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Newspaper copyright developments: a EU and UK perspective

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ABSTRACT

This paper examines how copyright has an impact on a newspaper librarian attempting to preserve copies of newspapers by copying, and attempting to provide ready access to newspapers for patrons. The perspective is from UK law, with recent development in EU law being highlighted. It is concluded that the law provides only limited help to newspaper librarians, and restricts their ability to make digital copies of newspapers. Recent EU Directives are unlikely to significantly change the situation, which is a microcosm of problems all librarians face when trying to preserve, and allow access to, cultural materials to their patrons.

Introduction

In this session, I will be discussing UK copyright law issues involved when someone makes copies of newspapers for the purposes of preservation, provides access to such copies, and under what circumstances they can lend newspapers to other libraries to let them copy.

It is worth stressing that in general, the law ignores the content –the law does not distinguish newspapers from other types of publications, such as books or journals – in other words, my remarks are applicable to all types of published materials and not just newspapers. It is also worth stressing that although copyright law is similar in most countries of the world, it most definitely is not identical, and therefore you should only assume what I am telling you is correct for the UK.

Copyright

As I am sure you are aware, the owner of the copyright has the right to prevent anyone else from doing certain acts to his work without his express permission. These acts include

copying, selling, lending or hiring out or amending the work. These are the so-called *restricted acts*.

Copyright in most works lasts for 70 years from the end of the calendar year when the author died. Thus, if a newspaper article has an identified author, the lifetime of the work depends on when that author died.

If the work is anonymous, or if it has been created as part of employee duties, then in the UK the lifetime is 70 years from the end of the calendar year when the material was first published.

Each individual article or news story in a newspaper is a separate copyright work. In addition, the contents of the newspaper as a whole enjoy copyright. Also in the UK, there can be copyright in the typography and layout of the printed words, though that only lasts for 25 years. There is also copyright in each image in the newspaper, such as photographs, sketches, graphs, etc.

So, copyright law says no-one may copy a work - and copying includes photocopying, scanning, faxing, microfilming it, etc. If you do copy all, or a substantial part of the work without permission, you are **infringing** the copyright in that material and can be sued for the damage you caused the copyright owner, or for the profits you made out of your infringing action. In addition, in cases of severe wilful infringement, such as outright piracy, you can be sent to prison. As you can see, copyright law is not helpful to those wishing to provide access to newspapers. Notwithstanding the best efforts of Nicholson Baker (Baker, 2002) to persuade me otherwise, I accept that newspapers are fragile documents that are easily damaged, especially by repeated re-use, and therefore if libraries are to provide reasonable access, and at the same time ensure the long term preservation of such a crucial part of our cultural, social and political history, they should be offering copies to readers rather than the originals.

This difficult situation is not helped by the aggressive attitude towards libraries adopted by the Newspaper Licensing Agency, the Reproduction Rights Organisation that represents many UK national and local newspapers.

Exceptions to copyright

However, all is not gloom and doom. One reason is that there are a number of important exceptions to copyright in UK law. In particular, there are special rules about libraries and archives making copies for preservation purposes, and it is this I now want to look at.

Section 42 of the 1988 UK Copyright Act permits libraries or archives, under certain conditions, to make copies of copyright material to preserve or to replace the original. Any library can supply the copy, but only “prescribed libraries” can receive them.

A “prescribed library” is, in essence, one that is not for profit, such as public libraries, University libraries, school and college libraries, libraries of learned societies and professional associations, government libraries, national libraries such as the British Library, and hospital libraries. Only material permanently held by the donating library may be copied and even then, it should be reference material only.

So, newspapers that are on loan to the archive or library, or electronic materials it simply has a licence to access, cannot benefit from this provision of the law. And any newspapers that can be lent to patrons cannot be copied.

Libraries can copy their own newspapers providing they fulfil all these requirements. Finally, the newspapers in question must be out of print and unobtainable. The copy must enter the receiving library's permanent collection as a reference only item. Copies can only be made in this way to help preserve an item that has been lost or damaged, or is in severe danger of doing so. Not for profit archives that are associated with a commercial body can also make copies in this way.

Note that this exception only applies to literary, dramatic or musical works or to illustrations that happen to be embedded in a literary work. You cannot therefore use this exception to make preservation copies of artistic works, or to preserve sound recordings, TV broadcasts, video and film. Thus, you could not use this exception to preserve multimedia items that combine, say, text, music, still images and moving images.

Furthermore, digital copies can only be made under strictly controlled conditions; this is because the law allows the making of a single copy only, whereas digital copies are potentially multiple copies as anyone can access and download the item. If the digitised copy of the newspaper were held on just one non-networked PC, it would be OK, but most PCs are networked these days!

Overall, then, Section 42 provides some help, but probably insufficient for scanning and digitising the old newspapers.

So how does one deal with the issue of digitising materials for preservation, making copies of electronic items for preservation, or making preservation copies under other circumstances where section 42 does not apply – for example, if you work in a non-prescribed library or the material in question can be borrowed, or is merely on loan to your library? You have to ask for permission from the copyright owner – in other words, you have to get a licence. There are certain steps you have to go through.

Firstly, you have to discover who the copyright owner is, i.e., who can authorise the copying. This is not always straightforward in the case of newspapers, as copyright ownership may reside with individual journalists and/or the newspaper proprietor (and remember, the owner might have changed hands over the years) and/or with news agencies.

You then need to work out what actions you need to take to be able to preserve the newspaper and what level of access you wish to offer your patrons. It is particularly important to distinguish in your mind preservation and access.

A copyright owner may well give you permission to preserve, but refuse permission for access, or make access conditions so difficult that in practice it is hardly worth your while. Think in advance why the person who could authorise your request to preserve an object might refuse to do so, and then prepare reasoned arguments and explanations of preservation methods you will adopt, and the access conditions you can impose, to persuade them that authorising preservation and access will not cause them any harm.

It is worth trying first with an informal letter, but it is likely that this will not work and you will need to negotiate a licence instead. Either way, you should consider the following points:

- Ensure that all actions necessary for the preservation process are permitted.
- Consideration should be given to the type of permission requested, e.g., access for the purposes of preservation only, and for no other purposes.
- You may have to display a notice to authorised users accessing the preserved object. The notice could warn them of the rights status of the object, or permitted actions, or both.
- Rights owners will be concerned to ensure the integrity of the object. You need to consider the technical and administrative means by which this can be guaranteed.

I cannot emphasise enough the problems that are involved in gaining permissions like these from copyright owners. The difficulties of tracking them down and getting them to agree to things are tremendous. You should bear in mind also, that if they fail to respond to an approach, that means “no”, and any approach along the lines of “unless I hear from you to the contrary, I shall assume it is OK for me to copy for preservation and to allow patrons access” has no validity in law. Indeed, I have developed a Universal Law on this (Oppenheim, 2000). This simply states:

Whatever your most pessimistic estimate is for the time it will take to get a licence agreement sorted out, it will take twice as long.

The EU and copyright

The EU has an active and long-standing interest in copyright. It believes, rightly, that anomalies in copyright law between member states are inhibiting the development of the single market. It also believes that a strong copyright regime is necessary for its vision of an information society to come about. To this end, it has passed a number of Directives in the copyright arena. I want to briefly describe two of the EU’s Directives that are of relevance. The first is database right.

There is now a special type of literary work called “databases”.

This is a collection of independent works, data or other materials that are arranged in a systematic or methodical way and are individually accessible by electronic or other means, *each of which may or may not be subject to individual copyright*. A newspaper is certainly a database in this definition.

The newspaper itself gets protection over and above any copyright in each news item. So a newspaper gets double protection. Without going into the complex details, the result is that in a newspaper, each individual article has copyright, and the newspaper as a whole has copyright and a new right called database right. In practical terms, however, this makes little difference to the situation I have outlined to you in this talk so far.

The second example of the EU's activity that is of relevance to today's discussion is its Directive on Copyright and Related Rights that was passed in summer, 2001 and at the time of writing was due to become law in the UK in late Spring 2003. *(An update will be provided at the session itself)*

The Directive updates copyright law to take account of the Internet environment, and includes a list of possible exceptions to copyright, that is to say, things that may be done by users without having to ask permission or pay any fees. One of these exceptions allows for reproduction made by "publicly accessible libraries, educational establishments or museums, or by archives".

It is reasonable to assume that all libraries currently considered to be prescribed will continue to be so.

Quite what the implications of this for copying for preservation purposes will be is currently uncertain, but bearing in mind the approach taken by the British Government throughout the passage of this controversial piece of legislation, almost certainly it will mean that there will be little or no change in the current legal position under Section 42 of the Act. *(To be confirmed at the session)*

Summing up

Let me sum up what I have been telling you today. Under UK law, it is possible under limited circumstances to make copies of newspapers for preservation purposes. Once lawfully copied, you are then free to provide those lawful copies to patrons, who can, if they wish, make their own copies of the newspapers under the well-known fair dealing exception to copyright, so long as it is for non-commercial research, or for their private study.

However, the law limits newspaper libraries in some regards; firstly, only prescribed libraries can create such preservation copies, and secondly, the possibilities for making digitised copies for preservation purposes is very limited. It is therefore quite probable that a UK newspaper library will have to approach the copyright owners for permission to copy for preservation, and/or to provide access to patrons. As I have indicated, this can be a stressful and time-consuming process, and you may not get the permissions you want in the end.

Furthermore, the recent EU Directives do not, in my view, have much impact on the current somewhat unsatisfactory situation.

So there we have it; a less than ideal situation for UK newspaper librarians to have to work in, and one that is unlikely to change in the near future. But copyright has always caused problems for librarians attempting to serve their patrons and preserve the cultural heritage as best they can. The problems facing newspaper librarians are merely a microcosm of these problems.

References

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