

LMS CONTENT DEVELOPMENT IN ESP: LEGAL ISSUES

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Abstract: Content-based instruction is an approach in English language teaching where teaching is organized around the content or information that students will acquire, whereas language is a means of acquiring information, rather than an end in itself. The university language teacher has the responsibility to identify not only relevant grammatical or other linguistic aspects but also the content needed and the materials suitable for students' needs. Thus, using authentic materials is beneficial for ESP teachers who are not experts in the study field of the faculty where they teach, because the authentic materials provide a good source of language and the content the teachers need to deliver. However, when a teacher finds useful authentic resources, the copyright issues arise. In this paper we will discuss several legal aspects of content development in ESP within learning management systems at tertiary level (university institutions, colleges, and high schools) with the special emphasis on intellectual property rights.

Keywords: ESP, LMS, eLearning content development, intellectual property right, copyright, citations, quotations, repurposing.

1. INTRODUCTION

Nowadays many universities offer online or distance courses for their students. Sometimes an online course is complementary to traditional classes, sometimes it is the only way of delivering materials needed for a student to pass the exam. The most complex aspect of content delivery and management is by using learning management systems (LMS) by means of which teachers not only deliver and manage the subject content but they also have a wide range of learning analytics options (the measurement, collection, analysis and reporting of data about learners and their contexts, for purposes of understanding and optimizing learning and the environments in which it occurs). In this paper, we will discuss some legal issues concerning teaching materials within the LMS officially provided by a university. All eLearning materials are copyrighted automatically under the law when created (in Serbia it is The Law on Copyright and Related Rights, hereinafter: The Copyright Act). Furthermore, many authors protect their work by putting a copyright notice. Typical copyright notice consists of a copyright statement: the copyright symbol (© or (c)), the word copyright, name of the copyright holder, year in which the work was copyrighted, and the words "all rights reserved".

However, our concern here is not about whether the teacher is protected from unauthorized copying and plagiarism. The questions we would like to discuss here are unauthorized copying and plagiarism in order to create content for English for Specific Purposes (ESP) courses and what an English teacher can do in order to use authentic materials in a permissible way. We will consider the following aspects:

- the development of content using authentic materials: what is permissible, what is not; and
- the authorship of the developed material: the original author, the ESP teacher as an instructional designer, the University where the teacher works, or a third-party.

2. DEVELOPMENT OF CONTENT USING AUTHENTIC MATERIALS

Authentic materials are of vital importance for teaching foreign languages, especially when teaching ESP. In this paper we will refer to the authentic materials in terms of real-life texts, not written for pedagogic purposes and not initially designed for the purpose of teaching, not altered, adapted or simplified as they, in such form, provide exposure to real language. They relate more closely to learners' needs and they support a more creative approach to teaching. These authentic texts are used for language exposure; when it comes to practising key structures, the authentic texts are to some extent adapted for exercises. For the sake of this paper it is enough to say that there are two broad categories of authentic materials beneficial for ESP students, such as text and audio-visual. Nowadays when we talk about audio-visual material, we usually refer to the combination of auditory and visual materials, such as films/movies, animated materials with recorded sound, video recordings, commercials, trailers, interactive training courses, video catalogues, computer games. There are following options where to choose class materials for IT students from:

- Field/subject specific vocabulary lists;
- Corpora: Using corpus linguistics;
- Official sites (Microsoft, Cisco, MicroTik, etc.);
- Newsletters, magazines, (scientific) journals, blogs, fora (IEEE Spectrum, etc.) [1]; and

- Published specialist books.

3. USE OF COPYRIGHTED WORK

As defined in The Practical Law Guide, intellectual property rights (IP rights) are “personal property rights which are designed to encourage the creation and exploitation of inventions, designs and other materials by entitling the owner to prevent their unauthorised use. They enable the owners to generate regular income by using the protected materials themselves or licensing others to do so. They may also raise capital by selling them outright.” [2]

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) lists the rights that fall into the scope of intellectual property rights: copyright and related rights, trademarks, geographical indications, industrial design, patents, layout-designs (topographies) of integrated circuits and undisclosed information (trade secrets). [3]

The focus of this paper will be on copyright and related rights, as other rights could be breached via LMS only under extraordinary conditions.

The Serbian Copyright Act defines the works of authorship “as an author’s original intellectual creation, expressed in a certain form, regardless of its artistic, scientific or some other value, its purpose, size, contents and way of manifestation, as well as the permissibility of public communication of its contents.” [4]. For example, this act enlists books, sketches, paintings, movies and other types of works as those that can be granted the status of copyrighted works. Almost identical provisions exist in all countries of the region. They all envisage that an author (or a copyright holder) has an exclusive right to allow or to forbid to third parties, among others:

- to reproduce;
- to place in circulation;
- to perform;
- to broadcast;
- to publicly communicate; and
- to adapt the work.

A) Consent

As previously stated, the author may allow the use of their work. This consent can be tacit and explicit. The most usual way of explicit consent is a license agreement.

Internet access is widespread and the exchange of works is faster than ever before. Therefore, private initiatives were created in order to make obtain the consents easier, especially when they are given without pecuniary compensation. Special attention should be paid to Creative Commons (CC) licence. CC licences allow for legal use, sharing, repurposing, and remixing as long as the used material is attributed accordingly. There are six licences [5]:

1. Attribution – CC BY: lets others distribute, remix, tweak, and build upon the work cited, even commercially, as long as they credit the author for the original creation.
2. Attribution-ShareAlike – CC BY-SA: lets others remix, tweak, and build upon the work cited, even for commercial purposes, as long as they credit

the author and license their new creations under the identical terms.

3. Attribution-NoDerivs – CC BY-ND: lets others reuse the work for any purpose, including commercially; however, it cannot be shared with others in adapted form, and credit must be provided to the one who reused the original work.
4. Attribution-NonCommercial – CC BY-NC: lets others remix, tweak, and build upon the work cited but non-commercially, and although their new works must also acknowledge the author and be non-commercial, they don’t have to license their derivative works on the same terms.
5. Attribution-NonCommercial-ShareAlike – CC BY-NC-SA: lets others remix, tweak, and build upon the work cited, non-commercially, as long as they credit the author and license their new creations under the identical terms.
6. Attribution-NonCommercial-NoDerivs – CC BY-NC-ND: only allowing others to download someone’s works and share them with others as long as they credit the author, but they can’t change them in any way or use them commercially.

B) Consent-free

The consent rule is followed by exceptions envisaged in the Copyright Act. These exceptions can be divided into two groups:

- Those where the above-mentioned actions can be done without consent and without paying the royalty fee (Articles 42 – 54v); and
- “Statutory licence” (Articles 55-57). The consent does not have to be obtained, but the royalty has to be paid.

As it can be seen in both cases, the consent can be avoided, but the difference is to be found in terms of royalties.

a) Absolutely Free

The first set of exceptions is related to the use where royalty does not have to be paid. For our case study the relevant is the one set within:

Article 49

Short excerpts of a work of authorship, or individual short copyright protected works, may be reproduced or be communicated to the public (right of quotation), without the author’s permission and without paying remuneration, on the following conditions:

- 1) *The work has been disclosed;*
- 2) *The mentioned parts or short works, are integrated into another work without alterations, for the sake of illustration, confirmation or reference, with a clear indication that a reference is involved and in compliance with the fair practices; and*
- 3) *The name of the quoted author, the title of the quoted work and when and where the quoted work was disclosed or published are noted in a suitable place, if those data are known.*

For instance, in case of LMS used for teaching English for specific purposes, short stories, magazine articles or several paragraphs of a novel can be used in order to illustrate how specialist language is used in different types of publications.

b) Statutory Licence

On the other hand, there are exceptions that exclude the obligation to obtain the author's consent for the use of the work, but with the obligation to pay the royalty.

These rules are set in the following provision:

Article 55

(1) Without the permission of the author, and with the obligation of paying the remuneration for copyright, it is allowed, in the form of a collection (database) intended for tuition, examination or scientific research, to copy on the paper or similar carrier, by photocopying or some other form of photographic or similar technology which gives similar results, the parts of the published copyright-protected works, individual short published copyright-protected works in the field of science, literature and music or individual published copyright-protected works in the field of photography, architecture, applied arts, industrial and graphic design and cartography if it concerns published works of several different authors, unless the author explicitly prohibits that.

(2) Provision of Paragraph 1 of this Article shall not apply to sheet music.

As can be seen, these provisions also cover works in different fields, and they also cover both short and parts of longer works.

The main difference between the norms of Article 49 (citations) and Article 55 (Statutory License) is that the second relates to the "collection" of works intended for tuition. The background of this separate provision is a matter of practicality. If an author is making a collection or compilation of works, it is rather hard to obtain multiple individual consents and to negotiate individual royalty fees. Therefore, the obligation to obtain consent is lifted in the situation where multiple authors of different individual works are involved.

However, the main focus is still on the word "collection" which includes collections of poems and stories, albums, etc. where they are not followed by any specific additional work of the author of such compilation, except structuring them into a coherent collection.

An LMS designed for English language learning and instruction is not a mere collection of works, but it is a work mainly comprised of language lessons, with examples, followed by substantial commentary and explanations. The copyright-protected works are deeply integrated into the final work. Therefore, in our opinion, in most cases, the English language LMS's use of other copyrighted works or their parts can be subsumed under the quotation rules. This is in line with the viewpoint of Mr Vladimir Maric, director of the Serbian Intellectual Property Office, stating that the quotation always has to be integrated into the new work of art. [6]

Some learning management systems, such as LAMS at Belgrade Metropolitan University, allow sharing learning objects among teachers. A learning object (LO) is "any digital resource that can be reused to support learning with at least three internal and editable components: content, learning activities and elements of context. The learning objects must have an external structure of information to facilitate their identification, storage and retrieval: the metadata. [7] The basic idea behind LO is reusability, which, broadly speaking, means – sharing with others, as well. Some possible problems include the situation when individual teachers share resources with colleagues they are almost never cited or attributed accordingly.

The corrective rule that also has to be considered is the one set within the provision of Article 41 (Par. 2) of the Serbian Copyright Act:

In each specific case, the scope of limitation of exclusive rights may not conflict with fair exploitation of the work nor may unreasonably prejudice the legitimate interests of the author.

This provision gives additional instructions that the standard of fair use has to be followed in the assessment of proper application of the citation clause. Therefore, for example, if the copyright-protected work is used excessively and it represents more than 60% of the final work than such use would not be considered as suitable to be subsumed under this clause, due to the standard of fairness. The percentage given above is provided as an example, and there are no strict legal rules that would give the exact limit.

4. EDUCATIONAL PURPOSES

Special exceptions are envisaged for educational purposes. However, the Copyright Act has quite limited wording, in comparison to the corresponding exception at the EU level.

a) Serbia

The Serbian Copyright Act provides an additional exception for the free use of copyright-protected work. Article 44 prescribes that the consent and royalty are not necessary when the published work of art is used for non-commercial purposes. The full wording is rather vague but implies that:

- Only "direct" use at the physical class is possible,
- Use at physical schools' events; or
- Via digital means, but only within the premises of the educational establishment.

Furthermore, we are of the opinion that the courts in Serbia would interpret "non-commercial purposes" in such a way that only publicly owned educational establishments, i.e. state schools can refer to this exception.

Therefore, the right to quote is a more suitable option for the practical issues' creators of LMS within Serbia.

b) EU

The old EU legislation was unclear on the scope of exceptions or limitations as they apply to digital uses. In addition, there was a lack of clarity as to whether those exceptions or limitations would apply where teaching is provided online and at a distance. The European Union and

professional audience realised that developments in information and communication technologies had created various new educational tools. These include Virtual Learning Environments. They also noted that the existing exceptions for educational establishments had been crafted at a time when such tools were not available and when the Internet was in its infancy [7].

The Directive on Copyright in the Digital Single Market [8] addressed this issue and now allows free use of work of arts for educational purposes. The exception or limitation provided in the Directive on Copyright in the Digital Single Market should apply only to the extent that the uses are justified by the non-commercial purpose of the particular teaching activity. The organisational structure and the means of funding of an educational establishment should not be the decisive factors in determining whether the activity is non-commercial in nature. It is important that the use takes place under the responsibility of an educational establishment, on its premises or at other venues, or through a secure electronic environment accessible only by the educational establishment's pupils or students and teaching staff. Of course, the indication of the source, including the author's name, unless this turns out to be impossible.

These provisions have to be implemented into the national laws within the following two years. The positive impact of these changes to the Serbian legal system is indirect. Serbia will have to harmonise its legislation as well. Meanwhile, even before the harmonisation, under the Stabilisation and Association Agreement (Article 75), Serbian courts can use the wording of the Directive on Copyright in the Digital Single Market to interpret the provisions of Article 44 of the Copyright Act in a broader manner than they would typically do. This especially applies to the interpretation of the scope of non-commercial purposes.

5. RELATED RIGHTS

The Copyright Act regulates the rights that are related to the copyright itself. Those rights are the right of performers (e.g. singers), phonogram producers (CD), movie producers, broadcast producers and database producers. All of these rights are envisaged in Articles 111-149. Everything that was said for the copyright itself is applicable for the related rights under the explicit provision of Article 144. This means that if a short voice recording of a person reading a copyrighted text, would be also considered as citation, if the name of the person reading the text is properly noted.

6. RIGHTS AFTER THE COMPLETION OF THE WORK

As stated in the introduction, after the new work (LMS) is created, with all the incorporated parts of the works of other authors, the creators of LMS are granted rights immediately after the creation of the work. That is envisaged by Article 8 of the Copyright Act.

If the work is created during the employment, the employer has all commercial rights lasting five years after the

moment of the creation of the right. This period can be even longer if it is especially envisaged by a contract or employer's internal bylaws. Author's moral rights remain intact even in this case. These rules are set within the Article 98 of the same piece of legislation.

CONCLUSION

To develop students' four language skills sometimes textual sometimes audio-visual materials can be used for teaching. There are different sources available in English, where the most common are: published specialist books, corpora, official sites, newsletters, magazines, (scientific) journals, blogs, fora. Nevertheless, for the authentic materials to be used effectively, they must be chosen with respect not only to didactic and methodological aspects but also to intellectual property rights. The authors, i.e. the teachers preparing the teaching material for their students have to both observe the IP rights of others and protect their own IP rights (when the textbook or study material has been completed). As a general rule and legally, intellectual property produced in the course of employment belongs to the employer. On the other hand, traditionally, for example, individual members of academic staff in higher education have controlled the IP in their publications. It is therefore vital that developers, practitioners, instructional designers of eLearning content have a clear idea and understanding of what is permissible with the product of their labours and what is impermissible. [8]: generally speaking, it is permissible to copy and redistribute the material in any medium or format, repurpose it, and build upon the material for educational and non-commercial purposes only, always giving appropriate credit to the original author of the content.

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