

# Clearing a Path through the Copyright Jungle

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In the last issue, **Professor John Kay FBA** reported on a British Academy review of the impact that copyright has on research in the humanities and social sciences. Here he brings us up to date with an important collaboration with the Publishers Association which is designed to clarify the legal complexities for authors and publishers.

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THE RESEARCH COMMUNITY has a love hate relationship with publishers. Publication is central to research, but publication is necessarily a commercial activity. And whenever scholarship and business interact, the scholars suspect that the business people do not give sufficient recognition to scholarly values and the business people feel that academics fail to recognise commercial realities. Tension is inevitable, perhaps even productive: but not when, as too often, it spills over into suspicion and mistrust.

The complex and uncertain area of copyright illustrates many of these problems. As creators of copyright material, academic authors have expected publishers to defend copyrights on their behalf: as users of copyright material, academic authors are often resentful when publishers adopt this defensive stand. But several months of discussion between the British Academy and the Publishers Association have achieved a constructive outcome.

A new set of guidelines agreed between the British Academy and the Publishers Association clarifies the issues involved in copyright. The agreement identifies the common interest of authors and publishers in ensuring both that copyrights are protected and that the continuing process of scholarship can, in Newton's famous words, see further by standing on the shoulders of the giants who have gone before.

Copyright seeks to protect the rights of authorship while securing the dissemination of knowledge. It protects the form of

expression of ideas, but not the ideas, information or concepts expressed and applies to all original literary works (including computer programs and databases). The sectors in which copyright is important include some of the fastest growing sectors of the UK economy, such as publishing, music, film, and computer games. These and similar creative industries account for almost 10% of UK GDP.

As the UK's national voice for the humanities and social sciences, the British Academy is uniquely placed to consider this problematic issue. Its Fellows and thousands of researchers holding Academy grants are both users and producers of original copyright work, so the Academy is committed both to the creation of new intellectual property and to the defence of existing intellectual property.

This dual role is reflected in Academy reports which have drawn upon the experience of Fellows and other researchers. *Copyright and Research in the Humanities and Social Sciences* (2006) examined the role of copyright exemptions and their effect on scholarship.

Recent developments in technology, legislation and practice have meant that the specific exemptions, which are provided by copyright to enable scholarly work to advance, are not in some cases achieving their intended purpose. The Academy's enquiries found that copyright exceptions were increasingly being narrowly interpreted both by rights holders and by publishers of new works, and that these impediments to scholarship were stifling the creation of new original works.

The legal grounds for such claims to copyright protection is often weak, since the law provides that the use of copyright material for purposes of private study and non commercial research and in criticism and review is permitted, without any requirement to obtain consent, so long as the use represents fair dealing. But there is an

absence of case law because the financial stakes involved in each individual case are small relative to the costs of litigation. As a consequence, the copyright system is in important respects impeding, rather than stimulating, the production of new ideas and new scholarly material in the humanities and social sciences.

## The Gowers Review

In response to these concerns, the British Academy made a series of strong recommendations to the Gowers Review, set up by the Government in 2005 to address concerns that the UK's intellectual property regime was not keeping pace with changes resulting from globalisation and technological developments. The Academy was pleased that the final report of the Gowers Review recognised that the UK copyright system should be more flexible in its application, and that it endorsed the principle 'that "fair uses" of copyright can create economic value without damaging the interests of copyright owners'.

The Gowers Report also favoured a broad 'fair use' exemption for copyright, as applies in the United States. The British Academy welcomes this proposal, but continues to believe that clarification is required, by legislation if necessary, of the scope of exemptions to ensure their continued effectiveness in securing their intended purposes.

It became clear from the Academy's activity in this area that both authors and publishers were uncertain as to the true position in many copyright cases. In particular, many problems originated in narrow interpretations of 'fair dealing' exemptions – both by rights-holders and by publishers of new works which referred to existing copyright material – and also in the actions of risk-averse publishers, demanding that unnecessary permissions be obtained, and such permissions might then be refused or granted on unreasonable terms.

In order to bring together the perspectives of both research and publishing, the British Academy and the Publishers Association have collaborated to produce *Joint Guidelines on Copyright and Academic Research*. These guidelines provide a unique and authoritative guide to the application of copyright in current issues involving literary works, and will be invaluable for researchers, authors, publishers and other relevant rights-holders. Reflecting current UK law, it is hoped that the guidelines will clarify the current situation and will have considerable moral force in the event of dispute.

The guidelines detail the current situation, providing an overview of the material protected by copyright law, guidance regarding the term of protection for different types of material, and questions of ownership. They address the lack of clarity about the nature and scope of the moral and economic aspects of copyright and the confusion between the two, and they also consider the way the law works in common situations, such as databases, editorial work and unpublished correspondence. A comprehensive section on 'fair dealing' exemptions provides important information on how these exemptions affect non-commercial research and private study, and the interpretation of fair dealing exemptions for the purposes of criticism and review. The advice is supported throughout by case study examples.

### 'Orphan works'

One of the key areas of interest to both researchers and publishers is the 'orphan work' – works either by authors whose date of death is unknown, and/or of which the rights holders cannot be traced. In January 2008 the Academy opposed a proposal from the House of Commons Innovation, Universities and Skills Committee that the Copyright Tribunal should become responsible for granting licences for the use of 'orphan works'. The proposal fails to appreciate that the typical

orphan work had lain unread for many years: the majority of copyright material ceases to have commercial value within a few years of publication.

Scholars are frequently left in difficulty about the steps needed to comply with requirements regarding orphan works. Publishers, who usually handle permissions requests on behalf of their authors and so need to protect the author's right to reasonable remuneration for the use of their work, also may find themselves using orphan works in publishing anthologies or reference works. In practice the problems are often addressed by demonstrating that 'reasonable' efforts have been made to trace the rights holders, or to trace the heirs of a deceased author. In UK law, however, there is statutory protection for such efforts only in relation to anonymous and pseudonymous works, and not with regard to works where it is simply the case either that the present holder of the copyright cannot be traced or the date of the author's death is uncertain.

These new guidelines offer clear and practical steps for authors and publishers to follow when ascertaining an author's identity, seeking reasonable grounds for assuming copyright has expired, making clear acknowledgements, and preparing for remuneration conditions. This advice is supported by the following example, one of a number of useful case studies that have been included.

*A poem is completed in manuscript in 1940, the author remaining anonymous or using a pseudonym but dating the work and making clear that he is a soldier facing the prospect of active service. The author is killed in action at El Alamein in 1942 but the fact that he wrote poetry or poems is not generally known. The manuscript of the poem is recovered from among debris on the battlefield and deposited with much other similar material in the Imperial War Museum. The copyright in the*

*poem will expire on 31 December 2039. However if in 2013 a would-be user (e.g. an editor or publisher wishing to include the poem in an anthology of war poetry) can show reasonable grounds for supposing that the author died before 1943 (here this might be the provenance of the manuscript), the reproduction in the anthology will not be an infringement of the copyright expiring in 2039. If further scholarship (or indeed serendipity or chance) identifies the author before the end of 2039, then publication before the end of 2012 will need a licence from whoever is now the rightsholder; but not from 1 January 2013 on, seventy years after the death of the author.*

The *Joint Guidelines on Copyright and Academic Research*, which were launched at the Academy on 30 April 2008, can be obtained from the British Academy or the Publishers Association. The British Academy will be developing the guidelines in the future to cover other copyright works such as artistic and musical works in order to provide continuing support and protection of the interests of both academics and publishers.

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The following statements and reports issued by the British Academy on copyright in 2008 can be found via [www.britac.ac.uk/reports/](http://www.britac.ac.uk/reports/)

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*The work and operation of the Copyright Tribunal: A response to the inquiry by the House of Commons Innovation, Universities and Skills Committee (January 2008)*

*Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions: The British Academy Submission to the UKIPO Consultation (April 2008)*

*Joint Guidelines on Copyright and Academic Research: Guidelines for researchers and publishers in the Humanities and Social Sciences (Published jointly by the British Academy and the Publishers Association, April 2008)*

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The British Academy places high priority on the informed and independent contributions it makes to policy debates that are significant for the humanities and social sciences. These contributions seek to promote nationally and internationally the interests of the humanities and social sciences, and often influence key policy debates on issues of significance to these disciplines. More information about the Academy's work in this area can be found at [www.britac.ac.uk/reports/](http://www.britac.ac.uk/reports/)