

## **Discussion Paper on Copyright and Intellectual Property Issues in the open and E-Learning Environment**

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### **Introduction**

The purpose of this paper is to discuss some copyright and intellectual property issues from the perspective of a teacher who is being asked to translate existing teaching materials from the on-campus to an e-learning context. The study will be developed as a scenario using a typical teaching environment. Emerging from the discussion will be a recognition that moving learning materials from an on-campus teaching environment to an e-learning one is fraught with complications and that current legislation makes translation of pre-existing learning materials onto the web a difficult activity. The intellectual property issues will be discussed following the case study. This is not intended to be a legal guide. Readers interested in exploring the ideas in this paper should consult with appropriate legal specialists

The Commonwealth of Learning and Christine Swales produced an excellent Trainers' Kit on *Copyright and Distance Education*. Readers are referred to this paper at: <http://www.col.org/resources/publications/> for detailed information on the copyright implications involved in developing distance learning materials *ab initio*. This paper is concerned more with demonstrating the difficulties of translating materials previously developed for on-campus teaching into the e-learning environment.

## **Background**

Many institutions, schools and universities are moving towards the use of information communications technologies to enhance teaching or to make programmes of study accessible to students who might be off the campus site. Institutions are approaching teachers and academics to transfer existing course materials to electronic learning management systems such as BlackBoard or WebCT. The migration of teaching to these learning management systems is highlighting a substantial number of intellectual property and copyright issues that have not normally been raised. This is partly because classroom teaching (or lecturing) works as a closed system and because teachers benefit from exemptions under fair use dealings in Copyright Acts based on the classroom teaching paradigm.

The paradigm of the co-location of teacher, student and place of study lies at the heart of much teaching in the western world. Teachers are expected to teach students who attend institutions in which are found resources, not least of which is a library where papers and books are held. These documents have usually been purchased and are available to students and teachers who may copy from them, subject to certain limitations.

The advent of the electronic learning systems breaks the nexus between student, teacher and place of study. In some respects, it renders the exemptions provided to teachers in Copyright Acts ineffective. Furthermore, there is an assumption that learning materials prepared for the classroom setting are transferable to the electronic environment which results in teachers using materials "on the web" with little understanding of the legal implications of the transition.

In order to highlight this position, a scenario will be developed to show what pitfalls there might be and some of them can be avoided.

## **Scenario**

Jane R is employed by the Unseen University (UU) to teach anthropology and archaeology. The country in which she works is a signatory to the World Intellectual Property Organisation's Copyright Treaty. Her work largely involves conducting archaeological digs and anthropological interviews. Over the years she has amassed photographs and videos of sites on which she worked. There are also pictures of ethnic people resident at or near the works. Her on-campus course is a popular one, involving the use of lectures and slides. She hands out copies of chapters from books and articles from publications, some of which are no longer in print. It is assessed by way of examination. Students attending the course pay some fees. Students may come from any country in the world to the University.

The Head of Department asked Jane R to convert her course to be deliverable more flexibly so that it can be taught to students who are unable to attend the campus or at the time when she gives her lectures. These students often study at home or from the workplace. They do not usually assemble in any classrooms. Jane is not a trained teacher and has no legal training. Jane, with University support, approaches a flexible learning specialist who involves a group of educational media experts to help redesign the course to achieve the desired end. On completion, the course contains;

- printed material,
- slides,
- videos,
- a teleconference component,
- a CD Rom,
- an on-line discussion forum,
- links to various external sources through a proprietary learning management system, and
- a text book (of which Jane is the co-author).

Student progress is assessed by internal and external examination, continuous evaluation by participation in discussions on-line and by essays. Students are also expected to download material from the University such as copies of slides, ethnic music, photos of ethnic people and various other images Jane has acquired over the years for use in her internal course.

Jane is a member of her industrial organisation.

Following the successful operation of this course for a period of time, Jane moves to another University and takes this course with her.

### **Emerging Issues**

- Employment law
- Copyright Law
- International Treaties
- Ethical and Moral law

### **Employment**

Jane's employer believes that the work she created while employed by the University belongs to it. Jane believes that because she has done the work and published some of it in the textbook, that she is the owner of the copyright. The publisher of the textbook also claims rights over the published material because Jane assigned rights when she signed a publishing contract. Jane's industrial union is negotiating with the University for an equitable division of rights over property, not for the small sums of money involved in this matter, but because of the large sums involved in the recent discoveries by an academic in the area of genetics.

On moving from the University, consideration might be given to the rights over the materials to be retained by the University and those she carries with her. Restraint of Trade issues might also be relevant if she intends to teach a similar course in a nearby competing institution.

### **Copyright**

Jane's course was initially developed for on-campus delivery. At no time did she give thought to copyright implications of her work, except to sign a waiver when publishing some elements of it in the textbook. Students could see the slides in the classroom and take notes of her lecture, read the handouts and watch any videos she might have copied from television.

In general, the creator of the original work owns the copyright, unless it arose as work made for hire. If the University employed Jane under a contract, the University might have a claim under the terms of the contract. The publisher may have a claim only to the printed material but only for a limited time. Due investigation may ascertain who holds the copyright and for how long. However, the University employed a number of educational media consultants to help Jane create the work. These people may also have rights over their creative input into the course design if hired under contract, but not necessarily if employed for creating learning materials.

Jane developed a set of printed handouts for students in her class. They can buy them from the University at cost, but are not a mandatory part of the study. The textbook is a required element of the course. Students can buy it through the University bookshop. She gives each student copies of printed chapters from other books and some articles. Some of these works are held on reserve in the library. Jane is unaware of copying limitations other than those she sees on signs located near to departmental photocopiers. She copies and distributes material as she sees fit, depending on the direction classroom discussions in previous sessions.

The source of the images may need exploration. If Jane took the pictures herself, she would have rights to use them. On the other hand, she may have employed a photographer for the purpose. If so, what were the terms of the agreement about use and royalties? Some academics use photos copied or scanned from magazines and journals to illustrate lectures. Are any of these pictures included in the collection? If so, is it possible to trace the source (they may have gathered over many years)? Does permission to use each picture need to be obtained? If not, are they central to the course or can they be identified and deleted? What payments need to be made to acquire the rights and how long are the rights to exist? If time is not a factor, then the number of allowable reprints may be. Is there an effective record keeping system in place to track the expiry of any agreements, so they can be renewed if necessary?

Some of the pictures in the archaeology series might be of indigenous peoples. Some people have ethical, moral or spiritual objections to the use of their images. If so, are these known and has a clearance to use been obtained. If so, are there any special conditions attached to the use?

Jane often took her super 8 movie camera with her on early field trips. She later used an analogue video camera and most recently used a digital camera. She has also used extracts from programmes produced by Discovery Channel and the British Broadcasting Commission in her classroom teaching. The moving images contain scenes of dance and other cultural artefacts. There is musical accompaniment with the films. Some is commercially produced and dubbed over the images, some is recorded at the time of the dance and sung/played by indigenous people. An indigenous dance group has performed some of the works on stage.

Over the years, Jane interviewed many people at the sites of her work. She uses audio tapes and translations in her class teaching. The explanations on tape are

given by men and women about the cultural significance and the taboos surrounding Jane's discoveries.

In order to bring together the materials for her on-campus students, Jane asked a young relative to create a website for her. On it she put examples of the course of study and asked internal students to visit the site. It is proposed to re-engineer this website using professional web designers for the off-campus environment so that the new site conforms to internal University standards.

Jane also asked her young relative who designed the website to put her materials on to a CD Rom for ease of storage. The CD contains a number of external links that function when the CD is running and the computer is attached to a live modem. The link goes to some international databases but need not pass through the University library which itself has agreements for payment with database owners and an Internet Service provider (ISP) on behalf of the University and its students.

### **Issues Surrounding the Ownership Rights**

Depending on the employment arrangements, Jane may have rights over the print material, but that might be limited by any arrangement existing between Jane, her industrial union and the University as to the division of rights and the duration of the rights. Jane's contract with the publisher may also contain clauses about rights. It is noted that some of the printed material is made available for sale, but only at cost. If it were sold for profit, the University and the publisher may have additional rights either in recouping costs or if considering loss of revenue from reduced sales. The copies of book chapters and articles are subject to fair dealing provisions of the national Copyright Act. Have negotiations occurred with the publishers of the material currently in print as well as the out-of-print about the number of copies that are made? Are negotiations required with the co-author?

Jane may have original rights over the still images she herself took. However, the subjects of those images may have some moral rights over the images if they depict scenes over which the subjects of the pictures claim copyright. She may not have rights over images taken from magazines. The change from hard copy print to use on the CD Rom involves considerations of media shifting where images are the subject of any agreements covering use.

In some jurisdictions it may be relevant that there are both analogue and digital images involved if they are to be transmitted using public systems or satellites, both in terms of the content and in terms of the quality of the images to be transmitted. Investigations would reveal if Jane had acquired rights to use moving images taken from television broadcasts. The ownership the rights to use music may also need investigation because musical rights may be different to those of performances. If the video images are of a particular dance performance or of a local play, then consideration needs to be given to rights over such performances.

Jane's recordings of people may have been taken without permission. Investigation will reveal if it was needed and if so, what were the conditions surrounding use of the sound files? Do the contents of the recording breach ethical or moral agreements between the speakers and the user? Should any taboos be respected in another cultural setting?

Jane's young relative may have rights over the design of the website. Is the person of a legal age to assert the rights and if so, is there evidence of any agreements between the parties? Images, sound files and text located on the website may be subject to considerations of media shifts, as far as media shifting is acceptable in law.



Is the translation of the various materials from the original format a breach of any agreements concerning original use? In this case, print and analogue files have been translated to a digital format. To what extent is Jane, as an employee of the University required to have her students access databases through the Library and via an agreed Internet Service Provider?

### **Who is using the materials?**

In this case, there are two categories of users, the first is on-campus students and the second are distance students. It should be noted that there are long standing sections of Copyright Acts dealing with exemptions for educational purposes. These exemptions often involve application of the following principles:

- The purpose of the use;
- The nature of the copyrighted work;
- The amount of copying and the duration over when it is copied,
- The effect of the copying, for example, on market value.

Section 44 of the New Zealand Copyright Act (1994) covers educational use. It is one of the few national Acts that specifically mentions "correspondence education". Section 2 of the Act states that "Instruction" means: "(a) Giving a lesson, either in person or by correspondence, to a student or a group of students at an educational establishment or elsewhere; or (b) Receiving a lesson, either in person or by correspondence and either alone or in a group of students, at an educational establishment or elsewhere:".

If Jane worked at a New Zealand University, it might be thought that the transfer of her work from a classroom-based model to a distance model would be straightforward. In reality, the transfer of media via technologies is not covered by the New Zealand Copyright Act very well, so that a print-based and distance-taught course might be covered but the addition of digital materials, audio and

video elements and use of the Internet are not contemplated by the Act unless they can be considered as part of a "Cable Broadcast" arrangement.

Jane's print material.

In all probability, Jane prepared her teaching notes on a word processor in digital format and translated them to print via her printer. She copied them on the photocopier (a temporary translation from analogue to digital and back again). There could be little complaint about this usage. However, rather than make bulky multiple copies of the various articles for her distance students, the educational technologist scans the works (analogue to digital) and stores them on a server, accessible through the Internet in digital format. From here, students can make their own copies of the articles and chapters without limitation of number or time. Depending on what proportion of each chapter or article is used in the class, there is a market factor to be considered for the items still in print. In addition, there are issues of media shifting and multiple copying.

#### Still Images

The images of people used in the class are subject to certain privacy rights. The right not to have the images displayed can be asserted. Similarly, there is a protection against having the images scanned and located on a website without permission and to which students may have unrestricted access.

#### Moving images.

An educational exemption exists for the performance by students of dramatic works in the presence of a student audience. The right may not carry over to the recording of the performance and its transmission either on videotape or on the Internet for distance students. Not only would Jane's videos be subject to privacy restrictions, but would be unable to be digitised and transmitted for distance students. The New Zealand Act permits educational establishments to record broadcasts. When read with other sections, students might be able to see the resulting copy of the broadcast. No provision is made for the retransmission of

the programme to distance students although it could be inferred from other sections of the Act. The fact that the dances have been performed in public elsewhere may also be relevant.

#### Audio files

Jane's audio tapes could be used for distance students if they remained the original format. The Copyright Act does not allow these files to be converted to another medium for transmission by the web. Original participants' permissions are required for making copies available to students. Similar issues to those concerning video retransmission affect audio retransmission

#### Website and CD Rom

Websites and CD Roms exist in digital form. From this it follows that copies of analogue data on the site or disc sourced from elsewhere may infringe the Copyright Act.

#### Examination of Jane's students

The use of materials for examination purposes is generally exempted from the operations of the Copyright Act.

### **Conclusion about Jane's Course**

A reading of the current Copyright Act in New Zealand indicates that Jane's course can be translated from a classroom-based course to a distance education course but only if it remains largely inside the environment of print materials, for which the educational exemptions of the Copyright Act are designed.

Translating Jane's course to an electronic format might lead to breach the Copyright Act, particularly where there is a translation of materials from one format to another. Also, there are prohibitions on transmitting certain dramatic works. Finally, the employment law implications need to be understood at both personal and institutional levels.

## **Implications**

Internationally, states have found that digital copyright reforms have tipped the balance in favour of copyright owners. The WIPO treaties provide a minimum standard of protection and give individual countries enough discretion to interpret the treaties in a manner that allows individual countries to strike the necessary balance between copyright owners and users.

Overseas experience with reform of copyright law to accommodate digital technology is that the balance tends to be shifted in favour of copyright owners and away from copyright users. This is apparent in the US Digital Millennium Copyright Act 1998, the EU Draft Directive on Harmonisation of Copyright and the Australian Copyright Amendment (Digital Agenda) Act 2000. A shift in balance towards owner rights is not in the interest of the "knowledge economies".

A number of countries are engaged in legislative change as a result of the WIPO Treaty on copyright. A major consideration in recommending any legislative change would be to maintain a fair balance between the interests of copyright owners and users. It cannot, however, be assumed that the current balance between user and owner rights can be easily transferred into digital copyright law. New legislation must actively safeguard and facilitate user interests, especially concerning use for educational purposes.

The application of the WIPO Treaty provisions, with its very heavy emphasis on the rights of the author and strong prohibitions on digital translation affect national copyright legislation. The effect on academics who wish to make greater use of the e-learning environment may be to force them into the print-based correspondence model if they wish to remain with current copyright exemptions.

A second implication is for those academics who do wish to move towards e-learning. They must become much more aware of the legal implications of the work they use inside the classroom before seeking to enter the digital teaching arena. Third, where institutions wish to move teaching towards the e-learning context, an adequate recording system of rights, obligations and permissions needs to be established so that the institution can better assess its legal obligations.

In conclusion, given the restrictions placed by the WIPO Copyright Treaty and related Copyright Acts on learning materials in the e-learning environment and the difficulties in establishing the status of ownership or rights surrounding these materials, it is suggested that institutions may find it more attractive to develop new learning materials from the beginning rather than attempt to adapt pre-existing ones whose origins are uncertain. This is particularly so where materials are being re-developed for transfer or sale.

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