

Rights and interests of publishers

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Copyright – some historical facts

- First copyright law in the world – the Statute of Anne (1709) – “An Act for the Encouragement of Learning”
- Some long established UK publishers:
 - Cambridge and Oxford University Presses – granted Royal Charters in 1534 and 1586 respectively
- Family run companies: Longman (founded 1724, family-run till acquired by Pearson in 1968)
- John Murray (founded 1768, family-run till acquired by Hodder Headline in 2002)
- Macmillan (founded 1843, family-run till acquired by Holtzbrinck in 1999)

Copyright and rights granted to publishers (1)

- Copyright is the essential framework needed to protect the rights of creators and the publishers they work with. Copyright has regularly adapted over the years, including to the digital environment, but faces threats from a number of sources
- Protection under national copyright legislation and membership of international copyright conventions
- Publishers need to acquire a sufficient range of rights to enable them to maximise and protect their investment in bringing works to market, whilst appropriately remunerating authors for their work
- They seek a range of primary publishing rights to sell their publications in agreed formats in agreed geographical territories for an agreed period of time
- Traditional publication in print format/s – since the advent of the internet and electronic publishing, most publishers will also now publish in eBook format. Some may require database rights; some may also publish in audiobook format

Copyright and rights granted to publishers (2)

- Publishers may also seek to acquire a range of subsidiary rights which can be licensed to third parties
- The full range of rights granted should be set out in a clear contract between author and publisher (the “head contract”)
- Publishers may also need to secure permission for any third party copyright material included in the work (e.g. quoted text, illustrations, photographs, maps, charts etc)

Why do publishers seek a broad range of rights?

- Successful physical and electronic sales of the publisher's own edition/s to retailers, wholesalers, institutions and individuals will benefit both author and publisher
- A common model of payment to authors is an initial advance payment, set against royalties payable on actual sales, with the royalty percentage increasing the more copies are sold. Royalties may be calculated on retail price or net receipts
- If the publisher is also granted a range of subsidiary rights, these can be exploited to the additional benefit of both author and publisher – licence revenue will be shared in agreed proportions

What range of rights may be granted to publishers?

- The range of primary publishing rights, permitted formats, sales territories and additional subsidiary rights is negotiable and may depend on the resources and reputation of the publisher
- In the UK and US markets, literary agents play a significant role representing authors; trade publishers may be granted a licence to publish in a limited range of territories and with limited subsidiary rights, with the agent retaining some rights to license separately
- By contrast, educational and academic publishers often acquire a full range of primary and subsidiary rights, perhaps via an assignment of copyright to the publisher

What subsidiary rights might be granted to publishers? (1)

- Same-language territorial rights (e.g. UK publisher could license to US publisher or vice versa)
- Hardback or paperback rights licensed to another publisher
- Low-price reprint rights for developing countries
- Large print rights (for visually impaired)
- First and second serial rights (extracts to newspapers and magazines)
- Anthology and quotation rights
- Undramatised reading rights (on radio or television)

What subsidiary rights might be granted to publishers? (2)

- Audiobook rights
- Electronic rights

Licence revenue will be shared with author as specified in head contract – share can range from 50% to 90%, depending on category of rights and status of author

Any licences involving manufacturing – e.g. coordinated foreign language coeditions of illustrated books – are best handled by the publisher who can deal with all production and shipment issues

Rights less likely to be granted if an agent is involved?

- Stage, film and television rights
- Merchandising rights
- Some agents may also withhold audiobook rights, some categories of electronic rights, some territorial rights, and translation rights

What are the benefits of sublicensing?

- Access to geographical markets, readership or formats which the primary publisher cannot service
- Additional revenue for author and primary publisher
- Enhancing author visibility and reputation
- Licensing is a complex activity, best handled by specialist staff with the relevant resources, whether in publishing houses or in literary agencies

The ideal author-publisher relationship (1)

- Author and publisher agree on a range of formats, territories, subsidiary rights to be granted and duration of contract, in return for remuneration to the author
- Author commits to delivering acceptable original work by agreed deadline
- Publishers normally have full responsibility for technical aspects of production, marketing and sales. Increasingly, authors can assist with promotion – personal appearances, via social media etc
- Publishers normally have clear contractual responsibility for dealing with any copyright infringements (physical or digital). NB UK Publishers Association Copyright Infringement Portal

The ideal author-publisher relationship (2)

- Authors and publishers may each choose to mandate their publications for inclusion in collective (secondary) licensing schemes, with revenue payable to each for multiple copying of limited amounts of copyright content by schools, universities, government departments and businesses (in the UK, via the Copyright Licensing Agency, CLA)
- The head contract should include clear provision for termination of the contract in a variety of circumstances (e.g failure of author to deliver as agreed, material breach of contract by publisher, or if publisher ceases to actively exploit the work)

Challenges to the traditional concept of copyright (1)

- Movements such as Copyleft, Creative Commons
- Ongoing pressure for more exceptions to copyright, e.g. for archiving, news reporting but in particular for educational purposes (lobbying from developing countries)
- NB The Berne Three Step Test requires exceptions to be limited, not to affect normal exploitation of the work or to unreasonably prejudice the interests of the rightsholder

Challenges to the traditional concept of copyright (2)

- A number of disappointing legal judgements, favouring fair dealing or fair use:

Authors Guild v. Google (2015) – “transformational use”

Cambridge University Press et al v. Becker (2008, against Georgia State University)

University of Oxford v. Ranoshwari Photocopy Service (2016, the Delhi University case)

Ongoing legal action re collective licensing tariffs in Canada

Challenges to the traditional concept of copyright (3)

- Exhaustion regimes re the resale of works – may conflict with territorial restrictions (e.g. 2013) Wiley v. Kirtsaeng case
- Current consultation on what exhaustion regime will apply in UK post Brexit

What about Open Access?

- The rise of Open Access represents a threat to the established copyright regime which has worked well for so many years
- A move to make funded research content freely available on the basis of Creative Commons licences
- Supported by the UK government
- Implications for publishers of journals and scholarly monographs
- Publication to be funded by Article or Book Processing Charges, paid by author, their institution or funding body – implications for quality of content?

And finally.....

- Useful books?

Owen: *Selling Rights 8/e* (2019, Routledge, paperback edition
ISBN 978-1-138-48948-6)

Owen (editor): *Clark's Publishing Agreements: A Book of Precedents*
(11/e due December 2021, Bloomsbury Professional, hardback with
downloadable precedents, ISBN 978-1-526-51694-7)

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- Thank you!