

Plagiarism v copyright infringement

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Copyright infringement and plagiarism cause much confusion. Many writers believe that they can copy another author's work without infringing copyright if they properly attribute the source. Others believe that they cannot use the ideas or theories of other authors without risk of infringing copyright.

Neither belief is entirely correct. The confusion often stems from the fact that copyright infringement is enshrined in law whereas plagiarism is not so precisely defined. Rather than being based in law, the meaning of plagiarism is found in the professional or moral codes which govern authors' work. *Ogunkoya v Harding*, a case decided earlier this year, highlights some of the challenges in distinguishing the two concepts and provides useful reminders for non-fiction authors.

In *Ogunkoya v Harding*, Adenike Ogunkoya, the author of *A Hundred Years of Freedom: The Smith Sisters of Sierra Leone 1860–1960*, claimed that Charles Harding, the author of *The Fascinating History of My Liberated Ancestors*, had plagiarised three chapters of her unpublished manuscript.

Ogunkoya first began work on her book in 1999, and in 2009 as part of her research contacted Mrs Christine Harding, the defendant's mother, a descendant of the Smith sisters. As a means to fund her further research, in 2010 she contacted Mrs Harding again, offering to sell her the first three chapters of her draft manuscript with the promise that she would receive a free copy of the resulting published book. Several copies of the chapters were sold to the Smith sisters' descendants, including Mrs Harding. The copies included a statement to the effect that the chapters were mainly for the relatives of the Smith family and that they were not to be copied in whole or part without Ogunkoya's permission. Ogunkoya's manuscript remains unpublished.

In 2016, the defendant Charles Harding published his book about his own ancestors, which contained two chapters about the Smith family. Harding's work includes a bibliography listing a vast array of sources and acknowledgments of the assistance he received in writing the book. Ogunkoya is not mentioned.

Ogunkoya filed a claim against Harding for 'plagiarism' on the grounds that 'conclusions made by the Claimant have been copied, portions have been copied. Numbers of the conclusions made by the Claimant are entirely new over earlier works, yet are included in the Defendant's work. That is no coincidence.' Ogunkoya was representing herself throughout the proceedings and so, before the matter proceeded to court, a case management conference was held so that the court could determine what kind of claim she was attempting to make.

The law

Copyright is a legal right which grants copyright owners certain statutory rights (in the UK, by the Copyright, Designs and Patents Act 1988) to control the reproduction and dissemination of their work for a specified period of time. If another person copies or issues copies of a work to the public without the rights-owner's permission, this will likely be an infringement of copyright.

Plagiarism arises when someone tries to pass off another person's ideas or work as their own. It is concerned with properly attributing ideas, theories and research to those who have discovered or created them. Plagiarism, though in some circumstances it may overlap with infringement of copyright, is not a legal cause of action. It may be morally disingenuous and unprofessional to pass off the ideas of others as your own, but it is not necessarily unlawful. That does not mean it is without consequence, however. Students or writers who are journalists or academics may be subject to codes of practice or faculty or funding policies that prohibit plagiarism and may even prescribe the circumstances and form in which the writer must credit their sources. Breach of these conditions could result in disciplinary action such as termination of employment or withdrawal of research funding.

It is possible for an author both to plagiarise another's work and to infringe copyright. For example, if an author writing a work of history incorporates several paragraphs word-for-word from another historian's book without properly attributing it, this would be a case of plagiarism as the author is presenting the quoted work as their own. As the author has also copied several parts of the history book word-for-word, this is also likely to amount to copyright infringement if the author does not have the permission of the copyright holder or if a relevant copyright exemption does not apply.

There are of course circumstances where plagiarism does not amount to infringement of copyright. If, in the example given above, the author used the historian's ideas or theses without properly attributing them, but did so in such a way that a substantial part of the historian's book was not copied, then the original work may have been plagiarised but its copyright was not infringed. Or, if the historian's period of copyright protection had lapsed, using lengthy, unattributed quotations will amount only to plagiarism.

Many authors will be familiar with the *Da Vinci Code* case in which Michael Baigent and Richard Leigh, the authors of a non-fiction work, *The Holy Blood and The Holy Grail*, claimed Dan Brown's novel *The Da Vinci Code* infringed copyright in their work by adopting a central thesis that references to 'the holy grail' in early Christian manuscripts were in fact to the bloodline of Jesus Christ. Though Dan Brown had not copied the text of their work, Baigent and Leigh (unsuccessfully) argued that he had copied how this thesis was structured and presented.

The case is ten years old now but is a useful reminder that 'non-textual' copying of ideas, plots and themes may be plagiarism but will only amount to copyright infringement where it is evident that what has been copied is the author's own 'skill and labour' in how these non-textual elements are expressed. The Court of Appeal was clear that to decide otherwise would amount to creating monopolies on historical research or knowledge.

It is also possible for a work to infringe copyright but not amount to plagiarism. For example, disseminating unauthorised copies of a book or hosting a publication on a website without the

copyright owner's consent would probably amount to copyright infringement. However, it would not amount to plagiarism if the infringers do not also claim that the work is their own.

The decision

Ogunkoya's claim was for 'plagiarism'. As this is not a legal cause of action, the court (in this case, Recorder Michaels in the Intellectual Property Enterprise Court) recast the claim as one of copyright infringement.

The court considered nine instances of alleged infringement as submitted by Ogunkoya. In her analysis, Recorder Michaels highlighted the difficulty of establishing evidence of copying between two works which both relied on historical sources. She also clarified the distinction between plagiarism and copyright infringement.

It was not in dispute that Harding had read Ogunkoya's work. He admitted that he had 'flipped through it' whilst visiting Mrs Harding, his mother. The court was therefore able to establish that Harding had access to the work and had the opportunity to copy it. The court also recognised similarities in the texts as to dates, names and descriptions of the relevant family members.

Ultimately, Recorder Michaels found that Harding had not infringed copyright in Ogunkoya's work. Though there were similarities between the texts, it could not be established that the whole or a substantial part of Ogunkoya's work had been copied. Firstly, the instances of linguistic similarity were extremely small; limited to a few words, names and dates. Secondly, Ogunkoya could not show that the parts of work she alleged had been copied amounted to a substantial part of her own work.

The test the court had to consider was whether the relevant part in itself contained original elements that were the expression of the author's own intellectual creation. It is not possible to have copyright protection in an idea, but copyright will protect how that idea is expressed. The author's own intellectual creation may be expressed through the words chosen but also potentially through elements such as the author's chosen subject matter, themes and arguments. It is difficult to show this in a non-fiction work where existing sources and known historical facts will limit the author's options for originality and intellectual creativity. Nonetheless, where this can be shown, there will be grounds for infringement of copyright.

Ogunkoya failed in this test because Harding was able to produce much of the original source and reference material he had consulted in producing his work. Recorder Michaels determined that what little similarities there were between the texts were the result of the parties using similar source material and the coincidence of writing about the same subject matter.

Ogunkoya alleged that even if Harding had not copied her work, he had used it as a 'short-cut' for his own research and she should have been credited. The allegation falls short of one of copyright infringement but certainly seems to be one of plagiarism. The court was only able to decide on the matter of copyright infringement but Recorder Michaels said that in regard to plagiarism, she found no evidence that Harding made use of any material derived either directly or indirectly from Ogunkoya's work. Instead, she noted Harding produced 'copies of credible, independent and publicly accessible sources of his information' and queried why he would use Ogunkoya's unpublished and unfinished draft in favour of those sources.

Breach of confidence

Ogunkoya also claimed that Harding had unlawfully accessed her work, which she described as 'a private research product'. Ogunkoya relied on the statement published at the beginning of the copy she provided to Mrs Harding and an alleged oral agreement with Mrs Harding that the work should not be taken from her home by any relative who did not live at the same address. Mrs Harding denied that there was any such agreement.

As part of the case management conference which was held before the trial, the court decided that Ogunkoya was in fact claiming for breach of confidence. The tort of breach of confidence protects confidential or private information conveyed in circumstances of confidentiality from unauthorised disclosure.

Ogunkoya had included a statement in her work stating that the chapters were 'mainly for the descendants and friends of the Smith family' and were not to be copied in part or whole without her permission. The court decided that this did not give notice to the purchasers of the book that the contents were to be kept confidential. Rather it merely described the intended recipients of the chapters. Nor did it prevent the work from being used, in the words of Recorder Michaels, 'in the same way that any published historical work could be used... as a source of information, inspiration and potential lines of inquiry to other source material'.

The court also found that Ogunkoya's alleged verbal agreement did not amount to an agreement of confidentiality as it did not prohibit Mrs Harding from using the work generally or discussing it with others. In any case, it did not prohibit her from sharing it with relatives visiting her home, as she had with Harding.

What authors need to learn

The case helpfully sets out the key distinctions between plagiarism and copyright. It also serves as a reminder to those of us who write non-fiction and use reference materials that our own originality and creativity in producing our work will not only help reduce the likelihood of a claim from another author but also help protect our own from being unlawfully or unprofessionally copied by others.

The case also shows how meticulous record-keeping during the research and writing processes could support a claim or a defence for copyright infringement. It demonstrates the value of keeping a record of all sources you access and when you access them, whether or not you use them in the final version of your work.

Further, any author considering sharing an unpublished work with any other person needs to think carefully about how to maintain its confidentiality. Manuscripts should always be marked as confidential. In addition you might want to consider entering into a non-disclosure agreement that would contractually bind the recipient from disclosing the information your manuscript contains. ●

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