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Introduction

This overview paper briefly explains the landscape of intellectual property law and its relevance to the use of information and communications technologies in UK further and higher education (FE and HE). It will focus almost exclusively on copyright law issues.

1. Intellectual Property Rights – A Primer

Intellectual property rights (IPR), very broadly, are rights granted to creators and owners of works that are the result of human intellectual creativity. These works can

be in the industrial, scientific, literary or artistic domains. They can be in the form of an invention, a manuscript, a suite of software, or a business name, as examples. In general, the objective of intellectual property law is to grant the creator of a work certain controls over the exploitation of that work, as the unfettered ability of others to copy the work or invention may deprive the creator of reward and incentive. For some intellectual property rights, the grant of protection is also in return for the creator making the work accessible to the general public. Intellectual property law maintains a balance by (in most cases) granting the rights for a limited time. Some rights require registration, for example, patent right, whilst other rights accrue automatically upon the work's creation as in copyright.

2. Types of Intellectual Property Rights

The principal intellectual property rights are: copyright, patents, trade marks, design rights, protection from passing off, and the protection of confidential information. This paper will focus on copyright which is an important issue for those working in FE and HE. A clear understanding of the application of the law of copyright can assist those working in FE and HE to maximise the use of other people's materials for online learning.

3. What is Copyright?

Copyright is one of the key branches of IP law and it protects the expression of ideas but not the idea itself. For a work to gain copyright protection, it has to be original and should be expressed in a fixed material form, for example, in writing. Copyright is thus effective upon the creation of the work. It arises automatically and in the UK one does not have to register the copyright in the work before it is protected.

4. Copyright Legislation

Currently, copyright law in the UK is governed by the Copyright, Designs and Patents Act 1988 (the Act). Part I of the Act deals with copyright law. It has been subject to various amendments over time including those of October 2003 which were aimed at bringing the Act in line with the EU Directive on Copyright and Related Rights in the Information Society (EU Copyright Directive) 2001 and the challenges posed by the Internet. As the UK is a member of various international conventions and treaties on copyright law, it has been amended on a number of occasions to harmonise it with the provisions of international treaties.

The Gowers Review of Intellectual Property (http://www.hm-treasury.gov.uk/independent_reviews/gowers_review_intellectual_property/gowersreview_index.cfm) has also proposed changes to copyright law but it is not expected that any changes will become law until the latter half of 2008 at the earliest.

5. Relevance of Copyright to UK FE and HE

Copyright is of fundamental importance to FE and HE as they being users, producers and disseminators of information will need to minimise their liability and maximise exploitation. For example, the internet allows for the public dissemination of this information in an unprecedented manner. Those working in the FE and HE should therefore always be mindful that their work may involve copyright material. Merely because material (e.g. internet content, software, on-line databases or journals) is openly available on the internet does not necessarily imply that it may be freely used. The vast majority of such material is made available under certain terms and conditions. One should therefore always ensure that the use of online materials complies with the terms of use stipulated by its rights holder.

6. Entitlement to Copyright Protection

A work is entitled to copyright protection if:

- It is of a type protected by copyright under the Act (See below).
- It is recorded in some form – e.g. in writing, by a sound recording, on a computer disk, or in a printed form.
- The work meets the requisite degree of originality. A work is original if adequate skill, labour and judgment is expended on creating it.

7. Works Protected by Copyright

The types of copyright works are broadly categorised into:

- original literary, dramatic, artistic or musical works,
- sound recordings, films or broadcasts and
- the typographical arrangement of published editions.

Literary work also includes

- (a) a table or compilation other than a database,
- (b) a computer program,
- (c) preparatory design material for a computer program and
- (d) a database.

Dramatic work includes a work of dance or mime. Musical work means any work consisting of music. However the words accompanying the music have separate copyright (for example, the lyrics of a song are protected as literary works), as does the singing which may attract performance rights or rights in the sound recording.

8. Rights Granted by Copyright

Copyright grants certain rights that are initially exclusive to its owner. Based on these rights, the copyright owner, subject to copyright law exceptions, controls who may

- (a) copy the work
- (b) issue copies of the work to the public
- (c) rent or lend the work to the public
- (d) perform, show or play the work in public
- (e) communicate the work to the public – this includes broadcasting of a work and also electronic transmission and
- (f) make an adaptation of the work or do any of the above in relation to an adaptation

The definition of “Public” in FE and HE is thought to include its staff and students. So it may be infringement under the right of communication to the public to include on the FE or HE intranet or internet, a student’s or a copyright owner’s work without their permission.

Copyright can exist separately and collectively in the components of any particular work. For example, the elements that constitute a website may include the web page, title, sound effects, images or pictures on the page and the address or domain name. Apart from the copyright of the website itself, each of these components grant separate rights to their owners.

9. Copyright Ownership - Who Owns What in a Copyright Work?

Copyright ownership can arise automatically or by means of transfer of ownership through an assignment, or assignation. A licence may also be granted by the copyright owner for use of the copyright material subject to certain conditions. Such a licence does not normally involve transfer of ownership of the copyrights. Much of the copying which takes place in the FE and HE sector is with the permission of the copyright owner usually by means of a licence.

Copyright owner: The first owner of copyright in a work is the person who created the work. Joint ownership may arise where more than one author is involved in creating a work.

Copyright ownership in computer generated works: In the case of computer generated works, the creator is the person by whom the arrangement necessary for the creation of the work is undertaken.

Copyright ownership in an employer-employee relationship: Under s 11.2 of the CPDA, the basic legal position is that copyright of works created during the course of employment will be owned by the employer unless an agreement to the contrary is in place.

Copyright ownership within FE and HE: The beneficiaries of copyright ownership in FE and HE can be its staff (lecturing, research, general), outside contractors or students as well as the institution itself. Research data, teaching materials, lecture notes may all be works which attract copyright protection.

Ownership of copyright by staff: Copyright ownership of works created by FE and HE staff is principally dependent on whether the creation of the work was within the

scope of his/her job specification. The rule applies irrespective of the question whether the staff had used the employer's resources to produce the work and whether the work in question was produced during office hours of the staff.

This issue has great significance within FE and HE. Many academics in institutions produce content in the form of articles and other publications during office hours whilst using the equipment of the institution. In some cases, their primary job specification may only relate to their teaching or lecturing function.

Many FE and HE institutions have, expressly or impliedly, waived their copyright in materials produced out-with the remit of the academics job specification. The rationale for this may be that by allowing the academic to retain copyright in the work, he or she is encouraged to produce more material thus raising the profile of the institution. It can also be observed that one of the common requirements currently included in the job specification of most academic staff is to raise the research profile of FE or HE institutions through publications in journals. It is also worth pointing out that some academics hand over their copyright to academic journals and their institutions pay for subscription to these journals. It may be the case in law that these journals may contain articles, in which, as employer, the institution already owns copyright and which, as an employee, the academic was not in a position to hand over.

Copyright ownership in collaborative research: In the case of collaborative research partnership between FE and HE institutions and an outside partner, copyright ownership can be held jointly. It is often the case that an agreement regulates this partnership. This agreement should also include agreement as to ownership of copyright and other IPR.

Copyright ownership by students: In general the student will be the first owner of the intellectual property rights in his or her work. However there may be circumstances where the institution may wish to assert or obtain ownership, or acquire a licence to use the materials. This difficult area is explored in greater depth in the JISC Legal publication entitled 'JISC Legal Investigation into Student Work and IPR' available at <http://www.jisclegal.ac.uk/publications/studentipr.htm>.

10. Additional Rights

Related Rights: The works of performers, sound recording producers and broadcasting organisations are protected by means of related or neighbouring rights.

Moral Right: The exclusive rights of a copyright owner can be sold or passed on. Apart from these rights, a copyright owner is also conferred certain rights which remain with the original creator and affect how subsequent owners deal with the work. Such rights are known as moral rights.

Moral rights comprise

- the right of the creator to be identified as the author of a work (also called the 'right of attribution' or 'right to paternity')

- the right to object to derogatory treatment (prevent his work being subjected to any distortion or mutilation) of his/her work or derogatory action which would ultimately be prejudicial to his/her honour or reputation (also known as the 'right of integrity').
- the right to object to false attribution, i.e., the right not to be named as the author of a work which he or she did not create.

However, the right to paternity or the right to be identified as the creator does not apply to anything done by or with the authority of the copyright owner where the copyright in the work originally vested in creator's employer,

11. Duration of Copyright Protection

The duration of copyright is dependent on the type of work in question.

- **Literary, Dramatic, Musical and Artistic works:** The life time of the author plus a period of 70 years from the end of the year in which the author dies.
- **Computer generated works:** 50 years from the date of creation of the work. A work is deemed to be computer generated where there is "no human author".
- **Sound recordings:** 50 years from the end of year in which it was made or published.
- **Broadcasts:** 50 years from the end of the year of broadcast.
- **Typographical arrangement of published editions:** 25 years from the year of first publication.

12. Infringement of Copyright

When is a work infringed? Copyright is said to be infringed when one of the exclusive rights of the copyright owner is performed by a party without the consent or authorisation of the copyright owner or of the law. This infringement is called primary infringement. Providing facilities for infringing the exclusive rights or assisting in the making or distribution of infringing copies is also treated as an infringement and is referred to as secondary infringement.

It should be noted that copyright infringement occurs where a whole work or a substantial part of it is used without consent to carry out one of the exclusive rights of the copyright holder. However what constitutes a substantial part is not defined in copyright law. It has been interpreted by the courts to mean a significant part of a work in qualitative terms even where this might not comprise a large part of the work. It is possible that a small portion of a work will still be a substantial part. The Mona Lisa smile on the original painting would be a good example of a small portion of a work which if still in copyright today would likely be defined as substantial.

Making temporary copies: Browsing of the internet creates temporary copies of web pages on the cache of a computer. Until 2003, such temporary copies were considered as infringing copies. The updated law has however changed the position. It clearly states that the making of temporary copies is not an infringement so long as it is a transient copy, has no economic significance and is done solely for the transmission of a work or for its lawful use. The same rule applies in the case of sending copyright work by means of fax.

13. Exceptions to Infringement of Copyright

Much of the copying which takes place in the FE and HE sector is with the permission of the copyright owner usually by means of a licence. In certain circumstances copyright law provides for basic exceptions and defences in the form of permitted acts which do not require the permission of the copyright owner. A number of these exceptions and defences apply to schools, universities and other educational establishments. These include:

- **Fair dealing** with a copyright work constitutes one of the most significant of these permitted acts. The application of fair dealing in some specific situations of importance to FE and HE is examined below:
- **Fair dealing for research or private study:** The current UK copyright law permits copying of works for research or private study only where it is aimed at a non-commercial purpose. Research or private study is not collective but are individual acts. The law also requires that sufficient acknowledgment be given to the copied source when used in research or private study. For academic staff and research students in FE and HE, this creates an obligation of using proper citations during publications. The only exception may be situations where acknowledgement would be impossible for practical reasons.
- **Fair dealing for criticism and review:** Fair dealing for criticism and review is permitted if it is accompanied by sufficient acknowledgement and the work is made available to the public.
- **Educational purposes:** there is limited permitted use of copyright works in the educational environment if
 - the source is acknowledged,
 - it is not done through reprographic means (e.g. multiple photocopying, faxing, scanning) and
 - it is not aimed at a commercial purpose.

Reprographic process means using a fax machine, photocopier or any appliance which makes multiple copies. Therefore, this exception could permit teachers to write material on the board or on an overhead projector as well as students making their own copies by writing, painting, typing, etc.

For teachers involved in setting examination papers, the law requires them to include sufficient acknowledgement of the copied matter where practicable.

Students answering these questions in exams are luckily exempt from the requirement.

Copyright law also permits the recording of web broadcasts by educational establishments in certain circumstances. Ordinarily, to record a transmitted broadcast FE or HE institutions would need an Educational Recording Agency (ERA) licence. Recordings and copies of recordings made under the ERA Licence can be used only for the non-commercial educational purposes of that establishment. Recordings may not be shown to fee-paying audiences or non-registered students.

For broadcasts which are not included in the ERA licence scheme, the FE or HE institution can make use of the broadcast where it acknowledges the source of the recording and uses it for non-commercial purposes only. In addition the recording should be made available only to persons within the premises of the educational establishment. In practice those FE or HE institutions that wish to record and re-broadcast content through e-transmissions for distance learning purposes on the internet or via an intranet will require an ERA licence.

- **Library uses:** The making of copies from books in libraries by its users (staff or students) is permitted only if it is made for research or private study for non-commercial purposes. This would require the user to sign a copyright declaration form confirming that the use is purely non-commercial prior to making a request.
- **Visually impaired people:** A visually impaired person or FE or HE institution may make copies of a work for a visually impaired person if it is for his or her personal use. However, this is subject to the condition that the visually impaired person or the institution already has a legitimate master copy (bought or borrowed) and that a copy of the work is not commercially available. An additional exception that caters to visually impaired persons allows the making of multiple copies where the author of the work is acknowledged and where the making of the copy does not interfere with the legitimate exploitation of the work.

14. Enforcement of Copyright

Copyright is essentially a private right and the copyright owner can avail of considerable rights and remedies to protect copyright in a work and can pursue a civil action against the alleged infringer.

By application to the courts the copyright owner can:

- stop a person making further infringing use of the material by seeking an injunction, interdict or other order
- claim damages from those who infringe their copyright
- compel the infringing party to give up or destroy the infringing.

Additional remedies are available for infringement on a commercial scale. Deliberate infringement of copyright on a commercial scale may be a criminal offence. This activity is usually known as copyright piracy and is often linked to wilful infringement of trade marks known as counterfeiting where criminal offences also exist. Piracy and counterfeiting are therefore often also referred to as intellectual property or IP crime.

Music or other file-sharing can be unlawful under the CDPA and students or staff who trade, swap or share music files illegally over the internet open themselves up to the possibility of a civil legal action.

FE and HE institutions may be vulnerable to the extent that office holders and those responsible for compliance must not knowingly facilitate the commercial abuse of copyright law.

Further information on copyright crime in the FE and HE sector is contained in the separate JISC Legal Cybercrime Overview available on the JISC Legal website at - <http://www.jisclegal.ac.uk/cybercrime/cybercrime.htm>.

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