

Archiving of internet resources: the legal issues revisited

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Some background

- JISC/Wellcome Trust Report - Legal issues relating to the archiving of Internet resources in the UK, EU, USA & Australia (Feb. 2003)
 - http://www.jisc.ac.uk/uploaded_documents/archiving_legal.pdf
- ERPANET Presentation - Law and the Would-be Web Archivist (May 2003)
 - <http://www.erpanet.org/events/2003/kerkira/presentations/Charlesworth.pdf>
- Three years later, have the legal issues/risks facing web archivists begun to change?



Legal issues and risk factors

- National laws on legal deposit of digital materials (see John Tuck's presentation)
- Intellectual property law, esp. copyright
- Defamation law, esp. libel law
- Privacy law, esp. data protection law
- Content liability laws, esp. obscenity and indecency laws.



Intellectual Property

- The © regime has become more stringent with regard to digital works.
 - Fair use and other user rights are increasingly circumscribed.
- The 'deep web' is growing at the expense of the public web.
 - Greater use of technical protection, which in turn is protected by new national © laws.
- Rightsholders are becoming more proactive in pursuit of the protection of intellectual property rights on-line.
 - See NetCopyrightLaw <<http://netcopyrightlaw.com/default.asp>>



Intellectual Property II

- With some exceptions, web archivists appear to have sought permission from rightholders to archive web resources, rather than addressing © *ex post facto*.
- This has the advantages of permitting negotiation to archive 'deep web' resources, and helping to ensure that 3rd party rights are not inadvertently breached.
- Rightholders are considering the desirability and cost of archiving, and are more open to external archiving.
- © law in the UK, as it stands, still means that any other approach carries a significantly higher legal risk factor.



Defamation

- Defamation law varies widely between nations.
- The UK is seen as a favourable jurisdiction for bringing on-line libel claims.
 - Since 1998 libel claims can be brought in the UK on a conditional fee agreement basis.
- Web archives, by their very nature, may hold information unavailable elsewhere and provide it to the public.
- The leading case of 3 years ago on the issue is still relevant
 - *Loutchansky v Times Newspaper* [2001] 4 All ER 115



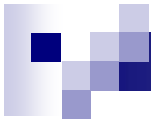
Defamation II

- Recent developments in on-line defamation law have centred on issues of jurisdiction and liability of ISPs.
- There is little evidence the UK legal position with regard to web archiving and defamation has changed in the last 3 years.
- Web archivists handling potentially contentious material should:
 - Ensure they understand how their operations relate to the rules relating to defamation law.
 - Have clear guidance to staff as to how to handle complaints regarding potentially defamatory statements.



Privacy and data protection

- The UK's privacy laws remain relatively weak and their impact on web archiving does not appear great.
- Data Protection Act 1998 does have potentially important implications for web archiving where the material archived contains personal data
- The archiving exemptions in the DPA still do not fit comfortably with the archiving of public webpages.
- The UK DP regulatory regime is, however, relatively light touch compared to some EU countries.
 - C-101/01 Criminal proceedings against Bodil Lindqvist (ECJ)



Privacy and data protection II

- In 2003 the issue of DP compliance was seen as high risk for web archives.
- In 2006, in the UK, the issue of DP compliance may be regarded as less risky:
 - the DP rules are better understood
 - the ICO's position on acceptable processing of personal data is clearer
 - court rulings have narrowed the scope of DP
- Both opt-in & opt-out procedures are accepted as a viable approach to protection of data subjects
- But web archivists should still seek to comply as far as possible with the Data Protection Principles.



Content liability laws

- Content liability law shows little uniformity in the EU:
 - Some Member States operate rigorous regimes of censorship over depictions of sexual activity, e.g. the UK
 - Others take a rather more *laissez faire* approach to their citizens' proclivities, e.g, the Netherlands
 - Some Member States bar certain other types of material e.g. neo-Nazi or holocaust denial material
- Some aspects of content liability show a degree of consensus e.g. the undesirability of child pornography,
- BUT this consensus does not appear to extend to the uniform interpretation of subject matter, uniform definition of offences, or uniformity of punishment.



Conclusions

- Probably the key UK legal change in the last 3 years has been the move towards legal deposit of digital materials.
 - This has not been a particularly swift process.
- Otherwise the most influential changes in terms of law and web archiving have been:
 - A realisation of the potential value of material placed on the web
 - A realisation of how difficult that material may be to capture and store in meaningful form
 - The increased willingness of commercial operations to let non-commercial web archivers take on the cost and risks of capturing both deep and shallow web materials – electronic journals, datasets etc.



Conclusions II

- We are in a better position to make determinations about the risks/benefits of archiving particular web materials
- Internet-related laws are starting to shake down, as law enforcement agencies, regulators and rightholders come to terms with the digital environment – don't look so much for changes in legislation, as much as more nuanced and knowledgeable interpretation
- Web archiving, like many other internet-related disciplines, is becoming more mainstream and is acquiring greater legitimacy from its relationship to established institutions – can be a double-edged sword.