



Intellectual property created by teachers

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Introduction

The term "intellectual property" generally refers to a range of legal rights resulting from creative activity. In particular, it includes the rights known as "copyright", "trademarks", "patents", "designs" and "moral rights".

Intellectual property law is of increasing significance to teachers, as it is common for teachers to create in, or in some way related to, their occupation, material of such originality as to attract some degree of legal protection.

These laws are complex, and the range of circumstances which may arise is vast. Accordingly, this brochure can only indicate in very general terms some of the major issues. The most fundamental point of all is that experience has shown that many teachers seek legal advice too late, that is, after they have invested much time and effort only to discover that there may be a real dispute as to whether the intellectual property rights are owned by them or by their employer, the Department of Education.

Commercialisation of teaching resources

In general, teaching materials prepared by a teacher in the course of their work for Education Queensland (EQ) belong to EQ.

EQ engages teachers not just to present lessons, but also to prepare material based on the curriculum as the basis of these lessons. Teachers are not free to use those materials outside of their employment with EQ. This includes teaching resources prepared specifically for a class as well as resources prepared for another purpose, but used in presenting classes.

While the teacher is free to take the material from one school to another and share it with other EQ teachers, EQ can recover from teachers any profits made from publishing materials they

prepare or use as part of their role as an EQ teacher.

Where a teacher has expended money on purchased resources, the teacher retains ownership of those purchased resources unless reimbursement for the cost of the resources was obtained from EQ.

Secondary employment

Concurrent employment in both the public and private sector may give rise to a real or apparent conflict of interest. It is not prohibited to engage in other employment concurrent to employment with the department, but teachers must disclose the full details of such employment.

Staff who are engaged in employment other than their teaching duties must submit a Notification of Other Employment Form to their supervisor or manager.

Before entering into an agreement to create and develop materials for another employer or company, staff must also request permission from their HR line manager.

You must ensure that the ability to fulfill duties with your primary employment is not adversely affected and that the integrity of the department is not compromised. You must also ensure that you do not use your position as a public official, or public resources, facilities or intellectual property, to advise, promote or benefit your private interests, either financially or in kind.

Employees must not engage another employee or allow themselves to be separately engaged by the department to provide goods or services that they could reasonably be expected to provide as part of their standard paid employment.

Copyright Act

The *Copyright Act 1968* (Cth) regulates legal rights arising out of the creation of literary,

dramatic, musical or artistic works. These terms are very widely defined and explicitly include computer programs.

Many works which would not colloquially be considered either literary or dramatic or artistic will fall within the wide definitions of those terms as used in intellectual property law. For example, a safety manual would almost certainly fall within the concept of literary work.

On the question of ownership, the *Copyright Act* (section 35(2)) provides that, subject to the terms of the section:

"...the author of a literary, dramatic, musical or artistic work is the owner of any copyright subsisting in the work by virtue of this Part."

Copyright is, generally speaking, a bundle of rights, eg the right to reproduce the work or part of it, the right to license it, the right to exploit it for related purposes.

In relation to the rights of employees, there are special provisions, for example, where the author of a work does so "under the terms of his or her employment by the proprietor, magazine or similar periodical under a contract of service or apprenticeship and it is so made for the purpose of inclusion" in such a document.

The principal provision, however, is section 35(6), which reads as follows:

"Where a literary, dramatic or artistic work to which neither of the last two preceding subsections applies, or a musical work, is made by the author in pursuance of the terms of his or her employment by another person under a contract of service or apprenticeship, that other person is the owner of any copyright subsisting in the work by virtue of this Part." (This is subject to agreement to the contrary).

The critical words here are "in pursuance of the terms of his or her employment". The most significant criterion in determining whether a work is made in pursuance of the terms of employment is the duties of that person. In the case of professional employment, duties are often widely described and may be performed at a range of times and places outside normal working hours and away from the workplace. It is not so much when and where which determines the rights, but the nature of the duties.

It is common for there to be disputes between employers and employees about this matter. Even where both parties are motivated by good faith, genuine differences can arise. Accordingly, the importance of clarifying the position at an early date, particularly where the employee is the weaker party in terms of resources, is paramount.

If you are concerned about these matters, you should seek advice as soon as possible. It is quite possible for a submission to be made (although it should be carefully and thoroughly prepared) to seek a decision from the Department of Education. While ultimately the determination of the issue is a legal one, it can be of considerable practical assistance to know at an early date what the view of the department is on the question of ownership.

Moral rights

Even where the employer owns the intellectual property rights, the law does confer some rights on employees, known as "moral rights". These include:

- the right of integrity: the right not to have the work subjected to derogatory treatment, that is, anything done in relation to a work which is prejudicial to the author's honour and reputation
- the right of attribution: the right to be identified as the author whenever an attributable act occurs, that is, the work is reproduced, published, performed, communicated, exhibited, copied or an adaptation is made
- the right not to have authorship falsely attributed, which is the right to prevent:
 - insertion of the author's name in a way that falsely implies he or she is the author of a work
 - dealing with an altered work as if it were the unaltered work of the author.

You can be asked by your employer to waive your moral rights.

Conflict of interest

Section 89 of the *Criminal Code Act 1899* (Qld) provides it is an offence punishable by three years imprisonment for a public servant to contract with the department in which they are employed. This means that you would commit an offence if you entered into a contract with a school, TAFE or even an agency of the department on behalf of a private business interest. This provision significantly limits your ability to sell products to schools or associated agencies and, if breached, has very damaging consequences.

Apart from the question of ownership, you also need to consider whether any conduct you are proposing involves an apparent or actual conflict of interest.

This matter is governed by principle 1 of the Code of Conduct, entitled "Integrity and impartiality". Teachers should read that document, particularly section 1.2, very carefully.

Generally speaking, a conflict of interest arises when your private interests conflict with your public duties.

The issue is particularly critical if you derive some benefit from your employment over and above normal salary and other employment benefits.

Activities which may constitute breaches of the code of conduct include:

- the giving or receiving of a gift
- carrying on a business in direct competition with the employer
- establishing a business to provide the Department of Education with goods or services
- improperly exploiting the department contacts for private benefit.

While you have important rights, including the right to conduct remunerative activities away from your employment, involvement in such activities almost inevitably raises important issues for consideration. Advice should be sought before, not after, the event. As with the question of ownership of copyright, this is an area where sooner is much better than later, and safer is much better than sorry.

Conclusion

These principles are of particular importance to teachers in view of the increasing trend for teachers to seek to commercialise their intellectual property, and the high standards now imposed under public sector integrity laws.

If you are interested in this matter, you should also read “Intellectual Property and Copyright Use” on the department policy register.