

# Recent Impacts of Copyright Law upon Distance Education

SUE FRENCH

DEPARTMENT OF ACCOUNTANCY AND BUSINESS LAW  
MASSEY UNIVERSITY AT PALMERSTON NORTH

This paper scrutinises certain practical requirements of contemporary distance education courses and attempts to reconcile the same with the provisions of the Copyright Act 1994 (the Act). An earlier paper contains an analysis of the overt shortcomings of the Act from the perspective of the distance educator and also provides useful background material for readers who are unfamiliar with copyright law (French, 1997). The aim of this paper is to consider the less immediately obvious impacts of the Act upon distance education, as well as more recent developments in general. Separate divisions of the paper cover such diverse issues as the influence of the Act upon, respectively, the creation of a traditional written study guide, the multi-copying of excerpts of literary works, the use of hypertext links in Web teaching courses, and the importation of foreign educational materials.

**MORAL RIGHTS AND THE CREATION OF A DISTANCE EDUCATION STUDY GUIDE** Part IV of the Act provides for the protection of the moral rights of the creators of copyright literary, dramatic, musical, or artistic works, and the directors of copyright films. Moral rights are rights which exist in addition to the traditional copyright in an original work. They were introduced into New Zealand law in 1995 in order to comply fully with international copyright agreements, in particular the Berne Convention. Unlike copyright, which is fundamentally an economic right and is commonly assigned to the publisher of a work,

moral rights are personal to the creator of a work and cannot be assigned to anyone else.

The Act contains four types of moral rights, two of which are particularly relevant to lecturers and teachers creating study guides. They are:

- the right to be identified as author or director (ss 94 - 97);
- the right to object to derogatory treatment of a work (ss 98 - 101);

It will be important both for promotion prospects within employment and also for obtaining further employment that an original creator is, first, able to establish his or her authorship of study guides created in former positions, and secondly, that the original creator can be confident that his or her study guides have not been subjected to derogatory treatment.

In order to be enforceable, the right to be identified as the author or director must first be positively asserted by the creator of a copyright work. Such an assertion must be in writing. For practical purposes, the ideal method of asserting moral rights is within a statement printed near to the traditional copyright notice. Examples of such assertions may be readily observed within literary works published in the United Kingdom since the coming into force of the Copyright, Designs and Patents Act 1988 (the legislation which introduced the concept of moral rights to United Kingdom law).

Section 21 of the Act provides that, subject to

any agreement to the contrary, an employer will be the first owner of any copyright in a work made by an employee in the course of his or her employment. Thus, unless stated to be otherwise by an educational institution's own Intellectual Property Policy statement, an educational institution will be the first owner of the copyright in a study guide created by a member of its staff (although there are certain arguments against the automatic vesting of ownership of academic works in a creator's employer, see Monotti, 1994). However, provided that the creator has asserted their moral right to be identified (see s 97(6)(a)), the moral right to be identified in relation to the study guide remains with its creator.

Because teaching materials are inextricably linked with professional reputation, career advancement, and status, the creator of a study guide should consider it essential to assert their moral right of identification, regardless of whether or not the copyright in the study guide may have automatically vested in the employer by virtue of s 21 of the Act. The practical effect of an assertion of ownership of moral rights in a study guide is that the employer educational institution would be thereby prevented from re-using a particular study guide without identifying the original creator of that study guide. This becomes particularly important when, for example, the creator leaves an educational institution and their teaching course is taken over by a new employee.

However a significant exception to the right to be identified is contained in s 97(6). Section 97(6) provides that where copyright in a work vested first in the creator's employer under s 21 (discussed supra), then the right to be identified does not apply to any act done by or with the licence of the copyright owner if the author or director cannot readily be identified, or, if more than two persons were involved in the creation of the work, it is impracticable to identify their respective contributions to the work, and the authors have not previously been

identified in or on published copies of the work. This provision may operate to prevent the protection of the right to be identified attaching to study guides which have been produced by a team of writers.

The right to object to derogatory treatment of a copyright work is also known as the "right of integrity". This right is conferred automatically upon the author or director of a copyright literary, dramatic, musical or artistic work, or film, and does not have to be asserted. "Treatment" is defined in s 98(1) as "...any addition to, deletion from, alteration to, or adaptation of the work...". The treatment of a work is "derogatory" if "whether by distortion or mutilation of the work or otherwise, the treatment is prejudicial to the honour or reputation of the author or director".

The practical effect for teaching staff of the right to integrity is to prevent an educational institution undertaking the unauthorised modification or re-packaging of study materials which is prejudicial to the reputation of the author. Without such protection, it is possible that the original creator could find their material "...distorted to the point where they believe it is prejudicial to their professional reputation" (Wells, 1994 p.24). For example, the use by an educational institution of materials prepared for one particular group of students may not, in the creator's opinion, be appropriate for a different ethnic group of students. The creator's right of integrity defends his or her right to prevent any such unauthorised use as being prejudicial to his or her professional reputation.

Unfortunately, however, the usefulness of the foregoing provision is diluted by an exception which is contained in s 100. Section 100 (8),(9) provides that where copyright in a work vested first in the creator's employer under s 21 (discussed supra), then the right of integrity of the author is not infringed by any act done by the employer in relation to a work, provided that "...a clear and reasonably prominent indication is given...", with the identification of the author, that the work has

been subjected to treatment to which the author has not consented. The right of an author to object to derogatory treatment of their teaching materials therefore hinges on the crucial question of whether the teacher as author, or alternatively the educational institution as employer, owns the copyright in the teaching materials (see Monotti, 1994).

## LITERARY COMPILATIONS FOR DISTANCE STUDENTS

The creation of compilations of literary extracts for students has become a widely accepted and increasingly popular means of supplementing a study guide in most subject areas. The process is not confined to distance teaching but, arguably, it is an essential part of teaching for distance students, while remaining merely a desirable adjunct to internal teaching. The reason for this assertion is that internal students have ready access to the educational institution's library and the Act confers upon them the ability to make their own copies of literary works as recommended by their lecturer or teacher, for the purpose of research or private study. Such copying is called 'fair dealing' (s 43). The production of literary compilations for internal students is, therefore, purely for reasons of convenience and to avoid pressure on library facilities. However the distance student is generally unable to attend the library in person and is accordingly unable to make use of the fair dealing concession (French, 1997).

Section 44 of the Act allows multiple copying for educational purposes of literary, dramatic, or musical works of no more than the greater of 3% or 3 pages of a work. If 3 pages would in fact comprise the entire work, then the Act allows the copying of no more than 50% of the entire work. Furthermore there are stringent and impracticable conditions attached to such copying (s 44(6)). Therefore, in order to produce literary compilations of any real pedagogical benefit to students, either permission must be sought from the individual copyright owners, or (as is already the situation with the universities and many

other educational institutions), a reprographic licensing arrangement must be entered into with a body which is representative of all copyright owners and which has reciprocal arrangements with overseas copyright licensing bodies.

An instructive comparison may be made between the educational copying provisions of the Copyright, Designs and Patents Act 1988 (the UK Act), the Copyright Act 1978 (the US Act) and the Act. It is unfortunate that the fair dealing provision and the multiple copying provision of the Act draw upon both the UK Act and the US Act and would seem to have absorbed the most disadvantageous features of both, at least so far as New Zealand's distance education institutions are concerned.

The fair dealing provision of the UK Act (s 29), allows the making of a single copy of a work and permits that copying to be carried out by a person acting on behalf of the student. To a certain extent this alleviates the difficulties of the distance student in the UK. However, the section contains a proviso that the quantity of copying by an agent must be restricted to no more than "a reasonable proportion" of a published edition (ss 29 (3)(a), 38). Furthermore, the provision (s 29(3)(b)) that such copying is not fair dealing if "...the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose", would seem to mitigate against the fair dealing provision being utilised as a substitute for supplying a ready-made literary compilation on the scale which would be necessary for a class of distance students.

In contrast to the tendency towards protecting the interest of the copyright owners over the interests of the copyright users which is demonstrated in both the United Kingdom and New Zealand legislatures, the United States Congress has always been concerned to uphold what it considers to be "the true

purpose of copyright law". That is the societal interest of stimulating the production of original works for the benefit of the whole nation (Copyright Clause, United States Constitution). "The essence of copyright is the promotion of learning - not the enrichment of publishers" (Twentieth Century Music Corp. v. Aiken, 1975). Thus, unlike s 43 of the Act, s 107 of the US Act provides specifically that fair use includes reproduction for purposes such as "...teaching (including multiple copies for classroom use)...". However, in stating four determinative factors to be considered when deciding if any particular use of a copyright work is fair dealing, s 107 of the US Act is actually very similar to s 43 of the Act. The four factors contained in s 107 are as follows:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work. (cf s 43 (3) of the Act).

A body of caselaw has evolved in the United States concerning the question of what is or is not fair use, a recent decision being that of the United States Court of Appeals in Princeton University Press v Michigan Document Service, (1996). Although the decision is not binding upon the New Zealand Court, the similarity between the respective fair use provisions contained in the two Acts invites judicial respect for the United States Court and in particular for the learned Judges' discussions concerning the "fair use v copyright licensing" dilemma.

The matter under consideration by the Court in Princeton University Press v Michigan Document Service was whether the multiple copying of "substantial segments" of copyrighted works by a commercial copyshop (Michigan), (albeit acting on the instructions of teaching staff at the University of

Michigan), and the preparation of compilations for sale onward to University students, at a price which was lower than that which the teaching staff would have been able to produce the same compilations, could be fair use under s 107 of the US Act. If such copying was fair use then it was of no significance either that Michigan did not obtain permission from the copyright owners to make such compilations, nor that Michigan did not pay any licensing fee or royalties to the appropriate copyright licensing bodies.

Although a majority of the Court held that Michigan's copying of the copyright materials was commercial exploitation and did not constitute fair use, five of the learned judges voiced dissenting opinions. It was common ground that if the teaching staff had produced the compilations within the University and sold them to the students at cost price, this would have amounted to fair use under s 107, despite the fact that the cost of the compilations so produced would have been greater than the cost of those produced by Michigan. Circuit Judge Merritt delivered one of the dissenting opinions. Observing that the teaching staff had each testified that, had it not been possible to copy the various extracts, they would have omitted the works altogether instead of requiring the students to purchase the entire works, and emphasising his belief that the copying by Michigan came squarely within the s 107 provision, His Honour stated:

It is also wrong to measure the amount of economic harm to the publishers by loss of a presumed licence fee - a criterion that assumes that the publishers have the right to collect such fees in all cases where the user copies any portion of published works.

Because copyright law is effectively international in scope by virtue of various international Treaties and Conventions, the fair use provision contained in the US Act will permit educational institutions in the United States to make multiple copies of New Zealand copyrighted works for classroom use.

Conversely, in New Zealand, as stated previously, the Act will not permit multiple copying of works to be fair dealing under any circumstances. It is difficult to rationalise a situation of such inequity. Indeed, it is apparent that the impetus of the Act, which is to effectively compel the distance teaching establishments to enter into expensive licensing arrangements for the production of literary compilations may not be well-founded. A more considered approach to the true purpose of copyright law and the historical basis of fair dealing might have provided New Zealand's distance education bodies with a more equitable law.

**THE USE OF HYPERTEXT LINKS IN WEB TEACHING** As a teaching medium for distance students the World Wide Web (the Web) appears to offer many advantages over a traditional paper based course. The Web is often likened to "an information superhighway". The benefits to students of utilising such a source of information are incalculable.

In order to make full use of the almost unlimited educational potential offered by the Web as a teaching resource, references to different areas of the Web may be made within study material offered on a particular Web page. Such references are known as hypertext links. An individual hypertext link acts as a reference, enabling the user to access another location within the same Web site or, perhaps, to a particular area within another site on the Web altogether. Although this process is commonplace to regular users of the Web, and although "...the legality of linking has not yet been addressed by any court, it has been at the centre of legal and policy debates around the world..." (Stangret, 1997 p.202). In particular, for educational institutions the issue turns upon whether the inclusion of hypertext links to other Web sites within academic or teaching-text Web sites on the Internet, is permissible as being the equivalent of, say, a footnoted reference to another text within traditional published texts, or alternatively, it has been argued that any such

hypertext link, by effectively allowing the incorporation of another author's original work within the first work, thereby constitutes an infringement of copyright.

The recent interim decision in *The Shetland Times Ltd v Wills and Another* (1977) raises a further significant issue for educational institutions (French, 1998). This is the question of copyright in a hypertext reference itself, either as a literary work or as a cable programme. The facts of *Shetland* were that the pursuer reproduced certain news items from its own published newspaper, *The Shetland Times*, on its Web site. Access to any particular news item was gained by clicking on the appropriate headline on the home page of the Web site. The headlines thus comprised the hypertext links to individual pages of the Web site. The defender was the managing director of a news reporting service, *Zetland News Limited*, (the second defender). *Zetland* also provided a news reporting service from its own Web site. On the home page of its Web site, *Zetland* included a number of headlines from the pursuer's home page. These headlines performed the function of hypertext links to the individual news items appearing on the pursuer's Web site. Users of *Zetland's* Web site were invited to click on the headlines and thereby obtain direct access to the news items appearing on the pursuer's Web site. However, because the pursuer's home page was not accessed by *Zetland's* users the pursuer's home page would lose much of its attraction for potential advertisers and would thereby sustain a loss of advertising revenue. The pursuer brought an action claiming that its headlines constituted a cable programme and that their inclusion by *Zetland* in a cable programme service constituted primary infringement of copyright under s 20 of the UK Act. In the alternative, the pursuer claimed that its headlines were literary works and that in storing the headlines by electronic means *Zetland* was infringing copyright by "copying" as provided in s 17 of the UK Act.

It should be noted that the relevant sections and definitions contained in the UK Act are

very similar or identical to the equivalent sections contained in the Act. It is evident that many academic Web sites would satisfy the Shetland test of cable programme service, the primary function of an academic Web site being, in general, to send information. This part of a Web site could be said to comprise... "a severable part of the cable programme service."

Furthermore, the question now arises as to whether any hypertext link is capable of being an "original literary work" within the meaning accepted by copyright legislation so as to thereby be afforded protection. If the particular hypertext link consists of a headline or a title then Lord Hamilton affirmed that it could indeed be such. If the hypertext link consists (as is more usual) of a coded "address" or sequence of information, then the position is more tenuous. The Court in *D.P. Anderson & Co Ltd v The Lieber Code Company* ([1917] 2 KB 469) found that a code which was made-up for the purpose of telegraphy was an original literary work and capable of protection. However the requirements of "sufficient skill, labour and judgment in its creation" (see *Independent Television Publications Ltd v Time Out Limited* [1984] FSR 64), might prevent the more commonplace hypertext link from being considered to be worthy of copyright protection as an original literary work. Because it raises several issues of importance to Internet users, a full hearing of the Shetland Times case would have been welcomed. However, the parties settled before the date set down for the full hearing.

In the absence, to date, of any clear court ruling on the legality of linking, creators of Web teaching courses must be advised to adopt a cautious approach. The question of possible copyright infringement when downloading material from certain Web sites is also pertinent (see Harrison and Frankel, 1996). Current advice to would-be Web teachers must be, therefore, to obtain prior permission from the creators of other Web

pages with which links are to be set up within a teaching course.

## THE IMPORTATION OF FOREIGN EDUCATIONAL MATERIALS

The use of a reasonable proportion of foreign educational materials is inevitable in most New Zealand teaching courses, both in internal and distance mode. Indeed, a failure to utilise such materials within a country of such a small population might be considered academically unsound and parochial. With this premise in mind the implications for the educational institutions of the parallel importing ban contained in the Act (ss 12, 35), will be considered.

The rationale for imposing a ban on parallel importing is to afford to the copyright owners an additional right of exploitation of their works. The existence of a ban on parallel importing within a country provides an economic incentive for a foreign copyright owner to license an official distributor of the copyright work within that country. However the overall effect of a parallel importing ban is to create a monopoly and it can therefore be seen as anti-competitive and detracting from a free market economy.

The Australian Time-Life decision (*Interstate Parcel Express Co Proprietary Limited v Time-Life International (Nederlands) B.V. and Another*, 1977), illustrates the practical effect of a ban on parallel importing. In *Time-Life* an independent importer who obtained certain books from a wholesaler in the US and placed them on the Australian market at approximately half the price of the same books as sold by the official distributor, was held to be in breach of the ban on parallel importing contained in the Copyright Act 1968 (Cth).

So far as New Zealand educational institutions are concerned, the major impact of the parallel importing ban is apparent in the requirement of many educational courses for foreign textbooks, videos, sound recordings, and music scores. The existence of the present all-inclusive parallel importing ban condones the

setting of unnecessarily high prices for imported educational resource materials (due to lack of competition), and fails to provide a practicable remedy in situations where: (a) the official distributor is inefficient and fails to order materials in sufficient quantities in time for a particular educational course, or (b) no official distributor has been appointed (*Remington Arms Company Inc and Sportsways Distributors Ltd v Reloaders Supplies Ltd and R D Dent*, 1996).

While there may indeed be valid arguments to justify the ban on parallel importing in the case of the commercial equivalents of these items, (for example investment by an official distributor in advertising, marketing, and back-up services), it is difficult to see any real justification for such a ban on the parallel importation of purely educational materials. Arguments for removing the ban on parallel importing of educational resources include the following points:

- the education of a country's citizens is a "public good" and one of the dual aims of copyright legislation.
- the official distributors of resource materials are often extremely inefficient - it can take some months to obtain certain music scores for instance.
- the official distributors of written educational materials are generally publishers, acting as agents for foreign publishers. Unlike the book sellers, many of which are multi-national organizations, the publishers in New Zealand tend to be relatively small-scale businesses with neither the marketing expertise and back-up, nor any real incentive to keep prices down for the consumer.
- educational resource materials are already widely advertised, both on the Internet and through foreign advertising material posted as a matter of course to most universities. There is therefore no requirement for New Zealand marketing.
- educational resource material does not generally require a back-up or support service.

It is understood that the New Zealand Institute for Economic Research is presently undertaking an investigation into the economic implications of the parallel importing ban. It is to be hoped that the serious implications for the educational institutions will be perceived. It is further hoped that consideration be given to recommending the passing of amending legislation to create an exception to the parallel importing ban in the case of educational institutions, such as already exists in the equivalent Australian legislation (see the Copyright Act 1968 (Cth)). Since the date of writing this paper, the parallel importation provisions of the Copyright Act 1994 have been repealed.

**CONCLUSION** Although this paper is necessarily restricted to only a small selection of copyright issues which currently affect distance education in New Zealand, it should be noted that there are many others. For example, the educational exceptions in the Act applicable to performance rights, copyright in broadcasting, including in a cable programme, have yet to be considered, as has the question of copyright issues as they affect distance education courses which have been created in New Zealand for sale to a foreign educational establishment. It is apparent that copyright issues will continue to be contentious and worthy of research for some time to come.

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**Sue French** is Lecturer, Department of Accountancy and Business Law, Massey University, Private Bag 11 222, Palmerston North. Email: S.F.French@massey.ac.nz