Copyright in the digital age: a UK perspective

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This chapter considers issues relating to copyright in a digital context in the United Kingdom, with special reference to the academic sector. Topics include e-resource primary licences, digital rights management (DRM), sharing and adapting content, audio and video, and licensing schemes. It presents a picture of shifting focuses in copyright legislation and interpretation in a higher education context, and concludes with a look at the growth of the open access movement.

Introduction

As the availability of electronic resources of all kinds continues to grow, there is a need for copyright provisions and licensing to ensure that it is possible to use and exploit them, using the technologies already available, without causing detriment to copyright holders, authors and publishers.

Alongside consideration of licence models already available and the needs of end-users, publishers, librarians and aggregators, the chapter will look at different types of e-resource and will consider the current and future impact of copyright and licensing in this evolving digital age. Examples are drawn from the perspective of higher education, although some of the principles will transfer easily to other sectors.

What does copyright do?

The laws of copyright, although slightly different in each country, have a common theme: to allow creators to enjoy the economic fruits of their work and therefore to prevent unauthorized use, including duplication, publication and adaptation of original work (literary, artistic or musical). Whether an author/creator holds the copyright or has assigned it to a publisher or organization, their work remains in copyright until 70 years after death in the majority of cases. Until a work is published it will remain in copyright until at least 2039 (the date set for expiry of copyright on all unpublished works written before 1 August 1989). The rules regarding unpublished works are complex, but generally any work written after 1 August 1989 which is not published can be assumed to remain in copyright for at least 50 years, and in many cases, up to 70 years.

Copyright licences

Although copyright law benefits the creators and rights holders of original work, it can also constrain the development of knowledge by prohibiting the copying and sharing of extracts, and this is where the major copyright licences have a role. The Copyright Licensing Agency (CLA)[1] concerns itself with multiple copying of extracts, whether print to print, print to digital, or, most recently, digital to digital. The Newspaper Licensing Agency (NLA)[2] performs a similar role relating to newspaper extracts, whether print to print or print to digital; while the Educational Recording Agency (ERA)[3] licenses the use of extracts from radio and television broadcasts within further or higher education, and in schools.

Fair dealing

The concept of 'fair dealing' or 'fair use' exists in many 'Anglo-Saxon', or common law, countries and embodies a statutory permission to make a copy of a single article/chapter or a proportion of text for personal and non-commercial use. In terms of e-resources, this should convert to the right to view, download, save and print the same proportion from an e-book, database, or e-journal. While the American concept of fair use does make provision for an exception for parody, and some limits on copying from audio-visual works, the UK concept of 'fair dealing' is restricted mainly to text and to uses relating to quotation, news reporting, and private study.

Technical protection or 'digital rights management'

Digital rights management (DRM) is the broad term preferred by rights holders for what the law calls 'technical protection': a recent development which allows copyright holders to enforce the way in which end-users access and use their products. Examples can include an e-book provider who restricts copying of more than a restricted percentage of a book, a DVD provider who implements copy protection on their discs, and a database provider who does not allow downloads of material.

Although the original purpose of DRM was to prevent piracy of music and video, it has caused discontent and problems where systems are made incompatible due to their level of protection (for example, audio downloads from one service, such as Napster[4], being unusable on certain devices, like the iPod). It could be argued that DRM will not prevent end-users from accessing information, but simply encourage them to breach terms and conditions already agreed, simply because there are technical ways of circumnavigating DRM protection.

For higher education, DRM can sometimes prevent use of material which is allowed under the educational exemption enshrined in the Copyright, Designs and Patents Act (CDPA)[5]. This anomaly has been addressed in part by the recommendations of the recent Gowers Review[6]. ('Digital Rights Management', strictly speaking, embraces not only technical protection but also metadata about rights holders, and even automatic disbursement of royalties.)

The Gowers Review

In December 2006 the Gowers report was published, after a wide consultation and call for evidence relating to a range of intellectual property issues, including copyright exceptions. One of the main aims of this report was to recommend the reform of copyright laws to allow content in digital formats to be more easily used. Some of the major recommendations included:

- allowing the use of orphan copyright works (those with no traceable author)
- introducing a limited private copying exception (allowing, for example, the copying of a vinyl record to CD in a private household – a right already allowed in the United States)
- clarifying the research exception, and allowing libraries to copy and format shift copies of archival works.

Alongside this would be greater protection for rights holders and stiffer penalties for the unauthorized use of digital content.

Although the report was welcomed by the Joint Information Systems Committee (JISC)[7], it recognized a key omission within its recommendations, stating: 'While JISC broadly welcomes the Gowers Review, it will continue to lobby for the optimum outcomes on behalf of UK further and higher education, including lobbying to ensure that statutory exceptions and permitted acts in relation to copyright law are not overridden by contractual terms, an issue which the review has not addressed'.

E-resource primary licences

Model licences are an 'idealized version of a licensing contract ... in a standard, well-organized format', according to Croft[8].

    The first primary licences to affect the UK higher education sector appeared as part of the UK Pilot Site Licensing Initiative (PSLI)[9] in 1995. This initiative was introduced as a direct response to issues raised in the Follett Report[10], particularly increased prices for academic journals, and copyright laws restricting copying and distribution of materials. Since the success of PSLI, the UK higher education community has been well served by the model licences being made available through the National Electronic Site Licensing Initiative (NESLI)[11], a well-respected national consortium, which is overseen by JISC. The licence itself was developed by JISC alongside the Publishers Association (PA)[12].

    In the United States, the American Library Association (ALA)[13] and other bodies issued in 1997 their 15 principles which should be included in a licence[14]; while in Europe two years later, the European Licensing Principles appeared from LIBER (Ligue des Bibliothèques Européennes de Recherche)[15].

Systematic downloading

A common clause in e-resource licences has been one prohibiting the systematic downloading of content – that is, the saving of more than one article from a journal issue, or a chapter from an e-book. However, there could be some conflict between copyright allowances under fair dealing – which allow the browsing of content – and restrictive licences. Some e-resource providers count even the downloading of journal issue tables of contents as 'systematic', which can cause some conflict and inconvenience – in effect, blocking the use of their intellectual property by the way in which it is made available.

Sharing content

Within universities in particular, it is accepted that a certain amount of collaboration does take place – between different institutions when carrying out research, even sometimes between universities and industry. Access to content is often needed within different countries – for example, when providing content to registered students or teachers of those students at partner institutions. At the moment copyright law is silent on these points and it is left to the institutions themselves to discuss their requirements with licence providers and seek a way forward. Licences often allow the distribution of files and content to 'other authorized users' either by printed copy, e-mailed file, or inter-library loan – but where these provisions are not allowed, it can be complex to arrange them.

Inclusion of material in coursepacks and VLEs

The use of printed material in coursepacks (i.e. a printed collection of handouts) has always been, in the UK, under the auspices of the CLA – first under a transactional system and then as part of the main licence agreement. Until recently, the CLA had not looked to license the use of printed materials in electronic coursepacks, or to allow digital-to-digital copying. In the US, licensing of material to scan or import into coursepacks has been handled through the Copyright Clearance Center[16], either on a transactional or annual licence basis.

    The earliest web-based Virtual Learning Environments (VLEs) started to appear between 1995 and 1997[17], including Web CT, Blackboard, and Bodington, becoming core repositories where students could access references and lecture notes, as well as taking part in discussions and submitting their own assignments. It became essential to ensure that material could be imported into these systems as electronic coursepacks, either as saved content from e-resources or digitized from print originals.

Adapting content

The adaptation of material is usually prohibited unless an agreement is reached with the content provider. However, especially within universities in areas such as art and design, being able to use and adapt a work is often a cornerstone of performance and exhibition. This is also true of translation, homage and parody. Although educational exemptions do allow material to be used in this way for the purpose of assessment and examination, current rules can be seen to stifle creativity – especially when it is so easy, technically, to use and adapt material.

Audio and video

Commercial databases and services

The increase in electronic resources containing audio or video content over the past few years raises questions about the copyright requirements relating to their use. Most radio and television broadcasts have been covered by the ERA licences, although podcasts and services operated by companies other than the BBC, ITV, Channel 4 or Five are not included. Neither are digital music libraries, file-sharing services, or on-demand services such as those provided through the BBC iPlayer[18].

On-demand provision of audio and video content has been the largest growing area of digital content over the past year – with the BBC, ITV, Channel 4, Five, Sky and others launching content either available to all or to subscribers.

Peer-to-peer sharing

There are now upwards of 20,000 podcasts available on the Internet according to PodNova[19], in areas ranging from arts and education to news and politics, music and technology.

Numerous file-sharing networks have appeared as a result of the rapid growth of the Internet. These networks allow material under copyright to be quickly and easily shared. Legitimate services such as Napster and iTunes[20], which charge for each download, remain popular, but it is still the case that some material on social networking services contravenes copyright and should not be shared or copied without permission.

YouTube[21], MySpace[22], Bebo[23], Facebook[24], and VodPod[25] encourage the collection and sharing of audio and video content, while Blubster[26], Qtrax[27] and others are set up to allow the sharing of music and audio. Controlling and licensing this content is nigh on impossible due to the fact that any user can upload it, and the terms and conditions of use often amount to disclaimers which do not assist end-users in using the material effectively.

Creative Commons

Originating in the US, Creative Commons[28] represents a new licensing system whereby the copyright owner can define which rights are transferred to an end-user. The system is now available in over 40 countries, and mainly covers audio, images and video. Licences have been utilized by individuals and by large corporations. Perhaps one key advantage of these licences is that some of them can allow remixing or adaptation of content, a right usually missing from more traditional licences.

Creative Archive

The Creative Archive[29] licensing initiative is UK-specific and was set up in 1995 to allow the sharing and use of audio and video content from providers such as the BBC, Channel 4, the British Film Institute (BFI), Teachers TV and the Open University.

Similar to Creative Commons in its scope, it allows content to be used for non-commercial or educational purposes, and to be used to create new works, with due attribution to the original creators.

A report from Eduserv in 2007[30] focuses on both the Creative Archive and Creative Commons and their use in the UK cultural heritage sector, explaining: 'Copyright operates so that permission is needed for any use except for a limited number of cases ... open content licensing reverses this default and grants

permission for a very wide range of uses but asks that users seek permission only in a limited number of cases – often known as a "some rights reserved" model' and concluding 'the complexities of copyright law and the technicalities of licensing pose difficulties for those wishing to make use of an open content licence – or to develop a website copyright policy reflective of the organization's stance on use and re-use.'

Copyleft

Copyleft [31] is a way to make a programme or other work free, including all future versions and modifications of it. It does not allow the work to be included in other programmes as if it was in the public domain, but does allow end-users the freedom to redistribute or change the software without additional terms and conditions. Copyleft is mainly concerned with the GNU operating system, but could be used for other electronic products as well.

According to Hu and Breivold (2008)[32], the principle of copyleft is invoked by e-books such as Wikipedia, which disclaims ownership of content within its service, contributed in itself by unknown creators. This could also be seen as true of many blogs and websites with content submitted by authors whose association with their work cannot easily be established – although under the CDPA, anonymous works are copyright once they have been published.

SERU

In the US, the Shared E-Resource Understanding (SERU) initiative[33] has allowed some publishers and institutions to forgo a licence agreement and depend instead on 'statements of shared understanding'. Since its launch in 2005, SERU now has over 20 publishers listed in its registry, including the UKSG, while around 50 American libraries are also included.

ONIX-PL

The ONIX electronic expression of licensing terms[34] is intended to work with major electronic resource management (ERM)[35] systems in providing a core template of licensing terms, often based on model licences, which can allow publisher licences to be compared.

AHRC Copyright Research Network

Theme 5 of this project from the Arts and Humanities Research Council (AHRC)[36] concentrates on Copyright and the New Technologies, specifically whether copyright law strikes the right balance between creators of copyright works, copyright owners, and end-users of copyright works. It also looks at the attempts to accommodate new technologies in copyright law and whether these attempts are likely to work.

TASI

The Technical Advisory Service for Images (TASI)[37] provides advice relating to the use of digital images on its website. It deals with the interpretation of copyright law when assembling a digital image collection, and when using images for teaching and research. The advice is specifically geared to higher education and concentrates on digital technologies and rights including moral rights, database rights and design rights.

Digitization

So far we have concentrated mainly on born digital content, that is, e-journals, e-books and databases. Works which have been created in digital format from hard copy originals will now be considered. In principle, digitization is a form of copying so is an infringement of copyright.

Generally, digitization has been allowed – but at a cost – where publishers have opted into existing licensing arrangements, such as the CLA's CLARCS scheme. Where a publisher has not opted in to such an agreement, other avenues have had to be explored including negotiation on a case-by-case basis, or the use of copyright clearing services such as the British Library.

Within universities and companies with end-users accustomed to speedy access to digital content, it has been the expectation for some time that all relevant information be made available in electronic format. Although it remains the case that only a minority of all published information is in digital form, the need to transfer hard copy material into more user-friendly formats is increasing.

The explosion of Web 2.0 initiatives such as social networking and bookmarking, blogs and wikis, and so on, are impacting on the very core of publishing. If anyone can be an author or publisher, and feel free to assign their rights as they wish, where does this leave the traditional form of publishing and rights management?

Websites

Websites are currently not represented in major licences, although they often provide their own terms and conditions (see the BBC website[38]). Images, audio and video, text, references, and content created in collaboration often have multiple copyrights, which can complicate their use. There is also the issue of anonymous and pseudonymous content found on blogs, forums, or in chat spaces which are in fact copyright, and subject to the usual rules of the law. In practice the copyright is hard to protect as the content is often re-used.

The provenance of information located on the Internet is not always easy to define. Website registration, the watermarking of images, and the use of services such as Copyscape[39] (which identifies plagiarized material on websites) can protect rights holders, while services are available to protect website designs from unauthorized use[40]. For an end-user, caution is advised when using material obtained on websites, whether secured by authentication or not.

The use of sites that encourage the sharing of images, video and audio content can only complicate matters further, as content removed from its source often has no attribution and no visible protection. E-resources presented as blogs and wikis, or within social networking services, are just as vulnerable. Metadata can reduce the risk of resources being used without permission by clearly identifying them and their source.

Institutional repositories

Repositories were originally subject based – the first, arXiv[41] (Cornell University), covering physics, mathematics and computer science, opened in 1991. Other major subject-based services include RePEc[42], covering economics, and E-LIS[43], covering librarianship and information science, which opened in 2003.

The Registry of Open Access Repositories (ROAR)[44] now notes that there are more than 230 institutional repositories in the US, over 100 in the UK, and between 10 and 100 in most countries in Europe, Australia, India and South Africa. The SHERPA project[45] has been instrumental in keeping up-to-date information on publisher policies relating to copyright and archiving (the RoMEO database) and on the archiving mandates of major research funders (the JULIET database).

The use of e-resources and digitized content within institutional repositories has grown with the increasing need to provide digital copies of research assessment submissions. Repositories such as JORUM[48], which allow teaching materials to be imported and shared with staff in other universities, have led to the amendment of licence clauses to allow the inclusion of material: these clauses are now standard in most model licences issued in the last couple of years.

Needs of end-users

The end-user of an e-resource needs to be assured of fast, seamless access to an electronic product, and of the ability to view, download and copy material for further use within study, non-commercial research, teaching, and development of knowledge.

As the supporters of learning technologies, we need to find ways to present our copyright legislation and licensing agreements in a way which does not alienate the end-user or leave them disillusioned with the limitations of current licensing structures. We need also to ensure their own rights as authors are protected, and that they are aware of their own legal obligations and safeguards.

Needs of publishers

Publishers must protect their content from unauthorized use while allowing subscribers to effectively use materials. Commercial considerations sometimes mean that licences are not as generous as end-users may hope, and sometimes licences are lengthy, complex and contain contradictions that need to be explored further. Generally, however, provided that they do not restrict any freedoms granted to users under copyright law, licences can be viewed as fair in the aspects of use that they allow.

Open access e-resources

Few licences exist for open access content. As literary work this content is, of course, covered by copyright legislation but terms and conditions can vary or may not be present at all. The Directory of Open Access Journals (DOAJ)[47] uses the Creative Commons CC-BY licence, which allows long-term preservation and text- and data-mining. Journals within DOAJ have the SPARC Europe Seal for Open Access Journals[48] as long as they use this licence.

Open access publishing most commonly involves the author retaining copyright, rather than the traditional model of assigning it to a publisher. Hoorn and van der Graaf[49] note the various issues and models relating to copyright of open access materials. They conclude that although authors generally wish to allow the use of their material for non-commercial purposes, most would still wish to see a restriction when re-use by others would be commercial.

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