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**“Copyright, performance rights, moral rights  
and your digital materials.”**

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**Introduction**

This paper provides a short overview of the rights management issues involved in creating and disseminating electronic learning materials. Managing the process of acquisition and licensing of copyright and related performance rights and moral rights so as to produce and deliver materials to students to time, at acceptable cost and at managed levels of risk.

**What is copyright?**

Copyright holders derive income and exercise control over the use of their work by managing and licensing a series of restricted acts. Some are more familiar:

- Copying.
- Issuing copies to the public.
- Performing, showing or playing in public.
- Broadcasting.
- Making an adaptation.
- Making available.

Others are more recent introductions and reflect changing legislation taking account of on-line delivery:

- Communicating to the public.
- Removing or altering rights management information.
- Circumventing or attempting to circumvent protection measures.

Moral Rights are related to copyright but can only be held and controlled by authors, as distinct from copyright holders. These are:

- Attribution right (the right to be named as the author)
- Integrity right (the right to object to your work being treated in a derogatory way)

Any use of a work in which you perform at least one of the Restricted Acts necessarily involves *rights* clearance.

### **Why *rights* clearance' rather than *copyright* clearance?**

Copyright is the intellectual property from which the rights are derived. Owning copyright allows you to control the licensing of a number of rights derived from the restricted acts: the right to copy, broadcast, adapt, etc. The terms of the licence can further refine the licensing so that publishing may be restricted to a territory, or group of users, or edition; broadcast may be restricted to a particular channel, or number of transmissions; multimedia works may be restricted to a particular format, and so on.

### **What's different about on-line delivery?**

In this section I shall look at six characteristics that are either unique to, or exaggerated by, digital on line content:

- The change from ownership to licensed access
- The primacy of licensing
- How rights holders behave
- Not all Permitted Acts are media neutral
- Performance rights
- Moral rights

### **The change from owning things to licensing access.**

The most important difference is the change from ownership of a physical object (book, CD, etc) to licensed access to content (VLE, on-line database, etc). This change brings into play a concept called "First Sale Doctrine" in which a seller's ownership of physical goods (as opposed to copyright) lapses on sale. Let me illustrate the difference. A reader or library buying a book owns the book as a physical object – the paper, board and ink – and although they don't own copyright in the book they are able to lend it to friends, sell it to a second hand bookshop, donate it to a charity shop, and so on.

Now imagine that instead of buying a book they access an e-Book on line. In this case there is no physical object and so nothing for the subscriber to own. Instead they have a licence to access electronic content. What can be done with the e-Book depends on the terms of the licence under which it is accessed. So, to take another example, while a library whose subscription to a print journal has lapsed may archive back copies and make them available to readers, whether or not in similar circumstances it may make available an e-journal depends upon the terms of the licence agreed between the journal publisher and the library.

This means that: -

### **The licence defines the product**

It is essential to arrive at a clear definition of your product and its purpose before starting rights clearance. Defining your product defines the level of rights clearance required. This allows you to approach rights holders using standardised licences and contracts, which streamlines the process and reduces costs, and also focuses the negotiation of licences. Unless you know the minimum rights required for your product to be delivered effectively you risk accepting licensing terms that restrict your ability to deliver to your customers. A licence that defines your delivery as campus-based rules out delivery to distance students accessing

from off-campus. A licence that defines a campus as 'university owned premises' may allow access by students at off-campus learning centres or halls of residence but not from homes or offices or public libraries.

It is essential that you are accurate in defining the licensing terms that best fit your requirements. Digital delivery has the potential for seamless transition across media formats, territorial boundaries and customer bases.

### **The rights holders' perspective**

If one can talk about tradition in such a comparatively young and growing area, then rights holders have traditionally been wary of licensing for electronic use. Their concerns are being addressed partly by changing legislation and partly by changing practice among both users and licensors although one may feel that the Permitted Acts also need extending to counter-balance the extension of holders' rights.

There are four sources of content: staff creating content under contracts of employment, content created by students in the course of study, content commissioned from external producers, authors and designers, and existing third party content (text, footage, music, images etc) licensed from rights holders. The balance between the four will vary according to the product being developed and is often closely related to the academic subject being taught. However, the principle for each is to secure those rights necessary to reach both core and secondary users/markets.

In each case there is a need to manage both the commercial rights existing under copyright and the moral rights governing the adaptation, manipulation and contextualisation of work.

Before going to look at these in more detail I want to look at the reason why networked distribution to distance learning students may be more complex than for campus based students.

### **Not all Permitted Acts are media-neutral**

The Permitted Acts cover a range of activities that may be undertaken without permission of the rights holder. These include some that apply equally to the print, broadcast and internet media, for example, the reporting of current events. The range of Permitted Acts applicable to education is well rehearsed and so I shall concentrate here only on those that do not apply to digital distance learning:

- **Classroom use does not translate into use in a VLE.** Ad hoc teaching using sources such as images, text quotation, etc, either by staff or by students should be cleared. The timescale here is a real problem as 'off the cuff' teaching does not allow time for clearance. Similarly, while playing a video in a classroom is not a 'public performance' (allowing purchased pre-recorded videos and DVDs to be played in class), making the same DVD available via a restricted-access VLE is not permitted.
- **The CLA photocopying licence does not at present extend to electronic course materials.**
- **The digital right of 'making available' defines making off air recordings available to premises owned by the institution.**

This excludes streaming or otherwise making available off-air recordings via on-line services to distance learning students. Both ERA and The Open University are examining ways of extending their schemes.

### **Performance Rights**

Performance rights may be approached from two directions. The first is the rights that performers have in their work. This requires clearance of music, film and other works incorporating performances before they are copied or made available on line. Because of the complexities involved in clearing multiple rights holders each controlling rights of relatively low commercial value, performance rights are normally cleared via either agents (in the case of dramatic performers) or Representative Rights Organisations (in the case of musical works and recordings). For a licence to use music in on line course materials you should approach the (Performing Rights Society) PRS/MCPS (Mechanical Rights Society) Alliance. The PRS/MCPS web site is helpful in clarifying the type of licence appropriate to your needs and offers a range of on line licensing options including one suitable for non-commercial or educational web sites.

### **Moral Rights**

Moral rights were introduced to the UK in the 1988 Copyright, Designs and Patents Act. They allow authors to assert their right to be attributed as author and grant them a (waivable) right to act against derogatory treatment of their work that is damaging to either their reputation as an artist or the integrity of their work.

There are certain limitations that academic employers and staff need to take account of. These apply to employees. Under the legislation the moral rights of employees are restricted. Staff cannot prevent publication of works created in the course of employment, even if in a form they do not approve. However, they may insist that the work carries a disclaimer stating that it is released against the wishes of the author.

Universities and other educational employers need to find a way to cater for moral rights concerns under contracts of employment, involving their staff in decision leading to the release of course materials in other territories or to other user groups, for example, and to handle the ownership of copyright in a medium where staff and institutional products may be in competition.

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