RECENT DEVELOPMENTS IN COPYRIGHT LAW AND WHAT THEY MEAN FOR YOU

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Visiting Professor in LLS

LLS Conference, 5 July 2016
REMINDER OF THE BASICS
WHO IS THE OWNER?

Interesting question regarding who owns © in an employee-created work. It will normally be the employer when the work has been created as part of employee duties, or where the employer’s explicit policy is to claim ownership of everything created by employees.

How does this apply to teaching materials created by a University employee? Arguably they ARE required to create them, so the University owns the © in them.

What about research outputs? Does the University own the ©? Why then does it leave it to you to assign © to (say) a journal publisher? Is it waiving © ownership, or just the handling of ©?
The first owner of copyright (an individual, or their employer) can *choose* to assign (pass over ownership). Typically with journal articles, the © ownership is assigned to the publisher.

An alternative is *licensing*, where the original owner retains ownership, but grants permission to the third party (say a publisher) to reproduce the item. Licences can be exclusive, sole or non-exclusive.

Also Creative Commons licences – more on them later
WHAT IS COPYRIGHT?

Q. What tests must a work pass to enjoy copyright?

A. For a work to be subject to copyright, it must be original (i.e., not copied from something else), ‘fixed’, and show some minimum skill/judgement by the creator(s).
WHY CONSIDER TYPES OF COPYRIGHT WORK?

- Different durations
- Some differences in rights
- Different owners within mixed media content
- Different licences
- Some exceptions are specific to a particular type of work
COPYRIGHT WORKS (1)

- Literary
- Artistic
- Musical
- Dramatic
- Broadcast
- Sound Recording
- Film
COPYRIGHT WORKS (2)

Æ Typography
PD Public Domain
Database
Moral Rights
Performance
Non-Qualifying
RESTRICTED ACTS

These are the acts that are restricted to the copyright owner only.

If someone carries out a restricted act without the permission of the copyright owner (e.g., a licence, to be covered in more detail later), or as permitted in law (I cover exceptions later), they are said to have INFRINGED the copyright.

The copyright owner can then sue for damages in a civil court case; in a few circumstances, infringement can lead to criminal penalties.

NB The terms “piracy”, and “theft” are often used. The former is perjorative but is in common parlance for large-scale infringement. The latter is inaccurate in law and should be avoided!
COPYRIGHT USAGES – RESTRICTED ACTS

- Copying
- Issuing copies to the public
- Renting or lending to the public
- Performing, showing or playing in public
- Communication to the public, e.g., placing on a Web site
- Adaptation
THE ‘PUBLIC”

Note that this can include a small sub-set of the public, e.g., a group of students, or you lot!
WHAT IS A LICENCE?

NORMALLY, WRITTEN PERMISSION FROM THE © OWNER TO A THIRD PARTY ALLOWING THEM TO DO ONE OR MORE RESTRICTED ACTS

MAY COST MONEY – FOR EXAMPLE, THE VARIOUS E-BOOKS AND E-JOURNAL LICENCES TAKEN OUT BY A LIBRARY

SOME LICENCES MAY BE IMPLIED, FOR EXAMPLE STUFF PUT UP ON SOCIAL MEDIA, BUT CAUTION REQUIRED - DOUBLE CHECK
WHY CONSIDER TYPES OF COPYRIGHT LICENCE?

+ First point of call
  + Can effectively provide zero risk
  + May already have paid for them

– They nearly all involve limitations
  – Not a carte blanche so may need to check wording
  – Relationship with exceptions
COPYRIGHT LICENCES (1)

CLA (Copyright Licensing Agency)

NLA Media Access

ERA (Educational Recording Agency)

Filmbank / MPLC

Library E-resources (often based on JISC’s standard terms)

Creative Commons / Open Licences
COPYRIGHT LICENCES (2)

‘Bespoke’ permission

Website Terms and Conditions

IPO Orphan Works Licensing Scheme (discussed later)

You made it yourself

You work for / in collaboration with rights holder
EXCEPTIONS

THIS IS WHERE THERE HAVE BEEN SOME IMPORTANT RECENT CHANGES TO THE LAW
FAIR DEALING

Determines whether usage is lawful or infringing based on how a ‘fair minded and honest person’ would deal with the work.

- Does using the work affect the market for the original work? Does it affect or substitute for the normal exploitation of the work.

- Is the amount of the work taken reasonable and appropriate? Was it necessary to use the amount taken?

- N.B., rules like “one chapter from a book, or 5% of a total work is OK” generally have no legal basis. Only a Court can decide if usage was fair or not.
RESEARCH AND PRIVATE STUDY – S.29

Allows individuals to make normally a single copy of limited extracts of copyright works for non-commercial research or private study. No contractual override.

BECORE 1 JUNE 2014

- Non-commercial
- Literary, dramatic, musical and artistic works only
- Contractual terms can override exception

AFTER 1 JUNE 2014

- Non-commercial
- All copyright works, including sound recordings and films
- No override by contract
TEXT AND DATA MINING – S.29A

- New exception, allows copying and downloading of large volumes of text or data for analytical purposes
- Use of algorithms to determine trends/relationships
- Non-commercial use
- Requires legitimate subscription/access to text/data
- No contractual overrides, but © owner may impose technical limitations (e.g., “you must use my API”, or “don’t download more than 1000 items a day”) if it can argue other use will adversely affect their systems. Grey area, may lead to a Court case sooner or later
- At present, UK only. EU is considering introducing a Directive to permit this in other countries.
QUOTATION (CRITICISM AND REVIEW) – S.30

Allows ‘fair dealing’ usage of quotations for any purposes including ‘criticism and review’. No contractual override.

BEFORE 1 OCTOBER 2014

“”Criticism & review does not cover ‘illustrative’ use
“”Works must already have been made publicly available

AFTER 1 OCTOBER 2014

“”Widened to cover any reasonable quotation, legitimising academic practice
“”Must have been made publicly available
# Copying for Disabled Users – S.31 A & B

Allows copying to provide equal access to copyright works for users with any type of physical or mental disability. On either an individual (S.31A) or institutional (S31.B) basis. **No contractual override.**

<table>
<thead>
<tr>
<th>Before 1 June 2014</th>
<th>After 1 June 2014</th>
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</thead>
<tbody>
<tr>
<td>☐ Restricted to people with visual impairments only</td>
<td>☐ Widened to all impairments which prevent equal access</td>
</tr>
<tr>
<td>☐ Literary, dramatic, musical or artistic work</td>
<td>☐ All types of copyright work</td>
</tr>
<tr>
<td>☐ Contractual override</td>
<td>☐ No contractual override</td>
</tr>
<tr>
<td>☐ Doesn’t address DRM/TPM measures</td>
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**Updated**
ILLUSTRATION FOR INSTRUCTION – S.32

Allows limited, non-commercial ‘fair dealing’ use of copyright material for the purposes of teaching. No contractual override.

BEFORE 1 JUNE 2014

❖ Non-reprographic copying of literary, dramatic, musical and artistic works only
❖ Wide examination exception (not music)
❖ No sound recording/film exception
❖ Acknowledgement required if practical

AFTER 1 JUNE 2014

❖ Must be fair dealing
❖ Copying can be reprographic
❖ Examination exception narrowed? ☹
❖ Covers all copyright works including sound recordings, films and broadcasts
❖ Acknowledgement required if practical
**RECORDING OF BROADCASTS – S.35**

Allows recording of off-air broadcasts by or on behalf of educational establishments for **non-commercial** purposes. Only applies where no licensing scheme (i.e., ERA) available.

<table>
<thead>
<tr>
<th><strong>BEFORE 1 JUNE 2014</strong></th>
<th><strong>AFTER 1 JUNE 2014</strong></th>
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<tbody>
<tr>
<td>📡 Non-commercial educational use</td>
<td>📡 Non-commercial educational use</td>
</tr>
<tr>
<td>📡 ‘Communication to the public’ premises limitation</td>
<td>📡 ‘Communication to the public’ off premises via secure electronic network</td>
</tr>
<tr>
<td>📡 Dove-tails with ERA licence</td>
<td>📡 Dove-tails with ERA licence</td>
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EDUCATIONAL COPYING AND USE OF PUBLISHED EXTRACTS - S.36

Allows copying and use of multiple copies of extracts from published copyright works. Only applies where no licensing scheme (i.e., CLA) available.

BEFORE 1 JUNE 2014

- Non-commercial
- ≤1% per work, per quarter, per institution
- Covers typographical arrangement
- Dove-tails with CLA licence
- Very limited use

AFTER 1 JUNE 2014

- Non-commercial
- ≤5% per work, per year, per institution
- Includes incorporated works (e.g., illustrations)
- Dove-tails with CLA licence
- Still of limited use
New exception

Relates to a publicly accessible library, educational establishment, museum or archive

Allows collection items to be digitised and viewed on site through ‘dedicated terminals’

Works must have been lawfully acquired

For research or private study

Access must be compliant with licensing terms if they exist
LIBRARY COPYING FOR OTHER LIBRARIES – S.41

Allows supply of copies of the whole or part of any published work from one library to another. **No contractual override.**

**BEFORE 1 JUNE 2014**

- Supply of a journal article or whole or part of literary, dramatic or musical work
- Includes illustrations in context
- Contractual override

**AFTER 1 JUNE 2014**

- Supply of journal article or whole or part of any published work
- Will include sound recordings, films and broadcasts
- No contractual override
# PRESERVATION – S.42

Allows libraries, archives and museums to make copies of items in their permanent collection. **No contractual override.**

## BEFORE 1 JUNE 2014

- Single copy of item in permanent collection
- Literary, dramatic or musical work
- Includes illustrations and typographical arrangement
- Contractual override

## AFTER 1 JUNE 2014

- Copy an item in permanent collection
- All types of copyright work including sound recordings, films and broadcasts
- Items not publicly accessible or available on loan
- No contractual override
**LIBRARY COPYING FOR PATRONS – S.42A**

Allows libraries to make a single copy of reasonable proportion of copyright works for their patrons, or for patrons of a different library, for non-commercial research or private study.

<table>
<thead>
<tr>
<th>BEFORE 1 JUNE 2014</th>
<th>AFTER 1 JUNE 2014</th>
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<tbody>
<tr>
<td>‘Prescribed’ libraries</td>
<td>Not-for-profit library</td>
</tr>
<tr>
<td>Non-commercial research or private study</td>
<td>Non-commercial research or private study</td>
</tr>
<tr>
<td>Article in a periodical or part of literary, dramatic or musical work</td>
<td>Reasonable proportion of any copyright work</td>
</tr>
<tr>
<td>Declaration form</td>
<td>Declaration still required but not through set form</td>
</tr>
<tr>
<td>Patron must pay cost of supply</td>
<td>Patron does not have to pay cost of supply</td>
</tr>
<tr>
<td>Contractual override</td>
<td>No contractual override</td>
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</table>
## LIBRARY COPYING OF UNPUBLISHED WORKS – S.43

Allows librarians to make a single copy of whole or a part of an unpublished work for their patrons for non-commercial research and private study.

<table>
<thead>
<tr>
<th>BEFORE 1 JUNE 2014</th>
<th>AFTER 1 JUNE 2014</th>
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</thead>
<tbody>
<tr>
<td>Literary, dramatic or musical works only</td>
<td>All types of copyright work</td>
</tr>
<tr>
<td>Copyright holder must not have prohibited copying</td>
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</tr>
<tr>
<td>Single copies only may be provided</td>
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</tr>
</tbody>
</table>

BEFORE 1 JUNE 2014

- Literary, dramatic or musical works only
- Copyright holder must not have prohibited copying
- Single copies only may be provided

AFTER 1 JUNE 2014

- All types of copyright work
- Copyright holder must not have prohibited copying
- Single copies only may be provided
ORPHAN WORKS EXCEPTION

- Orphan Works = works where the rights holder is unknown or untraceable.
- Previously required a ‘risk-managed’ approach. Now:
  - UK Orphan works Licensing Scheme
  - EU Orphan Works Directive 2012/28/EU
- Implemented in the UK on 29 October 2014
ORPHAN WORKS

UK LICENSING SCHEME

- Covers all types of Orphan Work (including photographs)
- Commercial and non-commercial use
- Anyone can take a licence out – though few have done so; complaints about expense
- Requirement for reasonable searches
- Operated by the IPO
- 7 year licence term / UK only

ORPHAN WORKS EXCEPTION

- Covers all text and audio visual works (but not artistic unless embedded)
- Non-commercial use
- Applies to cultural and educational organisations
- Reasonable searches recorded on a database
- No geographical restriction or time limit
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Amendments to the slides have been made by me! (Charles.Oppenheim@northampton.ac.uk)

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TIME FOR Q & A?