

Fair use and fair dealing: Academic Research

Sections 29 and 30 of the Copyright, Designs and Patents Act 1988 provide scant guidance with respect to what 'fair use' and 'fair dealing' mean for the purpose of academic research. "Private study" suggests that publication of academic papers and books are not included. While it seems clear that there is some inclusion of published research under this exception, the extent of this is far from certain.

This lack of clarity is a significant impediment to academics and universities working in the humanities, especially those who would pay close attention to the language and other semiotic choices of non-academic texts. This is especially the case in linguistics, but also involves those working in the areas of media and film, cultural studies, popular culture and so on.

Certainly arrangements with academic publishers provide clear guidelines about what constitutes fair use and fair dealing. This has the effect of specifying in a detailed manner (by reference to number of words cited) what a 'substantial' amount of work is.

The situation is very different outside of academic publications. While case law holds that what constitutes fair use and fair dealing is not a judgement of quantity but rather one of 'quality', this is not helpful to many scholars (*Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.* [1964] 1 W.L.R. 273).

In relation to this question, Lord Hoffman asks

But what quality is one looking for? That question, as it seems to me, must be answered by reference to the reason why the work is given copyright protection (pgh 19; *Newspaper Licensing Agency Limited v. Marks and Spencer Plc* ([2001] UKHL 38)

It seems to me that academic use of material does not contravene property rights in any way related to copyright ideology.

Examples of difficulty

While the lack of clarity in the law may not seem to be an impediment to academics, there are two factors which contribute to silencing certain kinds of critique.

1. The lack of resources available to publishers to consider the finer points of copyright law;
2. The stringent enforcement of intellectual property by (especially commercial) rights holders.

Publishers are not lawyers. The commercial return from academic titles for publishers is not generally great. The market for specialist titles, which academic work by its very nature is, even though increasingly international is still not large. Nor do publishers have extensive legal departments at their disposal. Quite simply, academic publishers can neither afford to investigate the ambiguities of copyright law nor can they afford the risk of being sued. As an academic not a specialist in intellectual property law, any arguments which I can make are, quite rightly, seen to be only in my interest.

The risk that publishers perceive is a rational one. In my own experience (see appendix), few organizations approached for copyright clearance grant it, fewer grant it without charging fees. This is the case even when material is used in such a way as to fall within fair dealing (to my mind at least). Clearly organizations are refusing copyright permission simply because they do not like the fact that they are being subjected to academic criticism. From my experience, this is completely without reference to what is actually being argued for in any particular piece of

academic writing. At the same time, organizations can be unreasonably tardy in responding to requests for clearance, in some cases taking close to a year (and finally refusing any permission).

Reasons for consideration

Purpose of copyright and intellectual property protection

The purpose of copyright and intellectual property protection, in my understanding, is based primarily on two concerns. First, that people who invest time, effort and money in an endeavour should not be deprived of commercial gain from this. Second, there is a moral right to be identified as the creator of the product.

Academic research and criticism of work contravenes neither of these. In many cases, I have sought to critique (in terms of micro linguistic structure) material which is freely available, that is, that does not cost money. It would be bizarre to argue that an academic publication, in the form of a book or a journal article, could possibly be jeopardising the commercial rewards the copyright holder hopes to gain. In short, the two are not in competition. Even in the case of material which is sold for profit, an academic paper which examines such material can hardly be said to be in competition with it.

In terms of moral rights, academic conventions of attribution ensure that such material is acknowledged. To critique a text, film or newspaper in terms of linguistics or semiotics requires that it be identified as emanating from elsewhere.

Power and Civil Liberties

As stated, copyright holders in the commercial sector routinely refuse permission to use even the smallest excerpts of material. This is clearly based on an unwillingness to be subject to scholarly attention of whatever kind.

In order to make sound arguments, scholars need to be able to refer to data. To stand in the way of this is to exercise rights which are only incidental to the present copyright and intellectual property legislation and in no way fundamental to it.

In the absence of clear legislation or case law, publishers enforce a definition of 'fair dealing' with respect to non-academic sources which is narrower than that established by the CLA for academic sources. The result is that very little, if any, text can be used in publications. Quite simply, this makes a mockery of the criticism, research and private study exemption. It is impossible to critique a text, in any academically rigorous way, without referring explicitly to it. Indeed, sometimes this may even require reproduction of it (in the form of an appendix for example). The difference between the market to which the original product appeals and that to which the final academic paper is directed could hardly be starker.

The absence of clarity in this field results in private industry being exempt from considered appraisal in terms of their publications, speeches and packaging. This is a right which should not be upheld through the machinery of intellectual property rights. That such battles do generally not occur is exactly because of the limited resources of academic publishers and their understandable reluctance to put their heads above the parapet. The imbalance in power and the injustice which is silently perpetrated could hardly be clearer.

The right to speak openly, to criticise rigorously and to have public discussions is a mark of a decent democracy. Currently, academics do not have these rights in many areas. That those best equipped to offer insight into contemporary culture and events are being obstructed in this way is clearly limiting the rights of the British academy. More significantly, these restrictions mean that British intellectuals are unable to be as competitive or innovative in a global context than might otherwise be possible. It is my understanding that the position in the US is somewhat more liberal with respect to academic fair use. It is impossible to compete in the global academic marketplace when different standards apply to British scholars and publishers.

Recommendations

In the light of the above, a number of actions need to be taken.

1. Confirmation given to academics, their institutions and publishers as to their ability to use material under the existing legislative exemptions with respect to fair dealing and use
2. Confirmation that when copyrighted material is used for scholarly activity, the resulting academic publication is not in competition with the original and thus not subject to the restrictions many now believe apply.
3. Confirmation that reproduction in a different media from the original is not subject to copyright for academic purposes (e.g. in the case of transcripts or audio/visual material).

Appendix: Personal experience of copyright denial

Church of Scientology

When preparing a manuscript for publication about marginal religious movements and the language they use to recruit new members, The Church of Scientology was approached to ask for permission to use excerpts from a speech given by their founder, L. Ron Hubbard. This speech was freely available on the internet at the time of research.

I transcribed the speech for analysis. For publication, I wanted to quote small sections (lines and phrases) in order to demonstrate the linguistic details of the speech. As a discourse analyst, it would be poor scholarship not to do this. I did not ask, nor did I need, to reproduce the entire speech in any form.

Permission was denied on the basis that the title of the book contained the word 'cult'. The word was included in inverted commas to suggest the argument of the book (clear on the back cover and all related material), namely, that 'cult' is an ill-defined and inapplicable term in relation to the groups examined. I explained this in some detail, sending the introduction which made clear in the strongest terms that I do not consider the Church a 'cult'. I was refused permission nonetheless. In fact, there was no opportunity for discussion. My academic publisher advised me not to use direct quotation. This severely undermined the usefulness of the research. Further, this was a specialist book, intended for and purchased by, academic linguists.

McKinsey Corporation

When preparing the same manuscript, I wanted to compare the recruiting language of a well respected private organization. Given McKinsey's reputation, they were an obvious choice.

I had used for analysis a recruiting brochure freely available from university careers offices and from the organization itself. I asked for permission to quote small parts of the publication (sentences and phrases) and was refused.

I contacted McKinsey's head office in the US and in the UK by post and email on several occasions in a nine month period. It was only when, nearly one year after the first attempted contact, I communicated to them that the manuscript was about to be sent for publication that I received any response at all. I was told that firm lawyers, in the US head office, had been consulted. Finally, I was refused permission to use any of their material.

Ally McBeal

I am currently finalising for publication a paper on *Ally McBeal* with respect to the semiotics of the law. As a linguist, I am focusing on the way in which the characters argue cases in court and generally construct themselves with respect to legal and moral discourses. I transcribed some relevant passages from an episode for analysis. Having done this, I needed to include some extracts in order to provide evidence for the points I was making.

The publishers, an academic press, expressed reservations about the use of extracts. I altered many of them, providing paraphrases rather than direct quotation. Not only does this make the piece less convincing, it also makes it more difficult to process.

Despite these changes, the publishers are still reluctant to proceed with the piece as it stands. There are only two extracts used that are longer than a phrase. One is four lines long, the other seven.

Consultation with colleagues working on Fox television (who produce *Ally McBeal*) cautioned me that if asked, the corporation would deny permission or charge a large fee for any use. I have attempted to contact Fox and have received no reply.

I am engaged in ongoing, time consuming negotiations with a publisher which is, reasonably, concerned about possible law suits. They appear to know very little about copyright law and take an extremely conservative approach.