Managing Copyright in the Digital Repository: Beyond "Undue Diligence"

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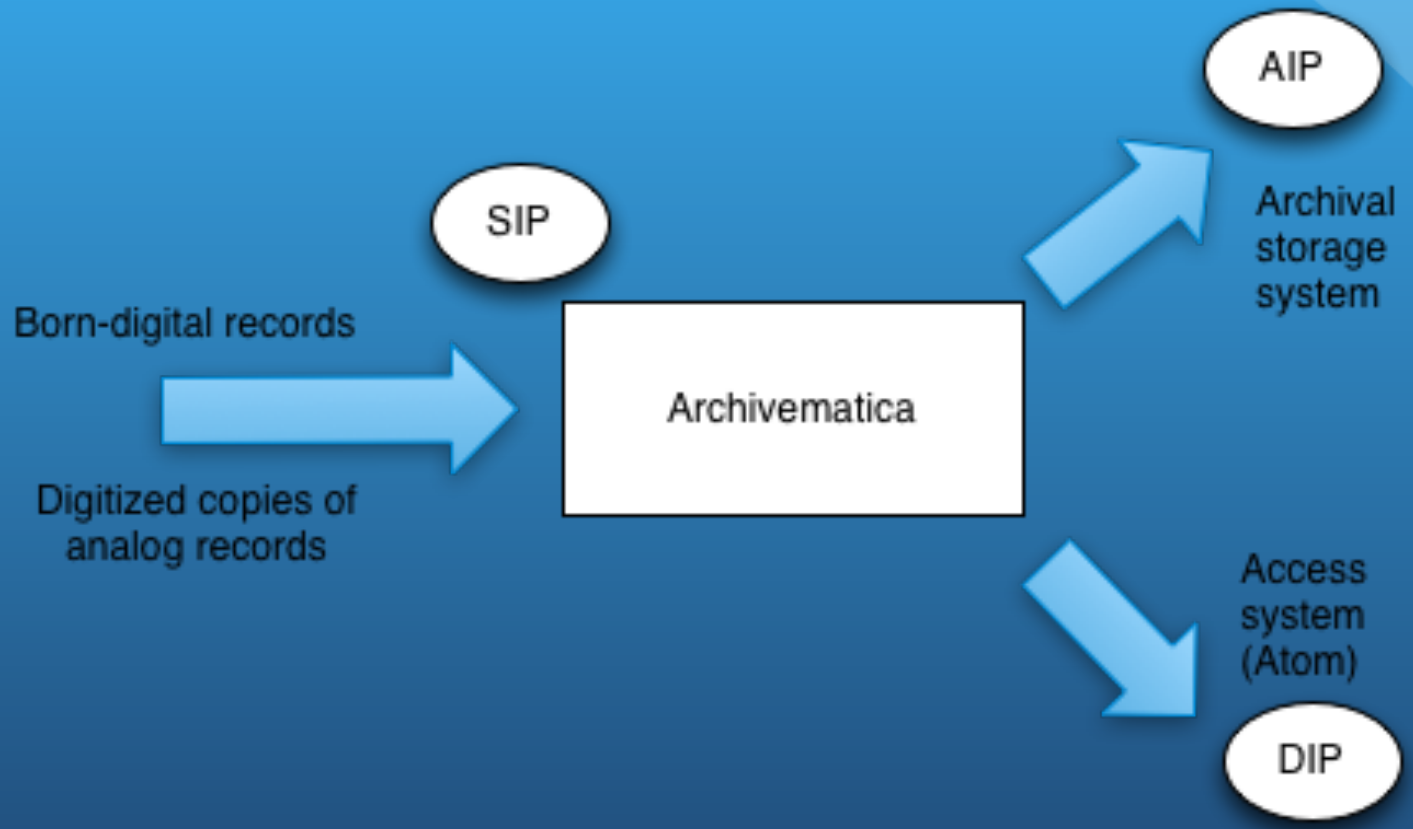
ACA Victoria Conference

June 2014

Digital repository



The copyright problem

Derives from the intersection of:

- The nature of copyright: ownership grounded in authorship
- The nature of archives: aggregates of records made or received
- The nature of the internet: resembles an act of publishing

The conservative approach

Avoid liability, disseminate archival materials via the internet only if:

- Material is already in the public domain
- Repository owns copyright
- Copyright owner has given permission

In the analog repository …

Conservative approach does not hinder access:

- Clear distinction between allowing consultation (access) vs making a copy (reproduction)
- Archives can make single copies for individual researchers under fair dealing and LAM exceptions

But in the digital repository ...

1. Access system blurs the distinction between access and reproduction
2. Transfers of born-digital records will include protected materials that must be actively managed, but item-level review is untenable
3. Archival bond must be preserved, but conservative approach results in patchwork access threatening archival integrity

Recent US initiatives

Well-intentioned practice for putting digitized collections of unpublished materials online (W-iP guidelines, 2010)

- http://www.oclc.org/research/activities/rights.html

Code of Best Practices in Fair Use for Academic and Research Libraries (ARL code, 2012)

- http://www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices

Canadian copyright landscape

2012 Canada Copyright Modernization Act expanded list of allowable purposes under fair dealing

In a series of cases since 2002 Supreme Court has articulated a "user rights" approach to copyright

- Théberge v. Gallerie d'Art du Petit Champlain (2002)
- CCH Canada Ltd v Law Society of Upper Canada (2004)
- Five copyright decisions in 2012 ("copyright pentalogy")

CCH fair dealing tests

Test	Tends to fairness	Tends to unfairness
1. Purpose of the dealing	Dissemination supports research / private study, is free, and the principles governing the practice are documented in policy	Dissemination is a for-profit service for which users must pay Decision-making is conducted in an ad hoc manner
2. Character of the dealing	The access system distinguishes between provision of access (temporary consultation of records in the virtual reading room) vs. reproduction (creation of a new durable object outside the repository) The system's approach reflects best practices within the archival profession	The access system provides routine access by creating durable new copies on researcher's computer that become the user's physical property (download) The system is designed without reference to professional best practice

CCH fair dealing tests

Test	Tends to fairness	Tends to unfairness
3. Amount of the dealing	Dissemination of entire work is appropriate to research purpose Originality of the material (degree of skill and judgment required in production) is low	Research purpose does not require access to entire work Originality of the material (degree of skill and judgment required in production) is high
4. Alternatives to the dealing	Potential commercial value of material to the owner is low Objects disseminated are unique records for which there are no alternates Online access system implements controls that mirror onsite systems	Potential commercial value of material to the owner is high Objects disseminated include non-record materials (publications) that exist in multiple copies Online access system does not implement same controls as onsite access system

CCH fair dealing tests

Test	Tends to fairness	Tends to unfairness
5. Nature of the work	There is a public interest in access, records are unique and unpublished, and dissemination expands access Materials disseminated are unique, unpublished archival records with relatively low level of creative originality	Works are readily available elsewhere, or there are legitimate expectations of confidentiality / privacy that reasonably limit demand for access
6. Effect of dealing on the work	Works are readily available elsewhere, or there are legitimate expectations of confidentiality / privacy that reasonably limit demand for access Materials disseminated include commercially available publications, creative works of high originality, or records which have been published elsewhere by the copyright owner	Materials disseminated include commercially available publications, creative works of high originality, or records which have been published elsewhere by the copyright owner

Risk management: elements

1. Policy explicitly aligns archival mission with public policy goals of copyright
2. Criteria for risk assessment
3. Virtual reading room recovering distinction between access / reproduction
4. Notice-and-takedown procedure for complaint resolution

Criteria

Does the record – considered as a self-contained work circulating as an "article of commerce" – have a commercial value from which its owner could reasonably expect to accrue economic benefits?

The greater the potential commercial value, the greater the risk in disseminating the record without permission.

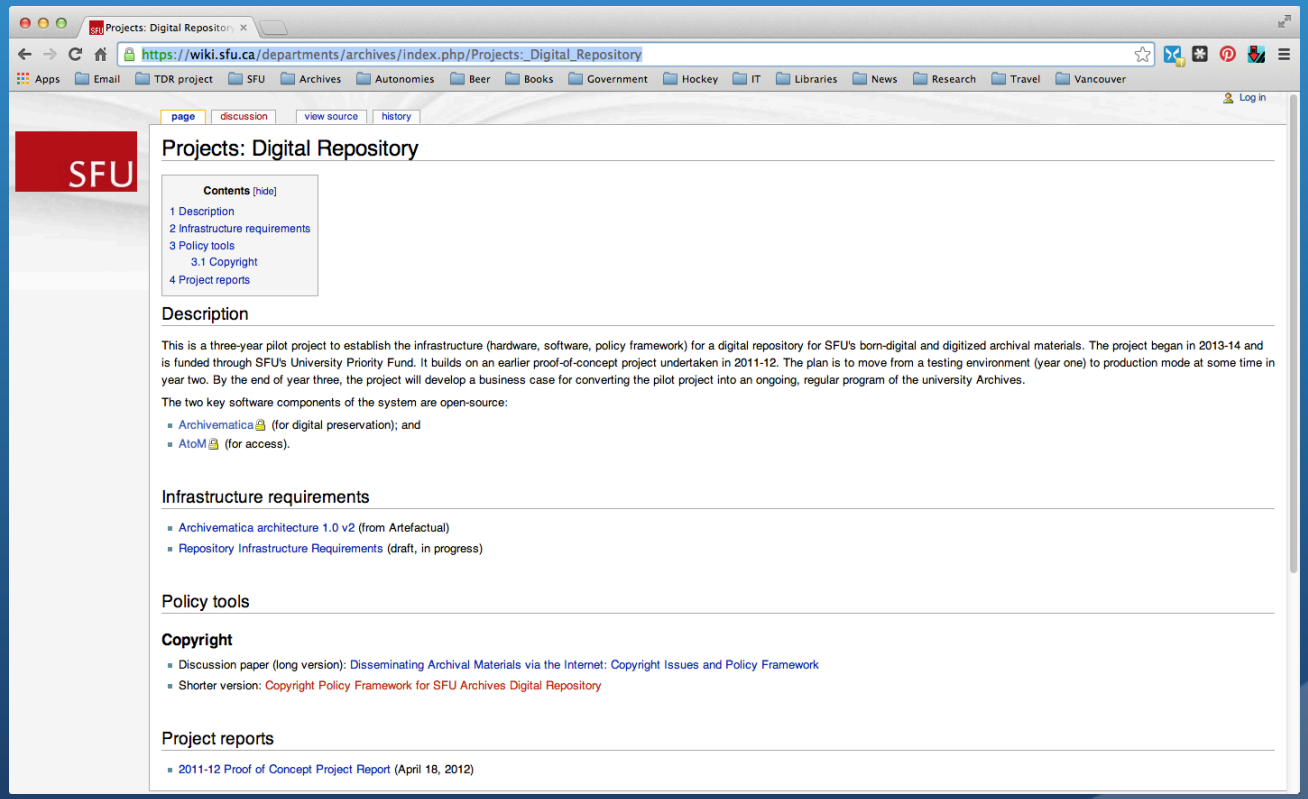
Criteria

Identifying potential commercial value:

- Published
- Created with commercial intent
- Creatively original
- Author is prominent individual in their field

Risk value

Assessment	Description	Outcome
No risk	Records fail to meet the minimum requirements for originality; not protected by copyright	Disseminate without restrictions
Low risk	Records judged to have no potential commercial value to copyright owner	Disseminate with no effort to identify, locate and obtain owner's permission
High risk	Records judged to have potential commercial value to the copyright owner	Try to identify and locate the owner and typically only disseminate with owner's permission. The default for orphan works is dissemination, but evaluate on a case-by-case basis

Conclusion

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