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E-learning and copyright: background

Introduction

This chapter considers copyright and the digital environment in some detail. It provides an overview of the major differences between copyright laws in several English-speaking countries in the world and how they apply to e-learning. The focus of this book is on the UK, but copyright laws in countries such as the United States, Australia, Canada and New Zealand are explored. It does not provide legal advice for those working in e-learning but examines how copying can be undertaken for educational purposes. This includes what copying is permitted under exceptions in the law and how copyright issues impact on face-to-face teaching. The chapter also defines e-learning more specifically and looks at the 'new learning environment' which includes the use of the internet, intranets and secure networks such as virtual learning environments, course management systems and other online teaching environments. This chapter considers how the digital environment differs from the face-to-face learning environment of the classroom. It also explores new developments in scholarly publishing including the open access movement and open-source software along with the development of what some see as an alternative to copyright – the Creative Commons movement. This chapter includes the first case study, which is from Brunel University, where the institution took the decision to appoint a Copyright and Digital Resources Officer in light of the copyright challenges they were facing.

Recognizing the copyright dilemma

Much of what teachers wish to do in an online learning environment is no different to what they have done previously in the classroom. Students are given set reading to undertake, asked to critique a work of art or consult a manuscript source. They may work individually or in groups. The difference lies in how students might access learning resources, which are often copyright-protected materials. Technology offers the teacher the possibility of providing students with a perfect copy of a copyright work such as an e-book, a music file or a piece of digital video. Early digital library research projects, such as those funded by the JISC in the 1990s as part of the eLib programme, recognized the complex copyright issues that the digitization process could cause. The background to this programme is discussed in greater detail by other authors (Rusbridge, 1998; Secker, 2004), being outside of the scope of this book. Nevertheless, many early digitization projects in libraries throughout the world deliberately concentrated on using material that was out of copyright, thus avoiding the need to process copyright permissions, which are both time-consuming and potentially problematic if the owner of a work cannot be traced. However, in the UK, JISC launched several projects as part of eLib to tackle this issue head on looking at on-demand publishing and electronic short loan. These various projects ultimately led to the establishment of HERON (Higher Education Resources ON-demand) funded initially by JISC as a project. HERON subsequently became a commercial service providing digitization and copyright services to higher education in the UK and more widely. This is discussed in greater detail in Chapter 2.

Through early projects in e-learning and digital libraries, JISC became increasingly aware of the legal ramifications of working in a digital environment. Consequently the JISC Legal service was launched in 2000 to provide advice and support on a wide range of legal issues for the further and higher education community. The JISC Legal website (www.jisclegal.ac.uk) provides a wealth of legal advice and guidance over the use of ICTs in education, including copyright issues. In recent years many JISC-funded projects involving digital resources have mentioned copyright or IPR issues in their final report. JISC have numerous resources and tools available on their website and a selection of these are listed in the Conclusion to this book.

The development of e-learning

Before considering copyright issues any further, this next section will briefly provide an overview of e-learning support. A list of general readings on this topic is provided in the Conclusion of the book. However, e-learning has become increasingly important in education and training, with the proliferation of digital technologies and the widespread availability of network infrastructure, which facilitate high speed broadband capability. In higher education e-learning has had the greatest impact, with significant investment from funding bodies such as JISC, who have provided the infrastructure, through the JANET network and research and development funding for projects and initiatives. This means that every higher education institution (HEI) in the UK has invested significantly in digital technologies to support teaching and learning. Student's classroom learning is primarily supported through the use of VLEs, with the commercial system Blackboard and the open-source system Moodle, dominating the field.

In the further education sector most colleges also now have VLEs, with the most common platform being the open-source system Moodle. Essentially what these systems provide is a relatively easy to use platform to distribute content to learners, with built-in educational tools or activities to engage learners and to facilitate learning, such as discussion tools, assessment tools, file upload and collaborative workspaces. In fairness, true e-learning, as defined in the Introduction, is rare, but most educational establishments have recognized that providing online support for learners, in addition to face-to-face teaching, offers many rewards for both the teacher and the learner. The use of e-learning is largely linked to the need to provide students in higher and further education with greater flexibility, in terms of the time and place in which they do their learning. Funding cuts have meant that there are now far higher numbers of part-time students and students who need to work while studying. This means that students increasingly need the support provided by electronic access.

Meanwhile, in the schools sector e-learning has been slower to develop, but progressed more rapidly following recent investment from central government through Becta (www.becta.org.uk). Becta's role is 'to ensure that technology is used at its best in the British education system' (Becta, 2009a). They have run several events and produced numerous resources to help encourage the effective use of e-learning. Developments in the

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schools sector were largely driven by the UK government's e-Strategy (DfES, 2005) launched in 2005 that sought to provide a 'cradle to grave' approach to using technology in learning. The e-Strategy also set the expectations that:

- ◆ by spring 2008 every pupil should have access to a personalized online learning space with the potential to support an e-portfolio (provided by their local authority)
- ◆ by 2010 every school should have integrated learning and management systems (a comprehensive suite of learning platform technologies) (Becta, 2009b).

Often known as 'learning platforms' in schools, VLEs are becoming common place along with the use of other classroom technologies such as interactive whiteboards.

Blended learning

Many HEIs invested in e-learning solutions drawn by the lure of supporting students at a distance. Distance learning is seen as a useful way of expanding student numbers without the need for additional teaching space. It also meets the growing demand for education throughout the globe. However, the financial investment associated with distance education is not insignificant. The UK witnessed the financial collapse of the much heralded 'e-University' in 2005 at a reported cost of over £500 million. This led many institutions to reconsider how they might use e-learning and focus on what is often called 'blended learning'. This is defined in the Introduction as the support of on-campus face-to-face students with an e-learning platform that enables them to access lecture materials, resources and readings and communicate with their peers and tutors outside of the classroom. This model has become increasingly common as higher education has expanded and the profile of students has changed. Since 1992, the UK and many other English-speaking countries have seen a significant expansion in higher education. Participation levels in HE in the UK are now approximately 50%. With increasingly large class sizes and more students studying while working part- (or even full-) time, e-learning, or blended learning, opens up higher education and provides

students with flexibility to learn at a time and place convenient to them. Thus, it has been linked to the widening participation agenda in the UK, which sees students from non-traditional backgrounds entering universities. Here, student retention can be a key issue and many e-learning systems include administrative functions that allow student participation to be tracked to alert tutors to potential problems early on.

E-learning and digital resources

While many e-learning researchers have long advocated that VLEs should be interactive environments, where students complete tasks and activities rather than simply access content, it is fair to say that many teachers are lured into using VLEs or course management systems as a document repository. Materials such as PowerPoint presentations, lecture notes and essential readings seem to be the obvious contenders for uploading onto the learning platform. A typical course in any HEI will inevitably become an electronic file store for materials, which previously were included in course handbooks or given out in the classroom. In recent years institutions are also starting to invest in lecture capture systems, so not only can slides from a presentation be accessed, but also a recording of the lecture alongside presentation slides will be available. Podcasts, screen capture and other video and audio production are becoming increasingly sophisticated. Consequently many e-learning support teams now work alongside more traditional audiovisual technicians in providing services in this area as the technology improves and the costs are reduced. Bandwidth was until recently an issue with audio and video material in digital format, due to the large file sizes of the materials, but streaming servers now allow this content to be delivered over networks.

The wide availability of digital resources, be they useful web-based resources, e-journals or e-books leads many teachers to try to include as many learning resources as possible within the VLE for the convenience of their students. Librarians are aware that students and academic staff visit the library building less frequently, as many prefer the convenience of desktop access from their office or home that authentication systems allow. It is therefore no surprise that teachers who use the VLE want to include direct links to access full text materials, for example from the course reading list. Many teachers are unaware of the complex licensing

arrangements negotiated by libraries that allow them to access resources such as e-journals and e-books. In fact with more sophisticated authentication procedures, many teachers are not aware when they are using a subscription resource as opposed to content freely available on the internet. The desire to provide students with as many resources as possible to help their learning can inevitably lead to copyright issues. Teachers will argue that they are simply trying to help students get access to material, however the ease with which content can be downloaded from the internet or a library database or even scanned from hardcopy, means it is all too easy to break licence agreement terms and conditions or infringe another's copyright. The general perception that there exists some sort of blanket exception for educational or not-for-profit use prevails in education, particularly outside of higher education (which is better resourced and consequently more likely to employ copyright experts to advise staff and students). Additionally many teachers believe that because they are distributing content to students via a secure network this differs from making material available on the internet.

Our learners: 'the Google Generation'?

Before turning to copyright laws, it is also worth briefly mentioning the recent research that has looked at the characteristics of students today. Many recent reports (Rowlands et al., 2008; RIN (Research Information Network, 2007) have suggested that young people have a different relationship to technology than earlier generations. Various authors have labelled them as 'the Net Generation', 'the Google Generation', 'Generation Y' or 'digital natives'. While it is true to say that in much of the developed world many young people have greater access to technology, be it the internet, mobile phones, video games or MP3 players, perhaps more worryingly, there is also some evidence to suggest that young people have a different (or lack of) understanding of copyright laws. Rowlands et al. (2008, 301) qualified the findings from earlier research that suggested that young people did not respect intellectual property, saying they found this only to be partly true, while stating: 'Young people feel that copyright regimes are unfair and unjust and a big age gap is opening up. The implications for libraries and for the information industry of a collapse of respect for copyright are potentially very serious.'

Certainly what is clear is that students tend to expect resources to be freely available to them, either on the internet or in their online learning environment. Moreover, students perhaps more than staff have a limited understanding of why copyright might present those delivering or supporting their teaching with difficulties.

Brief introduction to UK copyright law

These next sections will go on to explore copyright in greater detail, including why the laws exist and what they permit in terms of copyright for educational purposes in the UK, and contrasting the situation with some other countries in the world.

Copyright laws were intended to protect the creative industries and to ensure that intellectual and financial rewards for investments were returned to their rightful owners. Many countries talk about the need for balance in terms of adequate copyright protection against theft and piracy, versus generous educational provisions that foster the free flow of ideas. In the UK, copyright does not require a registration process and provided that works meet certain criteria, then they qualify for automatic copyright protection upon their creation. These criteria state that the work must be:

- ◆ original
- ◆ fixed or recorded in some form
- ◆ created by a qualified national.

Usually the primary author owns the copyright to a work, but this is dependent upon the nature of the work (see Table 1.1). In the case of literary works such as books, authors are often fairly clear, but identifying the owner of copyright for works such as films and sound recordings can become more complex. So for example in the case of sounding recordings the author of the work is the producer and the company who made the recording owns copyright. However, if a sound recording is performed it qualifies for performance rights. In the case of films the producer and the principal director are the author of the work. Cornish (2009, 12) provides an excellent overview of the issues surrounding copyright ownership if you are in any doubt. Don't forget that as a property right, copyright can also be bought, sold and transferred to another. In many cases the

Table 1.1 *UK law on duration of copyright by type of material (Copyright, Designs and Patents Act 1988, OPSI, 2009)*

Type of material	Duration of copyright
Literary and artistic works	70 years from the death of the author
Dramatic and musical works	70 years from publication if no named author
Sound recordings	50 years from the date of recording
Films	50 years following the last to die of: the principal director, producer, author of screenplay, composer of soundtrack
Broadcasts	50 years from the date of broadcast
Typographical layout	25 years from publication
Unpublished works	70 years from the death of the author
Crown copyright	125 years from publication but subject to a waiver

copyright owner of a work can be identified from the universal copyright symbol placed somewhere prominently on the work (for example, © Jane Secker 2009), however its use is not a prerequisite for copyright protection in the UK or for much of the world.

Cornish (2009, 39–43) provides greater detail about the duration of copyright and should be consulted for specific queries such as protection for authors from outside of the European Economic Area (EEA) and protection for works with multiple authors. In terms of Crown Copyright material, generally this can be copied as it is subject to a waiver that allows unrestricted copying of the material as part of the public right to information about government. In addition, most US government materials are also not covered by copyright and unrestricted copying is permitted. For further details of international copyright agreements such as the Berne Convention, that award protection to materials around the world, the UK's Intellectual Property Office provides an excellent overview (Intellectual Property Office, 2008).

'Fair dealing'

UK law (and many copyright laws throughout the world) have a provision

known as 'fair dealing' which many confuse with educational copying permitted under the law. Fair dealing is in fact a defence that could be used in court rather than a right under law and it states that a single copy of literary, dramatic, musical or artistic work can be made for the following specific purposes:

- ◆ private non-commercial study and research
- ◆ criticism and review
- ◆ the reporting of news
- ◆ government administration.

Much photocopying and scanning of published works undertaken in an educational context falls under the fair dealing provision; for example, single copies made by teachers for their research or by students as part of their private study. However, distribution of copies via an e-learning platform constitutes multiple copying and thus cannot be considered as fair dealing. In addition, fair dealing in the UK does not currently extend to films, sound recordings or broadcasts, or to electronic resources.

Educational copying and the law

Provisions for educational copying are enshrined in almost all copyright laws throughout the world, but with many caveats. For example, in the UK, sections 32 to 36 of the Copyright, Designs and Patents Act 1988 includes an exception that permits copying for educational purposes. However, copyright exceptions have a problematic relationship with technology, even it would seem the humble photocopier. UK law is clear that copying for educational purposes is permitted, provided a *reprographic process* is not used. Therefore, it is no real surprise that the widespread availability of scanners has caused problems to copyright legislators across the globe. The high cost and size of photocopiers historically meant that the chance of regular households having such a machine was slim and, in addition, copies made from photocopiers were clearly degraded in terms of quality when compared to the original work. However, the inexpensive desktop scanner that many people now own in their homes can create digital copies of protected works quickly and efficiently and to a high standard. Yet without permission these copies are rarely suitable for use

in teaching. Moreover, copying existing digital content, such as a portable document format (PDF) file, is even simpler and leads to no degradation of quality from the original file.

Since the advent of the internet it is interesting to trace how different countries have dealt with educational copying in terms of making material available via a learning platform. Whilst not attempting to be comprehensive, the following section includes details from a selection of English-speaking countries. It aims to highlight how technology is causing governments around the world to reconsider their copyright laws and try to bring them up to date. Yet the pressure to amend the laws seems to often be coming from commercial concerns, particularly industries such as the music and film industries that are attempting to combat internet piracy and illegal file-sharing. In trying to clamp down on this type of copying, legislators could well be causing even further problems for educators who simply want to allow students and researchers to be able to access information in the most convenient format. The measures that are in place in many countries are already overly burdensome for administrators and librarians. One hopes that in the future the needs of education can be balanced fairly against the need for copyright owners to receive just rewards for their endeavours, and that this will be recognized by governments around the world as they undertake copyright reforms.

Copyright and educational copying in the UK

Copyright is an exclusive right given to the primary author or creator of a work. Not everything is covered by copyright but in the UK as in most other countries, protection is given to a variety of original material that is fixed in some form. Therefore copyright can protect a broadcast, a recording or a literary or artistic work, but it cannot be used to protect an idea – it fundamentally protects the expression of an idea. This book is not a comprehensive guide for librarians to copying under the law, as several other authors have already produced comprehensive and up-to-date books on this topic. See the further reading at the end of the book, but notable authors who have produced invaluable guides for UK librarians or archivists include Norman (2004), Pedley (2007, 2008) and Cornish (2009). Both the work of Norman and Cornish are useful supplements to this book as they are set out as questions and answers to common copyright

dilemmas that those dealing with copyright queries are frequently asked. Meanwhile Pedley's *Digital Copyright* (2007) is particularly useful for those interested in relevant case law in this area. This work seeks neither to replace nor replicate these existing publications, but rather to provide a focus on how copyright issues impact on e-learning.

This section serves as an introduction to the legal framework in which practitioners operate. It will compare how copying for e-learning can be undertaken within the law in the UK, and then contrast this with several countries including Ireland, the United States of America, Australia, Canada and New Zealand. By way of interest, the law in terms of educational copying in Ireland is also briefly discussed but for practical reasons this book cannot provide a comprehensive overview of the legal position across the globe. Therefore, the focus is deliberately on the major English-speaking countries in the world to provide advice for e-learning practitioners. There are also other books available which include much more detailed copyright advice for respective countries. These are referenced in the Conclusion and should be consulted for specific advice pertaining to a country outside of the UK. Copyright legislation in the former Commonwealth countries (including Canada, Australia and New Zealand) is based on UK law and so is broadly similar. The key differences in terms of educational copying are discussed in the next section. In the USA, the law differs for the 1976 Copyright Act includes the concept of 'fair use' 'Fair use' is generally seen as a more permissive approach to copyright for it permits copyright material to be copied for educational use. Significantly in the UK and many other countries, much educational or classroom copying needs to be undertaken under a licence from the respective reprographic rights body, as UK law does not include the 'fair use' concept.

An important query often raised by teachers who are developing content to be delivered throughout the world concerns the jurisdiction that applies when they are copying material. Does the law of the country in which they work take precedence over the law of the country where the content will be delivered? The answer put simply is that if you are developing an e-learning course in a UK institution then the laws of the UK apply (or if you are developing a course in a US educational institution then US law applies), even if students from a different country might be accessing this material. This query really only arises in the higher education

sector where many traditional campus universities now utilize e-learning to deliver distance learning courses across the world.

Distance or open learning higher education developed as early as the 19th century in the UK and has always been popular in the US and Australia where distance might prevent people from attending a university in person. The development of robust e-learning platforms has meant that even traditional campus-based universities can deliver some of their courses as distance education. In the past, distance education was a specialist mode of delivery that was usually delivered by specialist units or institutions such as the Open University. Knowledge of copyright issues is a prerequisite and distance education universities, such as the Open University in the UK, have a rights and permissions department to negotiate contracts and clear content for use. However, many HEIs have recently ventured into the realm of distance education and do not have specialist staff involved in this work. This means that there is rarely any detailed understanding of the potential copyright issues associated with this form of delivery. Consequently, getting answers to fundamental questions, such as the jurisdiction that applies in terms of copying material or protecting that material, can all too easily necessitate the institution needing to seek expensive legal advice.

In general there are a number of ways that copying works can be undertaken without infringing copyright laws. These include:

- ◆ copying small amounts of a work (copyright protects a substantial part of a work although no definition of what 'substantial' might be is provided in UK law and it does not relate simply to quantity)
- ◆ copying material where copyright has expired. Copyright protection is limited in terms of duration and a summary is listed in Table 1.1 (thus unrestricted copying of a work which is out of copyright and in the 'public domain' is permitted)
- ◆ copying material under a statutory exception; for instance, copying under 'fair dealing' in the UK for the purposes of criticism and review
- ◆ copying material under a licence which extends the limits provided under law – for example the Copyright Licensing Agency offer licences for the education sector to permit multiple copying of published works with limits
- ◆ copying material with permission from the copyright owner.

Copyright and e-learning in the UK

Under UK law copying for an educational purpose is limited. Although the Copyright, Designs and Patents Act 1988 (hereafter known as ‘the Act’) makes a provision for educational copying under Sections 32 to 36, the Act does not permit copying by a reprographic process. In practice this means that photocopying, scanning or copying a work using digital technology for education is prohibited. The technology that can be used to make copies is not specified in the Act. The only reference to how copies are delivered came in 2003 when the UK law was amended by The Copyright and Related Rights Regulations (Statutory Instrument No. 2498) which:

- ◆ redefined broadcasts to specifically exclude internet transmission (or podcasts)
- ◆ gave copyright holders the exclusive right to ‘communicate a work to the public’
- ◆ defined this right as making the material available by ‘electronic transmission’, that is, via the internet and/or broadcasting the work.

(OPSI, 2003)

Prior to this amendment it was technically illegal to view websites, as doing so created temporary copies on the viewer’s computer. However this amendment stated that copyright is not infringed by:

the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable:

- (a) a transmission of the work in a network between third parties by an intermediary; or
- (b) a lawful use of the work.

(OPSI, 2003)

There are some notable exceptions to copyright; for example, under ‘fair dealing’, students in education are permitted to make single copies of copyright works for private non-commercial research or study. Similarly,

Section 32(3) permits copying for 'the purposes of an examination by way of setting the questions, communicating the questions to the candidates or answering the questions' (OPSI, 2009). Many agree that the examination definition also covers student theses, so that they can include copyright material, although if they are subsequently published this will require permission. Section 36 covers reprographic copying by educational establishments, stating that 1% of a work can be copied in any quarter of the year, but it goes on to state that where a licence is available this should regulate copying. Licences are available for the education sector, therefore universities, schools and colleges would be unwise to rely on Section 36 to digitize copyright material for e-learning.

Section 36 of the act means that multiple copying of copyright works either for the classroom or for e-learning is largely undertaken in the UK under licence from the reprographic rights organization, the Copyright Licensing Agency. Since 1999 the CLA have offered a digitization licence to the higher education sector. Initially this was a transactional licence that meant copies had to be paid for on a per page per student basis. In 2005 the first blanket licence for the higher education community was issued by the CLA. This licence operated for three years as an optional addition to the institutional photocopying licence. In 2008, the first comprehensive photocopying, scanning and digital licence was issued and take up by universities has been extremely high. It has led to the vast expansion of scanning services in HE libraries to support the parallel growth in e-learning. The use of this licence is discussed in greater detail in Chapter 2. However, the CLA also offer licences for other sectors, including further education, schools, businesses and the health sector.

Visually impaired persons (VIPs) and students with disabilities

A further piece of copyright legislation that impacts on education is the Copyright (Visually Impaired Persons) Act 2002 (OPSI, 2002). This allows single copies of copyright works (literary, dramatic, musical or artistic work or a published edition) to be made for VIPs for accessibility purposes if it is not available commercially. The copy needs to include a statement to say that it has been made under this provision and needs to include a sufficient acknowledgement. Educational establishments or not-for-profit organizations (NPOs) are also permitted to make multiple copies for VIPs.

The Gowers Review

While the UK copyright act has been modified many times since 1988 using statutory instruments, in December 2005 HM Treasury launched a widespread review of UK intellectual property rights law. The Treasury launched this review as IPR issues were seen as central to supporting the UK economy. The recommendations made by the Gowers Report (HM Treasury, 2006) were widely criticized by those in higher education as not going far enough to recognize the pace of technological change. They have yet to be implemented in UK law but in summary include:

- ◆ a specific provision for distance learning
- ◆ clarification over copying items where copyright cannot be traced (orphan works)
- ◆ clarification over format shifting for preservation purposes particularly of multimedia works.

The Gowers Review sought to address intellectual property issues that had arisen largely due to developments in new technology. Gowers aimed to provide a balance, but its reception in the education community has been lukewarm, with many seeing the review as not going far enough, in particular in terms of fair dealing. To date the UK government has not implemented the recommendations. The issue of 'orphan works', that is items where copyright ownership is difficult or impossible to trace, has caused many problems in academic institutions. Orphan works consume a considerable amount of staff time in attempts to track down rights holders to obtain permission to copy the materials. On occasions where the rights cannot be traced, an institution needs to assess on a case-by-case basis the risks involved if the material is copied without permission. Institutions also need to maintain records to demonstrate that all possible avenues were explored.

There has also been widespread concern that copyright law is being undermined by contract law, particularly in terms of the licensing of electronic resources, where the terms of a licence are more restrictive than the law permits. In terms of copyright and preservation, it had been hoped that Gowers might address the issue of format shifting for preservation or access purposes. However the UK is lagging behind other countries where

currently only single copies can be made of literary works and sound and video collections are not covered by the fair dealing clause. Responses to Gowers were received from bodies such as the Society of College, National and University Libraries (SCONUL), Universities UK (UUK) and several universities. One institution that had a particular interest in the review was the Open University (OU), which called on the government to dispense with the distinction between e-learning and distance learning. The former Head of Intellectual Property at the OU, Richard McCracken (2007) argued that copyright legislation should focus on purpose and use rather than media and location. Macracken also suggested that the definition of the classroom should be extended to include the electronic classroom. In a recent meeting between the UK government and the Libraries and Archives Copyright Alliance (LACA), the SCONUL Secretary Toby Bainton called on Secretary of State David Lammy to consider the 'excessive bureaucracy' that is placed on UK libraries to administer licences and the inconsistencies in the copyright legislation (SCONUL, 2009).

Digital Economy Act 2010

Another legislative change of significance to the e-learning community is the UK's Digital Economy Act [HL 2009–10] which became law in April 2010. At the time of writing, the impact of the Act on education was unclear. The Act followed the Digital Britain White Paper (DCMS, 2009) that addressed the UK's strategy for implementing a digital economy and infrastructure. The White Paper identified a number of problems with current copyright law and it was hoped the Act might address, among other issues, the copying of 'orphan works' and images from the internet. Amendments to the Act along these lines were withdrawn as it was rushed through Parliament in the run up to the general election. Clauses 4-18 are of particular relevance to education and deal with the issue of online copyright infringement. Persons found guilty of infringement can have their internet access blocked and internet service providers (ISPs) can be fined by Ofcom for failing to act against persistent offenders. Critics fear that this legislation will serve the interests of the film and music industries who wish to crack down on illegal file sharing. *The Guardian* (2009) recently argued that the Act:

will force internet service providers to become copyright police, obliging them to provide lists of violations to copyright owners. . . . All this will drive up the costs of web access, by piling duties on providers. Add the more defensible surcharges to pay for next generation services, and Digital Britain risks becoming a land beset by an even deeper digital divide.

Case Study 1: The Copyright and Digital Resources Officer at Brunel University, UK

Monique Ritchie

Introduction

In 2004/05, Brunel University Library created a new dedicated post to manage copyright in the academic environment, with a focus on digital copyright: the Copyright and Digital Resources Officer. Like most educational institutions, recent changes to copyright law and licensing schemes, and the increased use of e-learning environments and e-resources, threw copyright to the forefront of strategic planning. There was a strong recognition among Library and senior University management that the digital age posed particular challenges at a time when the University's e-learning strategy was evolving rapidly.

Copyright management was not new to Brunel, but with the implementation of the EU Copyright Directive into UK legislation in 2003, there was a rapid evolution from a role that the University was previously able to adequately manage by sharing the responsibilities for licence administration and copyright advice within the existing staff infrastructure. It became increasingly apparent that the existing provisions were no longer adequate when faced with an increasingly intricate licensing and legislative framework.

Before the post was filled, it became clear that a University-wide copyright consultancy service was required, with the Learning and Teaching Development Unit (responsible for e-learning), and Computing and Media Services in particular, lending their weight to support the Library's bid to create the new post.

Remit, scope and position in the institution

The remit is broad, with the Copyright Officer responsible for providing support on copyright and IPR issues to all staff and students, academic and non-academic. However, the post sits within the Library staff structure, as, despite the close links with external departments and Schools, key stakeholders are primarily engaged in teaching, learning and research functions. The Library naturally occupies a central position in relation to these, and is quite often the first port of call for questions – library or non-library related.

Initially, the post was managed directly by the Director of Library Services, who oversaw the direction and focus of the role in the early stages, particularly as it had linkages with the University's strategic planning process. In August 2008, the Library underwent a restructuring process to ensure that roles best met the changing and growing needs of the University, leading to the creation of an Academic Support team, managed by an Assistant Director (Academic Support). Copyright is now part of this team alongside the institutional repository and subject liaison librarians, which provides comprehensive support to the University's learning, teaching and research aims and objectives.

The Copyright Officer works closely with the Systems Support team responsible for Electronic Resources, e-strategy and library systems, and with the Resource Development team within the Library, who manage interlibrary loans, reading list processing and acquisitions. Within the institution, there are close links with Registry, Computing and Media Services and the e-Learning team, as well as directly with academic staff within Schools. The role therefore involves working with a wide variety of colleagues at many levels.

Role and responsibilities

The role deals primarily with the following areas:

- copyright licence administration
- creating and implementing copyright policy and procedures
- copyright compliance monitoring
- copyright clearance
- copyright consultancy (guidance on copyright and IPR issues, with a focus on digital copyright)
- designing and delivering staff development and user education on copyright and IPR in a teaching, learning and research environment.

The Copyright Officer is responsible for ensuring that the University meets the requirements of copyright law by administering licences and providing advice and training. The role directly supports the University's e-learning strategy, playing a significant role in making digital resources of all kinds available to staff and students, developing services and helping to ensure that initiatives in this area are seamlessly integrated from a user's perspective. The Digital Readings Service, which delivers digital readings licensed by CLA to the VLE, is one such initiative.

Core parts of the role of the Copyright Officer are ensuring that staff and students are aware of the terms of the licences, developing support materials and disseminating information in the form of web pages, staff development sessions, handbooks and newsletters. Copyright clearance is perhaps the smallest part of the role, possibly because Brunel encourage and provide support to staff to obtain their own, and before the post was created, many staff and departments were accustomed to doing this themselves.

Problems, issues, challenges

The key areas of difficulty relate to the CLA Licence almost exclusively. The licence terms and conditions are complex, requiring interpretation or condensing into manageable bite-sized formats for staff. This requires a heavy programme of training, which has been embedded in the training programme for staff learning to use the VLE. The VLE was upgraded to a new version in 2007, which required training for most staff, and 50 sessions were delivered to staff during that year. The programme has lessened, but it is expected that the training workload will increase in 2010, when an upgrade is planned to improve functionality.

Brunel has found that academic staff, who are the primary users of the licence in their teaching, and to a lesser extent in their research, simply do not have the time to absorb the complexities of the licence and work out how to apply them to their needs. Many staff are balancing heavy teaching, research and administrative workloads and the reality for most is that planning course content and relevant readings is often done under pressure. It is not uncommon for reading lists to be put together on an ad-hoc basis, even a week before they are needed. In fact, from an academic's viewpoint, it is arguably the best method to guarantee the currency and relevance of readings, although from a library perspective this is the worst possible way, as the acquisitions process takes time,

particularly when many lists come in at once.

It is somewhat easier to say that everything that is shared in any electronic environment requires copyright clearance as without a CLA Licence this is the case. Having the CLA Licence has complicated the situation tremendously, as sometimes only part of the copyright message is retained – which leads to omissions in reporting from academics who use the licence, leading to double the amount of time spent carrying out retrospective licence compliance checks. Much content used is not even part of the CLA Licence repertoire, although often it is covered by some other licence, for example e-journals. However the time must be invested to verify this.

Conclusion

Compliance with multiple terms and conditions in complex licences is resource-intensive and the workload it generates increases exponentially each year with increasing use of e-learning environments and other emerging technologies where the rules are different.

Overall, even with a dedicated post, it is a very challenging task to ensure that the institution complies with copyright legislation and terms of 'blanket' and contractual licensing which are not yet flexible enough to allow academics to make use of the best resources available, without getting bogged down in working out what is legal or not. At Brunel the view is that copyright can hamper the ability to teach, which has an impact on the creative output of students and researchers and ultimately on the economy.

Ireland

Irish copyright laws are broadly similar to the UK although the Copyright and Related Rights Act dates from 2000. Educational institutions are mandated to take out a licence to cover multiple copying of copyright works from the Irish Copyright Licensing Agency (ICLA) (www.icla.ie). Licences are available for the primary and secondary sectors and also for higher education. The licence also covers digital copying of Irish works for secondary schools and for the higher education sector. However, several Irish institutions are still unsure about whether the licence enables them to put materials onto a VLE, because of some of the terms of the CLA

Licence. The licence specifies that institutions can make 'digital copies' (defined as scanning unaltered from the original) of copyright works:

- ◆ already owned by the institution
- ◆ not exceeding the limits of the paper licence (that is, 5% or chapter of a book, one article from a journal, a short story or poem not exceeding 10 pages from an anthology)
- ◆ not including printed music, newspapers, maps, charts, books of tables, artistic work other than that essential to illustrate a text, in-house journals, or 'privately prepared teaching materials'.

The licence also specifies that:

- ◆ no changing/editing of the material is permitted
- ◆ digital copies should not be posted on the web or sent by e-mail or linked to such that it can be accessed by unauthorized parties
- ◆ no copying to storage devices of the digital materials is permitted
- ◆ gathering of the copies is only permissible for backup purposes and not for construction of a repository/database of resources.

Scanning under the licence is currently causing concerns in some Irish institutions who are concerned that they might not be able to restrict users from copying the files to a storage device – such as a Universal Serial Bus (USB) stick, or their own computer. On the positive side, one of the key differences of Irish copyright law to copyright law in the UK is the recent amendment that now means that licences and contracts for digital publications (such as electronic journals or databases) cannot limit the exceptions to copyright (such as fair dealing) provided by statute.

Australia

In Australia the Copyright Act 1968 remains in force although significant changes were made to the law in 2000, which impacted on the copying that could be undertaken for educational purposes. Specifically the Copyright Amendment (Digital Agenda) Act 2000 meant that from 2001 it has been possible to scan copyright works for educational purposes under a licence from the reprographic rights organization, Copyright Agency Limited

(CAL). The CAL website (www.copyright.com.au) provides guidance for those in education and the education licences are blanket licences similar to that issued in the UK in 2005. Two licences are offered, the first known as the Hardcopy Licence covers photocopying, scanning from print or re-keying print resources and storing them in digital format. Meanwhile the Electronic Reproduction and Communication licence covers digital-to-digital copying and digital-to-paper copying. The similarity of these licences with those which are offered in the UK is largely a reflection of the similarities of the legislative environment.

The CAL licences are more permissive than the CLA Licence in the UK, permitting 10% of a literary or musical work to be copied or one article from a journal issue. Artistic works can be copied in their entirety and copying from the web and CD-ROM are also covered by the Electronic licence. Copies can only be distributed to registered students on a course and the material must also contain a copyright statement. Where the CAL licences also differs from the UK is in the provision for data reporting. Whereas UK universities have agreed to full data reporting on all items they scan under licence since 2005, data reporting is not a requirement of the Australian licence and compliance is monitored largely through periodic surveys. Further information about the CAL Licences is available from their website and they also include Frequently Asked Questions (CAL, 2009).

New Zealand

Although the New Zealand Copyright Act 1994 allows schools, public tertiary institutions and non-profit private training establishments to copy material from published works for educational purposes, the amounts permitted are limited. Therefore New Zealand has a similar licensing scheme to permit copying beyond these limits issued by Copyright Licensing Limited (CLL) (www.copyright.co.nz). CLL is the reprographic rights organization in New Zealand and offers licences for education and other sectors. Scanning under the Copyright Licensing Limited licence in a HEI features in a case study from the University of Auckland presented in Chapter 4. The licence is similar to the Australian licence in terms of the limits being 10% of a work. Sample data is collected from selected licensees over an eight-week period when full records need to be kept. Outside this

time full data reporting is not a requirement of the licence. Further sources of advice about New Zealand copyright law are included in the Conclusion, but both the Copyright Council of New Zealand and the Library and Information Association of New Zealand Aotearoa (LIANZA) provide useful information.

Canada

Canadian copyright laws are based on UK law, thus principles such as fair dealing exist and there are similar exceptions to copyright for educational purposes. Since 2007 the Canadian government has been attempting to review its copyright laws, which has led to considerable public concern about copyright issues. Known as C-61 the reforms were criticized by many including Michael Geist a University of Ottawa law professor, who led a movement that gained enormous popularity through a Facebook group. For example, amendments to Canadian law to outlaw the circumvention of digital rights managements systems have been met with much opposition. Campaigners argue that circumvention for non-infringing purposes, such as fair dealing or uses permitted by educational and library exceptions in the Copyright Act, must be allowed.

The Gatineau Copyright Roundtable was held in July 2009 and attended by copyright experts and representatives from bodies such as the Association of Universities and Colleges of Canada (AUCC). The AUCC recognized, in particular, that copyright reforms were needed to support e-learning, stating that educational uses of materials freely posted on the internet should be permitted, and that:

Copyright law must also be amended to facilitate technology enhanced learning so that students participating in a program of learning through the Internet will not be disadvantaged in comparison with their counterparts physically present in the classroom, and educational institutions will be able to take advantage of new information and communications technologies for program delivery.

(AUCC, 2009)

There are several resources on Canadian copyright law listed in the

Conclusion. The Canadian Library Association maintain a Copyright Information Centre on their website and are another good source of up-to-date information.

The USA

In the United States the copyright legislation dates from 1974, but several other acts have been issued that those working in education need to be aware of. If we first consider the Copyright Act 1974, copying for education under this act is certainly less restrictive than other countries in the world. The concept of 'fair use' is enshrined in the law, and differs substantially from the similar sounding 'fair dealing'. Specifically 'fair use' covers copying for educational purposes. In the late 1990s many US librarians were involved in CONFU (Conference on Fair Use) to set out guidelines of what could be copied under this provision. This coincided with many university libraries establishing electronic reserves services. Electronic reserves are either scanned or digital copies of copyright works made available to students via the library. Taken from the US term for short loan collections, traditional paper 'reserves' were either books or copies of articles kept in the library to facilitate teaching. Electronic reserves services were originally separate to the development of e-learning systems, but increasingly these services are now integrated. Some US universities rely on the fair use provision to deliver copyright material to students, and only seek copyright permission for material that is repeatedly used in a course of study. Others are more risk averse and will routinely seek permission to digitize material for electronic reserves either directly with publishers or through the US reprographic rights organization, the Copyright Clearance Center (CCC). The CCC also now offer a blanket licence to institutions who wish to cover the copying they undertake.

Other relevant US legislation

The Digital Millennium Copyright Act (DCMA) came into force in 1998 and specifically prohibits the circumvention of any 'technological protection measure' that a copyright owner might put in place. This means that digital material that a teacher might legitimately wish to use in teaching may be prohibited if a publisher had placed some form of digital

rights management provision in place. Meanwhile legislation dating from 2002 has also impacted on the delivery of copyright works in the US, specifically with relation to distance learners. The TEACH (Technology, Education and Copyright Harmonization) Act allows copyright works to be delivered to distance learners without permission from the rights holder and without the payment of fees. It covers the digitization of analogue works to produce digital materials if a digital version is not available for purchase.

Some of the specific requirements of this act include:

- ◆ only not-for-profit educational institutions are covered
- ◆ they must have an institutional copyright policy
- ◆ they must provide copyright information to faculty, other staff and students
- ◆ the material must have a notice to inform students of the copyright policy
- ◆ the materials can only be distributed to enrolled students.

The TEACH act formalized what had been, until this point, a grey area in US legislation. It allowed US institutions to make digital copies of published content available to students via a secure network. However, activity in this area has not been without controversy and only recently have large publishing houses embarked on legal action against universities that they believed to be in breach of copyright. The University of California and Georgia State University are two universities that were recently pursued in court by publishers who believed their copyright had been infringed. Case Study 3 examines practice at one US university which takes a less risk adverse approach to copyright issues.

Copyright and scholarly communication

While technology moves at a fast pace and offers teachers greater possibilities in terms of delivering different types of resources to students across a network, copyright law is often perceived as being slow to change and out of step with what is now technically possible. Arguably copying material for educational purposes has also been an area of unspoken tension between publishers and academics. Many academic authors are

themselves rights holders and as content creators they wish to see their work protected and derive a modest income from their publications. However, the nature of education means that reproducing, copying, modifying and amending the work of others has always been a fundamental part of scholarship. Very little research is undertaken without building on the findings of previous studies and conventions such as citation and referencing were developed to recognize and acknowledge the works of others. So it is inevitable that teachers will use others ideas in the classroom, particularly in the arts, humanities and social sciences, where debate, opinion and argument are a fundamental part of the learning process. However, technology has led many in the industries of publishing, film and music to try to tighten copyright laws further still. In the face of ever tighter copyright restrictions some academics and IPR experts have launched initiatives to attempt to redress the imbalance that they believe now exists. A few of these initiatives are worthy of mention and discussed briefly next.

Creative Commons

The Creative Commons (CC) movement was founded in 2001 by Lawrence Lessig and a group of cyberlaw and intellectual property rights experts. Lessig is a Professor of Law at Stanford Law School and founder of the school's Center for Internet and Society. The movement, sometimes called an alternative to copyright, is founded on the belief that modern copyright laws have become overly restrictive and are stifling creativity. According to their website (Creative Commons, 2009): 'A single goal unites Creative Commons' current and future projects: to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules.'

Creative Commons is also referred to as 'some rights reserved' meaning that content creators can attach licences to their work to indicate that they are happy for it to be used in certain circumstances. Different licences exist, including Attribution, Non-commercial/commercial and Share Alike. As a content creator, a teacher can attach a Creative Commons License to their work to indicate that they are happy to share it under certain conditions. Teachers can also use the Creative Commons search to identify material that they can use in their teaching. Specific Creative Commons Licenses are available for different jurisdiction around the world. For example the

UK: England and Wales licences are available from their website: <http://creativecommons.org/international/uk>. You can also find out more about the progress of the licences in different countries around the world from: <http://creativecommons.org/international>.

Open access and open education resources

A parallel development related to Creative Commons, which has done much work recently to raise awareness about copyright issues has been the open access and open educational resources (OER) movement, led by institutions such as the Massachusetts Institute of Technology (MIT). Suber (2007) provides a useful definition stating: 'Open-access (OA) literature is digital, online, free of charge, and free of most copyright and licensing restrictions.' Suber provides a valuable overview of the open access movement, which is largely beyond the scope of this book. However, the establishment of open access repositories to capture the intellectual output of researchers by HEIs has done much to highlight the importance of copyright issues. Many higher education funding councils are now mandating authors to deposit publicly funded research outputs into an open access repository. Additionally, academics are starting to question whether they should assign copyright of their own publications to a publisher. One of the biggest concerns of the open access movement has been the restrictive licensing models of large publishers that effectively lock the general public out of accessing the outputs of publicly funded research. Many in the open access movement maintain it is not anti- copyright. In fact websites such as the SHERPA RoMEO website (University of Nottingham, 2008), developed by JISC and hosted by the University of Nottingham, have done much to raise awareness of publishers' copyright policies and help ensure that content deposited in open access repositories is there with permission from the publisher. A key advantage of open access publications for the e-learning community is that research output can be used (often by simply linking to it) without the need to pay additional permission fees to publishers.

Related to this are open educational resources, which are described by the United Nations Educational, Scientific and Cultural Organization (UNESCO) (2002) as:

technology-enabled, open provision of educational resources for consultation, use and adaptation by a community of users for non-

commercial purposes. . . . They are typically made freely available over the Web or the Internet. Their principal use is by teachers and educational institutions to support course development, but they can also be used directly by students' and described by the Organisation for Economic Co-operation and Development (OECD) as, 'digitised materials offered freely and openly for educators, students and self-learners to use and reuse for teaching, learning and research'.

(OECD, 2007)

It is important to be clear on the distinction between the terms 'free' and 'open' and how they are used together in this context. 'Free' materials may be offered for no cost but under strict copyright protection without permission to repurpose, adapt and reuse. 'Open' educational materials are deliberately licensed by the creator for reuse by others, sometimes without the need to reference the original author, and without restriction on how and in what context the materials can be used. However, free materials, even online, are not necessarily open. Open Educational Resources are discussed in more detail in Case Study 4 (see pages 75–80).

Open-source software

It is worth briefly mentioning open-source software and how this relates to e-learning and copyright issues. Open-source software is defined by the Open-source Initiative (OSI, 2009) and needs to meet ten criteria, including: free distribution, access to the source code and a free licence to distribute the software. Open-source software is an alternative to commercial, proprietary software and has much in common with Creative Commons and the open access movement, in terms of challenging more traditional licensing models. Increasing numbers of institutions are considering open-source solutions for e-learning; for example, the open-source VLE Moodle is widely used in higher and further education. A growing number of open-source learning tools are also available such as VLEs, e-portfolio software, social networking tools, and content management systems. While this development is separate to the other movements discussed earlier, it is related to a desire by some institutions to have a greater control over the software that they use and the licensing fees that they are charged.

Conclusion

This chapter first explored what e-learning is and how teachers might wish to use content in the digital environment. It also considered how e-learning differs from classroom teaching and why copyright issues are more pertinent. It has also examined how the UK and several other countries approach copyright and how this impacts on online education. The chapter has shown how developments in technology are necessitating reforms to the existing copyright legislation throughout the world. In many countries a satisfactory balance has yet to be achieved between protecting the economic well-being of rights holders and the needs of educators to be able to share, copy and disseminate information freely.

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