
Academic Intellectual Property Rights in current practice

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In *Oxford Magazine*, No. 302 Justine Pila looks at the relations between academics and their employing universities in the application of intellectual property law, and in particular at the assertion by universities of intellectual property rights in works created by their academics.¹

I don't disagree at all with any of the points Dr Pila makes. I share her scepticism about the enforceability of some universities' assertions about copyright (especially in regard to the assertion of rights over student work, where the recent JISC Legal study² has some helpful observations). But her discussion remains at the rather theoretical level – is the assertion of rights by universities justifiable or not? – when the emergence of new technologies and modes of transmission has changed the pattern of creation and distribution of copyright works by academics; and these changes may have material effects on the intellectual property rights involved and the determination of copyright ownership.

Section 16 of the Copyright, Designs and Patents Act 1988 lists the acts which are 'restricted', i.e. reserved to the copyright owner:³

- (a) to copy the work;
- (b) to issue copies of the work to the public;
- (ba) to rent or lend the work to the public;
- (c) to perform, show or play the work in public;
- (d) to communicate the work to the public;
- (e) to make an adaptation of the work or do any of the above in relation to an adaptation.

It is illuminating to note that the judgement by Lord Evershed about academics' intellectual property rights, on which so many still rely,⁴ was given fifty-eight years ago, when for practical purposes the only restricted act for which rights were likely to be asserted or infringed was the print publication of scholarly work – that is, right (b) in the list above. (Translation would also be an infringement of right (e).) Technology has moved on, and in the course of their work typical academics might now also have to deal regularly with performance, communication to the public and (to a much greater extent than before) adaptation.

The meaning of most of the phrases in the list of restricted acts is defined in the subsequent sections (17-21) of the Act and for present purposes we may rely on the self-evident sense of the words used in everyday language for most of them. The exception is (d), communication to the public, where the definition is not self-evident but is important. 'Communication to the public' is defined by section 20(2) of the Act as:

- (a) the broadcasting of the work;
- (b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.

'Broadcasting' is defined (section 6) as transmission of images or sounds 'for simultaneous reception by members of the public ... or...at a time determined solely by the person making the transmission' – so BBC1 programmes put out to the national audience at advertised programme times are broadcasts. The second part of the definition is the one where all the action is. It defines the act of making material available on the internet, where the user decides when to visit the web page and access the material that has been made available. Although the definition refers to 'members of the public' this includes intranets accessible only to authorised users (e.g. by logging on with a username and password). So the law is clear: putting material on the web is an act reserved to the copyright holder.

I shall return to the effect of the internet shortly, but first there is more to say about the traditional process of scholarly publishing. There are other pressures in play which affect the traditional model of authors' ownership of their work. First among these is the practice whereby, particularly in relation to articles, publishers require the author to sign over the copyright in the work they want to have published. For example, Imperial College Press authors submitting book chapters are required to sign a Copyright Transfer Form containing the words 'To the extent transferable, copyright in and to the undersigned Author's chapter ('Chapter') entitled ___ by ___ is hereby assigned to IMPERIAL COLLEGE PRESS of 57 Shelton Street, London WC2H 9HE, UK for publication'.⁵ This practice of publishers requiring authors to cede copyright to them only gathered pace some time after Lord Evershed's judgement was given.

The scholarly journals market is for the most part a commercial arena. Although the authors may not have produced the work for a profit motive, and in most cases will not even be paid directly for the work produced, the resultant journals are sold commercially. Usually the main buyers are libraries in the very institutions which have produced the work. The incongruity of (mainly) publicly funded research being given away to commercial publishers and then bought back at considerable expense has led in recent years to a movement for a different model for scholarly publication, the Open Access model. As it is currently spent, the money spent on journals buys access only for the purchasers and their end-users, so that access is limited to those who can afford the price. Under Open Access, the money covers the costs of disseminating articles online, so the articles can be freely accessible to all. Copyright remains where it first arises (with the author or employer).⁶

With the growth of open-access institutional and subject repositories, and funding bodies' requirements for the results of research to be placed in them, many of the major journal publishers have now resiled from outright demands for copyright and either require only a licence to publish, or a transfer of copyright accompanied by

the publisher's relinquishing back to the author limited rights for further use. For example, Emerald Group Publishing states:⁷

"Emerald Group Publishing Limited seeks to retain copyright of the articles it publishes, without the author giving up their rights to use their own material ... [Authors may]:

1. *Distribute photocopies of your own version of your article to students and colleagues for teaching/educational purposes within your university or externally. Please note, this does not refer to the Emerald branded, published version.*
2. *Reproduce your own version of your article, including peer review/editorial changes, in another journal, as content in a book of which you are the author, in a thesis, dissertation or in any other record of study, in print or electronic format as required by your university or for your own career development.*
3. *Deposit an electronic copy of your own final version of your article, pre- or post-print, on your own or institutional website. The electronic copy cannot be deposited at the stage of acceptance by the Editor."*

(Note that this does not include the right to deposit in a non-institutional website, e.g. a subject repository based in another institution.)

SAGE Publications, on the other hand, seek only a licence to publish:⁸

"With an exclusive licence you retain copyright. Your work is credited as © The Author(s) but you license the control of all rights exclusively to SAGE or, where relevant, a society or other proprietary publishing partner. This means that all licensing requests including permissions are managed by SAGE."

SAGE further allows the author to:⁹

- *"circulate or post on any repository or website the version of the article that you submitted to the journal (i.e. the version before peer-review) – 'version 1'.*
- *post on any non-commercial repository or website the version of your article that was accepted for publication – 'version 2'. The article may not be made available earlier than 12 months after publication in the Journal issue and may not incorporate the changes made by SAGE after acceptance.*
- *re-publish the whole or any part of the Contribution in a book written, edited or compiled by you provided reference is made to first publication by SAGE. The article may not be made available earlier than 12 months after publication in the Journal issue without permission from SAGE.*
- *make photocopies of the published article for your own teaching needs or to supply on an individual basis to research colleagues on a not-for-profit basis.*
- *[but] not post the final version of the article as published by SAGE or the SAGE-created PDF – 'version 3'.*

All commercial requests or any other re-use of the published article should be forwarded to SAGE."

So SAGE allows photocopies of the article as printed; Emerald does not. SAGE also allows pre-prints to be lodged in any repository, not just the author's institutional repository. In addition, SAGE has an open-access option:¹⁰

"SAGE offers optional, funded open access in a number of

journals. ... For these journals, you will be invited to select this option on acceptance of your article. More information is available by linking to SAGE Open FAQ. The SAGE Open Access Publishing Agreement enables distribution of your article under the terms of the Creative Commons Attribution Non-Commercial License (<http://creativecommons.org/licenses/by-nc/2.0/uk/>) which permits unrestricted non-commercial use, distribution and reproduction in any medium, provided the original work is properly cited."

Creative Commons¹¹ is a method of providing an easily understood partial copyright waiver, and is well suited to internet publication as it can be encoded so as to be readable by web crawlers and acted upon by search engines.

The outcome of all this is that even if we adopt the starting position that the author owns the copyright in his or her work, this position is inevitably weakened by the process of scholarly publishing, either by the funder's mandate or by the publisher's contract, or both. As we have seen, selection of one journal rather than another can have material consequences for the subsequent use of the material, so it is as well to find out in advance (preferably at an early stage in the procedure) what the various publishers' and funding bodies' policies are. The SHERPA consortium, in which the University of Oxford is a partner, draws together useful information about publishers' and funding bodies' policies on copyright and deposit in repositories, and provides searchable indexes of them in the respective RoMEO and JULIET databases.¹²

So although the academic author may still retain the copyright in a monograph, at a practical level copyright in an article may well be lost or weakened in the publication process. But what about the process of teaching within the university?

In the days before the internet, when a lecturer prepared lecture notes they stayed in his or her possession, perhaps only in a single copy. There may have been handouts for students on a small scale. The opportunities for any of the restricted acts to take place were limited, and the employing university had little practical opportunity to exercise any assertion of copyright it might claim as employer. There was in any case the argument, alluded to by Pila, about whether any specific item could be considered to have been created 'in the course of employment'. A history lecturer may be employed to lecture and to produce research, but not specifically to produce an article – or even the definitive book – on, say, the development of military strategy during the Napoleonic wars. The lectures which may underpin the book would not normally be fixed in any kind of recording medium unless the lecturer chose to write verbatim the entire text of the lectures, and even then the notes would remain in the lecturer's personal possession.

Let's leap now to the leading edge of university teaching, and the lecturer whose lectures are recorded in a video and put into a Virtual Learning Environment (VLE) such as Oxford's Weblearn.¹³ As we saw earlier, putting the material on the web (including into a VLE) is one of the acts reserved to the copyright owner.

First, the lecturer's words are now fixed, so there is material in which copyright may be asserted. But there is absolutely no doubt that this material has been produced 'in the course of employment' because the lecturer is employed to lecture, and this is one of those lectures. So the university's assertion of copyright over this mate-

rial will be much stronger than any claim over scholarly output in general.

Second, there is an additional copyright in the film as a film ('film' covers all moving image media, including celluloid, videotape, DVD) whose copyright owner is the producer, i.e. 'the person by whom the arrangements necessary for the making of the sound recording or film are undertaken'.¹⁴ The provision about works created in the course of employment apply to film works as well as to literary, artistic, musical and dramatic works and to film works, so the university also holds the copyright in the work as fixed in the film. However, the employment provision does not extend to sound recordings, so if the lecturer of his/her initiative arranges for a sound recording to be made, then the copyright would remain with the lecturer. If the sound recording is made on a departmental initiative, it would belong to the university.

Third, there is the lecturer's right as a performer. If a lecture is recorded, then the recorded words of the lecture constitute a literary work, and a performance is defined, *inter alia*, as 'a reading or recitation of a literary work... which is, or so far as it is, a live performance given by one or more individuals'.¹⁵ The performer retains the right to authorise the making of the recording itself, the copying of any recording made, issuing copies to the public and making the performance available to the public by electronic transmission.¹⁶ Moreover, although the copyright in a work created in the course of employment passes to the employer, there is no equivalent provision vesting the right in performance with the employer. Performance right (and the subsidiary 'making available right') remains with the performer.

Each of these rights has a limited duration, although in most cases the limits will exceed the lifetimes of all the people involved. The copyright lasts until seventy years after the death of the author. This term applies even where the copyright immediately passes to the employer or is assigned to a publisher, but I suspect that few employers or publishers (academic or otherwise) bother to track the subsequent lives of their authors in order to maintain proper copyright control. The copyright in a film also lasts for seventy years after the death of the director/author of the words (more complex, but enough!). Both the copyright in the recording and the right in performance last for fifty years, unless the work is made available to the public in that time, in which case a second fifty-year clock starts ticking from that moment. (A similar double ticking clock applies to anonymous films, but with a seventy-year duration.)¹⁷

A recorded lecture involves all the rights discussed above, but even a simple set of lecture slides on the VLE will attract copyright and its relevant issues of ownership. Moreover, this University's waiver of its assertion of copyright in most literary works does not extend to a waiver of its copyright in any film or recording made in the University.

The fact that all of these rights can now come actively into play, by virtue of fixing a lecture in a recording and by the ease with which the restricted acts of copying, issuing to the public and communicating the work to the public can now take place, has interesting consequences when a lecturer moves from one institution to another. Before the internet and VLEs, a lecturer's lecture notes and any visual aids would have departed with the lecturer to pastures new. But what about a lecture recorded on a VLE, or lecture notes mounted on one? If the lecturer

makes copies and takes them to the new establishment, this is almost certainly an infringement of the copyright owner's right to authorise copies. If they are then mounted on a VLE at the new establishment, this is a breach of the communication to the public right (although the educational establishment exception may come into play).¹⁸ So to stay on the right side of the law, if the new employer wants its new recruit to continue to use teaching materials created on the former employer's VLE, it would be well advised to reach a contractual agreement with the various other parties.

The University of Oxford is remarkably silent on many of these issues. The copyright guidance on Weblearn focuses (quite properly) on not infringing third-party copyrights when mounting pages. The University's iTunesU website has *Guidance on producing audio and video material for publication online*¹⁹ which states:

"If you have produced audio or video material that you would like to submit for consideration for the University's podcasting portal (<http://podcasts.ox.ac.uk/>) and its site on iTunesU (<http://itunesu.ox.ac.uk/>), you will need to complete a contribution form signed by both the speaker, and the relevant head of department or his/her representative ...

"Please be aware that you must own the copyright or have secured permission for all the material, including any images or music used, and secured the permission of all those individuals featured in the material."

The contribution form does deal with copyright (including an assertion of employer's ownership for University employees, and a contractual arrangement for others) and performer's rights, and requires publication under a Creative Commons Attribution-Non-Commercial-Share-Alike licence. But again, the focus is on ensuring the University has the rights necessary to use the material, and not on the creator's interests in safeguarding his or her own rights.

JISC has recently published guidelines about recording lectures.²⁰ It reviews these issues about lecturers' rights, and includes in addition guidance on the use of third-party materials, and on the rights of others who may be included in a film (e.g. the student audience or research/lab assistants). It also provides useful model rights forms.

So regardless of the University's partial waiver of the rights it asserts in its employees' works, academics' control over their works is in practice eroded on the scholarly publication front by publishers' requirements, while the entire area of rights in lecture material has moved from the privacy of the lecturer's study to the very public domain of the internet and VLEs. Rights management has become immeasurably more complex than it was in Lord Evershed's day, and it behoves all of us to take an active interest both in our own rights and in such rights as we may have, or require, to use the material of others.

¹ Justine Pila, 'Who owns the intellectual property rights in academic work?', *Oxford Magazine*, No. 302 (Eighth Week Trinity Term 2010), 4-7.

² JISC Legal Investigation into Student Work and IPR, 19 April 2007, <http://www.jisclegal.ac.uk/Portals/12/Documents/PDFs/JISCLegalStudentIPRRreport.pdf> accessed 29 June 2010.

³ Pila refers to the text available at <http://www.ipa.gov.uk/cdpact1988.pdf> and this is the only freely available document which incorporates in a single text all the many amendments made to the Act since its passage in 1988; however, one should note that it is an unofficial consolidated text containing only the sections dealing with copyright and related rights, and does not contain the sections of the Act dealing with designs

and patents.

⁴ Stephenson Jordan & Harrison v. McDonnell & Evans (1952) 69 RPC 10,18, and cited by Pila (note 14).

⁵ <http://www.icpress.co.uk/authors/copyright.doc>, accessed 18 July 2010.

⁶ Budapest Open Access Initiative, <http://www.soros.org/openaccess>, accessed 18 July 2010.

⁷ Emerald Publishing Group, Authors' Charter, <http://www.emeraldinsight.com/authors/writing/charter.htm>, accessed 18 July 2010.

⁸ SAGE Publications, Journal Author Gateway, Contributor Agreement, Copyright and Permissions, <http://www.uk.sagepub.com/authors/journal/permissions.sp>, accessed 18 July 2010.

⁹ Ibid.

¹⁰ Ibid.

¹¹ <http://www.creativecommons.org.uk/> --site under construction, until then see <http://creativecommons.org/international/uk/>, both accessed 18 July 2010.

¹² <http://www.sherpa.ac.uk/>, accessed 18 July 2010

¹³ <https://weblearn.ox.ac.uk/portal>, accessed 18 July 2010

¹⁴ CDPA 1988 section 9(2)(aa),(ab) and section 178.

¹⁵ CDPA 1988 section 180(2)(c).

¹⁶ CDPA 1988 sections 182A-182CA. Showing the recording in an educational establishment to teachers and pupils at the establishment is, however, permitted under section 34(2) of the Act in respect of copyright and Schedule 2, section 5 of the Act as regards performance.)

¹⁷ CDPA 1988 sections 12-14, 191.

¹⁸ See note 16. If a recorded lecture is made available more widely than within the confines of the educational establishment to the students and staff, then the exception cannot be utilised.

¹⁹ <http://www.ox.ac.uk/document.rm?id=797>, accessed 18 July 2010.

²⁰ Recording lectures: legal considerations. JISC Legal: 28 July 2010. Available from <http://www.jisclegal.ac.uk/ManageContent/ViewDetail/tabid/243/ID/1608/Recording-Lectures-Legal-Considerations-28072010.aspx>, accessed 7 August 2010.