

CURRENT INTERESTS

Law Librarians as Copyright Specialists: the Perfect Match?

Abstract: This article, written by Kate Faulkner and Wendy Lynwood, considers the skills of law librarians and shows how they can assist those who also hold a copyright specialist role. Most librarians encounter some aspects of copyright within their role. However, the understanding that law librarians have with regard to law, legal research capabilities, teaching and liaison skills equips them to take on copyright, sometimes in addition to their law library role, or to move into a full-time copyright specialist role.

Keywords: copyright; law librarians; legal information professionals; academic law libraries; skills

INTRODUCTION

Copyright occasionally grabs the headlines; in the late 1990s the emergence of Napster led to a high profile court case¹. Almost a decade later, the National Portrait Gallery objected to out of copyright images it had digitised being made freely available on Wikipedia² and more recently Ed Sheeran was alleged to have copied a particular refrain from an earlier work – the court found in his favour.³ However, most of the time copyright operates 'behind the scenes', with the Copyright, Designs and Patents Act 1988 (CDPA) responsible for balancing the rights of copyright holders and those wishing to use in-copyright works. It is a lengthy piece of legislation, and the sections which cover permitted acts, or exceptions, are worded in such a way that they are open to interpretation. Those working in universities are not immune to the uncertainty which accompanies copyright, with many aspects of institutions' day-to-day activities impacted by this area of the law.

COPYRIGHT AND UNIVERSITIES

Copyright pervades key areas of a university's operations. In relation to teaching, an academic's use of third-party copyright and what is covered by licensing or exceptions needs to be considered. The use of images and video within lectures, for example, is commonplace. In the course of teaching, staff will also produce works which attract copyright including slides, lecture notes and documents which introduce a key legal concept. The default position in law is that copyright in material created in the course of employment belongs to the employer.⁴ However, increasingly institutional Intellectual Property policies make it clear that academics own copyright in these works, although they may include provisions which mean that the institution can reuse some works under licence for a specified period (see LSE's⁵ and Cambridge University's⁶ Intellectual Property Policies).

Copyright is also a consideration in relation to research, both in the use of other's copyright (3rd party copyright), and in relation to the academic's own copyright. The introduction of a new UK Research and Innovation (UKRI) policy in April 2022⁷ has put copyright in the spotlight, with CC-BY⁸ being the default licence for outputs from UKRI funded research.

For those institutions with archival material, copyright also has to be considered in relation to the digitisation of collections which raises another set of questions. If the copyright holder is unknown, but the work is potentially in copyright, what path should be taken? For unpublished works, where copyright does not expire until 2039 but the work itself was produced at the beginning of the 20th century, can it be made publicly available or not?

APPROACHES TO COPYRIGHT SUPPORT

As the previous section illustrates, navigating copyright can be complex but it is dangerous to avoid or ignore. Universities approach supporting their communities in a number of different ways. For some, the central Legal Team offers copyright advice, in others it falls to a single library team such as those based in Scholarly Communications / Research Support, while others have a copyright and licensing expert, often based in the library. LSE and Cambridge (the employers of the authors of this article) have each taken a different approach.

Cambridge

In 2018 Cambridge University Library decided to set up a Copyright Group that would harness the existing knowledge within the network of libraries at the University of Cambridge (there are over 100 libraries⁹ within the University). In constituting the Copyright

Group (known as CULCG) it was clear that it would best to pull in expertise from the Office of Scholarly Communications, the e-journals team, the Digital Content Unit, Archives, and the faculty libraries where the research and teaching librarians are based.¹⁰ It was further decided that the chair and secretary roles for the committee, and the person managing the CLA Licence, would be filled by staff from the Squire Law Library.

London School of Economics (LSE)

In addition to the Legal Team, LSE previously had a Copyright and Digital Literacy Advisor based in the Learning Technology & Innovation Team. When this post became vacant, it was not immediately filled and so there was no named copyright contact for over three years. During this time the Library lobbied for and took on responsibility for copyright, and initially a cross-section of staff answered queries as they came in. It was recognised that in order to develop the service and provide more consistent support, a role with oversight for copyright was required. At the beginning of 2020 a vacancy for an Academic Support Librarian for Law and Copyright Officer was advertised, with the current post holder starting in June 2020.

LAW LIBRARIANS AND COPYRIGHT, A NATURAL FIT?

Whilst each institution has resourced copyright support differently, both Cambridge and LSE have models where established law librarians have taken a lead in relation to copyright support. This may initially have been with the thought that copyright is law so why not give it to the law librarians? But as the rest of this article will demonstrate, there are other parts of the law librarian's arsenal which make us well suited to copyright work, namely, knowledge of the legal system, experience of liaison and teaching, and the close-knit community in which we operate.

LEGISLATION

As law librarians our day-to-day experience of dealing with legislation means that we are confident in using primary sources. We are adept at understanding how primary legislation is often broad and we know how statutes evolve over time. We are aware that the detail can be found in statutory instruments. We know the difference between 'as printed' versions and up-to-date versions of legislation and can often quickly see which one we are viewing by the format. (King's Printer versions being nicely presented PDFs with the Government's coat of arms at the top, while up-to-date legislation is more likely to be less carefully/formally formatted html text from legislation.gov.uk or Westlaw.)

We can identify at a glance clauses and sections of legislation that have been inserted into legislation. For example, section 29A 'Copies for text and data analysis for non-commercial research' was added by the 2014 statutory instrument - the capital A after the section number denotes that this is an addition. This is a particularly useful skill for legislation that has been in force for over 30 years, as lay users can be quite adamant about the wording of the law, not realising it has since been amended. We also know that it is important to check that a provision was enacted and still in force and we don't take it for granted that it is.

We know from our research enquiries that real-life practice frequently develops through codes of practice and even common convention. Often, what someone thinks is law is actually convention. For example, the one chapter/5% or 10% figures which are commonly cited were initially not in the legislation but were rules-of-thumb developed by librarians (back in the day when photocopiers were the biggest worry!) and have since been adopted by the Copyright Licensing Agency and inserted into section 36 of the CDPA.

Understanding the interplay between legislation and case law also helps us understand how the law evolves.

MOST CASES DON'T GO TO COURT

Within the CDPA there are a number of exceptions which permit the reuse of 'reasonable amounts' of an in-copyright work without the need for the copyright holder's permission; these rely on the concept of fair dealing. Whilst concern is often voiced that relying on exceptions is risky, very few copyright infringement claims end up in court and are often settled before reaching that stage. This lack of case law, whilst reassuring for those of us assisting with queries of 'how much is too much?' when reusing copyright works, also means that we're reliant on our own, our colleagues and our institution's appetite for risk when assisting enquirers wishing to make material available under an exception.

Fortunately, as law librarians we understand how common it is for disputes to be settled outside of court so there is very little public paperwork. Terms of settlements are usually private. Our familiarity with the way the legal system functions means we understand the reasoning behind the necessary risk analysis, reputation risk and the fact that the cost of litigation plays a huge part in decisions.

LAW IS TERRITORIAL

Many of us have had experiences of having a user looking for a case and failing to find it because they are looking in the wrong jurisdiction. Although this is less of an issue now that Lexis and Westlaw (and Google) allow us to search across datasets. However, it does mean that many of us are trained to think early on in our reference interview or research process – which court, which country?

We know from experience how students and new lawyers can be caught out by the fact that the basis of a law is the same in several jurisdictions but the devil is in the detail. Those subtle differences between different countries' laws can create confusion and/or conflict. Most notably, within the world of copyright, it is not unusual for academics and students to talk about fair use (a US doctrine) which is quite different in scope from UK law's principle of fair dealing. As the internet is not territorial, a user may have spent a great deal of time researching copyright and not realised that they were reading about US copyright law.

The understanding of legal jurisdictions helps us grasp the implications of Brexit and what that means in practical terms for legislation and EU case law (how it has gone from binding to interesting). In relation to copyright, we have now lost the Orphan Works exception as a result of operating outside of the EU. This has practical implications when we are considering digitising collections as to whether we can make material available. Whilst the UK does have an Orphan Works licensing scheme, the checks which we need to undertake before applying for the licence are onerous and the licence is time-limited.¹¹

LICENSING

Law librarians' knowledge of the law, and experience of working with material from a variety of legal, regulatory and governmental bodies means that we understand, to a greater degree than those from a non-law setting, the role that licensing is supposed to play in order to create legal certainty. This is connected to the concept of 'agency' (hence the Agency in the CLA), one of many useful points learnt when attending the BIALL Law for Librarians course some years ago. This background knowledge helps us to understand the relative position of legislative exceptions and the CLA Licence. Experience of close reading of statutes also stands us in good stead when navigating the licence. We recognise that whilst the CLA Licence can at times be viewed as an administrative burden, it is an important mechanism for ensuring that rights holders are remunerated for the use of their intellectual property.

LEGAL RESEARCH SKILLS AND ACCESS TO RESOURCES

Unsurprisingly, our legal research skills also prove useful. When searching for particular wording in the legislation (the CDPA is a long act) we know that Westlaw has more functionality than legislation.gov.uk. Someone not working in a law library would not necessarily have access to Westlaw or Lexis or might not be confident with how to search legal databases quickly and accurately. We frequently use Westlaw for searching but then return to legislation.gov.uk for sending hyperlinks to enquirers who are not in the law faculty but in the wider university.

However, it is not just a case of needing to look up the copyright legislation – at Cambridge and LSE we get queries that require knowledge of data protection, legal deposit and disability legislation. There needs to be a little understanding of how it is possible for legislative provisions to conflict, for example between disability regulations and copyright.

Also, as law librarians we know how the law can change and the procedures that show signs of that happening. We preach about the importance of current awareness, and at Cambridge Kate has set up alerts in Westlaw and a more refined case alert ((librar! OR universit! OR college) & SUJ,KW(copyright)) which brought to light the case of *Young v British Library* in 2021¹².

Another bonus of being in a law library is that we are also more likely to have ready access to (or be able to buy in our budget) copyright and intellectual property books.

LIAISON AND TEACHING

Whilst not limited to law librarians, these are aspects of our roles which we feel are useful in the context of copyright support. In a university context, those coming from a scholarly communications background (for example) may not have the existing skill set to the same degree.¹³

Liaison

Our work as law librarians, whether in a university or commercial context, requires us to build long-term relationships with our users to ensure that we can carry out our jobs effectively. As part of this we gain an understanding of where specialist knowledge resides and in which committees decisions which may impact our work are made. Liaison is embedded in many librarians' skills set and often taken for granted. These are skills many librarians hone but perhaps it is particularly the case for law librarians. The need to teach our students specialist legal research skill, often gives us more time with our users than the average librarian.

In a university context, experience of working with academic staff has proved valuable both in relation to building networks across our organisations with those who can assist us with copyright enquiries (at LSE Wendy has called upon the expertise of the Legal Team, and IP academics). It is also essential to get to know those in the institution who can help get the copyright message out (for example, at LSE sessions have been run for members of the Communications Network, and at Cambridge sessions are run with department and college library staff).

Teaching

The need to teach specialist legal research skills has led law librarians to embrace the teaching role for many years. Part of that is understanding your audience so that

messages can be pitched appropriately. This chimes well with copyright as it is best learnt at the correct level according to pre-existing knowledge. For example, telling a new undergraduate about the requirements for PhD theses to be made available on an open access basis is too much information too soon and irrelevant to their current information needs. The copyright messages need to be tailored so that they are relevant. The best format needs to be considered (in person or online, synchronous or asynchronous). A first-year undergraduate would need to know different aspects of copyright from those required by a lecturer, a trainee solicitor or a clerk.

COMMUNITY

Twenty-first century copyright issues involve risk analysis, balance and weighing up evidence - there are rarely straight-forward answers. Building on existing knowledge and engaging in a community of practice is essential. Being part of the conversation in the academic arena in relation to copyright makes it possible to provide guidance to users when asked.

Thanks to BIALL and CLIG we are already a very organised group and used to training each other, sharing resources and asking questions on the Jiscmail list LIS-Law and the BIALL members email list. The culture of legal information professionals supporting each other,

means that we appreciate the importance of, and are attuned to, the idea of the copyright community, the hive mind and are happy to utilise LIS-Copyseek, the copyright literacy webinars and so on.

CONCLUSION

All librarians have a mix of skills that are well suited for copyright work, but experience of dealing with legal information gives law librarians extra tools that help us grapple with modern copyright issues and queries. Our experience of relationship building with the departments we liaise with and provide training for also equips us with the knowledge and skills needed to raise awareness of the importance of copyright across our communities, improving our users' confidence in this key area.

Our experience of working with copyright demonstrates that it is also best when copyright issues are not tackled alone. This is hard wired into the Cambridge model, and is an area that we are looking to formalise at LSE. A pilot Library-wide Copyright working group is being established for 2022/23, and we are also looking to formalise relationships across the School so that copyright can feed into the existing committee structure in a more coherent way. Copyright is a fast changing and challenging area, so if you have always written it off as dull we challenge you to think again.

Footnotes

- ¹ *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004 (2001).
- ² Maev Kennedy, 'Legal row over National Portrait Gallery images placed on Wikipedia' *The Guardian* (London, 14 July 2009) <www.theguardian.com/technology/2009/jul/14/national-portrait-gallery-wikipedia-row> accessed 27 July 2022.
- ³ *Sheeran v Chokri* [2022] EWHC 827 (Ch), [2022] E.C.D.R. 15.
- ⁴ Copyright, Designs and Patents Act 1988, s.11.
- ⁵ 'LSE Intellectual Property Policy' s.2.1 <<https://info.lse.ac.uk/staff/services/Policies-and-procedures/Assets/Documents/IntProPol.pdf>> accessed 27 July 2022.
- ⁶ University of Cambridge's Intellectual Property Policy <www.admin.cam.ac.uk/univ/so/pdfs/2020/nov2020/ordinance13.pdf#page=25> accessed 3 August 2022.
- ⁷ <www.ukri.org/publications/ukri-open-access-policy/> accessed 3 August 2022.
- ⁸ <<https://creativecommons.org/licenses/by/4.0/>> accessed 3 August 2022.
- ⁹ <https://www.libraries.cam.ac.uk/libraries-directory/libraries-a-z>.
- ¹⁰ For further details regarding the Copyright Group at Cambridge see: Claire Sewell, 'Building Copyright Confidence Through Community' (2022) 22(3) *Legal Information Management* 151–155. doi:10.1017/S1472669622000299.
- ¹¹ Intellectual Property Office, 'Copyright: Orphan Works' <www.gov.uk/guidance/copyright-orphan-works> accessed 4 August 2022.
- ¹² [2021] EWHC 697 (IPEC) The case of a self-publisher who wanted a court order to require the British Library and the Bodleian to remove the metadata for her book *Twiggles and Squiggles* as she believed the institutions were operating illegal licensing schemes (with Google) and affecting the profits from book sales. The claim was struck out.
- ¹³ These aspects were discussed in Copyright Literacy Webinar 51: 1 July 2022 'Becoming a copyright specialist', Chris Slater, Wendy Lynwood and Neil Sprunt. Recording on YouTube: <<https://copyrightliteracy.org/upcoming-events/webinars-copyright-and-online-learning/>> accessed 4 August 2022.

Biographies

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The 'Cardiff Index to Legal Abbreviations' is available at <http://www.legalabbrevs.cardiff.ac.uk/>

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