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schools online curriculum content initiative

THE LE@RNING FEDERATION

Approach to Managing Intellectual Property Rights

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1 Executive summary

This report summarises The Learning Federation's (TLF) approach to managing intellectual property rights and the considerations that have shaped it. The approach focuses on managing rights through a combination of business rules, business processes, technology systems, legal documentation, and communication and education throughout the content distribution chain. The approach, which is based on comprehensive legal advice, concentrates on informing rather than enforcing rights, as this has technology implications that cannot be feasibly implemented within the school education environment.

2 Definitions

2.1 Intellectual property rights management and digital rights management

Intellectual property rights management is a holistic term used to describe the business processes of tracking intellectual property rights creation, licensing and usage.

Digital rights management (DRM) is commonly used to refer to the use of *digital technology* to manage intellectual property rights. In this regard, DRM systems are a usual element of a wider intellectual property rights management approach.

Given the current focus on protecting and managing intellectual property in a digital arena, DRM has become a 'buzz' word for describing the system that will provide the solution. However, DRM does not adequately describe the approach that the TLF project is undertaking. The broader definition of intellectual property rights management is more suitable to the holistic approach TLF has adopted to manage intellectual property. It is an approach that melds business processes, policies, procedures and professional development programs with the use of digital technologies.

The terms 'open' and 'closed' are often used to describe DRM systems that manage access to rights-enabled content. They can be viewed as opposite ends of a continuum, the ends of which are defined as follows.

'Open' refers to systems characterised by the use of open technology standards to manage access and interaction with content. These technology standards are available for anyone to use for no licence fee and can be further developed through participation in the relevant standards community.

In contrast, 'closed' refers to systems characterised by the use of proprietary software that is required to gain access and interaction with content. Proprietary software usually incurs commercial license fees and cannot be contributed to by a user community.

A common misunderstanding is that a closed system means a rights enforcement system. This is incorrect; whether a system is open or closed is independent of whether enforcement of rights is imposed. The misconception derives from the relatively immature application of open standards to date whereby there are very few examples of systems actually using open standards *and* enforcing rights over the content.

2.2 Managing and enforcing rights

Licences are legal vehicles granting individuals or groups with rights to use content in which they do not own the copyright. They stipulate what an individual or group is able to do with the content and what they are not permitted to do, in what context, and for how long. However, the mere existence of a licence does not necessarily mean that a user of content actually complies with the licence terms. What the licence does is provide legal recourse for the copyright owner or licensor if the rights are infringed.

The aim of any organisation which owns or licenses copyright is to minimise the risk that copyright is infringed and legal action is pursued. Management strategies to promote compliance by licensed users can take various forms ranging from 'hope for the best' to

'forced compliance'. Understandably, forced compliance mitigates the risk of infringement substantially more than hoping for the best.

An example of a very relaxed strategy is to grant a licence and then trust that the end-user will know that terms exist and how to comply with them. Such a strategy relies on the potential legal recourse a licence affords to *remedy* any damage caused by an infringement, subject to the facts of the case. At the other extreme, a very strict strategy will utilise technology that prevents the end-user from performing any act that is not allowed under the terms of the licence. This is referred to as a rights enforcement system and relies on the technology to *prevent* an infringement occurring.

There are many scenarios in between these extremes incorporating differing degrees of management processes, provision of information and education and technical mechanisms to manage licences and promote compliance with licence terms. They are all rights management strategies or systems and they only become referred to as enforcement systems when technology is used to prevent users infringing copyright.

The current immature state and application of 'open' technology standards means that in order to manage rights using enforcement technology, proprietary software must be used. Such systems rely on enforcement technology being in place at every point in the distribution chain. This is much easier with short, homogenous distribution chains, unlike the school sector distribution chain. Proprietary enforcement systems from different vendors currently do not interoperate and there is also much evidence to suggest that enforcement systems are circumvented, albeit illegally, over time anyway. It is therefore useful for any organisation, particularly in the current technology climate, to ask the question: "What damage is done if copyright is infringed? Does it justify the investment in even trying to implement a rights enforcement system throughout the distribution chain?"

In the absence of enforcement technology, the more that is done to make users aware of their rights, the greater the likelihood of preventing unwitting infringements of copyright and the stronger the legal case for a legal remedy, should a breach actually occur.

Based on the current state of technology standards and the specific requirements of the school education sector, it is feasible to adopt a rights management strategy whereby licences are granted to individuals or groups without using an enforcement technology and whereby other reasonable measures are put in place to assist users with awareness and compliance of licence terms, thus mitigating the risk of an infringement actually occurring.

3 The Le@rning Federation's approach

TLF has recently undertaken a complete review of all intellectual property rights and licensing activities, in line with the licences with education systems and sectors that are guaranteed under the MOA and the consequent wider distribution of content than has occurred to date. The purpose of the review was to ensure that business activities are aligned both across the project and with the TLF licensing-out regime, and that the risk of copyright infringement in the third party works is *reasonably* minimised.

The review involved balancing a number of factors: the significance to the joint venture companies and the education systems of a potential infringement of copyright; current technology capabilities that ensure copyright will not be infringed; and the potential cost associated with making the use of specific technology through the distribution chain a pre-requisite, in order to afford a higher level of copyright protection (whether it be based on open or closed systems).

TLF engaged an experienced intellectual property lawyer, Philip Crisp, Special Counsel, Australian Government Solicitor, to advise on the legal issues and risks of different approaches. His advice comprised a strong legal and inherently practical interpretation and application of the law to the multi-media content production, distribution and usage environments in which TLF and education systems and sectors are trying to manage rights. Philip Crisp has also been involved in developing the Memorandum or Agreement and the TLF licensing-out regime so had broad experience across intellectual property and licensing requirements for TLF and education systems and sectors. In addition to the licensing regime, specific legal advice was provided on: rights required for third party works licensed in by TLF; requirements for copyrighting works; requirements for identifying third party works within

content; compatibility between expected use of content by teachers and the TLF out-licences for third party works; and the information, link placements and behaviour of the conditions of use statement.

The following sections set out the key considerations that have shaped the approach that TLF is taking to manage intellectual property rights and the key elements of the approach.

3.1 Characteristics of the school system environment that shaped the approach

The characteristics of the school sector environment and implications that are integral to TLF's considerations for a feasible rights management approach are:

- Users and systems are widely distributed and rights-enabled content may be distributed through many points before the end-user interacts with it. The implication is that rights information must travel with the content.
- Systems throughout the content distribution chain are heterogenous; the hardware and software deployed within jurisdictions, schools, classrooms and at home varies in type and set-up. The implication is that rights-enabled content must work on disparate systems.
- End-user capability and experience of using multi-media content to facilitate learning varies. The implication is that it cannot be assumed that teachers have a high level of competence or awareness of intellectual property rights, especially in a digital environment.
- The majority of primary and secondary students are not legally able to be party to a contract and therefore cannot be bound by on-screen acceptance to licence terms. The implication is that compelling a user to agree to on-screen licence terms is not applicable to a large proportion of end-users.
- It is potentially disruptive to a student's learning to be forced to view rights information every time content is viewed. The implication is that a balance must be struck between promoting rights information to the user and interfering with the educational experience.
- Content usage infrastructure environments vary. Examples include: using content in networked and managed systems; using content on CD; and using content offline. The implication is that rights-enabled content must also be permitted to run offline.
- Content usage scenarios vary. Examples include: aggregating content from multiple sources, of which TLF content may be only one source; re-contextualising content such as including content within a word document; and modifying content. The implication is that rights information must be easily accessible by the end-user and licences must cater for broad and varied use by end-users.
- End-user understanding of rights over intellectual property and whether usage should be reported to the Copyright Agency Limited (CAL) varies. The implication is that rights make clear what the end-user responsibilities are. (TLF content is exempt from CAL remuneration).

3.2 TLF licensing-out regime

TLF needs to license content to any group that is a separate legal entity from the joint venture companies. There will be a range of licences, the primary licences being those for the education systems and sectors for non-commercial educational use. The Memorandum of Agreement is being finalised and TLF is licensing content to all education systems and sectors for broader distribution. The licences are being enacted with the peak organisations of the school systems as a manual and paper process. Developing the licensing regime has been a considered process undertaken in collaboration with the education systems and sectors. The benefits and implications across the licensee parties have and continue to be carefully reviewed.

Key implications for TLF arising from the licensing regime are: an online offer and acceptance model for licences does not need to be supported as all licences are negotiated and signed

by peak organisations outside a technology system; and all existing and future content published by TLF must be capable of being licensed out to education systems and sectors under the terms of these up-front licences. This has particular implications for licensing in third party content.

3.3 Broad use licences for third party works

TLF has defined business rules that specify broad terms should be sought for use of third party works so that third party works may then be licensed out under the up-front licences with education systems and sectors on terms suitable for their educational use. The terms essentially provide for broad use of the content for Australian and New Zealand educational purposes. The terms are typically generic across all third party works licensed in to ease the effort and cost involved in both TLF and jurisdictions managing licences, and the onus on end-users becoming familiar with the terms.

The key differences in the licences for third party works compared with works that have been created by or for TLF 'from scratch' (referred to as TLF Content) are that they are not able to be enhanced (a form of modification/adaptation) and the licence is for a fixed term. TLF will provide information about the third party licensor within the content's metadata should an education system or sector wish to independently contact the third party to secure the additional rights to extensively modify a work. TLF will also set in place business rules for extending the fixed duration licences so that content may remain in circulation without copyright being infringed.

3.4 Managing rights; not enforcing rights

TLF is implementing a rights management strategy focused on effective licensing protocols, management and communication of rights. It is based on a comprehensive legal framework. TLF is deploying business rules, processes and technology systems to internally manage all aspects of licensing-in and licensing-out activities.

The approach relies on sharing responsibility throughout the distribution chain for managing rights, managing access to content, and communication of rights. Once licensed content is distributed from the Exchange or on-distributed via other systems in the distribution chain, it is critical to ensure that every effort is made to enable jurisdictional and end users to manage and comply with the licence terms, particularly in respect of third party works. However, there is currently no feasible or sufficiently mature technology solution available that can be deployed in the end-user environment to guarantee compliance by end-users and meet jurisdictional needs regarding the intended and expected use of content. Therefore, throughout the distribution chain, it is expected that *managing* access to content and communication of rights, rather than enforcing rights, remains the focus.

The approach sits midway between the relaxed approach of doing nothing to inform users of rights and the strict approach of using technology to enforce user compliance with rights; it does not incorporate an infringement prevention policy thus does not impose the necessity of enforcement technology at any point in the distribution chain.

Key elements of the strategy include:

- business rules that specify all third party works licensed in by TLF must enable broad educational use;
- clearly articulated conditions of use that are suitable for end-users that describe what users are permitted to do with content and that use of content is not subject to Copyright Agency Limited payments. Information is included within the content as an html document when it is distributed, thus easing the onus on jurisdictions in communicating licensed rights for content and on end-users understanding what use is permitted. Consideration is being given to the use of rights expression languages to express and package this rights information as it travels with the content. Rights expression languages are attractive in this context because they enable computer-assisted communication and management of the rights;
- clear copyright information both for TLF works and third party works. The latter is handled via acknowledgements located in proximity to the third party work within the content;

- metadata that identifies the licensors of third party works, should jurisdictions wish to seek usage rights in excess of broad educational use;
- clearly defined processes and the use of in-house technology systems to manage the intellectual property rights, licences and distribution of rights-enabled content to ensure TLF complies with licence terms and accurate information is delivered to jurisdictions and end-users; and
- an expectation that education systems and sectors will provide appropriately secure access to content, appropriately manage copyrighted works and include intellectual property rights education in professional development programs for content administrators and teachers.

With every rights management system existing today it is possible for a user to purposefully and illegally go outside the normal and permitted use of content, to circumvent protective technology and to find a way to infringe copyright. This cannot be prevented. However, it is possible to put in place mechanisms that reduce the risk of a user unwittingly infringing copyright and TLF has defined a comprehensive approach within a legal framework to achieve this. The approach endeavours to ensure that: anticipated normal use of content by teachers is permitted under the terms of the licence; where content is used within the terms of the licence, no legal risk exists for TLF or education systems and sectors; unwitting copyright infringement is minimised due to provision of accessible and clear information to end users; and should any malicious infringement of copyright occur, the TLF and education systems and sectors have mitigated responsibility due to the reasonable extent to which they have secured copyright works and made users aware of their rights and responsibilities.