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?
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...
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
Intellectual Property – an introduction to the issues
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
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
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”
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
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
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
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
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
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)
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
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)
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).
Intellectual Property and the global Network
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
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
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
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
Intellectual Property and Open Archives
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”
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?
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)
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
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
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
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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