



Date : 09/06/2006

E-publishing and open access repositories: the relevant legal moments for academic institutions

Wilma Mossink

Legal advisor SURF Foundation

Utrecht, Netherlands

Meeting:	158 Acquisition and Collection Development with Serials and Other Continuing Resources
Simultaneous Interpretation:	No

WORLD LIBRARY AND INFORMATION CONGRESS: 72ND IFLA GENERAL CONFERENCE AND COUNCIL
20-24 August 2006, Seoul, Korea
<http://www.ifla.org/IV/ifla72/index.htm>

Introduction

This paper discusses the different legal moments an academic institution encounters when it is involved in e-publishing and open access repositories. To foster open access to scholarly journal literature two complementary strategies are recommended: self archiving and publishing in open access journals. This paper focuses on depositing articles in open access institutional repositories and the various legal aspects which should be considered when managing an open access institutional repository. The various initiatives undertaken by the SURF Foundation to assist and support academics and the academic institutions regarding the self archiving of the Dutch scholarly output are also discussed.

E-publishing and open access

E-publishing is defined as publishing in which all aspects of preparation, refereeing, assembly and distribution are carried out electronically¹. It is not a synonym for open access; this is about free and unrestricted online availability. More specifically: the world wide electronic distribution of peer reviewed literature and completely free and unrestricted access to it by all scientists, scholars, teachers, students and other curious minds². The definition of e-publishing describes the process of

¹ Prytherch, 200, Harrod's Librarians Glossary and Reference Book. Ninth edition. Aldershot Gowe

² http://www.zim.mpg.de/openaccess-berlin/berlin_declaration.pdf

publishing and making available and not the conditions under which the published works can be used by end users, as the definition of open access clearly does.

Berlin Declaration

There are many declarations and statements of open access, but the Berlin Declaration is the one most used and referred to. This declaration builds upon its two predecessors: the Budapest Open Access Initiative and the Bethesda Statement on Open Access Publishing and is therefore more comprehensive than the aforementioned.

The Berlin Declaration promotes the internet as a functional instrument for a global scientific knowledge base and human reflection. It specifies measures which research policy makers, research institutions, funding agencies, libraries, archives and museums could consider when disseminating knowledge widely and readily available to society.

According to the Berlin Declaration open access contributions must satisfy two conditions:

1. The author(s) and right holder(s) of such contributions grant(s) to all users a free, irrevocable, worldwide, right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship (community standards, will continue to provide the mechanism for enforcement of proper attribution and responsible use of the published work, as they do now), as well as the right to make small numbers of printed copies for their personal use.
2. A complete version of the work and all supplementary materials, including a copy of the permission as stated above, in an appropriate standard electronic format is deposited (and thus published) in at least one online repository using suitable technical standards (such as the Open Archive definitions) that is supported and maintained by an academic institution, scholarly society, government agency, or other well established organization that seeks to enable open access, unrestricted distribution, inter operability, and long-term archiving.

The Berlin Declaration is signed by many institutions. By doing so an academic institution declares it is in favour of the abstract principle of open access but committing the institution to actually providing open access needs more concrete steps. These steps were formulated at the subsequent Berlin meetings. The meetings provided institutions with a practical open access provision they could commit themselves to after signing the Berlin Declaration. In the beginning of 2005 at Berlin 3 the recommendation emerged that in order to implement the Berlin Declaration institutions should: 'Implement a policy to a) require their researchers to deposit a copy of all their published articles in an open access repository and b) encourage their researchers to publish their research articles in open access journals where a suitable journal exists and c) provide the support to enable that to happen'.³

³ <http://www.eprints.org/events/berlin3/outcomes.html>

Depositing a copy of published articles in open access repositories

Self archiving can be described as making e-prints freely available in digital form on the internet. It is referred to as the 'green road': i.e. publishing an article in a toll access journal but also concurrently archiving it in an institutional open access repository⁴. The most common strategies for self archiving are depositing an article on the author's personal web site, in disciplinary archives, institutional unit archives or institutional repositories. This strategy must fulfill the system of open access; the material must be searchable and must meet the necessary functions of a publication such as the determination of ownership, the peer review, making available and preservation.

A narrow view of a repository is of a place to store and from which to disseminate the traditional published output of institutions: copies or preprints or post prints of material, such as journal articles or books or other manuscripts produced by the faculty of an institution.

A much wider view is that institutional repositories are services deployed and supported at an institutional level to offer dissemination management, stewardship, and where appropriate, long term preservation of both intellectual work created by an institutional community and the records of the intellectual and cultural life of the institutional community⁵.

Independent of the way an academic institution thinks about self archiving or an open access repository, some legal questions always need to be answered and some legal procedures always need to be followed. After all, depositing an article in a repository establishes and is dependant on legal relationships between the author and a publisher, the author and the institution and the author and the end user.

Determination of ownership

Open access contributions may include many different forms such as original scientific research results, raw data and metadata, source materials, digital representation of pictorial and graphical materials and scholarly multimedia material. Irrespective of the type of work most material produced by academics raises questions about ownership. It is not always clear who is the first owner; is the copyright owner the institution where the research is done and which is employing the author, is it the author or is it perhaps the organisation funding the research the author has done? The question of ownership can not be answered unequivocally for the rules of initial ownership of rights of scholarly works are determined by the law or Copyright Act of each individual country. The provisions and jurisprudence often leave room for different interpretations, so an academic institution must be aware of possible controversies of ownership.

In principle, the author or first owner of a work is the natural person who created the work; however in some countries the law determines the employer as the first owner of copyright. Such is the case when a work is made for hire or when a work is made in the course of employment. Nowadays many academics especially in the STM fields work in research institutions financed or co-financed by public or private funders. In these cases the determination of copyright ownership can

⁴ Harnad S, Brody T, Valliers F, Carr L, Hitchcock S, Gingras Y, Oppenheim C, Stamerjohanns H & Hilff E. Y, The Access/Impact Problem and the Green and Gold Roads to open access, *serials review* 30 2004.

⁵ Advancing scholarship & Intellectual productivity: an interview with Clifford Lynch by Brian L. Hawkins *Educause review* May/June 2006 p. 446

be problematic. In case of multiple authorship the doctrine of 'collective works' or 'works of collaboration' could help.

In July 2006 the Dutch SURF Foundation and the English Joint Information Systems Committee partnership on copyright published a report on Institutional Copyright Policies in the Netherlands and the UK⁶. The report is the result of a study which investigated how universities in both countries deal with copyright in terms of their policies and practices especially, with respect to the ownership of scholarly works. The legislation both in the UK and the Netherlands appears to be unambiguous, but the custom and practice indicates otherwise. More through custom and practice than through formal policies most universities waive their rights to copyright in scholarly works to their authors.

The study shows that in the UK in 17 out of 42 cases ownership lies with faculty but the way this is expressed, varies since in some cases there may be conditions on ownership. The difficulty is that it is not always clear whether this means that an institution waives ownership or not. In general the conclusion is that most of the time there is some sort of clause in institutional policies on copyright that either explicitly or indirectly waives ownership in scholarly works produced by their academic staff. This means that in nearly all the cases the author is effectively the copyright owner.

The outcome of the study in the Netherlands showed that only a limited number of universities does have an explicit copyright policy. The reason for this is, as one of the university lawyers explained: 'If there is a problem, which hardly ever occurs, we talk to the parties involved and solve the case. It is thus too much trouble and not necessary to write a copyright policy'.

The ownership of rights of scholarly works remains a highly debated issue in the Netherlands but the custom and practice is that the academic owns the copyright in scholarly works.

In the United States which was not included in the aforementioned SURF/JISC project, the official position of the American Association of University Professors (AAUP) is as follows:

'It has been the prevailing academic practice to treat faculty members as the copyright owner of works that are created independently and at the faculty member's own initiative for traditional academic purposes'. In its Statement of Copyright AAUP shades this statement by saying that it is not likely that a single principle of law can clearly allocate copyright interests in all cases.⁷

The position of the American Association of Universities (AAU) is diametrically opposed to this, who consider that that the university should own the intellectual property that is created at the university by faculty, research staff, and scientists and with substantial aid of its facilities or its financial support.⁸ The fundamentally different positions taken by associations of authors and of institutions make clear that the ownership of works within an academic institution must be approached very seriously. Therefore SURF and the JISC strongly recommend that academic institutions should develop a clear, official policy on copyright and ensure that all employees are aware of this. Part of this policy should be a clear strategy on the ownership and management of

⁶ Weedon R., Mossink W., Report on Institutional Copyright Policies in the Netherlands & the UK: Lessons learnt, good practices and guidelines. SURF-JISC 2006

⁷<http://www.aaup.org/statements/Redbook/Spccopyr.htm>

⁸<http://www.aau.edu/reports/IPReport.pdf>

copyright, taking into account developments in electronic publishing, institutional/digital repositories and the requirements of funding bodies. The institutions should proactively work to disseminate this policy and the supporting information. At the same time an institution should uphold academic freedom to publish and it should support and uphold as far as possible the rights stemming from copyright law including moral rights. Finally a copyright policy should preferably not be developed in isolation but be a part of the approach to copyright in teaching and administrative materials, software and databases and the whole IPR portfolio of an institution⁹.

Institutional repositories and legal aspects

It is clear that the transition to the electronic open access paradigm ideally requires the active commitment of each and every individual producer of scientific knowledge. Although a recent report on open access self archiving shows that a vast majority of authors would willingly comply with a mandate from their employer or research funder to deposit copies of their article in an institutional or subject based repository¹⁰, getting a repository filled is not done overnight. It involves much advocacy work and assistance from the institution. The CNI, JISC, SURF study on institutional repositories showed that not that many full text articles are available¹¹. Despite the willingness of authors to comply with a mandate which only a few institutions around the world actually do have¹², it is difficult to create a vast body of full text articles. The question arises why it is so difficult to get repositories filled if authors say they would willingly comply with a mandate but in many cases don't self archive. More research in this area is needed.

To make available articles which have been published in a traditional scholarly or scientific journal via an institutional repository, an author must either have retained the copyright in the article or only granted certain non-exclusive rights to a publisher. It is also possible that the author has transferred all rights to a publisher but the publisher's policy permits authors to distribute the work under specified terms and conditions. This is a consequence of the current practice in the traditional scientific and scholarly publishing sector which requires a full transfer of copyright with respect to paper and electronic copies. Usually publishers become rights holders, holding rights derived through contract from the original author, of whom an individual author has to ask permission for depositing and making the article available on the repository or even on his or her own web site.

Whether an article can be put into a repository actually depends on the provisions in the publishing agreement the author has signed. This contract between author and publisher outlines the terms and conditions on which an article is accepted for publication and made accessible to a wider readership. In most cases publishers allow putting the pre-print in the repository; often also depositing of the post-print is allowed. Depositing the PDF frequently poses a problem. Only in limited cases this is allowed. Practically always the author should link to the publisher's web site,

⁹ Idem 6

¹⁰ Alma Swan and Sheridan Brown, Open access self-archiving: An author study, Key Perspectives May 2005

¹¹ van Westrienen, G & Lynch, C.A, Academic Institutional Repositories Deployment Status in 13 Nations as of Mid 2005, D-Lib Magazine September 2005 Vol11, Number 9

¹² Registry of Institutional Self Archiving Policies <http://www.eprints.org/openaccess/policysignup/>

instead of depositing the publishers' version in the repository. The SHERPA database¹³ shows examples of publishers' agreements and indicates whether and under which conditions self archiving is allowed.

Licence to publish

Bundle of rights

At a closer look copyright is not a single right but a bundle of rights. Therefore the copyright owner can manage the different rights he/she has and so create a balance of rights between his institution, the publisher and himself. The problem is however that an author hardly knows the different rights he has and does not know the differences between giving permission (licensing) and giving away (transferring/assigning). Basically most authors are not even interested in the rights they have. He does not bother which rights he has licensed or transferred or which rights he needs to retain to do his work properly: he just want to be published as soon as possible in the journal with the highest impact factor.

The balance of rights between authors, publishers and institutions was the drive for the so called Zwolle conferences and the Zwolle Group. Zwolle is a small town in the Netherlands where three conferences about the management of right of scholarly works were held. The Zwolle Group consists of 13 persons: academics, librarians, authors and policy makers. Together they created the Zwolle Principles, a set of principles designed to assist stakeholders to achieve maximum access to scholarship without compromising quality or academic freedom and without denying aspects of costs and rewards involved¹⁴. The key principles are that the primary focus should be on the allocation of specific rights to various stakeholders (management of copyright) and that optimal management may be achieved through thoughtful development and implementation of policies, contracts and other tools, as well as processes and educational programs that articulate the allocation of rights and responsibilities with respect to scholarly works.

Building upon the work the Zwolle Group has initiated, the SURF Foundation took the initiative to draft a 'Licence to publish'¹⁵. The SURF Foundation wants to provide a publishing agreement which identifies the issues that should be considered when a scholarly work is submitted to a journal.

The 'Licence to publish' is based on a checklist of key needs¹⁶ which can help both authors and publishers to identify the rights they may wish to seek to retain when transferring/assigning copyright or licensing for a publication. It also sums up the key needs which are important to both parties thereby helping them to determine which rights could be best exercised by which party and thus create a balance of rights. The interests of authors and publishers often converge but may sometimes diverge. Consideration of the key needs of authors and publishers helps each of them to understand the other's position when entering into a publishing agreement.

If an author wants to be sure that he retains all the rights needed for optimal access, he can use the 'Licence to publish'. By signing the Licence and sending it to his publisher the author grants the

¹³ <http://www.sherpa.ac.uk/romeo.php>

¹⁴ <http://www.surf.nl/copyright>

¹⁵ <http://www.surf.nl/copyrighttoolbox>

¹⁶ <http://www.lboro.ac.uk/departments/dis/disresearch/poc/pages/pub-listingrights.html>

publisher a sole licence for certain copyright related acts which have an economic or commercial objective with respect to the article. At the same time the author retains certain rights for various, scholarly purposes such as depositing the article in a repository. The Licence makes no distinction between pre prints, post prints or publisher's version but stipulates that the published version of the author's article can be disseminated via an institutional or centralised repository immediately after publication in a journal or after an embargo period of a maximum of six (6) months. The licence can also be used in the case of multiple authors. One of the clauses deals with this.

The 'Licence to publish' differs from the Author's Addendum from SPARC. SPARC is an alliance of academic and research libraries and organisations working to correct market dysfunctions in the scholarly publishing system. The Licence is a contract between author and publisher which is initiated by the author. The publisher won't have to sign; he accepts the conditions of the contract upon acceptance of the article. The Author's Addendum of SPARC is a form which an author could use to amend the publishing agreement supplied by a publisher. The Author's addendum must be attached to the agreement the publisher has sent to the author.¹⁷

More and more, statements of funding organisations include comments about enhancing access to research publications, especially when such works are financed by public resources and is often their priority ensuring that the availability and accessibility of the output of research funded by them is not adversely affected by copyright strategies of publishers. The funding organisation may insist on specific addenda to insert in publishing agreements that make it possible that the research output is widely distributed. The NIH in the USA and Wellcome Trust in the UK have extensive policies about this.¹⁸ in which they explain their ideas of open and unrestricted access to published research.

Making available: the Creative Commons Licence

Whether the wider or the narrower view of an institutional repository is used the question remains whether open access is just free access or free access plus a set of specified use rights that go significantly beyond normal copyright rights. According to the Berlin Declaration the author of contributions to the institutional repository grant to all users a free, irrevocable, worldwide, right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose. The author also permits users the right to make small numbers of printed copies for their personal use. The Berlin Declaration furthermore states that a copy of this permission should be deposited in an appropriate standard electronic format at in at least one online repository.

Contributions in open access repositories with a proper licence attached don't grow on trees. Often a contribution is placed in the repository without any licence and even in institutional repositories of institutions which have signed the Berlin Declaration not much permission to use is attached. The lack of a licence automatically places the end user in the same position he or she would be in according to the normal exceptions and limitations of the Copyright Law of Act.

¹⁷ http://www.arl.org/sparc/author/docs/AuthorsAddendum2_1.pdf

¹⁸ <http://www.nih.gov/about/publicaccess> and <http://www.rcuk.ac.uk/access/statement.pdf>

If a licence is attached to material in the repository most of the time it is a Creative Commons Licence. This licence is by far the most widely used licence for the distribution of scholarly works. The Creative Commons licence was developed at Stanford University in 2001. In the core licensing suite there are a total of 6 licences to choose from. Although some of the Creative Commons licences are seen as very suitable to distribute a scholarly article ¹⁹, there are some reservations which can be made.

The Creative Commons Attribution licence, just like the first condition of the Berlin Declaration confers on the user the rights including the right of access to and a licence to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works.

It would seem very obvious that academics would attach this licence to their works, but they can make other choices. Some scientists or scholars may frown at seeing their work incorporated and transformed into another work or being used by free riders. They would rather attach a Creative Commons No Derivative or Creative Commons No Commercial and because the suite has six different options they can make a choice. The No-Commercial licence authorizes others to copy, distribute, display and perform the work, and derivative works based upon it- but for noncommercial purposes only. The No-Derivative version authorizes others to copy, distribute, display, and perform only verbatim copies of the work, but not derivative works based upon it. It is also possible that the Share Alike is chosen. This licence allows others to distribute derivative works only under a licence identical to the licence that governs the work.

If an institution has signed the Berlin Declaration and followed the recommendations of Berlin 3 and has required its authors to deposit their articles in the repository, the question rises whether the permission stated in the Berlin Declaration allows the author to use other licences than the Creative Commons Attribution or even whether a licence is needed.

Making available: the E-deposit licence

The Creative Commons Licence is user oriented. Reading the licence an end user knows what he or she is allowed do with the work. One could argue that the institutional repository is also a user and therefore is authorized to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works. This would mean that no e-deposit licence is needed for the rights of the repository because they are clearly written out in the Creative Commons licence. From a managerial and risk-avoiding point of view an academic institution would perhaps like to specify some rights not covered in the Creative Commons licence.

There are many electronic depot licences developed. An overview is given in the legal toolkit, a project funded by SURF and conducted by Leiden University in the Netherlands²⁰. This toolkit gives guidance of the various e-depot licences used around the world and gives recommendations for use.

¹⁹ Ed Barker, Charles Duncan: *The Common Information Environment and Creative Commons. Final Report to the Common Information Environment Members of a study on the applicability of Creative Commons Licences*, Intrallect Ltd, 10 X 2005. and Gerhard Spindler, Universitätsverlag Gottingen 2006, Rechtliche Rahmenbedingungen von Open Access Publikationen, p. 77

²⁰ <http://www.dare.leidenuniv.nl/index.php3?m=23&c=163&garb=0.5108627787361215&session=>

A spin off of the toolkit project is a working group 'Licences digital depot' which drafts a licence suitable for the Dutch open access repositories. Part of the e-depot licence will be a statement of the author that he is the owner of the work, that he has permission of co authors to deposit the work and distribute it. A dispute settlement between author and institution will also be a component of the licence.

A few remaining legal aspects

Liability

All academic institutions will be aware of the need to ensure that any material stored in their institutional repositories should be legitimate and comply with the law. This condition won't be problematic for scholarly works but for other material it is possible that sometimes an academic institution is liable for illegal acts. An excellent summary of the risks facing a repository manager has been articulated by Charles Oppenheim²¹.

In Europe institutional repositories may be covered by the E-Commerce Directive²². Only when institutional repositories act as a 'mere conduit' for material, they may escape liability for illegal acts in the case where they exercise no editorial control. With an institutional repository this is fairly unlikely to be the case and in some cases then, institutions may be regarded in law as a publisher and therefore likely to be liable as a service provider of the repository. A risk assessment before a repository goes live is however good practice. To minimise and manage the risks academic institutions could draw up, implement and publish a formal 'notice and takedown' policy and procedures.

Preservation

To keep the scholarly output accessible through the length of time the work has to be preserved. Some copyright legislation helps the legal process of preservation but often the legislation prohibits the possibility to make the work available after its preservation. If the academic institution wants to preserve the contribution in the open access repository and keep this material available again then it has to be sure that it has the right to do so. A provision in the deposit licence could make it possible that preserved material can be made available.

Conclusion

There are many legal moments which must be addressed when making available scholarly output through open access. An academic institution must label all those moments and develop views, opinions and policies how to handle those moments. Organisations such as the Dutch SURF Foundation, the JISC and SPARC have developed toolkits, guidelines and other web based material to assist academic institutions that is freely available on the internet.

Wilma Mossink

1 June 2006

=====

²¹ Charles Oppenheim, *An Inventory of Legal Issues associated with e prints*'

²² http://europa.eu/eur-lex/pri/en/oj/dat/2000/l_178/l_17820000717en00010016.pdf