no formalities** (registration, etc)
- **rights protected**
 - economic rights
 - moral rights

briefly on copyright (iii)

- the author has the right to authorise or prevent certain acts in relation to a work, including:
- **its reproduction in various forms, such as printed publications or sound recordings;**
- **the distribution of copies;**
- **its public performance;**
- **its broadcasting or other communication to the public, including online;**
- **its translation into other languages;**
- **its adaptation, such as from a novel into a screenplay.**

duration of copyright

- **Berne Convention:** the life of the author plus not less than 50 years after his death
- **US and EU:** 70 years after the death of the author
- **CH:** 50 years after the death of the creator for computer programmes; 70 years for all other types of works (art. 29 UrhG)
- upon expiration: into **the public domain**

copyright's extension

FREE MICKEY



***Eldred v. Ashcroft*, 537 U.S. 186 (2003)**

copyright limitations and exceptions

- common law countries: **fair use/fair dealing** (US, UK, Canada, Israel)
- civil law jurisdictions: **limitations and exceptions to copyright**
- allow limited use of copyrighted material **without** requiring permission from the rights holders

fair use

- **case-by-case test**
- in determining whether the use made of a work is a fair use **4 factors** are considered:
 - **the purpose and character of the use**, incl. whether such use is of a commercial nature or is for nonprofit educational purposes;
 - **the nature of the copyrighted work**;
 - **the amount and substantiality of the portion used** in relation to the copyrighted work as a whole; and
 - **the effect of the use upon the potential market for or value of the copyrighted work**

copyright limitations, most relevant to research activities

- **no blanket limitation for research as such**
- protection is fragmented and given in different instances
- **exceptions for teaching purposes (art. 5.3a EUCD / art.10.2 BC)**
- **quotations (art. 5.3d EUCD / art.10.1 BC)**
- **private use/study/copying (art. 5.2b EUCD / art. 9.2 BC)**

teaching and research

- **use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;**
- **broad in scope, incl. reproduction and communication to the public (including the right of making available online); domestic laws may extend it to distribution (art. 5.4 EUCD)**
- **any type of work**
- **fair compensation not specifically required**
- **only Lichtenstein and Switzerland require compensation, under a license subject to compulsory collective management**

quotation

- **quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose**
- **any work; broad in scope; due acknowledgement**

private use/study/copying

- **personal use shall mean any use of works in the personal sphere and within a circle of persons closely connected to each other, such as relatives or friends (art. 19.1.a UrhG)**
- **most EU laws require compensations; private copying is usually compensated by means of levies applicable on the blank carrier (e.g. CD), on the equipment (photocopiers, scanners, faxes) and/or on the operator (schools, libraries, government)**
- **private copying online (websurfing; downloading)**

a happy researcher?

- a great deal of **legal uncertainty**
- **duration of copyright** / **exceptions** / **fair use** / **applicable law** / **orphan works**
- **copyright strongly impacts on the selection of materials for digitisation; libraries and archives avoid the complexities of copyright law by digitising materials that have passed into the public domain and are no longer covered by copyright restrictions (e.g. Europeana only 2% audiovisual works)**
- **a bubble of (still) limited (digitally available) information?**

Directions:

- Set arrow at correct date
- Read information in windows
- Mouse-over asterisks [*] for clarifying information

Is it Protected by Copyright?

For works first published in the U.S.A.*

No

Permission Needed?

Copyright
Status/Term

In Public Domain

Unpublished Works
(date of creation)



2007 Michael Brewer & ALA Office for Information Technology Policy*

Date of First Publication

Before 1923

Between 1923-1977

If published without © notice

Between 1923-1963

If published with © notice, but not renewed after 28 years

Between 1923-1963

If published with © notice & renewed after 28 years

Between 1964-1977

If published with © notice

Between 1979-January 1, 2003

Created (unpublished) before 1979, but published before January 1, 2003

Between 1978-March 1, 1989

If published without © notice & without subsequent registration

Between 1978-March 1, 1989

If published without © notice but renewed; or published with © notice

After March 1, 1989

Published with or without © notice

Published after 2002

Created before 1979 and author died more than 70 years ago

Author living or died in the last 70 years

Author died more than 70 years ago

a happy researcher?

- **analogue / digital dichotomies**
- **hindrances in the practical reality of doing research**
- **contemporary research in a digital networked environment (not the lone researcher but through sharing and collaboration)**
- **Digital rights management systems (DRMs) and licensing as overriding (offline) user's rights / statutory exceptions and limitations**

changing memory institutions

- **archives, museums, libraries are paradigmatic examples for traditional memory institutions**
- **content-sharing platforms, social networks, peer-to-peer file-sharing infrastructures, digital images agencies, online music stores, and search engines as novel entities with a de facto derivative function as networked memory institutions**
- **trends of commercialisation / privatisation**

- **thank you.**
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