On Line Courses: Universities and Servers: A Fragile Consortium

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Introduction

Higher education administrators are feeling a great deal of pressure to offer Internet courses. Accordingly, faculty are being pushed to generate, build and maintain these Internet offerings, usually without sufficient experience or resources (*Computer User*, August, 2000). Individual faculty "assigned" to develop these courses typically face major decisions to develop a self-sufficient on-line course, or work with publishers rapidly linking textbooks with both CD resources and online resources. However controversial this choice process may seem to the individual faculty member and administrators trying to organize online offerings, a major issue looms: who actually owns the content of the courses published (*Chronicle of Higher Education*, July 21, 2000).

In times past, this disagreement has usually been between the professor teaching the course and the university administration. Given the explosion of the Internet, there are other players in this game of who have the right to course content: the third-party firm that houses the server and sells and maintains its content to universities and colleges (*Computer User,* September, 2000).

In the past couple of years, several companies on the Internet have arisen that offer the uses of their servers and software to publish these courses. Software vendors and publishers are offering enticing packages including web space and course maintenance for both students and faculty, easy access to publisher copyrighted materials, and research tools for students. Software vendors are primarily marketing to administrators a common image and standardization. Publishers are typically marketing to faculty, who select textbooks, and offering a wide array of options to aid faculty members in integrating a textbook and online environment for students. College presidents are being advised to support and encourage collaborations of this nature. (*Chronicle of Higher Education,* June 22, 2001.)

Unfortunately, this licensing arrangement that initially appears to be a perfect marriage of private business and higher education can be fraught with 'gray areas'. An example is the $25-million "strategic alliance" between the plant-biology department at the University of California campus and a multinational life-sciences company based in Switzerland (*The Chronicle of Higher Education,* June 22, 2001).

An examination of the license agreements of each of these third party groups shows a wide disparity in the rights of ownership of these materials when they are uploaded to the servers. It appears true that some of these Internet providers may have the rights to use of the materials published in other courses not originally contemplated by the professors

publishing the content. Professors, who believe they have worked out ownership of a course, may find that a provider can begin offering its own courses, using the best of the courses uploaded to the site from various schools or professors.

This paper examines the rights of the original providers of content and the sight owners under contract and copyright law (Ko and Rosson, 2001) to develop some clarification of this as yet unresolved area of law. We must stress that due to the legal nature of the issue, court decrees may alter our assumptions or presumptions.

Legal Background

The right of an author to the exclusive use of his/her work stems from the United States constitution, which states that Congress shall have the power:

> "To promote the progress of science and the useful arts, by securing for limited time to authors and inventors the exclusive rights to their respective writings and discoveries." (U. S. Constitution, Article I, Section 8)
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> Under the laws of the United States an author may copyright any original work. An author is "He to whom anything owes its origin: originator, maker." (Burrow-Giles Lithographic Co. vs. Sarong, 111 U.S. 53, 58 (1884))
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> One issue is what is original and may be copyrighted. First, it must be a tangible work containing some original creativity. (Gracen vs. Bradford Exchange, 698 F 2d 300, 304, (7th Cir, 1983) (Posner, J)) However, originality and creativity are very broad and are not the same as the accepted definitions of artistic originality. One court went so far as to hold that the page paginations of a company reporting court decisions was entitled to copyright protection. This decision, however, has been criticized as being too extreme (Nimmer, Melville and David Nimmer, Nimmer on Copyright, 1996 ed.).
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> It can be a derivative work, which is "a work based upon one or more pre-existing works, such as a translation, fictionalization, motion picture version,… abridgment, condensation or any other form in which a work may be recast, transformed or adopted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship…" (17 U.S. Code Section 101)

Another type of work that is entitled to protection is a compilation. Here the creator takes the works of other authors and compiles them in some new form or order (theoretically, with the express permission of the copyright holders of the original works). The copyright attaches to the compilation and the creative order of it. The authors of the underlying articles in a compilation must give their consent to the compiler or they may sue for copyright violation.

Before 1988, the rights of the author of a course were largely controlled by a patchwork of state and federal copyright laws. Someone who developed an original work such as a book, course, etc. had what is known as a state common law copyright until its

first publication. Upon its first publication by the author it had to be registered in the federal copyright office for its protection to remain valid. Any publication had to have the copyright © stamp on it along with the words "all rights reserved" to protect both the United States and international rights to the work. (17 U.S. Code Section 410 (C))

In 1988, Congress amended the copyright act to bring it into line with international standards as set forth in the Berne convention. These amendments totally preempted state laws of copyright. Currently the federal copyright law protects the author from the moment he writes his work until seventy years after his death, and for anonymous works the presumption is that the author died twenty-five years after the first publication.

The author no longer has to register his work with the government for the copyright to hold, nor does one have to place the copyright logo on the paper. Should there be an infringement the copyright holder must then register the work to be able to sue the infringer. In a lawsuit for copyright violation, the holder is entitled to actual damages. This means one must show the actual amount of monetary damages resulting from the wrongful copying. Many times this is difficult and the holder receives nominal damages. Should the holder have registered his work with the copyright office before the infringement and displayed the copyright logo on the document she might be entitled to statutory damages up to one hundred thousand dollars and attorney fees. Statutory damages are amounts that the law awards without the plaintiff having to prove an actual economic damage.

Hypothetical Situations

Let's apply the above to a professor with an online course using a self-sufficient website. In the course the professor has uploaded his class notes, a group of readings by other authors, which will be read on specified days and in specified order, streaming videos of class lectures, tests, and a chat room. The professor will have a copyright to his own material, including notes, videos, articles by him, the arrangement of the readings and tests, and any software he develops to present the materials.

Later, an outside company downloads the course from his site. The company downloading the course does not have permission to use the course and it is not under the fair use doctrine. However, registration is required before any suit for infringement can be brought. Because the professor is working for a non-profit educational institution there are no lost profits from the infringement. If the company doing the copying is also not making a profit, there are no true damages. If the course had been previously registered, the professor could at least sue for statutory damages and attorney fees.

Another possibility is the professor uploads the course to a server and has in the course a particularly good article on a subject such as France in the Middle Ages. The company owning the server does not directly copy his article. Instead, as the article is on the company's server and in the company's format it simply links to the article in question along with articles from other courses and incorporates them into its own course on the Middle Ages. This new course has as its materials a series of links rather than the direct copying of materials. Here the law is not as clear-cut.

As another (reverse) example, imagine that "an architecture professor distributes to his distance-education students digitized photographs of the palace at Versailles, warns the students about the images' poor quality – and then gets hit with a lawsuit from the

software company that provided the pictures. The company accuses the professor of violating the terms of the license agreement, which prohibits customers from publicly criticizing the product. A judge rules in favor of the company, citing UCITA, a new law that makes ubiquitous software-licensing agreements readily enforceable. The scenario is only imaginary, but it could easily become reality in any states that adopt UCITA, the Uniform Computer Information Transactions Act, which was drafted by a legal group that seeks to make state laws consistent nationwide." (*Chronicle of Higher Education,* August 11, 2000.) This law is currently only valid in two states.

One case on copyright may give more support to the author of an article published in electronic form. In Tasini vs. The New York Times (2d Cir. 97-9181, Sept. 1999) the plaintiff was an independent writer who had written an article for the defendant. The defendant had published his article in the NY Times with plaintiff's consent. The defendant later placed the article, along with all other articles, in the Nexus database, where it could be called up with a search engine. Plaintiff sued for copyright infringement, claiming he had given permission only for placing the original article in the defendant's magazine. Defendant claimed he had simply recompiled the article in an anthology form on the database and needed no further permission from the author. The court held that the database did not have the qualities needed to qualify it as an anthology and further permission was necessary before the defendant could republish the article. This case is currently on appeal to the United States Supreme Court.

Standard Copyright Agreements

At this time, when a course is uploaded to a third-party server, the professor presumably gives the third-party the implied right to publish it on the Internet. There are several companies that supply software for the academic community as well as free server space for publication on the Internet. A review of three software companies suggests that agreements with the person or institution uploading the copyright materials vary considerably and the full extent of agreements should be carefully read. For example, Blackboard.com states that the person or institution uploading the content has the sole right to the copyright of the materials, however, it also has the following in its use agreement:

> By uploading or otherwise making available any User Content, you automatically grant and/or warrant that the owner of such User Content has granted Blackboard, for the sole purpose of displaying publishing, distributing and/or otherwise transmitting the User Content through Blackboard.com[SM], the perpetual royalty-free, non-exclusive right and license to use, reproduce, modify, publish, distribute, perform and display the User Content through Blackboard.com[SM]. You also permit any other user of Blackboard.com[SM], subject to your restrictions, to access, view, store and reproduce the User Content to the same extent permitted herein.

Thus, the original copyright holder apparently still holds the copyright, but has relinguished actual control to Blackboard. When licensing its software for use on university servers, Blackboard has a much more restrictive clauses governing how a university (the licensee) can use Blackboard's software:

> 1.1 License. Subject to terms and conditions herein, Blackboard grants Licensee a non-excusive, nontransferable license to load and/or operate and use a single copy of the software entitled Courseinfo™ (the "Software")… on the server(s) indicated in Exhibit A attached hereto,… 1.3 Restrictions. Except as otherwise expressly provided, licensee may not copy Courseinfo™ in whole or in part except to a server in accordance with section 1.1. …

In contrast, eCollege.com has this rather straightforward statement on content uploaded to its server:

> Any material, communications, text, graphics, audio, video, links, art, animations, photos, or other information (collectively the "Course Content") that you upload to or otherwise make available to eCollege.com is and remains your property or the property of your licensors.

WebCT has no agreement online for the professor to accept or reject. Upon inquiry to them concerning copyright ownership authors received the following E-mail:

> Copyrights have not been an issue with us, WebCT owns the copyright on the application, and the course creator owns the rights to the content. We do not take responsibility for content uploaded to our servers, we merely maintain the server and WebCT interface. We have not in the past had an issue with copyrights, nor do we anticipate that there will be any problems with this.

Pending Legislation

There is pending legislation that may attempt to clear these differences. The pending Technology, Education, and Copyright Harmonization Act follows the recommendations of a report issued in 1999 by the U.S. Copyright Office, calling on Congress to expand copyright law's so-called fair-use exemption to include distance education. (*Chronicle of Higher Education,* March 30, 2001.) Both upon the first review of the proposal (*Chronicle of Higher Education,* June 18, 1999) and the latest revision, the vendors were quick to point out that the proposed law is unclear, and could easily direct the law into a newer, more narrowly defined lane. Administrators, legislators and private parties alike agree that the proposed changes are a step in the right direction, but not 'what the doctor ordered'. As of this writing, the law had not been passed, and was undergoing some changes to its construct. Cursory inspection of the law does not indicate that it would answer the above questions clearly.

Summary

There still is a long way to go for clarification of the contractual responsibilities of each party with respective to the copyright laws applying to on-line courses. The long standing concerns of faculty, that the university would become the owner of materials prepared in conjunction with classes without proper remuneration, have been complicated with the rise of the on-line third party server organizations.

Both faculty and university administration should consider these 'uncharted waters' closely prior to agreement with any party-for any reason. Many administrators face increased pressure to improve their 'own-line presence' based on headcount funding formulas. However with only limited technology resources the result could be devastating long term competitive consequences through rapid loss of any "monopoly" rents accruing to faculty intellectual property that is effectively unprotected. After all, students seek university acknowledgement of their education in order to gain faculty knowledge and support in a structured higher education process. To date the university model has been built on the mentorship roles developed between faculty and students. Otherwise, students could buy textbooks and surf the web on their own. To wit, universities could simply become testing agencies, and professors hired programmers for the 'one-shot' generation of the text of the courses.

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