

Impact of Copyright Laws on Flexible Delivery of University Education

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ABSTRACT

The digital age has greatly increased the way in which information is accessed. While the way in which information is accessed has changed in the tertiary sector in the past decade, concerns about ownership, access, and control of copyrighted information is also growing. At the same time, students are making contradictory demands for more flexibility and access to university resources from where ever students are located. To provide a truly flexible learning environment, an alternative access to library and other study related material should be appropriately supported according to the current legislative environment.

As substantial users and creators of copyrighted information, colleges and universities continuously strive to develop mechanisms that effectively manage this information. Protective technologies are being developed to ensure appropriate control mechanisms, some times with the peril of substantially limited access to information. Recently introduced guidelines for electronic copying and communication in Australia attempt to provide a framework for proper use of copyrighted material in online and electronic environments.

This discussion paper will explore the myriad of issues involved in managing copyrights in higher education. The discussion involves addressing the Australian Copyright Laws and their impact on flexible education delivery. The need to educate all parties involved, especially the content creators and unit coordinators about the impact of Copyright legislation on practical issues relating to every day management and storage of Copyrighted material. As copyright legislation is not globally uniform, issues relating to how to cope with inconsistent legislative environment must be considered in flexible education delivery. The main aim of this paper is to provide an understanding of the significance of the copyright requirements for anyone involved in flexible delivery of university education.

Keywords: Copyright, flexible delivery, electronic copying.

INTRODUCTION

The recent Australian initiatives in the copyright domain such as the introduction of moral rights for creators of a work address the shortcomings in existing copyright laws. The Australian Copyright Council has released an Information Sheet (G48) to highlight these changes in the domain of education institutions (www.copyright.org.au). Some of the changes made to the copyright law in Australia and in other countries recognise problems encountered in administering the current law of copyright and attempts to formalise requirements concerning the e-learning technical environment in order for IT administrators to implement stringent policies to avoid any unauthorised copying of learning materials. As mentioned earlier, in Australia, initiatives have been taking place in the recent months to address issues associated with unlawful copying of materials. Educators have generally welcomed the modernisation of the law to provide for digital and other technologies that make "anytime, anywhere" education available to all.

The necessity for amendments to copyright laws arose from the introduction of digital technologies such as computers (Welsh, 2000). For instance, it is easy to copy materials on computers and network connections enable easy distribution of materials. To avoid any reproduction of materials from other interested parties, universities need to protect their intellectual property and hence strict rules need to be formulated to avoid any unauthorised reproduction of 'works'. In current climate, universities provide education using the Internet facilities and this warrant policing of proper access to online resources. In certain cases, institutions can be held legally responsible for copyright violation of work and hence strict vigilance is essential. University need to establish their policies on copyright issues and ensure that the management of these policies is executed properly in order to avoid liability in copyright violation (Kavanaugh, 2000).

Under these circumstances, there is a need to investigate what is happening in this domain of copyright. It is expected that the recent legislative changes are likely to influence practical implementation of online learning environments at various levels. With this scope in mind, this paper provides a brief discussion on what is copyright and discussion of some key changes in copyright regulations followed by description what is covered under copyright and the impact of other issues associated with electronic copyright in Australia. Once the general framework is portrayed, impact of these copyright regulations on to Australian Universities is discussed.

What is Copyright?

Copyright refers to the right held by individuals or organisations for others copying original works of authorship (Brown, 1997). This falls generally into one of eight statutory classes: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, sculptural, and graphic works; motion pictures and other audiovisual works; sound recordings; and architectural works. While today's scholarly works include almost all literary works, the current trend addresses other types of works including multimedia as well (Charp, 2000).

The Australian copyright Act (1968) specifically protects written material, artistic works, musical works, dramatic works, computer programs, compilations, cinematograph films, sound recordings, broadcasts, published editions and performers. Recent changes include the introduction of 'moral rights' for creators in order to take action if some one else falsely attributes an individual's work. Further, in Australia, there is no need to register for copyright protection as the work is automatically protected from the time it is first written down or recorded in some way. In the area of educational institutions, copyright does not protect ideas or information. Further, using copyright material without the written permission of the owner in some cases may lead to infringement in educational domains. The focus of the paper is on the issues concerning educational institutions, specifically Universities.

What is covered under copyright?

Before discussing the elements of coverage of copyright, a discussion is needed to introduce certain aspects of publishing as these aspects have significant impact on copying and copyright. The word "published" generally refers to the printed copies of works and to distribute them publicly through bookstores and libraries. The word "printed" is important because this is different from electronic generation of documents. While the process of "print" and "electronic generation" may be similar, print usually produces one "object" at a time, whereas electronic generation may produce multiple objects simultaneously, such as simultaneous multiple copies of e-mails. Further, the act of publication in many countries encompasses the rights of reproduction and distribution¹. For instance, while authors have the right of first publication under U.S. copyright law, in Australia, authors lose the right the moment they 'assign' it (the right)

¹ Australian Copyright Act, 1968

to some one else. The assigning rights make some one else as the owner of the materials. Different countries have varying regulations in terms of first publication rights.

In terms of publication, one who authors a literary work receives a bundle of five rights. They are (1) reproduction, (2) distribution, (3) adaptation, (4) public performance, and (5) the right to display the work publicly. The rights of reproduction and distribution are the critical rights needed for publication regardless of how that publication occurs (Colbert & Griffin, 1998).

When it comes to electronic format, it is usually assumed that making works available in electronic format is a form of publication. It should be noted that in many countries, the legislative history of the Copyright Act is not so clear on this point. However, the Copyright Act in many countries states that unless material objects change hands, there is no publication regardless of the number of people who are exposed to the work (Colbert & Griffin, 1998). This statement is important because while it is possible to display a published work such as a book in a library, it may not be possible to display a computer file freely due to security concerns of the medium. Further, the question that whether electronic transmission can be really accepted as “changing hands” also raises an important issue. To deal with this problem, changes to copyright act include the recommendation that the definition of the term "publication" be rewritten to encompass the concept of distribution by transmission. This would clarify the matter by amending the Act's definition of "publication" no longer to require that a material object change hands.

In Australia, in order to publish a work, the publisher - whether a scholarly society, a university press, or a commercial publisher must - at a minimum, have the reproduction and distribution rights assigned to it by the author. When a scholarly work is undertaken for publication, authors are required to transfer these rights to the publisher as a condition precedent to getting the article published. In Australia, for education purposes, works generated by academics is considered the property of the University unless otherwise published by a commercial publisher. Therefore, transfers must be in writing when it comes to commercial publication and the author may transfer the total reproduction and distribution rights in the work in whatever format (print, CD-ROM, or electronic), or the author may limit the transfer to a particular format. In other words, the author can transfer only the print rights and retain the rights for electronic

publication. The transfer of the reproduction and distribution rights also might be limited by the number of copies reproduced and distributed or by the length of time the transfer endures (such as for ten years), after which time the rights revert to the author.

Most commercial publishers in Australia not only require a total transfer of the reproduction and distribution rights, but they frequently require the scholarly author to transfer the entire copyright, including rights that the publisher does not need in order to accomplish its publication goals. For example, some publishers expect the authors to transfer rights to modify the materials in the future by the publisher, which is not needed for current publication. This condition has potential impact on the author. For example, while such transfer rights are given to the publishers, the author may lose rights to (1) incorporate the article as a chapter in a later book; (2) update the article and produce a new "edition" that reflects later research results; (3) license the movie rights (an unlikely development, but certainly possible especially in fields such as history, literature, ethnography, and the like); (4) reproduce copies for distribution to the author's own classes or incorporate the work into coursepacks; (5) grant permission to other academic members to reproduce the article for distribution to classes or for incorporation into coursepacks at the author's own institution or throughout higher education; (6) reproduce copies for distribution to colleagues at conferences; and (7) supply copies to peers simply upon request (Anonymous, 1999).

If the author has transferred all rights to the publisher, then he or she must contact the publisher to seek permission even to reproduce and distribute the work for others to adapt the work (such as through a new edition). Although most publishers have permissions departments, publishers' responses, even to their own authors, vary considerably both in the scope of permission they are likely to grant to the author and in how long it takes them to respond to the author's request. Some are quite responsive and answer almost immediately while others take weeks to reply to the author. As a general rule, publishers are more responsive to requests from their authors than they are to other members who seek permission to reproduce and distribute an article to their classes. Further, publishers do not encourage authors to bundle their work with other publishers. Commercial publishers, many society publishers, and even some university presses have simply taken more rights from the authors than were needed in order to publish the work. While copyright certainly exists in order to promote learning as well as to reward authors, rewards to scholarly authors have not been economic but rather have been in

the form of increasing the author's reputation and status such as by being awarded tenure. These rewards are not related to the transfer of the copyright, however, but rather accrue from the production and publication of the work itself. It is the university that awards tenure to scholarly authors based, in part, on their research and publication records.

Issues associated with electronic copyright

The term "electronic publishing" covers a multitude of things. Electronic publishing includes not only on-line publishing but also CD-ROM and related technologies. Of these two, CD-ROM and related technologies are much more analogous to classic publishing than on-line publishing. They involve the physical transfer from the publisher to the reader of a tangible thing in which the published work is embodied. CD-ROM involves the production of a package. This package, like the cover of a book or a journal, serves a valuable purpose not only in helping to sell the product but also in helping to establish in the reader's or buyer's mind the identity of the publisher. The packaging gives the publisher an opportunity to give the reader/buyer subtle messages concerning quality, reliability, seriousness, excitement, and so on. These images help to sell a particular title, to be sure, but they also cumulatively help to establish in the reader's mind the identity of the publisher as a source of good writing, or sound scholarship.

On-line publishing is a very different to the CD-ROM publishing. It does not necessarily deprive the publisher of the opportunity to create a visual identity in the mind of the reader, but to avoid being a faceless address on the Internet the publisher is going to have to resort to new stratagems for helping to create or preserve its identity. Likewise, marketing strategies will have to be thoroughly revamped in light of the loss of familiar opportunities and the gain of new opportunities for reaching one's potential audience.

In online medium, it is possible to manipulate text and images without a trace, and hence authenticity becomes a paramount consideration. Therefore, the opportunities for such mischief are greatly increased on the Internet. This emphasises the need for a thorough process such as the one offered by publishers for a reliable source of information.

Copying in the digital age is faster, cheaper, and better than copying in the printed world. Using online medium, it is imperative that only certain kinds of rights can be allowed to users. Publishers and those delivering and using information disagree about whether the Copyright Act protects electronic transmission of publications. The US Register of Copyrights has written, "The copyright law protects works of authorship, published or unpublished, in any tangible medium of expression." Generally, publishers do not support changing the Act, insisting that language in the current law adequately protects current and future technologies. Conversely, information users advocate clarifying the Act--by expanding provisions on the types of works protected to specify online services and the Internet, and clearly defining fair use sections so they are less subject to interpretation. The massive transmission of electronic mail and postings on electronic bulletin boards further compounds the issue of what the Copyright Act does and does not protect.

In Australia, technological protection measures are available for software copyright issues. The Australian copyright allows legitimate copying of files by owners for storage or backup purposes. Also the concept of 'fair dealing' does not infringe copyright in certain cases. Also, in Australia, the Government may be allowed to use copyright materials if the material is used for the services of the Government. While the Government need not have to obtain permission from the owner, the owner must be notified.

The Berne Convention for the Protection of Literary and Artistic Works does not require authors to register or provide notification of their copyright. It would seem, therefore, that electronic mail and bulletin board postings are considered original works protected by the Copyright Act in Australia and in other countries that are signatories to the Berne Convention. Keep in mind that currently, there is no international tribunal for resolving international copyright disputes.

Impact of copyright regulations on Australian Universities

More and more Australian Universities are offering flexible curriculum delivery solutions to students and should be aware of certain impacts of copyright regulations.

While the publication in electronic format does not change the underlying copyright issues, such publication may, however, present opportunities for avoiding some of the pitfalls by universities.

Electronic publication presents possibilities for uncontrolled reproduction and distribution of works since users of articles from electronic sources can download and further distribute them. The potential impact of this problem is reduction in commercial revenue by publishers. Another problem is students may freely distribute scholarly works that deserve financial rewards. In certain cases, students may be able to reproduce the work in their assessments that may not demonstrate students' knowledge. Regardless of who owns the copyright or what rights the author grants to users, fair use will continue to be a major concern. Fair use will exist in the electronic environment as it does for printed works. Fair use is both a protection to copyright infringement and a limitation on the exclusive rights of the copyright holder. It is a privilege for the owner to exercise one of the exclusive rights in a manner which ordinarily would be copyright infringement but which is excused because of the existence of certain factors.

In US Copyright Act there are four major considerations for fair use: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in comparison to the work as a whole, and (4) market effect². Similar considerations exist in Australian Copyright Act 1968. The purpose and character of the use examines such issues as whether the use is for scholarship or for commercial gain. The commercial nature of a use, however, does not automatically mean that a use is not fair³.

On the other hand, non-profit educational uses are more likely to be found to be fair use than are commercial ones. The nature of the copyrighted work focuses on the work itself. The legislative history includes statements that indicate some works have no fair use rights such as standardized tests, workbooks, answer sheets, and the like. Further, factual works, such as scientific and other scholarly articles, have greater fair use rights attached to them⁴. The amount and substantiality factor looks at how much of the

2 Copyright Act, 17 U.S.C., [sections] 107 [1988]

3 Copyright Act, 17 U.S.C., [sections] 107 [1988]

4 United States Law Records, Patterson & Lindberg, 1991, p. 210

copyrighted work was copied. This is both a quantitative and a qualitative test, and courts measure percentages, and count words and bars of music. Reproducing even a small portion of a work can still be problematic if the "heart" of the work is taken.

The final factor is the effect on the market for or value of the work. Thus, the economic interests of the copyright owner and any existing or potential markets for the work are critical. In fact, market effect has been held to be the most important test⁵. Courts also seem to focus on the existence of licensing agreements.

So, if a user of a copyrighted work on a network claimed fair use, courts would apply the above four factors to decide the issue. The metes and bounds of fair use in the electronic environment are less clear than in the existing print world. At the present time, under the auspices of the National Information Infrastructure (NII) Working Group on Intellectual Property, a series of conferences on fair use in the electronic environment are being held with representatives of library, media, and education associations; authors groups; publishers; and computer software groups to examine fair use. The ultimate goal is to develop guidelines similar to the guidelines for library and classroom use of printed works and music⁶.

Faculty authors who publish their works via University managed electronic networks can answer many of the fair use questions through a blanket grant of rights for all educational uses including multiple copies for classroom use, library reserves, and the like. Even with such a blanket grant, however, there will still be fair use questions from users in the for-profit sector but whose purposes are education and research. Likewise, users in non-profit institutions might seek to make a commercial use of an author's work and will need to contact them for their permission. Thus, fair use will continue to be an issue of importance even with electronic publication.

In Australia, electronic copying and communication is covered by Part VB of the Copyright Act licensing scheme. Prior to this licensing schema Universities did not have access to electronic communication or publishing of copyrighted material without copyright owners permission. In some sense this licensing scheme is tighter than equivalent scheme for print copy. Strict guidelines exist to which Universities must adhere. These guidelines cover the 'nature and purpose of the copying', 'notice to

⁵ United States Law Records, Harper & Row Publishers, Inc. v. Nation Enterprises, 1985, 566

⁶ chaired by C. A. Meyer, U.S. Patent and Trademark Office, the series of fair use conferences began in October 1993 and will continue for several months. The author is a participant representing the Association of American Universities

users', 'reasonable limits to limit the access', 'monitoring the period during which material remains available on-line' and 'limits on the amount that can be copied or communicated'. Further, there are significant limits if material is copied from hard-copy format to electronic format. Limits also apply for simultaneous on-line publication of the same material by other departments of the university.

Conclusion

As substantial users and creators of copyrighted information, Universities continuously strive to develop mechanisms that effectively manage copyrighted information on-line. Protective technologies are being developed to ensure that appropriate control mechanisms are in place. Recently introduced guidelines for electronic copying and communication in Australia attempts to provide a framework for proper use and management of copyrighted material in electronic environments. Under current licensing scheme universities need to ensure that different stake holders rights are respected and appropriately protected.

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