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Digital Preservation and Copyright: An International Study

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Summary

The aim of the International Study on the Impact of Copyright Law on Digital Preservation was to review current copyright and related laws and their impact on digital preservation, as well as to make recommendations to help libraries, archives and other preservation institutions sustain digital works. Study partners are based in Australia, the Netherlands, the United Kingdom and the United States. The study found that, in many cases, digital works are not being preserved in a systematic way. This is partly because digital preservation entails more difficult copyright issues than preservation of non-digital material. All the surveyed countries have some form of exception for preservation activities. However, there is inconsistency in the details between the countries' laws and uncertainty in how they apply in the digital environment. None of the countries surveyed have a uniform national system yet for collecting digital materials. Technological protection measures and licensing arrangements may, in some cases, present significant practical barriers to preservation. Current approaches to address these barriers are ad hoc and include requesting permissions from individual rights holders and some use of model licence terms that permit preservation. Moreover, as yet, there are no effective solutions to the general issue of orphan works. Recommendations of the study include suggestions for drafting national policies and adapting laws to allow digital preservation to be undertaken as necessary, in accordance with international best practice standards, and for promoting national systems for the collection of digital materials by relevant state and national collecting institutions.

Introduction

There are significant legal issues in the preservation of digital works, both digitised and born digital. Copyright and related rights issues remain major obstacles to digital preservation. Many of the activities involved in digital preservation, such as making multiple copies of a work, distributing copies among multiple institutions, and migrating works to new technological formats and media, involve the exercise of exclusive rights, including but not limited to the reproduction right. Digital technologies have also changed the ways in which works are distributed and acquired which creates a tension between long-term preservation needs and copyright laws.

Previously, copyrighted works were marketed solely in tangible “hard copy” form and libraries, archives and other preservation institutions could acquire them on the market (or, in some cases, pursuant to legal deposit laws) for current use and long-term preservation. But now, many works are never produced in hard copy. Some works – such as web sites and various types of “user-generated content” available on the Internet – are not made available for acquisition, but only for listening or viewing. Those works will not be preserved unless they can be copied or otherwise acquired by preservation institutions with the ability to manage and maintain digital preservation repositories. Other types of works such as e-journals are available on the market by licence, but the terms of use may not permit the creation or retention of archival copies.

Legal Background

The unauthorised exercise of the rights in a work may result in infringement of copyright under the law of the various jurisdictions unless:

1. The material is not protected by copyright (i.e., it is in the public domain);
2. The copying is permitted under an exception in the copyright law or related legislation (e.g., pursuant to an exception for libraries, archives or other preservation institutions or legal deposit); or
3. Digital preservation is undertaken by the owner of copyright in the work or with the permission of the owner.

The Berne Convention for the Protection of Literary and Artistic Works provides the foundation for governance of copyright law internationally. All of the countries surveyed in the study are members of this treaty. In addition, all have joined, or have indicated that they intend to join, the treaties that provide the principal modern updates to the Berne Convention – the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), as well as the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Together, these agreements require members to provide authors of literary and artistic works with a number of exclusive rights with respect to their works, including the rights of reproduction, adaptation, broadcasting, public performance, communication to the public and distribution to the public, subject to certain limitations and exceptions. In addition, performers of phonograms (sound recordings) are provided with a right of fixation, and performers and producers of phonograms are granted rights of reproduction, distribution, rental, and making available their fixed performances. All of these rights are subject to limitations and exceptions.

The Berne Convention allows exceptions to the right of reproduction under certain conditions, known as the “three-step test”:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of [literary and artistic works] in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. Berne art. 9(2).

The WIPO Copyright Treaty builds upon Berne’s three-step test by providing that contracting parties may provide for limitations or exceptions to the rights granted under that treaty or under the Berne Convention in “certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.” (Art. 10). In other words, the WIPO Copyright Treaty makes the three-step test applicable to exceptions and limitations with respect to any of the rights granted to authors under either that Treaty or the Berne Convention. The WPPT similarly makes the three-step test applicable to rights granted under that treaty. Thus, while these treaties do not mandate any exceptions or limitations specific to preservation activities or preservation institutions, the treaties do permit such exceptions or limitations, provided they satisfy the three-step test.

The EU Information Society Directive (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society) permits, but does not require, members of the European Union to provide exceptions and limitations for certain activities of publicly accessible libraries, educational establishments or museums, or of archives. The permitted exceptions and limitations are:

1. for specific acts of reproduction of copyrighted works which are not for direct or indirect economic or commercial advantage, art. 5(2)(c); and
2. for use by communication or making available of copyrighted works in their collections, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of such establishments, provided those works are not subject to purchase or licensing terms to the contrary, art. 5(3)(n).

International Study of the Impact of Copyright and Related Rights on Digital Preservation

Four organisations undertook a joint study of the preservation landscape and associated legal issues, surveying their four different countries: Australia, the Netherlands, the United Kingdom and the United States.

The Open Access to Knowledge (OAK) Law Project is led by the Faculty of Law of the Queensland University of Technology and funded by the Australian Government’s Department of Education, Employment, and Workplace Relations. It is working towards facilitating optimal access to knowledge as a way of improving social, economic and cultural outcomes. With this in mind, the project is developing practical and effective copyright management resources and protocols for removing barriers to the reuse of information within the Australian and international academic and research sector.

The SURF foundation is a partner in SURF, the collaborative organisation for higher education institutions and research institutes in the Netherlands. Collaboration has resulted in services and products that could not have been achieved by the institutions in isolation. The results that SURF achieves are also guiding examples in an international setting. The Joint Information Systems Committee (JISC) supports tertiary education and research in the United Kingdom through technology innovation programs and by the central support of information and communication technologies services.

The JISC is funded by the UK tertiary education funding bodies and works with the UK research councils. The JISC also works internationally with organizations in support of the global infrastructure to ensure appropriate and sustainable information and communication technologies provision for the UK education and research communities.

The National Digital Information Infrastructure and Preservation Program (NDIIPP) is a programme led by the U.S. Library of Congress. The goal of NDIIPP is to develop a national strategy to collect, preserve and make available the growing volume of digital content, especially materials that are created only in digital formats, for current and future generations. The programme is working with over 130 partners from universities, libraries, archives and government agencies at all levels, as well as commercial content and technology organisations.

The aims of the joint study were: to review the current state of copyright and related laws and their impact on digital preservation in each of the study partner countries; to make recommendations for legislative reform and other solutions to ensure that libraries, archives and other preservation institutions can effectively preserve digital works and information in a manner consistent with international laws and norms of copyright and related rights; and to make recommendations for further study or activities to advance the recommendations of the study.

The participating organisations began by developing a joint outline of the topics relevant to digital preservation and copyright, and related rights, and of the legal and factual subject areas to be addressed in each individual country report. The areas covered for each country were the major current digital preservation activities; the copyright and related rights laws that bear on preservation, and relevant exceptions and limitations; areas where there is tension between the laws and digital preservation activities; and current efforts within existing law to undertake digital preservation, either through exceptions and limitations or pursuant to agreements with right holders. The related rights included database rights, performers' and other secondary rights and moral rights. Applicable exceptions were identified and assessed as was legal deposit legislation.

The other major issues covered were rights related to technological protection measures and the circumstances, if any, in which contractual arrangements may take precedence over copyright exceptions. Each organisation produced its own section of the joint report and formulated recommendations with respect to its own country's laws. After the individual country reports were completed, the organisations worked together on a joint report, developing introductory sections, a summary of findings and joint recommendations (Besek et al., [2008](#)).

The Preservation Landscape in Study Partner Countries

There is a great deal of preservation-related activity in each of the countries' studied. Much activity is taking place in academic and research sectors and major archives. Much work has been funded by government and government agencies. There is also increasing collaboration between institutions and the public and private sectors. Major players in the countries include national and state libraries and archives. These organisations are involved in initiatives to acquire digital content, storing it and making it accessible. This content includes digital records, data, publications, recorded sound and audiovisual material. There are also organisations engaged in web archiving and in digitising material for access and preservation purposes.

In addition, there are collaborative working and cooperative activities in the survey countries. These take the form of national initiatives such as the UK Web Archiving Consortium (UKWAC), the Australian PANDORA initiative, the US National Digital Information Infrastructure and Preservation Program (NDIIPP) and the Dutch Royal Library (Koninklijke Bibliotheek) agreements with individual publishers and organisations to acquire and preserve content in its e-Depot. Organisations in the study countries also participate in initiatives such as LOCKSS, CLOCKSS and Portico. There is also significant research and development. For example, JISC has a Repositories and Preservation programme and a digitisation programme.

The Legal Issues Arising from Digital Preservation

The copyright and related laws of all four study countries include exceptions allowing reproduction (and sometimes other activities) for the preservation of protected works. However, none of the exceptions adequately encompass all of the activities necessary for digital preservation. There are inconsistencies across the jurisdictions with regard to which institutions are able to use them, the types of work to which they apply, the nature and amount of copying allowed, and the nature of access to preservation copies. The UK exception, for example, allows certain libraries and archives to make "a copy", but digital preservation practices may require multiple and serial copying over time. Exceptions may not apply to recorded sound or moving images, or only refer to not-for-profit libraries and archives, so museums are excluded.

Some countries have recently amended their laws to update their exceptions, but applying the preservation exceptions that currently exist to digital preservation is often an uncertain and frustrating exercise. For example, in the US, libraries and archives exceptions allow only up to three copies for preservation and replacement, which is inadequate for long-term preservation of digital works. While there are other potentially applicable exceptions on which libraries and archives rely, namely the fair use exception, the extent to which fair use permits preservation and related activities is uncertain and has not yet been addressed by US courts. The Australian and UK fair dealing exceptions only allow limited copying for a narrow range of purposes or news reporting.

Another barrier to digital preservation is the problem of orphan works. None of the study countries yet have provisions for "orphan works", that is, works whose rights holders cannot be identified or located. This is a particular issue for audiovisual material, photographs, illustrations and some public records, such as letters to

government departments from members of the public. For example, the most effective method of preserving fragile recordings or films may be to digitise them. If the rights owners cannot be traced and contacted for permission, the material cannot be digitised, unless there is some other applicable provision, such as a fair use exception.

Legal Deposit

Three of the study countries have some form of law that requires the deposit of publicly available copyright materials for the benefit of one or more preservation institutions, whilst deposit in the Netherlands is by voluntary agreement only. However, none of the countries has yet implemented a comprehensive or uniform national system for collection of digital materials, either through a compulsory or a voluntary scheme. While the UK has recently updated its legal deposit legislation, it will require further regulation to extend legal deposit to non-print material. The federal law in Australia only extends to print and U.S. law does not extend to most material made available only online, although there are plans to amend the regulations that exempt online materials.

Technological Protection Measures

The use of technological protection measures (TPMs) to control access and use may also inhibit digital preservation as circumventing these measures may be prohibited by law. Even if preservation institutions are able to circumvent TPMs, the mechanism for doing so may be impractical, and the creation and supply of circumvention tools is illegal in some countries in any case. In addition, much digital content is made available through contractual agreements, which override legislative provisions in most circumstances.

Responses to the Legal Challenges of Digital Preservation

There has been some activity in the study countries related to legal review and reform. This includes the UK Gowers Review of intellectual property regimes and subsequent government consultation on the Gowers recommendations. The US Section 108 Study Group made detailed recommendations and there have been several reviews of Australian copyright law and policy in recent years. The Netherlands is the exception in that there are neither proposals nor initiatives for legal reform.

Preservation institutions have responded in different ways to the challenges. Responses include initiatives relying on collaborative agreements between preservation institutions and rights holders. Examples are the National Library of Australia's PANDORA web archiving project, the Dutch Royal Library's deposit agreements with publishers, the British voluntary deposit schemes and the US NDIIPP activities. Such agreements are important both for the materials they save and for the best practices they engender, but they are much more prevalent for some types of digital works than for others. The most prominent international cooperative archiving and preservation initiatives, have so far dealt largely with scholarly journals.

Preserving institutions can only work with individual rights holders if they know, or are able to find out, who they are and are able to contact them. Many digital works, such as web pages and wikis, are prone to becoming orphaned as they are created informally and, often, collectively. Australia has very limited provision for orphan works. In the US, the Copyright Office has made recommendations for reform to deal

with orphan works. Orphan works legislation based on these recommendations was introduced in 2006, but not passed by Congress. It has subsequently been re-introduced and is pending. Both the Netherlands and the UK are Member States of the European Union, and the European Commission has initiated high-level discussions on orphan works.

Conclusions and Recommendations

Although copyright and related laws are not the only obstacle to digital preservation activities, there is no question that such laws present significant difficulties. Further complicating matters are the evolving commercial markets for digital works, and the apprehension among creators and right holders concerning the impact that further exceptions might have on the market for their works. Digital preservation is vital to ensure that digital works will remain available over time to researchers, scholars and other users, however. Digital works are often ephemeral, so unless preservation efforts are begun soon after creation, they may be lost to future generations. Whilst recognising that legal reform can be slow and that the digital world is dynamic, the study partners make specific recommendations for amendments to the laws in each country. The joint recommendations outlined here focus on more generic amendments to national copyright and legal deposit laws to help to bring these laws into the digital age, and recognise that any new exceptions must be consistent with the legitimate interests of right holders.

The study recommended that countries should establish laws and policies to encourage and enable the digital preservation of at-risk copyrighted materials. These laws and policies should, at a minimum:

- Apply to all non-profit libraries, archives, museums and other institutions as may be authorised by national law (hereafter, “preservation institutions”) that are open to the public, provided they do not undertake these activities for any purpose of commercial advantage.
- Apply equally to all categories of copyright materials, including literary, artistic, musical and dramatic works, as well as to motion pictures and sound recordings.
- Apply equally to copyrighted materials in all media and formats, whether hard copy or electronic, born digital or digitised for preservation.
- Allow preservation institutions to preserve proactively at-risk copyright materials before they deteriorate, are damaged or are lost; and before any software or hardware required to access and use the material becomes obsolete, subject to measures appropriate to protect the legitimate interests of right holders.
- Allow preservation institutions to undertake preservation activities as necessary and in accordance with international best practices for digital preservation, including:
 - Reproduction and retention of such copies as may be necessary for effective digital preservation;
 - The serial transfer of copyrighted works into different formats for preservation in response to technological developments and changing standards, and
 - The communication of works within the preservation institution for administrative activities related to preservation, or between the

preservation institution and legally authorized third-party preservation repositories as necessary for the purpose of maintaining redundant preservation copies to protect against catastrophic loss.

All of the foregoing should be subject to measures appropriate to protect the legitimate interests of right holders. Furthermore, such laws and policies should enable relevant preservation institutions comprehensively to preserve copyrighted materials that have been made available to the public in digital form, by means of:

- A legal deposit system;
- The legal ability to harvest publicly available online content for preservation purposes;
- Incentives for contractual arrangements for preservation activities; and/or
- Some combination of the foregoing.

It is also recommended that:

- Preservation institutions should work with right holders to develop workable approaches to the digital preservation of copyright materials protected by technological measures such as encryption or copy protection.
- Preservation institutions should develop best practices for digital preservation.

The study recommended that further research should be undertaken on the national level on whether access to digital preservation copies can be provided without harming the interests of rights holders. Further research should be undertaken at the national level to re-examine the interaction between copyright and private agreements in relation to digital preservation. This would help in determining whether common approaches to these issues can be developed.

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