Open Archives and Intellectual Property: Incompatible World Views?

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Agenda

- What is intellectual property and why does it matter?
- How is all this changing in the network environment?
- How and why does intellectual property impinge on Open Archives?

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Who am I?

- For first 20 years of working life, a publisher
  - Primarily in academic publishing
  - Technical, business background
  - Pergamon, CBS Publishing, John Wiley & Sons
- For last 10 years, a consultant
  - Specialising in the impact of network distribution of Intellectual Property
  - Rightscom's business is about digital content strategies and media convergence (text, music)
  - Clients include commercial and non-commercial organisations
- Copyright knowledge firmly rooted in UK law
  - And not a lawyer
- No brief for "the content industries" or their current business models

First…a cautionary tale

- The sad tale of Kazaa and Sharman Networks…
- What does this story prove? We all care about our own intellectual property, but few of us care a great deal about anyone else's…

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Some background

- Barriers to publishing are disappearing
  - We are all publishers now
  - 36 million of us, at least
- Redistribution of content has become easy
  - And we all do it
- Concepts of territoriality are meaningless on the network
  - But still very significant for business in the physical world

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Intellectual Property – an introduction to the issues

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What is Intellectual Property *for*?

A useful definition, which emphasises the utilitarian nature of intellectual property:

"To 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"

Article 1, Section 8 of the *US Constitution*

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Intellectual Property and commerce

- It is difficult to separate the commercial from the IP issues
  - The “content industries” typically depend to a greater or lesser extent on the protection afforded by intellectual property legislation
- It is commercial rather than Intellectual Property issues themselves which will drive the response of the publishing industry to the OAI
  - In this context, Intellectual Property is simply the commercial mechanism
  - Publishers are not unduly concerned about Intellectual Property issues *per se*

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Intellectual Property…

- …is not only copyright (Trade Marks, Patents)
- However, it is only copyright (and related rights) that are the focus of this presentation
- What is copyright?
  - The exclusive right to **copy, publish, perform, broadcast, adapt** a "**work**"

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Copyright law

- Principles established internationally
  - Berne Convention
  - Universal Copyright Convention
- Legislation nationally
  - European Directives enacted in national law
  - Differences between different national regimes
- Significant differences in different legislative framework
  - “Droit d'auteur” – a “human right”
  - Economic good – a tradable commodity

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Copyright under international convention

- Protects both creators' and performers' rights
- Protects literary, artistic, dramatic, and musical works
- Tangible: there is no copyright in ideas, titles, names

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Droit d'auteur and "Anglo-Saxon tradition"

- Ultimately little difference in implementation, but substantial differences in attitude
  - Moral rights much stronger under Droit d'auteur (often inalienable)
  - The position of "intermediaries" (publishers) is weaker in droit d'auteur regimes
- Droit d'auteur regimes recognise a "hierarchy" of rights
  - "Neighbouring" or related rights

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Who owns copyright?

- In most circumstances, the creator is the initial owner
- May be the employer
  - Under UK law works produced “in the course of employment” belong to the employer
  - Even more broadly drawn in US law (all work for hire)
- Owners can assign or licence copyright
  - As broadly or as narrowly as may be negotiated in specific circumstances
  - Exclusively or non-exclusively
- New owner (or exclusive licensee) has same rights as original owner in terms of enforcement

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Moral rights

- Paternity – the right to be identified as the creator (also right to prevent false attribution)
- Integrity – the right to prevent “derogatory treatment” of a work
- Very limited recognition of moral rights until CDPA 1988 in UK and still in the US

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A special case – database right

- "*Sui Generis*" right
- Protects databases
  - Definition: a collection of independent works, data or other materials which
    - are arranged in a systematic or methodical way
    - are individually accessible by electronic or other means
  - Designed to protect content that is not sufficiently "creative" to be protected by copyright
    - Many databases (and/or their content) may *also* be protected by copyright
  - Does not protect the content as such – protects the database owner from "unfair extraction"
- 15 year term
  - Renewable if significantly updated
- No equivalent protection in the US
  - Seen as interfering with academic freedom
  - Typically now protected under contract law ("shrink wrap" or "click through" licences)

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Rights in indigenous culture

- A growing movement being taken very seriously in WIPO/OMPI
- Primarily defensive
  - To prevent others from exploiting traditional knowledge (a common reason for patents)
- However, also possible to develop active collective rights of exploitation
  - “Perpetual” protection is sought
- Seems to run counter to much of what we understand about “copyright” but may share the same utilitarian purpose

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Granularity of copyright

- Copyright exists in individual components, not just the whole
- Copyright exists in the arrangement (the 'get-up')
- Many works will contain embedded copyrights
  - Third-party sources/extracts, agency photos, website content, or images
- More complex media types may have very complex rights associated with them
  - Music and rights in performances and recordings
  - Photographs (eg of works of art)

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Exceptions to copyright

- Copyright has boundaries
  - Term
  - “Insubstantial parts” – but what is substantial?
- Different in different legislations, but typically may include areas such as
  - Criticism, review, research or private study
  - Education
  - Librarians under certain conditions
  - “Incidental” recording for broadcasts
  - Recent exception for the Visually Impaired in UK
- Ruled by the “Berne 3-step test”
  - Special cases
  - No conflict with normal exploitation
  - No unreasonable prejudice of legitimate interests of rights holder

Copyright in “free” information

- Any tangible material can be protected by copyright
- It does not matter if material is freely distributed (whether in print or online)
  - Apparently “free” information may be protected by copyright
- Providing access does not affect copyright
  - Access is the whole purpose of Intellectual Property protection (to provide an incentive to creators not keep things to themselves)

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Intellectual Property and the global Network

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Copyright and the network – what changes?

- Nothing – except that either casually or systematically breaching copyright gets easier
- New legislative frameworks
  - DMCA in the US
  - European Copyright and eCommerce Directives
- Protection for “technological protection methods”
- Exception for “transient copies”
- Notice and Take Down procedures for alleged breaches of copyright

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Protecting copyright in the network environment : DRM

- Two distinct strands
  - Infrastructure
  - Specific applications
- Management of Digital Rights
  - Identification and description infrastructure
  - Standardisation essential (significant development in MPEG 21 Framework)
- Digital Management of Rights
  - Perhaps poorly named – focus is “digital permissions management” (“rights” in the technical sense of network privileges)
  - Technology for the enforcement of rights
  - Legislated standardisation being sought by some sectors of the content industries

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Alternatives to technological mechanisms

- There are those who believe “technological measures” will never work
  - So what are the options?
- In some contexts, they may not be necessary
  - The migration of STM journals to the network has been achieved with only the simplest of “digital management of rights”
- It may not be necessary for some types of content
  - Many publishers remain to be convinced of the risk of digital piracy and the replacement of print
- Indirect compensation for copying
  - Levy systems
- Protecting other Intellectual Property
  - Trade Marks and brands

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Alternatives to enforcing copyright

- Allowing copying but enforcing rights of paternity and integrity
  - Attribution is a key value for most creators
- "Network effect" may enhance value substantially
  - Business models based on ubiquity rather than scarcity
  - Can be hard to monetise (but not invariably impossible)
- Copyleft and Creative Commons Deed
  - Deeply rooted in copyright
  - Creators seek to control some rights but not all

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Intellectual Property and Open Archives

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What is the Open Archives Initiative?

- A protocol for “metadata harvesting”
  - Collecting metadata from many places to facilitate metadata-dependent services (principally but not exclusively discovery)
  - Resources may or may not be “open access”
- A facilitator of institutional publishing
  - Metadata harvesting provides potential co-operative “marketing channel” (and effective publishing is primarily about marketing not access)
- A provider of “open access” and a solution to the “journals problem”

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Intellectual Property and Metadata

- Metadata protection
  - Much metadata not protected by copyright
  - Although collections of metadata will be protected by database right
- The peculiar position of Scientific &Technical abstracts in UK law
  - An anomaly
- Offering metadata for harvesting – and implied licence?
  - But a licence for what?

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Intellectual Property and Online Resources

- Who owns the IP of academics?
  - The contrasting position of academic journal articles and "courseware"
- Publishers: assignment or licence
  - Exclusive licence not necessarily less restrictive than assignment
- Copyright and preprint archives
  - Ambiguity often overcome by explicit terms of assignment or licence
- Copyright and postprint archives
  - Ambiguity unlikely
  - Many publishers happy to allow authors to archive at the moment
- Copyright and non-textual resources
  - Beware additional complexity – more rights holders, more rights (and a greater tendency to enforcement actions)

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Those who run OA services and eprint archives are publishers…

- …and need to take their responsibilities as publishers seriously
- If they are prudent, this includes ensuring they have the necessary rights to what they are publishing…
  - …or at least that they have warranties to the effect that whoever is providing the content has the rights to do so

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Conclusions (1)

- To avoid ambiguity and dispute, there should be explicit licences between Data Providers and Service Providers about the use to which harvested metadata will be put
  - Even if terms entirely standardised, these need to be properly stated and accepted
- If Data Providers wish to control use (for example, to prohibit commercial reuse) should they be allowed to do this?
  - If yes, they will require a mechanism to do so
- Whether controlled by copyright or by licence, Service Providers will need to consider how (or whether) to manage metadata harvested with different terms of use
  - Different approaches are possible
  - Machine-readable meta-metadata is one possibility

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Conclusions (2)

- Users of OAI services may find it very useful to know about the access status of resources described
  - "Rights metadata" would be useful, if not all "Open Archive" resources are "open access"
  - Machine readable?
- Those running eprint or other resource servers advised to ensure they have agreements with authors
  - Warranting that authors have the right to publish/republish
  - If institutional archive, dealing with what happens (for example) if author changes institution
  - Ensuring that they have policies and procedures to respond to "Cease and desist" notices

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OA and IP: incompatible world views?

- No...why should they be?
- Open Archives exist in the context of Intellectual Property legislation (just as all other legislation) and it would be sensible to acknowledge this operationally

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