COPYRIGHT IN INDEXES

THE ARGUMENT

As briefly reported in the last issue (April 1972, pp. 74-75) of The Indexer, the question of an indexer's entitlements with regard to the copyright of any index he compiles has been discussed by the Council of the Society.

The question, which was raised as a matter of principle as well as of finance by some senior members of the Society, resolved itself into two parts: (1) does copyright subsist in an index, and (2) if so, who owns the copyright? The answer to (2), it will be seen, might affect the earnings of the indexer. If the copyright is his property, then, unless he assigns it wholly and expressly to the publisher, he should expect additional payment for its use in further impressions, overseas editions, paperbacks, etc.

Some publishers and their editors have denied that there is any copyright in an index—a view supported originally by at least one distinguished member of the Society. This member, in defence of his view, made the point that there is no precedent, but he was given evidence by another member of the latter's success in obtaining additional payments from a publisher, who accepted the indexer's claim of ownership of the copyright, for outright assignment (as also mentioned in the April Indexer, page 74). It can be added that still another member of the Society, the writer of this report, in making a long-term indexing contract in 1960, was asked by the publisher concerned to agree to include a clause assigning the copyright to him; the contract, which was an involved one, was drawn up by lawyers for both sides and there was no doubt in any of their minds that a normal copyright situation existed.

Other members, therefore, have stood upon the terms of the Copyright Act, 1956, which restates the law that any original piece of writing automatically, as soon as it is put on paper, acquires the protection of copyright. And, as is stated in the letter to The Times signed by the Society's President, Mr. Norman Knight, and republished in the last issue of The Indexer, 'the courts have decided that even so simple a thing as a football fixture list is deemed to be copyright'. (This refers to the legal decision in 1959 in the case of Football League Ltd. v. Littlewoods Pools Ltd., where the Football League were declared the owners of copyright in their fixture lists, and therefore were able to charge for their use on pools coupons.) If football fixtures, then how much more the index, requiring skill and research!

Mr. Knight's letter followed articles on copyright in The Times, by Ronald Irving, which, ranging across a variety of subjects, nevertheless did not mention indexes. The Council, in January, when these articles were
appearing, set up a Copyright Subcommittee, with Mr. John M. Shaftesley as chairman and convener, and appointing Mr. Knight and Mrs. M. D. Anderson as members, with power to co-opt. The Subcommittee’s job was to try to pursue the matter in the press (the first, immediate, success being The Times letter) and, especially in the absence of any previous test case, to seek to obtain counsel’s opinion on the subject.

Mr. F. H. C. Tatham, a Vice-Chairman of the Society, at the same meeting drew attention to correspondence just beginning in The Bookseller on this same subject, sparked off by an incidental reference by another of the Society’s members, Mr. Oliver Stallybrass, in a two-part article contributed to The Bookseller in which he took the fact of copyright in indexes for granted. This was disputed by a publisher’s editor in a letter to that journal on January 15, 1972:

To the Editor of ‘The Bookseller’.

Sir,—In an otherwise admirable article in your issue of 4th December (which I have only just seen) Oliver Stallybrass introduced a note of mischievous nonsense in his reference to an indexer’s copyright. Presumably this was to afford indexers the opportunity to charge the publisher for (foregoing a right which has never, in my experience, existed. Or will the day come when one will write letters like this:

Dear Mr. Tushbeam III,

We are happy to offer you Municipal Elections in Ruritania for a 300 dollar advance on a 10 per cent royalty. In addition there are, of course, the usual subsidiary copyright fees to be paid—Indexer £25; copy editor £20; blurb-writer (if blurb is used in full) £3.00 (if used as a basis for your own blurb) £1.00; caption-writer £20; designer if you litho from our edition £20; typist if you set from original MS. £15.00; proof-reader (he did insert several commas which the copy-editor missed) £1.50; and ourselves, who made various suggestions to the author which resulted in a rearrangement of material, £100. You will not neglect to make the usual acknowledgements on the title page.

You will hear separately from our printers, binders, packers, etc., and of course from the authorities in Ruritania who published the election statistics.

Yours faithfully,

ROGER CLEEVE,
Editor.

Osprey Publishing Ltd.

Mr. Shaftesley immediately replied, and his letter was published on February 5:

To the Editor of ‘The Bookseller’.

Sir,—Who’s talking ‘mischievous nonsense’? I think it must be Roger Cleeve, who, in your issue of 15th January, applies this term to Oliver Stallybrass for daring to accept naturally, in an article in your journal, the existence of copyright in indexes.

There seems to be no clause or condition in the Copyright Act which excludes indexes from copyright. Mr. Cleeve may argue that there is no clause which includes them specifically, but that would be too subtle a refinement, as the Act gives no detailed list of types of work. Any original literary compilation is copyright as soon as it appears on paper, and it is not so many years in fact since the courts decided that even so elementary a compilation as a football fixture list has all the protection of copyright. Indexes, I take it even Mr. Cleeve will agree, require rather more literary skill than the drawing up of a fixture list. What amazes me is that there are still publishers who contest what seems the plain intent of the Act by singling out one item as being outside its provisions, although it would be thought that it fulfils the necessary conditions. Is there a publisher who can give the legal grounds for this stand, or has a test case been fought?

This attitude, by the way, is a measure of the low regard in which some publishers hold the index (a point on which many indexers could write reams).

Mr. Cleeve’s mock derisory letter to ‘Mr. Tushbeam III’ lists a lot of people engaged in the mechanical production of a book as likely claimants of additional ‘copyright’ dues once the horrid claim of indexes to copyright is admitted, but his analogies are patently false. As a writer, editor, artist, and indexer myself, with much experience of publishing books, I must draw attention to the truer analogy of the illustrations to a publication. Illustrations are generally no less dependent on the text of a book than the index is; I may be wrong, but I suspect that the opposition to acceptance of index copyright rests on the proposition that an index is nothing without the text—but then the converse is so often applies: the text is so often nothing without the index! But let Mr. Cleeve try to argue out of their copyright, say, certain museums, art galleries, photographers, or artists (including jacket designers), and see where that gets him. So it should be with indexes.

Yours very truly,

JOHN M. SHAFTESLEY,
Council member and former Hon. Secretary, Society of Indexers.

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This brought some incidental support from Mr. Maurice Prior, who wrote a letter on other problems of indexers in The Bookseller of February 26.

To the Editor of 'The Bookseller.'

Sir,—I would very much like to be associated with the remarks made by Mr. Shaftesley (5th February issue) regarding the apparent vexed question of indexing, and more specifically the point raised by him concerning the esteem, or in some cases lack of it, in which indexes are held by some publishers. Many appear to look on an index as a necessary evil, and in my experience of some 18 years of indexing, it is patent that some think an index is something of an afterthought to be grudgingly tolerated as a part of a book. I find many publishers lack the essential ability to put themselves in the reader of the book's place, and whether the reader would welcome the addition of an index. Too, there is a kind of air of 'fear' very much evident. Fear that an indexer may include too many entries with a view to his fee-upping instead of realising that an index can be an integral and worthy supplement to a title.

So much effort, skill and conscientiousness is requisite in a good, sound referential index, that it seems incomprehensible to me that some publishers are loath to include the name of the indexer possibly in the 'Acknowledgement' preface, and he or she therefore exists under a cloak of anonymity. No two indexers assess the compilation of an index in like manner and in my view it follows that a well-compiled index which receives the acclaim of the author and publisher merits some kind of copyright condition.

Yours faithfully,

MAURICE PRIOR.

But Mr. Cleeve, too, returned to the fray, with the following letter in the same issue:

To the Editor of 'The Bookseller.'

Sir,—I must thank Mr. Shaftesley for drawing a parallel between a book's index and a football pool fixture list, thus strengthening my argument that copyright in an index belongs to the publisher and not the indexer. For to whom does copyright in a fixture list belong—the publishers of the list or the individual who is paid to compile it? And to deal with his point about illustrations, the same rule applies of course: what is commissioned by the publisher is properly the publisher's copyright, unless an agreement is made to the contrary. There is no comparison between the purchase of a right to print a museum's copyrighted picture and the commissioning of an index, and Mr. Shaftesley's analogy is entirely misleading.

I am not, as Mr. Shaftesley implies, ignorant about—or unsympathetic towards—the indexing function. Whilst at Allen & Unwin I had the happy idea of initiating a book to be entitled Indexing, the Art of and was honoured by the acceptance of G. Norman Knight, founder of the Society of Indexers, to write it. But Mr. Shaftesley will find few people even in his own profession to support his apparent belief that the indexer's relationship to the publisher is comparable with the author's.

The fact is that because indexers are so poorly paid for their time and skill, and so often overlooked in the planning and early production of a book, people like Messrs. Stallybrass and Shaftesley attempt to raise the status of the indexer to its proper level by gross overcorrection. If it's not that which prompts him to say that a book is nothing without its index, and that typography and editing are mechanical, what on earth is it?

Yours faithfully,

ROGER CLEEVE.

The Bookseller's editor also kindly allowed Mr. Shaftesley a second 'go', and his letter was published on March 11:

To the Editor of 'The Bookseller.'

Sir,—Mr. Cleeve has, I fear, a penchant for extravagant language. After the 'mischievous nonsense' of Mr. Oliver Stallybrass, there is now Mr. Stallybrass's and my 'gross overcorrection'. Poor Mr. Stallybrass, who only innocently mentioned in passing the copyright of indexes! But now, like any advocate in a contentious cause, Mr. Cleeve has had his regulation two bites at the cherry, and I should appreciate your courtesy for a like privilege, after his letter in your issue of 26th February.

I think we now have the satisfaction of a clarification of Mr. Cleeve's attitude that was not apparent at least to me in his first letter. What he seemed to say then was that it was nonsense for an indexer to claim that he had any copyright in his work. Now he resolves that into a plainer statement of the outright ownership by the publisher rather than the indexer of the copyright in a commissioned work. (This, by the way, avoids the question of whose copyright is whose when, as is the custom with some publishers, they insist that copyright in an index belongs to the publisher rather than the indexer of the copyright in a commissioned work. (This, by the way, avoids the question of whose copyright is whose where, as is the custom with some publishers, they insist that the provision and commissioning of, and payment for, an index is the liability of the author of a book.)

It would be easy, but in the present context a waste of space and time, to argue the falsity of Mr. Cleeve's description of my reference to football fixture lists as a 'parallel' with indexes. I am sorry, too, that Mr. Cleeve has taken au grand sérieux my pleasantry about some books being
nothing without their index; I wrote ruefully as a researcher and editor myself. And when he singles out of his own list only the two items 'typography and editing' in order to belabour my reference to the 'mechanical' side of book production, he is more than unfair. He should be reminded that his own ironical list of putative 'copyright-owners' was, besides indexer: 'copy editor, blurb-writer, caption-writer, designer, typist, proof-reader, printers, binders, packers, etc.' Talk about 'over-correction'!

What, I have reason to know, exercises indexers on the question of copyright—other than outright assignment of their rights in any agreement they might make—is this claim of a publisher to all rights. Presumably an author of a hardback book would in the normal way receive extra payments for, say, paperback rights or for new editions by his first or different publishers. In the case of articles commissioned by newspapers, the copyright is ordinarily acquired from the writers by such newspapers for newspaper purposes only (unless special arrangements are agreed to, to the contrary). The Copyright Act of 1956 expressly provides that book and film rights are still retained by the author. Thus it is statutorily accepted, I think, that there are degrees of right and exceptions or restrictions in the ownership of copyright. This is what indexers are insisting on, and if publishers want to use the same index for different editions by themselves or others, or for any other process than the one originally provided for, they should acknowledge such a principle and pay extra for the index so used.

Yours faithfully,

JOHN M. SHAFTESLEY.

Mr. F. T. Dunn, another member of the Society, wrote in the same issue, and Mr. H. A. Jewers added a letter supporting Mr. Prior's views. Mr. Dunn's and Mr. Jewers' letters are as follows:

To the Editor of 'The Bookseller.'

Sir,—As a full-time free-lance indexer for 25 years (reaching this milestone on 21st April, if any of my publishers would care to mark the occasion), I have followed with interest the correspondence on indexers' copyright and public recognition.

I fully support Mr. Shaftesley and Mr. Prior, and the Society of Indexers (to which I belong), in their efforts to improve the indexer's status; but it does seem to me that a very good case is in danger of being spoilt by exaggeration. Any conscientious indexer takes a pride in producing a substantial, well-organised and detailed index, but this justifiable pride should not blind us to the fact that the index exists only as part of the book (even if it happens to be the best part); it cannot be considered separately with a view to republication as a solo item or in any other form, as a book jacket or illustration might be. The question of the indexer retaining the copyright, therefore, hardly seems to arise, unless, of course, anyone considers a Collected Edition of the Indexes of F. T. Dunn.

As for publishers' attitude to the indexer and the related question of the indexer's anonymity, my experience seems to differ from that of Mr. Prior. There are, of course, regrettable instances of publishers considering an index the most expendable or the most easily reducible feature of a book or refusing to allow a voucher copy; but in my experience they are a minority, and I have found no sign of the air of 'fear' of which Mr. Prior speaks.

Nevertheless, I agree with him in seeing no reason why the indexer should not be named, so that credit can be given where it is due. With reviewers paying more attention to indexes, it is galling to find an author (in all innocence) being congratulated on 'his' index because there is nothing to indicate that it was in fact the work of perhaps Mr. Shaftesley, Mr. Prior or me.

However, there are welcome breaks in the tradition of anonymity. The house of Harrap has recently initiated as regular policy the inclusion of the indexer's name (subject to his consent) at the head of any substantial index, and where one firm leads we can hope that others will follow.

Yours faithfully,

F. T. DUNN.

To the Editor of 'The Bookseller.'

Sir,—Mr. M. Prior's letter re indexes and indexers prompts me to add to his sentiments, with which I heartily agree.

Publishers of learned journals in many cases seem to regard a full or annual index as a necessary evil, when in fact it is undoubtedly an essential part of the reference value of a periodical. A collective index covering say 10 or even 50 years of publication of a journal is even more essential for the efficient use of the journal as a reference work. Yet when the suggestion that they should produce such an index is made to some of these publishers, the idea seems to appal them.

Yes, Mr. Prior, an index is an integral part of any worthwhile publication and, indeed, the indexer himself performs an equally important part of the production as the most learned observations published inside the book.

Yours faithfully,

H. A. JEWERS.
Mr. Dunn, it will be seen, takes the opposing view, but in further correspondence Mr. Knight took up the cudgels again:

To the Editor of ‘The Bookseller.’

Sir,—My attention has been called to my name having been introduced by Mr. Roger Cleeve (26th February) in the course of the great Index-copyright controversy which has been raging in your columns since early in January. Let me say at once how deeply grateful I am to Mr. Cleeve for having initiated ‘the happy idea’ of my being commissioned by George Allen & Unwin Ltd., to write Indexing, the Art of, which I hope will be ready for publication later this year.

I regret, however, that I cannot agree with his conclusions about copyright. An ounce of practice is worth more than a pound of precept. Mr. Cleeve may be surprised to learn that more than one prominent publishing house already recognise that an indexer possesses the copyright of his product unless and until he has assigned it. In the past two years I have personally received additional assignment fees ranging from 10 to 15 guineas each.

My present custom is to insert the following note at the foot of my bill for compiling an index: ‘Please note that the above sum does not cover assignment of my copyright’, and this almost invariably produces the desired result, although on one occasion I had first to suggest a friendly action in the courts.

This undoubted right on the part of the indexer has very recently been reinforced by Counsel’s opinion, specially obtained by the Society of Indexers. In probably eight out of ten cases it is of purely academic interest, since the publisher has clearly the right to produce an index for which he has paid. But the agreement between publisher and indexer, whether it be a written contract, as by the interchange of correspondence, or a verbal contract (e.g. made over the telephone), can only apply to the original publisher. If, as so frequently happens, he sells the rights in the complete work to a quite separate publishing house, either overseas, or at home (for, say, a paperback edition), and the new publisher decides to use the existing index, then the Society claims that the original contract ceases to apply and the indexer is entitled either to a copyright fee from the new publisher or to assign his copyright to the original one for a small fee.

Yours faithfully,

NORMAN KNIGHT.

While all this activity was proceeding, Mr. Knight and Mr. Shaftesley had a constructive talk with the author of The Times articles, who was very helpful in his comments. They followed this up by fulfilling the Council’s wish—which had also been urged independently by Mr. A. R. Hewitt, a Vice-President—to obtain counsel’s opinion. The following is quoted from this interesting document, which must prove of great value to the members of the Society of Indexers—as well as to others who ought to be members!

The above-quoted letters are reproduced by kind permission of the respective authors and journal editors.

COUNSEL’S OPINION

Following the publication in The Bookseller on 4th December, 1971, of an article by Mr. Oliver Stallybrass on the subject of indexes, and the publication in The Times of articles on Copyright by Mr. Ronald Irving, there has been dispute in the correspondence columns of these periodicals as to whether or not copyright subsists in an index. Mr. Roger Cleeve considers it ‘mischievous nonsense’ to assert that such a right exists, and I shall therefore consider first why it might not. Concluding that it does exist, I shall then consider who is entitled to it.

Existence of Copyright

A written work may be deprived of copyright protection

(1) because the copyright period has expired; or
(2) due to some inherent characteristic of the work; or
(3) because the labour of the producer of the work is not such as to attract copyright.

On these points,

(1) is not relevant in the present case.
(2) excludes works which are seditious, scandalous, blasphemous or immoral (Byron suffered under this head—he lost both Cain and Don Juan), and also arrangements of words which do not convey to the mind of the in-
structed reader any intelligible proposition. Thus aggregations of pure gibberish are not protected, and it has been held that there is no copyright in a cardboard pattern sleeve bearing printed scales and instructions, nor in the ingeniously printed face of a barometer, 'because both are really instruments to be used in conjunction with something else, and though there may be words or sentences on them, by themselves they convey nothing to the reader'.

It might be argued that an index also is 'an instrument to be used in conjunction with something else', and that it has no meaning when divorced from the corresponding text; this, however, involves a misunderstanding of the cases. The printed words on a barometer face convey no information whatsoever, unless the face is attached to the barometer and the needle is pointing; thus copyright could only have subsisted, if at all, in the barometer as a whole, and this would have depended upon registration at Stationers' Hall, which, needless to say, had no facilities for the registration of barometers.

By contrast, the words of an index lose none of their meaning through being separated from the text—the reader is still informed that, for example, Erasmus is referred to on p. 135—he is merely unable to pursue the matter further. An index is rather to be compared to a railway timetable, which is similarly 'to be used in conjunction with something else', but is not deprived of copyright because the reader happens to be in a foreign country, and so unable to catch any of the trains, nor, indeed, because the trains cease to run altogether. I am in doubt as to whether copyright can subsist in an index to a text which did not exist, but it is a problem which is unlikely to arise.

Almost the only labours in connection with a text which do not give rise to independent copyright are correction and transcription. There will be copy-right in a translation, in editorial comment, and in a particular form of re-arrangement. There can be no doubt that the preparation of an index involves the exercise of selective and grammatic skills of the utmost nicety, and that the index cannot be refused protection on the ground that the indexer is a mere copyist.

I therefore conclude that an index is the subject of copyright, independent from that in the appurtenant text.

Ownership of Copyright

Statutory provisions as to the initial ownership of copyright are contained in Section 4 of the Copyright Act, 1956, and are perfectly clear in the present case. Where the indexer is a freelance contractor, and not an employee of the publisher, then the copyright vests in the indexer, whether or not he was commissioned to do the work, and remains his until he disposes of it.

Assignment of Copyright

Section 36(3) of the Act provides that 'no assignment of copyright (whether total or partial) shall have effect unless it is in writing signed by or on behalf of the assignor'. From the description in The Bookseller article of the 'elegant pas-de-deux' between indexer and publisher, it does not appear that there is, in general, any such written assignment of copyright, and it therefore remains, in law, vested in the indexer. It may be, however, that it is the intention and understanding of both parties that for the agreed fee the publisher shall obtain full rights in the index, to deal with as he wishes. If that is the case, there has been a good equitable assignment of the copyright, and the absence of legal formalities is relatively unimportant—the publisher can call for a legal assignment to be executed in his favour by the indexer.

I should mention that since 1957 it has been possible to assign, both in law and equity, the copyright in a work which has not, at the time of the assignment, been writ-
ten; the assignment takes effect as soon as the copyright comes into existence.

Existing Contracts

I am not told that any dispute has so far arisen as to ownership of copyright in an index. The only reported case that I know of which concerns an index is H. Blacklock & Co. Ltd. v. C. Arthur Pearson Ltd. [1915] 2 Ch. 376, where the index to Bradshaw had been copied. It was not argued that copyright did not subsist in indexes, and since this one had been compiled by the publisher, no question of ownership arose. I am therefore unable to give more than a general analysis of what the position might be.

When the contract between two parties is silent on the point over which a dispute arises, it is necessary to determine what was the intention of the parties at the time when they made the contract, and the Court will imply such terms as are necessary to give business efficacy to the contract. At the least, the publisher must obtain, if he pays anything, an irrevocable licence to use the index in the particular edition for which it was prepared. At most, he may, as I have said, become the owner, in equity, of the entire copyright.

An indexer who denies that he intended to assign his copyright, or the whole of it, is asserting that he expected to be able to demand further payment, should his index be used, for example, in a second edition or in translation. It is not easy to justify such an assertion unless it has been customary for indexers in general to receive payment for such further use of their copyright material, or unless it has been customary as between the particular indexer and publisher.

Mr. Cleeve is wrong to suppose that if copyright is allowed to an indexer then the entire publishing staff will be entitled to it also—the copy-editor, blurb-writer, etc., are employees of the publisher, so that copyright in their literary efforts vests in him, while the labours of typist and proof-reader are not such as to attract copyright.

Future Contracts

For the avoidance of disputes, it is desirable that there should be certainty as to what rights in the index the publisher is to enjoy. It should not be supposed that such clarification will necessarily result in increased rewards for the indexer, for while he is certainly at liberty to restrict the rights enjoyed by the publisher—he could licence the printing of one copy only if he wanted to—it is to be expected that the publisher will correspondingly restrict the remuneration. Furthermore, separate ownership of copyright is somewhat inconvenient, and the publisher will prefer to buy it outright. If, for example, the copyright in the index is not vested in the publisher, then he should, under the word INDEX, display the notice provided for in Art. one hundred and eleven of the Universal Copyright Convention—the symbol © accompanied by the indexer's name and the year of first publication.

The question of ownership of copyright should be raised when the indexer and publisher are negotiating their contract. If the indexer agrees to part with the copyright, then he should make a written assignment. If it is decided that the publisher should enjoy limited rights only, then this may be implemented either by a partial assignment of copyright, or by a licence to print, publish and sell, subject to the limitations agreed upon.

Room for Improvement in Australia

Mr. H. Godfrey Green asks that it should be recorded that the University of Queensland Press also gave him assistance in collecting information for his article which appeared in our April issue, and regrets its omission.

Reference Books for Indexers

On page 61 of the April issue mention was made of A bibliographical dictionary of British architects, 1660-1840. This should, of course, have been A biographical dictionary . . .

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