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University Academics as Employees and Creators of Copyright Works: University Academics as Owners of Copyright?

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[p. 355]

The increasing relevance of copyright generated by academics within the managerial framework of universities

The creation and exploitation of intellectual property rights that attach to the output of university academics becomes more and more relevant to the management of universities. Of central interest are still patents, but also copyright becomes increasingly important, and not only in relation to computer software. From a legal, not necessarily commercial, perspective, copyright is the most significant intellectual property right that applies to works of university academics. Copyright concerns all academic output, whether in the arts and humanities, the social sciences or the sciences. Patents are confined to certain activities in science and engineering only. Since the university academics as the authors of the copyright-protected works are employees of their university it is worth investigating as to who owns the copyright in the works created by academics¹ and what the effects of university copyright (or intellectual property) policies on the relationship between academic-author and university-employer are. A recent study conducted by the present author on the management of copyright created by academics in UK universities² showed that the presumed legal position in the university copyright policies does not necessarily coincide with the real legal situation. This article is confined to the law of copyright with regard to academics as university employees; a discussion of the potential legal

¹ See also the opinion by J. Pila, 'Who owns the intellectual property rights in academic work?' (2010) *EIPR* 32(12) 609-613.

² A. Rahmatian, 'Make the butterflies fly in formation? Management of copyright created by academics in UK universities', (2014) 34(4) *Legal Studies*, 709-735.

problems with the copyright regulations which many university policies adopted can be found in the study.

The legal position: copyright works and academics as employee authors

University academics are mostly university employees and fall under the provision of s. 11 (2) of the CDPA 1988 in principle. The copyright in a literary, dramatic, musical or artistic work or a film made by an employee in the course of employment belongs to the employer as the first owner, subject to an agreement to the contrary. The employee remains author (differently from the works-made-for-hire doctrine in the US³) and also retains his/her moral rights, however, with restrictions.⁴ This scenario requires a discussion of the following matters for further analysis: (a) Which kinds of copyright-protected works do academics typically create? (b) When is there ‘employment’ for the purpose of copyright? (c) What does ‘in the course of employment’ mean?

(a) A creation is protected by UK copyright if it is recorded (in writing or otherwise) in some permanent form,⁵ and constitutes a ‘work’ that is ‘original’ within the meaning of copyright law. Potentially all classes of ‘work’ are open to academics’ creations and endeavours, but the practically most relevant ones are the literary work and artistic work categories. Academic books and articles, hand-outs, lecture notes (either for teaching preparation or for distribution in class), teaching material (for example for distance learning courses), reading lists, examination papers,⁶ course booklets and information materials, [p. 356] internet blog texts, oral speeches⁷ and lectures⁸ if recorded, are all protected as literary works.⁹ Works which derive from existing sources, such as translations,¹⁰ editions and restorative editions of fragments,¹¹ critical annotations, selections or abridgements,¹² and earlier drafts¹³ can also attract copyright protection in their own right.¹⁴ Academics may also be engaged

³ US Copyright Act 1976, 17 USC § 201 (b).

⁴ CDPA 1988, s. 79 (3) (limitation of the employee’s right of attribution) and s. 82 (severe restriction of the employee’s integrity right).

⁵ CDPA 1988, s. 3 (2). Strictly speaking there is no recording requirement for the artistic work (because the recording is inextricably intertwined with the nature of the visual arts in a broad sense anyway).

⁶ *University of London Press v. University Tutorial Press* [1916] 2 Ch 601.

⁷ *Walter v. Lane* [1900] AC 539.

⁸ *Caird v. Sime* (1887) LR 12 App Cas 326, HL (Sc).

⁹ CDPA 1988, ss. (3) (1).

¹⁰ *Byrne v. Statist* [1914] 1 KB 622.

¹¹ Also in the context of musical works, see *Sawkins v. Hyperion Records* [2005] RPC 32, CA.

¹² *Macmillan v. Cooper* (1923) 93 LJPC 113.

¹³ *Sweeney v. Macmillan Publishers* [2002] RPC 651.

¹⁴ They are protected to the extent to which they do not infringe the pre-existing work (if they infringe at all), compare *Ladbroke v. William Hill* [1964] 1 WLR 273, at 291-292. See also *Kenrick v. Lawrence* (1890) 25 QBD 99, at 103-104.

in the development of computer programmes and (usually electronic) databases which would also be protected as literary works.¹⁵ The artistic works category is mostly relevant for maps, charts and other graphical representations (also on slides for teaching), plans and photographs – all of which are protected irrespective of artistic quality.¹⁶ Artistic works in the more traditional sense, such as paintings, sculptures, drawings, etchings, architectural plans and models¹⁷ are very important for art, design and architectural schools and art colleges. The categories of dramatic and musical works¹⁸ are essential for conservatoires or colleges of music and drama, but tend to be of limited relevance to universities. The ‘literary work’ category is unquestionably the most important one for any kind of academic output in the arts and humanities, social sciences as well as the sciences, because also science papers are literary works. University research and enterprise departments or similar administrative units usually concentrate on patents because of their focus on potential commercial exploitation. In fact, copyright (here particularly literary, and to some extent artistic, copyright) is substantially more relevant from an intellectual property lawyer’s perspective.

The work, if recorded, must be ‘original’ to obtain copyright protection. Although normally a big topic in copyright law, it is of no relevance here because works of all sorts by academics qualify almost always as being sufficiently ‘original’ to attract protection. This is so whether one follows the traditional UK copyright definition of originality as being the author’s own skill, labour, judgement, effort, investment and so forth,¹⁹ or whether one adheres to the EU concept of originality as the author’s own intellectual creation, according to the originality criteria established by recent CJEU decisions.²⁰ Thus the question whether these CJEU decisions have really substantially changed the UK approach to originality²¹ need not be decided here. Only for the purpose of completeness one may mention that sound recordings and films and other entrepreneurial works need not be ‘original’; it is sufficient if they are ‘not copied’.²² These types of work are relevant for podcasts, recordings of lectures and the like.

Secondly, the author-academic would normally be the first owner of copyright in the work,²³ but for the fact that he or she is typically an employee of a university.

¹⁵ CDPA 1988, ss. 3 (1) (b) and (d), s. 3A.

¹⁶ CDPA 1988, ss. 4 (1) (a) and (2) (a).

¹⁷ CDPA 1988, ss. 4 (1) and (2).

¹⁸ CDPA 1988, s. 3 (1).

¹⁹ *University of London Press v. University Tutorial Press*, at 608-609 [1916] 2 Ch 601, *Ladbroke v. William Hill* [1964] 1 WLR 273, at 277-278, 281 for statements of the classical UK copyright position.

²⁰ These started with *Infopaq International v. Danske Dagblades Forening* [2009] ECDR 16 (Case C-5/08).

²¹ Discussion in: A. Rahmatian, ‘Originality in UK copyright law: the old “skill and labour” doctrine under pressure’ (2013) 44 *International Review of Intellectual Property and Competition Law*, 4-34.

²² CDPA 1988, ss. 5A (2), 5B (4), 6 (6), 8 (2).

²³ CDPA 1988, s. 11 (1).

The employee-copyright provision of s. 11 (2) requires an employment relationship as its basis, that is, the academic must be in a contract of service (employment contract), not under a contract for services.²⁴ Mixed contracts, that is, relationships that are partly contracts for services and partly contract of service, may also exist,²⁵ with a different result for copyright allocation: copyright created under the contract for services component certainly belong to the academic because for this part the employee-copyright rule of s. 11 (2) does not apply.

Thirdly, however, the copyright in works created under a contract of service (employment contract) may not be owned by the employer either; that depends on whether the work has been created ‘in the course of employment’. If not, the copyright remains with the author-academic. As a general rule, a work has been made in the course of employment if the creation of the work is representative of the typical activities an employer can expect from his employee in view of the range of the established employee’s duties. The scope of this criterion is potentially wide, but in reality the English courts take a narrow view in their interpretation. Furthermore, the determination of employee’s duties is fraught with additional difficulties in the case of academics, by comparison to other employees. [p. 357]

‘In the course of employment’: the narrow approach taken by the courts

The principal decision for the interpretation of the requirement ‘in the course of employment’ is still the Court of Appeal case of *Stephenson Jordan*.²⁶ The question was whether the employer company could claim copyright in the public lectures on cost control for business management which their employed accountant gave and wanted to publish subsequently as part of a book. The Court of Appeal ruled that the company had no copyright in these lectures because the lectures were not created in the course of the accountant’s employment. The delivery of the lectures was not part of the specific employee’s duties, and therefore the employer could not have ordered the employee to prepare and deliver them. The fact that the lectures were written, at least in part, in office hours and with the use of the company’s library and typed up by the company secretaries did not make them being created in the course of

²⁴ This is to be determined according to employment law rules, see S. Deakin and G. S. Morris, *Labour Law* (Oxford: Hart Publishing, 5th ed., 2009), 121. See also *Stephenson Jordan & Harrison v. MacDonald & Evans* (1952) 69 RPC 10, at 17, 22, and *Performing Right Society v. Mitchell & Booker (Palais de Danse)* [1924] 1 KB 762, at 766.

²⁵ *Stephenson Jordan & Harrison v. MacDonald & Evans* (1952) 69 RPC 10, at 22. See also *Waites v. Franco-British Exhibition* (1909) 25 TLR 441, 24 March 1909, CA, to which *Stephenson Jordan* refers.

²⁶ *Stephenson Jordan & Harrison v. MacDonald & Evans* (1952) 69 RPC 10. The case was decided under the old Copyright Act 1911, s. 5 (1) (b), but the law in CDPA 1988, s. 11 (2) is insofar the same today.

employment.²⁷ The case has a particular importance for university academics, because the court gave the example of the university lecturer as an illustration of the *ratio decidendi*.²⁸

‘[P]rima facie I should have thought that a man, engaged on terms which include that he is called upon to compose and deliver public lectures or lectures to some specified class of persons, would in the absence of clear terms in the contract of employment to the contrary be entitled to the copyright in those lectures. That seems to me to be both just and commonsense. The obvious case to which much reference by way of illustration was made in the course of the argument is the case for the academic professions. Lectures delivered, for example, by Professor *Maitland* to students have since become classical in the law. It is inconceivable that because Professor *Maitland* was in the service at the time of the University of Cambridge that anybody but himself, one would have thought, could have claimed the copyright in those lectures.’

Thus even a university lecturer who is typically called upon to give lectures (unlike an accountant, as in *Stephenson Jordan*) will retain the copyright in his lectures by default. The underlying idea of this reasoning may also be that the employment duties require a university academic to teach and research in general terms, perhaps to publish,²⁹ but not to carry out a determinable kind of research, ordered in advance as part of the employment duties, that is, to be expressed in a particular form capable of attracting copyright protection.³⁰ In certain cases this argument can be effectively an application of the idea-expression dichotomy in copyright law.³¹ Even if one assumes rather artificially that an academic is for example ordered by the employer to carry out research on employees’ copyright in relation to university academics, this task is an idea, a concept, a ‘storyline’ and cannot obtain copyright protection. Only the particular form of presentation, the specific text, the expression (such as the wording of this particular article), will be protected and can therefore become subjected to the employee’s copyright ownership rule of s. 11 (2).

This idea-expression dichotomy argument is a possible teleological interpretation of the court ruling, but it is not a necessary, and certainly not comprehensive, interpretation. One can more generally state that the courts normally regard the classical academic activities of lecturing (if recorded) and of publishing academic works as being outside the course of employment. The narrow approach in *Stephenson Jordan* had a predecessor in *Byrne v Statist*,³² and was confirmed in *Noah*

²⁷ *Ibid.*, at 18, 19-20, 22-23.

²⁸ *Ibid.*, at 18.

²⁹ That depends on the jurisdiction. In Germany, the publication of research is not within the duties of a university academic as an employee, see S. Rojan in W. Schricker, *Urheberrecht. Kommentar* (München: C. H. Beck, 3rd ed., 2006), s. 43, notes 31 and 63.

³⁰ W. R. Cornish, ‘Rights in university innovations: the Herchel Smith lecture for 1991’ [1992] EIPR 13, at 15. See also A. Rahmatian, n. 2 above, at 716.

³¹ On the idea-expression dichotomy in general, see e.g. L. Bently and B. Sherman, *Intellectual Property Law* (Oxford: Oxford University Press, 4th ed., 2014) 212.

³² *Byrne v. Statist Company* [1914] 1 KB 622.

v. Shuba,³³ as well as in a patent case which can be seen as equivalent in relation to the present issue.³⁴ However, the result in individual cases depends much on the specific facts: in *Software v. Magee*,³⁵ software written outside work time and on the employee's own equipment was nevertheless held to be created in the course of employment, because the employee was employed to write programs of the kind at issue.

In the case of academics' works one also has to distinguish between the types of work academics create to ascertain (or presume) copyright ownership. Core 'academic works', such as books, articles, book chapters, individual lecture notes for the preparation of the teaching in the lecture theatre, critical editions with commentary, texts written from the position of academic expertise for a more general readership,³⁶ artistic or scientific pictures or photographs, musical scores (in traditional, modern or individual notation systems), sound recordings of compositions, and bespoke computer programmes developed for specific academic research projects (in physics, chemistry etc.) are presumed to be in the academic's ownership, following *Stephenson Jordan*. Notes, memos, and any other material generated by academics in the course of their administrative duties [p. 358] within the university system belong to the university as employer.³⁷ A grey area are learning and teaching materials (for example for distance-learning courses), lecture hand-outs, slides for visual pedagogical support of lectures, course booklets and student information brochures in relation to courses, university examination papers and teaching podcasts.³⁸ One can consider such works as falling within the course of employment of an academic, because they form part of the academic's specific teaching duties. There is no clear guidance by the courts, and the outcome of a case would presumably depend heavily on the individual facts (duties stated in the employment contract, when and under which circumstances was the preparation of the work in question, e.g. at home and on weekends, and which resources were used; is the work required standard or an initiative by the individual employee, and so on).³⁹

³³ *Noah v. Shuba* [1991] FSR 14.

³⁴ *Greater Glasgow Health Board's Application* [1996] RPC 207, at 223.

³⁵ *Software v. Magee* [1989] FSR 361.

³⁶ The typical examples are the subject-specific internet blog or the newspaper comment by an academic. Where the academic writes texts which are not related to his or her expertise, such as poetry, that work is outside the course of employment in any case.

³⁷ See e.g. *Nora Beloff v. Pressdram Ltd.* [1973] FSR 33.

³⁸ Copyright in the sound recording of a lecture by an academic, made by students without authorisation (see CDPA 1988, s. 3 (3)), arguably belongs to the lecturer, because the sound recording only acts as a fixation of the literary work of the lecture which is itself normally outside the course of employment.

³⁹ See *Stephenson Jordan & Harrison v. MacDonald & Evans* (1952) 69 RPC 10; *Noah v. Shuba* [1991] FSR 14.

The university may avoid such grey areas by requesting from the academic an all-encompassing assignment of copyright in all present and future works, for example, when the new academic signs the employment contract. The general rule of CDPA 1988, s. 11 (2) can be overridden ('subject to any agreement to the contrary'), but the assignment is only valid if the formality requirements of CDPA 1988, s. 90 (3) are complied with.⁴⁰ The first problem with such an approach is political-sociological: the ensuing alienation (also in a sociological sense) is not popular with academics, and usually there is great reluctance among academics and their trade unions to agree to such a general assignment policy. The second problem is technical-legal: an assignment presupposes that the university does *not* assume that it is, as the employer, the initial owner of copyright generated by their employees, so this is an admission that s. 11 (2) does not normally apply to works by academics. If s. 11 (2) did apply, an assignment were superfluous and void, because it would be the assignment of copyright from a non-owning individual (academic/employee) to the owner (university/employer). Such an implicit concession by insistence on an assignment can weaken the argumentative position of universities considerably; even if a university requires academics to assign their copyright as a condition for employment, it will soon run into difficulties when recruiting new staff. In any case, whether the university is the initial owner of copyright according to s. 11 (2) or obtains copyright through an assignment, the university would have to establish a central, and efficient, office dealing with the publishers of academics who seek a vast number of assignments and licences as the typical precondition for the publication of academics' books and articles. The managerial challenges for the university administrations would be interesting to watch.

The confused position of typical university intellectual property policies in the UK

The struggle, legal and managerial, with the application of s. 11 (2) in relation to university academics became apparent in the study by the present author.⁴¹ The study showed that almost all university IP policies presumed that s. 11 (2) applies without restriction, thus that the university is initial owner of all the copyright its academics generate.⁴² From what has been said before, this is highly problematic and in this generality arguably incorrect. But, whether because of logical inconsequence or a secret concern that matters may not be so straightforward in law, university policies

⁴⁰ That is, it must be in writing signed by or on behalf of the assignor. It is interesting to note that even academic publishers often do not abide by these formality rules – not really to the chagrin of the academic who would normally have to give the assignment for free anyway. The possibility of an implied assignment (or licence) cannot be discussed here: see e.g. *Durand v Molino* [2000] ECDR 320.

⁴¹ A. Rahmatian, n. 2 above, 709-735.

⁴² *Ibid.*, n. 2 above, 725.

often contain curious additional rules, such as that the university chooses ‘not to claim’ or ‘not to assert’ copyright in core scholarly works like books and articles (often with the proviso that this does not apply to works which are commercially relevant), or that the university as owner grants a licence to the academic for (effectively) unrestricted use of the work he/she created, or that the academic acts as agent for the university as owner in agreements with third party publishers, or that core academic works are excluded from the definition of ‘IP’ of the policy in question which means that the IP policy does not apply to scholarly books, articles and so on. The legal implications of such rules can be chaotic.⁴³ The legal assessment of a ‘non-assertion of copyright’-clause alone is a complicated matter for the lawyer.

Given that copyright generated by university academics is largely irrelevant in commercial terms, the insistence of universities on ownership of copyright in employee-academics’ works is rather surprising. The real reason seems to be an increasing obsession with university managerialism that seeks to conceptualise a human employee as an objectified ‘human asset’ and looks to copyright as one possible device to assess the academics’ work as a sum of proprietary units (copyright-protected works) which can be evaluated, priced and audited, and so the economic efficiency of that individual can be ascertained. This follows the current trend of university managers that regard universities as just other forms of business corporations which sell knowledge products by content providers and learning facilitators or academics to customers or students.⁴⁴

⁴³ This is discussed in detail in *ibid.*, n. 2 above, at 723, 726-730.

⁴⁴ *Ibid.*, n. 2 above, at 711-712, 735; A. Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Cheltenham: Edward Elgar, 2011), 252, 263-264.