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Who owns your work?

Copyright, the Internet and Higher Education

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Abstract

The World Wide Web is having a major impact on Higher Education. Those working in HE are significant producers of Intellectual Property and they are major consumers. In the area of copyright, the issues affect teaching and learning, research and publication and administration.

The law seems to be clear on who owns the copyright in work produced by those working in HE, but for a number of reasons the reality is different. Partly because of custom and practice, partly because institutions did not see much commercial value in material such as teaching materials or publications, issues of ownership and control rarely surfaced in the past. With the advent of on-line teaching and learning, electronic journals and the globalisation of education, such issues are causing contention. In the UK, the AUT and the CVCP have discussed the matter but not reached agreement. Publishers and related interests are seeking to influence copyright, who owns it and on what terms. Around the world, worries over academic freedom and the commercialisation of education are growing.

Keywords

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Copyright; Law, Custom and Practice; Ownership; Higher Education; Policies; Internet, World Wide Web, On-line, Electronic, Digital.

Introduction

The WWW is having a major impact on Higher Education. The evidence is all around us, this conference is a testament to it, as is the electronic journal JILT.^[1]
<http://www.law.warwick.ac.uk/bileta/>^[1]<http://elj.warwick.ac.uk/jilt/default.htm> The Dearing Report (Dearing, 1997) devoted a whole chapter to ICT and references to it permeate the report. The University of Strathclyde is part of a Virtual Law School, which includes an extensive series of lecture notes and a library of articles and extracts from books (cleared for copyright I hasten to note). There is also an Information Technology & Telecommunications Law LL.M by Distance Learning which makes substantial use of the Internet.^[2]<http://law-www-server.law.strath.ac.uk/>

Copyright is important to Higher Education

Those that work and study in HE are significant producers and consumers of copyright and other IPR. The main categories are:

- * Research outputs, for example articles, conference papers and monographs whether in printed or digital form
- * Teaching and training materials, often multi-authored and utilising multi-media and the WWW
- * Substantial amounts of administrative data and communications including email.
- * The work of students, from undergraduate essays to prize winning dissertations, theses and research findings, is protected by copyright

Copyright is neglected in HE

The importance of copyright, particularly in digital material, has been recognised for sometime. The Follett Report (Follett, 1993) noted copyright was an issue that might holdback ICT in HE. JISC issued a warning (JISC, 1998) that HEIs were tending to avoid copyright issues and that they needed to be aware of the implications of the Internet. It was suggested that it was time for institutions to review their policy in this area. More recently JISC funded research into 'Policy Approaches to Copyright in HEIs' and found that:

- * Copyright and issues of who owns and controls it has generally not been a **high priority in HE**
- * Material covered by copyright was rarely seen as having any **commercial potential**. The exception to this is computer software and analogous material.
- * Copyright often **lacks any central co-ordination** in HEIs, different aspects being dealt with by different people, who are not necessarily aware of each other's roles.
- * **Information and guidelines** on copyright are often difficult to come by (Weedon, 2000).

Why copyright matters to HE

There are a number of reasons why institutions should be looking at copyright, which are often related to the growth of the Internet.

Scholarly works

- * The costs of **journal subscriptions** keep rising, above the rate of inflation. There is evidence that some publishing firms are making substantial profits (Sutherland, 1999).
- * Libraries are cutting back the number of journals they subscribe to and/or purchasing fewer **monographs** in an effort to mitigate the loss of the former.
- * In some cases institutions are forced into taking titles they do not want because of the practice of '**bundling**', where publishers insist a group of periodicals must be subscribed to, even though not all of them are required by the purchaser.
- * The authors of scholarly work in HE, generally **sign away all copyright** in their work to the publisher. Generally this is done with little protest or negotiation and they receive little or no payment. The peer review system also operates on the basis of unpaid reviewers. Rarely would an author think it necessary to consult his university or college over which publisher obtains the copyright to their work, or on what terms. When questioned over these issues, academics pointed to the influence of the RAE, it was 'publish or perish'. It has also been suggested that staff are more interested in acknowledgement of their work, rather than control of copyright, all be it some confuse the two.
- * The library has to **buy back** academics' work in the form of journal subscriptions, often at the request of the very academics that write for the journal in question. Worse still, in theory, the author must pay for permission to make multiple copies of his articles for **teaching purposes**, unless he has negotiated the right to do this.
- * Given that many HEIs still receive a great proportion of their funding from the **public purse** should their work be given away to the private sector? Potentially the work of all academics in the UK could be owned by HEIs rather than given to publishers. With the growth of electronic publishing, it has been suggested that the sector disseminates academic work itself.
- * The publishers argue that they '**add value**' by providing services: reviewing, editing, printing, marketing and distribution. However the sector could do this itself or contract it out, whilst maintaining control of copyright.

Teaching Materials

- * **Teaching materials** are increasingly valuable to institutions (Marcus, 2000). Substantial amounts of resources may be put into their creation and production. If such materials were to be lost when the author moves to another university, this represents a serious loss of investment. It also helps their competitors. Such materials are important to the TQA and other assessment regimes.
- * Teaching materials used to consist of the knowledge of an individual academic, supplemented by index cards or hand-written notes. Printed reading lists and lecture handouts were less ubiquitous than today and blackboards or perhaps OHPs were the height of technology.
- * Today course packs are common and material is posted to the Internet. CD-ROMs and other multi-media are widely used. Access to these is now being 'sold' to other institutions and students, in some cases commercially marketed.

Problems with copyright

Problems with copyright

There is concern that, in general, HEIs are not doing enough to **protect** their own materials. This is particularly worrying as far as the Internet is concerned. It is easy for someone on the other side of the world to copy major items of teaching material and reuse them, all be it in a changed form, without charge.

There are legal and technical means to prevent or at least slow the loss of copyright material via the web. Legal measures can include a copyright statement and terms of use on any website or CD-ROM. Technical measures can range from restricting access via an Intranet to watermarking material or encrypting it. Since resources and electronic publications may also include third party materials there is also the issue of liability. ECMS (Electronic Copyright Management Systems) are likely to combine many of the above features.

For a long time perhaps, Higher Education has expected to be treated as a **special case** by publishers and right holders. It was felt the restrictions on copying that apply elsewhere should be waived or at least reduced. It appears HE is now fighting a rearguard action. The CLA licences appear to be unpopular with staff and have become more expensive and restrictive over time (Weedon, 2000). What's more other licensing and collecting agencies, such as DACS are now involved.^[3] <http://www.dacs.co.uk/> Concerted lobbying appears to have resulted in changes to the current draft EU directive on copyright (EU 1997-2000) to protect Fair Dealing, but for how long? With more material in digital form and/or on a pay per view basis, it may be harder for it to survive.

Who should own Copyright to academics work?

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Any strategy on copyright that HEIs may devise depends, at least in part, on the issue of **ownership**.

The ALCS "advise authors not to assign copyright to publishers without good reason. Equally they are horrified at the thought of institutions asserting their ownership of copyright" (Tedd, 1995, ALCS, 1997). One licensing agency insists that 'authors' would win any case in the courts, where an employer sought to assert ownership of scholarly work. A university personnel officer insisted the reverse was true (Weedon, 2000).

The AUT recently argued that "In universities it should be put beyond question that academics **retain** ownership of copyright in their writings and other works, so that they may publish them when and where they wish, without control by their institutions" (Trythall, 1999). However this argument was rejected by the CVCP who said "the union is asking institutions to forgo rights and returns on intellectual property to an extent that would be counter-productive" (Patel, 1999).

So who does own your work?

The law is clear on ownership of copyright ... reality is different.

An American copyright officer summed up the legal position in the USA as follows (Whenmouth, 1999). The law determines ownership by:

- * Authorship
- * Employment Relationship
- * Intention in creating the work

In America the definition of an employee was treated in *Community for Creative Non-violence v Reid* (490 U.S. 730,740 (1989)) (Shekleton, 1999). In the UK a similar line might be taken, but there is no statutory definition here and little case law.

The principal legislation on copyright in the UK is the 1988 Copyright, Designs and Patents Act, (Christie and Gare, 1992a) as amended due to European law, particularly the 1996 Copyright and Related Rights Regulations. However whilst "Judges have provided some guidance on interpreting the 1988 act, there remain many areas which have not yet been considered by the courts" (Millard, 1996). Who owns the copyright in material produced by academic staff is one of them. One thing is clear; "Copyright law applies to electronic forms as much as to paper and other media"(Tedd, 1995).

Author or employee? - The initial owner of copyright in law is the author or creator, irrespective of who may commission or pay for the work. There is a significant exception made for employees. "Subject to contrary agreement, the first owner of copyright in a work created by an employee during the course of his or her employment is the employer, not the employee" (Christie and Gare, 1992b). The consequences of this for HE are significant. There are also people who are not employees: students, emeritus staff, visiting staff and alumni.

Research Publications

'Course of employment' - Considerable discussion has revolved around this phrase and whether employees use of university equipment and resources is significant. If Dr X, working at home, outside office hours, using his own computer and without any resources from the university, writes an article, is the university the first owner of copyright? What if Dr X is on a sabbatical, the very purpose of which is to allow him/her to complete a particular publication?

It has been argued that this is a red herring. The contracts of academics are frequently very vague and there may be no formal job description. It is not unknown for a post to have no fixed hours. Staff may work at home during office hours and at work outside those hours, they may be required to 'do such other work as directed by their Head of Department'. University policies do sometimes contain references to the use or otherwise of university resources, for example; the university "likewise asserts its right to ownership and use of all IP generated by staff outside the course of their employment where substantial University resources have been used."

Of course, if Dr X is writing on Byzantine castles but employed in the department of Biotechnology, it can be assumed the copyright in the article will lie with the author. However if it is generally accepted that writing articles is required of a post, even if not explicitly stated, then if Dr X is writing an article which is within the remit of the appropriate RAE panel for Biotechnology, then surely the copyright belongs to the university? Of course not all-academic staff are entered for the RAE...

Still, if an academic is normally expected to produce certain types of work and they 'would get into

difficulties with the HEI should they fail to produce such materials', then such work meets the test of the 'course of employment' (Oppenheim, 1995). So are academic staff employed to write textbooks? Without specific clauses relating to publication, how far can one take a duty to conduct and write up research to mean the publication of articles and monographs? "Even the stringent contracts which have been introduced for lecturers in former polytechnics and Colleges of Education allow for the rights in works produced in furtherance of the career of the individual to remain with the employee" (ALCS, 1995). It is arguable though that since it is generally accepted that the RAE is important to the institution, work contributing to this must belong to the HEI unless it chooses otherwise.

There are also staff, (academic related, administrative, library and computing, technical and others) who may publish articles not unrelated to their work, but as a requirement of their post. So who owns these? The simplest answer is to say that if Dr X is an employee then copyright in all his/her work belongs to the university unless agreed otherwise. Some HEIs policies say this to all intents and purposes. University contracts may specifically state that they claim ownership of all copyright works, although the courts might find such an all embracing clause to be 'manifestly unfair' and unenforceable (Oppenheim, 1995).

Assignments

The majority of staff when they have written an article deal with the publishers as individuals, they do not go through an IP office or research and enterprise group, nor do they feel it necessary to ask their HOD for permission to publish. Some universities state this to be the case, "Permission is not required to enter into agreement with outside bodies to write a book of an academic nature or learned articles."^[4]

After his/her paper is accepted by a peer-reviewed journal, the publisher sends Dr X a copyright assignment form. The form requires that all copyright is assigned to the publisher including digital rights and probably Dr X will sign and return this without demure.

So then, at least as far as journal articles are concerned, it appears that it is Dr X who owns copyright, how else could he/she assign it to a publisher? Indeed why would a publisher accept it? The publishers argue that Dr X is acting as an authorised representative of his/her university. In fact what is really happening is the continuance of long custom and practice. There is also '**Academic Freedom**', any suggestion that Dr X would be told to publish in journal Y rather than Z, because its terms on copyright were better, would be met with cries of 'censorship!'

Textbooks, monographs or conference papers? In many universities the copyright in these too will, de facto, belong to the academic. He or she may even receive a little in payment or royalties for them although rarely enough for them 'to give up the day job'.

So, for scholarly works then, the copyright belongs to the author not the university?

Assertions and waivers

Many institutions waive their rights to the copyright of scholarly work. A recent survey of HEIs found that 80% of respondents followed this approach (Weedon, 2000). A smaller group sent copies of their policy documents in, and here over 50% explicitly waived copyright in such works. It is likely that many of the others effectively waived their rights by custom and practice. However, they did not give them away!

So, Universities own copyright to their employee's work, but choose to waive it for scholarly material. Not surprisingly there are very few HEIs who do this for IPR such as patents or the

copyright in computer software.

Examples of policy statements are:

* "The college will continue to waive its rights to the ownership of copyright in books, articles, lectures or written work."

* "It is not intended that these regulations (on IP) should apply in relation to scholarly works such as books, papers and works of art."

* "The university will not in normal circumstances seek to benefit from any rights it may have as employer in the academic publications of members of academic staff."

* "The university agrees that members of academic staff in accordance with past practice, will be the owners if copyright in works produced in the course of their academic duties."

* There are exceptions to these waivers; one of the most frequent is for "work specially commissioned by the university".

The implication in most cases is that the university is the ultimate owner of the copyright. Sometimes this is explicitly asserted:

* The University of A asserts ownership of "all copyrights, including copyright in software and material circulated electronically e.g. via the World Wide Web. Except as agreed in writing, the university claims ownership of the IP created by staff in the course of the duties specified..." There is no reference to 'scholarly works' but the survey response showed that University A apparently waives its rights.^[5]

* In the USA by contrast it is academic ownership that is stressed. Tufts University's policy is "to protect the traditional rights of scholars with respect to owning the products of their intellectual endeavours." It notes that "this is in contrast to normal practice in the business world, where works created by employees are usually owned by the employer under work-for-hire rules." Essentially academics at Tufts retain ownership of any journal articles they write (Tufts, 1998).

* There are also cases of universities being willing to actively transfer and vest copyright in their staff. For example "The University may, as a matter of policy, determine that particular categories of IPR should be vested in the staff who produce them."

There are ambiguities in some of these statements - how should 'normal' be interpreted? Is there is a difference in law between vesting rights in staff, explicitly waiving them, or asserting them but allowing custom and practice to continue? What happens if a university or the sector as a whole wishes to change its policy and seek direct ownership and control of copyright in all works? What would count most, s.11 (2) of the 1988 Copyright, Designs and Patents Act or established custom and practice?

* **Moral Rights** - These are severely limited or do not exist at all for employees according to the statute (Henry, 1998. Millard, 1990). However in line with other authors, academics assert their Moral Right to be recognised as the author of their publications, in the usual way. This might suggest that in this case at least they are not acting as employees but independent authors. Do the authors of online teaching materials have any Moral Rights? (Note Moral Rights are much stronger in countries such as France. What if the writer was a French national, or did the work in France?)

* **Other owners** - In some cases the copyright may belong neither to the individual nor the university but to the organisation funding the research or work in question. This is particularly likely

where commercial sponsors are concerned, but even the research and funding councils make a point of asserting their own copyright before transferring it to the institution.

* **Commercial value** - Some university policies on IPR make a distinction based on commercial value. If the work has a commercial value it must be reported to the appropriate person/office, and/or be evaluated. If there is thought to be value, then the university will assert ownership (assuming it has not already done so), but if not, it may well waive its rights. In the former case there is often a revenue sharing scheme whereby the author shares in any profits made from his/her creation.

How is 'commercial' to be defined? How does one put a value on a research publication or monograph or teaching materials? If an HEI sets up its own electronic publishing house and seeks to control where academics publish, where it did not in the past, on the grounds such work now has commercial value, would this be reasonable? If such a policy is designed to save the university money, is this a reasonable commercial consideration? Are HEIs to be regarded primarily as commercial organisations, public institutions or charities? Or all three? Does the concept of 'Academic Freedom' have any weight in law, to balance against commercial concerns?

Copyright in teaching materials

Ownership of teaching materials is more likely to be asserted by HEIs, but it depends on the type of material. In the JISC survey 73% of HEIs waived their rights to personal lecture notes (Weedon, 2000). It can be argued that it does not necessarily requi

It was accepted in the past that teaching materials went with staff if they moved posts, teaching was an individual affair. With the TQA and co-authored module and course books etc., things are a little different. Only 43% of respondents to the JISC surve

HEIs may not feel it necessary to stop staff taking teaching materials with them, but may feel it necessary to protect their right to reuse them. For example "the University agrees that members of academic staff shall own the copyright in any course material produced during their employment for the purposes of teaching. In return for this, the university receives an automatic licence to use such materials." Can a former employer prevent staff from using their materials in a similar course at their new institution? There is also the issue of 'updating' teaching materials once the author has left.

Other HEIs are careful to only waive rights to personal lecture notes not course material per se, for

example, "the University will waive its rights over personal lecture notes developed in the course of employment, to allow their use for teaching in academic employment."

In the UK it is argued that material on the web is 'published', so are lecture notes on-line 'publications' not teaching materials? (Patel, 2000). Since a university may well waive rights in the former but not the latter, this is no semantic question. If the university waives its rights to personal lecture notes but not to online materials, what happens if material created as the former is transferred to the latter, either at the initiative of the member of staff or the university. Does copyright ownership change?

One argument is as follows. Where the member of staff is very much part of the course, it could be argued lecture notes on the web are 'personal lecture notes'. Where online courses do not involve the author of the materials in actual delivery and where they were simply contracted to prepare them, then they would be 'teaching materials'. Ownership of copyright would be decided by university policy on these different types of material. The 'online' is irrelevant, what matters is the difference between personal lecture notes and course materials (Pearson, Martin, and Newman, 1999). The JISC survey suggests institutions do treat the two environments differently however (Weedon, 2000). "The ease of web publishing means that what were once clear distinctions between scribbled lecture notes and glossy print publications have been blurred" (Martin, 1999).

USA - Separating teaching and materials

The trend in the USA is to separate teaching and the preparation of course materials. Admittedly the tradition of faculty ownership of teaching materials is probably stronger, and therefore the issue more problematic. The individuals hired to devise teaching materials are often staff specifically commissioned and all copyright is assigned to the university. The teacher who uses the materials has no rights of ownership over them at all. "What's happening in this environment is that education becomes content. Who has control of that content?" (Woody, 1998). In the USA "universities have developed special policies for copyright in distant learning courses that differ from the typical copyright in teaching materials policies" (Broveak, 1999). A US company APEX, who deliver on-line courses (another significant trend) notes that staff are paid to develop the courses, not necessarily to teach them. Since the company pays for the former it considers it owns the copyright, irrespective of the latter (Woody, 1998).

At the University of Texas, "faculty members retain ownership of any web based courses they create.... The University does claim ownership however, when parties agree beforehand that someone is hired for the sole purpose of creating an on-line course". In reality where there are several authors and input from AVMS (AudioVisual Media Services) in terms of graphics, ownership by faculty is complicated. Other institutions such as the University of California are "quietly asserting ownership of on-line courses". The University of Kansas is "considering policies that would give copyright in multi-media courses to administrators". The fear is that the money to be made from web based courses and materials will result in changes of policy for all courses. At UCLA a private company was commissioned to deliver an extension course over the Internet. All instructors were required to hand over their rights to the company although this policy was changed so that the University received the copyright. At Colorado, specific contracts are used for online courses, which give copyright to the university although the management of them is contracted out to a private company (Woody, 1998).

In some cases web based courses raise significant revenues for institutions, but whilst some share the profits with the authors of web based courses, other do not. A comparison has been made with the entertainment industry where unions "have been fighting for the rights to be paid for repeated

performances for years." It has been suggested that whoever owns the rights to web based materials and courses could sell access to various on-line colleges. After all, staff conducting face to face teaching are effectively paid for each occasion on which they teach (Carnevale and Young, 1999. Woody, 1998).

So who does own 'on-line' course materials?

In the USA it has been argued that institutional policy is the key (Shekleton, 1999). One case cited is *Weinstein v University of Illinois* 811 F.2d 1091, 1094 (7th Cir. 1987). Then there is the question of whether the work "was created during the course of employment" (Shekleton, 1999). If it was, the ownership is likely to be with the university, irrespective of when and where the work was done. However it was noted that if teaching materials was prepared before a course and not for that purpose, then it could be argued staff held the copyright. Whereas, if they were specifically asked to devise them for that course, the university would have the best case for ownership (Shekleton, 1999). Would the courts in the UK take a similar line? And where do you draw the line between 'course of employment' and other work?

Conclusions

Conclusions

So, who does own your work? The law on ownership of copyright is clear ... but reality is different and it's changing all the time. Academics, their institutions, publishers, lawyers and technologists need to get together and consider how the situation can be clarified to meet their mutual concerns.

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For recent amendments (February 2000) see:
http://europa.eu.int/comm/internal_market/en/intprop/intprop/copy3.htm

For some of the concerns for HEIs on the draft directive, see: <http://www.eblida.org/ecup/news/> and <http://www.eblida.org/posharmo.htm>

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[1] [and](#)

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[3]

[4] This and all following extracts from UK HEI policy documents are taken from the documentation supplied to the author 'in confidence' and on the understanding the institution would not be identified. The material lies behind part of a report on 'Policies on Copyright in HEIs' (Weedon, 2000).

[5] (Weedon, 2000). The individual survey responses were supplied under guarantee of anonymity and so the institution cannot be identified here.