



Are You Protected?

With issues of copyright often leading the news these days, it is important publishers know exactly where they stand with regard to ownership of the work they're reproducing — especially given the fact many magazines are now published not only in print, but also online. While the rules surrounding ownership of printed words, pictures and illustrations are generally well known, when it comes to re-publishing these same works online the rules change.

So just what is the publisher's position with respect to copyright of re-published work? The answer depends on the type of work in issue and the nature of the relationship between the publisher and the contributor.

With a magazine there are two main copyright issues – ownership of the copyright in the published edition or page (which the Act defines as the “typographical arrangement”)

and ownership of a specific creative work. For example, a single page of a magazine may include different creative works, such as an article and a photo. The Copyright Act deems that the publisher owns the copyright in the page as a whole (the typographical arrangement), so only the publisher may reproduce the page as a whole as it appeared in hard copy, but ownership of specific creative works which appear on that page is a separate question subject to a number of considerations.

The first consideration is what exactly is the type of work in issue. While this is a simple question to answer, it is significant as the Act treats some works differently from others.

S21 of the Act, which determines first ownership of copyright in a work, distinguishes between works



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produced by employees and non-employees and between different types of works.

For the purpose of this article, let's use an example of a written article which appears on one page of a magazine which has been published in hard copy format. The publisher wishes to reproduce on the internet that magazine or the page of the magazine in which the article appears. Can the publisher do so as of right? Or, must the publisher obtain the permission of the writer to do so?

In addressing the issue, it is necessary to first consider the nature of the relationship between the publisher and the writer. Under the Act, if the writer of the article is an employee

of the publisher then the publisher owns the copyright in the work (through their capacity as employer), which means they can reproduce it in full or in part as they choose (and prevent others doing so). However, it is open for the publisher/employer and writer/employee to enter into an agreement which displaces that general rule and vests ownership of the copyright in the employee, which would then mean the permission of the employee would be needed for reproduction on the internet or anywhere else. For the publisher, it is best practice to ensure you have clauses in all your employment agreements which expressly state that the publisher retains ownership of copyright in any works produced in the course of employment.

However, the situation is different if the contributor of the literary work or article is not an employee of the publisher, even where the publisher has commissioned the writer to produce the article for the magazine. This is because literary works are treated differently to other types of work.

With non-employees, the Act states that if a work is produced for the publisher pursuant to a commission, the publisher retains first ownership of the copyright. However, the

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commissioning principle only applies to photographs, computer programs, paintings, drawings, diagrams, maps, charts, plans, engravings, models, sculptures, films or sound recordings. Literary works are not included which means that even if a publisher commissions a freelance author to write an article for publication, the freelance author owns the copyright in the article.

Accordingly, unless the author of the article is an employee of the publisher, the general principle is that the writer of any literary work submitted to a publisher for publication retains copyright in that work. If the publisher wishes to reproduce that article on the internet, in whole or in part, then they require the author's consent.

One way for publishers to overcome this problem is to have terms of trade with the contributor which permit the publisher to use the article for a variety of purposes. For instance, it may be the publisher stipulates a term of trade that the contributor provides a licence to the publisher to reproduce the article on the internet in the future. In addition, under the Act, the copyright in the work can be assigned (transferred) to a publisher but such an assignment must be in writing and signed by or on behalf of the assignor (the contributor).

There are numerous variables in any copyright situation and far too many to discuss in this article. Accordingly, if you have any doubts about where you stand with any of your contributors and when and how you can reproduce your magazines, take advice! It may also be beneficial to examine your employment agreements and assess your terms of trade with contributors to look at how you deal with copyright. ■



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