



CREATE

Copyright for Archivists: An Introduction

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Education and Training Resource**

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Venue: New Register House
3 West Register Street
Edinburgh EH1 3YT

Ronan Deazley

Updated by Victoria Stobo

victoria.stobo@glasgow.ac.uk

A Note from the Authors

The following commentary incorporates changes to the law implemented by the *Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014*. For a discussion of the law as it stood before the 2014 *Regulations*, see: Ronan Deazley and Victoria Stobo, *Archives and Copyright: Risk and Reform*, CREATE Working Paper No.3 (March 2013), 6-18 (available [here](#)).

CREATE and the Scottish Council on Archives intend to release subsequent updates of this resource as and when appropriate. As such we would welcome comments upon the material and arguments set out within this resource, and well as suggestions for further development.

Please direct all relevant correspondence to Victoria Stobo, School of Law, University of Glasgow (victoria.stobo@glasgow.ac.uk).

1. INTRODUCTION

The term copyright may be used in different senses. It may, for example, be used to describe all of that area of the law dealing with authors' works, or to describe the particular right granted under the relevant statute protecting such works. Also, different jurisdictions describe the scope of copyright differently. For some, the concept of copyright only refers to productions like literary, dramatic, musical and artistic works; for others, the concept of copyright also includes rights in productions such as sound recordings and films. Within the UK, the main legislative provision regulating copyright law is the *Copyright, Designs and Patents Act 1988* (the CDPA) (as amended).

2. WHAT IS NOT COPYRIGHT-PROTECTED

Before considering what copyright protects, it is worth considering what copyright does *not* protect. There are four issues to consider here: (i) the difference between the work and the copyright in the work; (ii) the difference between an idea and the expression of that idea; (iii) that copyright is not a monopoly right; and, (iv) immoral or indecent works.

2.1. The difference between the work and the copyright in the work

It is important to realise that owning the copyright in a work does not necessarily mean that you own the work itself (and vice versa). They are two separate forms of property. Consider for example a work of art: a painting. Copyright regulates the commercial exploitation of the work by reproducing the image. Owning the painting does not mean that the owner has the right to make copies of the painting; that right lies with the owner of the copyright. Ownership of the painting and ownership of the copyright in the painting are two forms of property that can and do very often lie with two different people.

2.2. Idea and expression

Copyright does not protect the idea for a work, only the expression of that idea. In *Donoghue v. Allied Newspapers* [1938] 1 Ch 106 Farwell J observed that:

[T]here is no copyright in an idea, or in ideas. A person may have a brilliant idea for a story, or for a picture, or for a play, and one which appears to him to be original; but if he communicates that idea to an author or an artist or a playwright, the production which is the result of the communication ... is the copyright of the person who has clothed the idea in form, whether by means of a picture, a play or a book, and the owner of the idea has no rights in that product.

However, how and where do you draw the line between an idea and the expression of that idea? As Lord Hailsham commented in *LB (Plastics) v. Swish Products* [1979]: '[i]t all depends on what you mean by ideas'.

2.3. Copyright is not a monopoly right

Copyright does not provide the copyright owner with a monopoly right. Copyright prevents others from copying your work, but it does not prevent others from exploiting very similar or even identical works that they have independently created (however unlikely that may seem). In *Francis Day & Hunter v. Bron* [1963] Ch 587 Upjohn LJ commented that there must be a *causal connection* between the alleged infringer's work and that of the copyright owner. That is, the infringer must have actually copied the copyright owner's work. He continued that 'if it is an independent work, then, though identical in every way, there is no infringement'.

2.4. Immoral or indecent works

Traditionally, as a matter of public policy, the courts have also refused to protect works they consider to be immoral, obscene, scandalous, or irreligious. In *Glynn v. Weston Feature Films* [1916] 1 Ch 261 the defendant made a film, *Pimple's Three Weeks*, which the claimant alleged was based upon her novel, *Three Weeks*. Younger J refused to protect the claimant's work.

Stripped of its trappings [the claimant's work] it is nothing more nor less than a sensual adulterous intrigue ... [I]t is clear that copyright cannot exist in a work of a tendency so grossly immoral as this, a work which, apart from its other objectionable features, advocates free love and justifies adultery where the marriage tie has become merely irksome.

As recently as February 2000, Aldous LJ, in *Hyde Park Residence* [2001] Ch 143, reaffirmed that works which are 'immoral, scandalous or contrary to family life' would be refused copyright protection before the courts. In practice, however, the line taken by the courts today is likely to be much more tolerant, and far less paternalistic and prudish, than was the case in *Glynn*.

3. WHAT IS COPYRIGHT-PROTECTED?

The CDPA sets out a detailed and exhaustive list of eight different types of work protected by copyright (s.1):

- (i) original literary, dramatic, musical and artistic works (s.1(1)(a))
- (ii) sound recordings, films and broadcasts (s.1(1)(b)), and
- (iii) the typographical arrangement of published editions (s.1(1)(c))

A distinction can be drawn between those works in the first category, and those in other two. Historically this distinction used to reflect the fact that the first category contained the works of an author ('authorial' copyrights), while the others concerned the methods by which those authorial works were secondarily exploited ('neighbouring' or 'related' rights). Put another way, the protection afforded works in the first category reflected the interests of a creative author, whereas the protection afforded works in the second category reflected the interests of an entrepreneur or investor and were generally considered to be less deserving in terms of length of protection. Today, this distinction is no longer so

clear-cut; for example, films have been accorded the same status (in terms of copyright duration) as works in the first category.

In any event, all eight types of protected subject matter are referred to as 'works'. In order for something to be protected by copyright in the UK it must fall within one of these eight prescribed categories.

One effect of this exhaustive list is that it leaves no room for the courts to recognise new forms of subject matter, other than through the generous interpretation of the eight existing categories. Sometimes this has resulted in the courts producing quite strained interpretation of the legislation.¹ On other occasions, the fact that the list is closed has led to the exclusion of works that would have been protected in countries operating a non-exhaustive system.

And, of course, it is important to appreciate that more than one copyright may subsist in a particular cultural product or creation. Consider, for example, a recording of a song; there may be copyright in the lyrics, in the music, in the arrangement, and in the sound recording itself. With a film, there may be copyright in the original story, in the screenplay, in the musical score, and in the film itself. It is important to be able to separate the different types of copyright involved as each may have a different author and/or owner.

3.1. Literary works

Literary works were the first type of work to receive statutory protection in the UK under the *Statute of Anne* 1710. Under the CDPA they are defined to include: 'any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes: (i) a table or compilation (other than a database); (ii) a computer program; (iii) preparatory design material for a computer program; and (iv) a database' (s.3(1)).

Literary works include those things we normally think of as literature (novels, poetry) as well as the ordinary and the banal: listings of stock exchange prices, chronological tables, logarithm tables, and so on. For this reason, it is important to bear in mind that the term 'literary work' implies no condition of literary merit or style.² When problems have arisen in deciding whether something is a literary work, the courts have tended to rely upon the test set out in *Hollinrake v. Truswell* (1894) 3 Ch 420, in which the Court of Appeal (the CA) suggested that to qualify as a literary work, the creation must provide 'either information or instruction, or pleasure, in the form of literary enjoyment'.³

¹ See for example the comments of Whitford J in *CBS v. Ames Records* [1981] RPC 407 in observing that the fact that the United Kingdom had no law of unfair competition had resulted in copyright being 'stretched to give protection to creative talents and activities the protection of which was never in the contemplation ... of those who from time to time have been responsible for the framing of successive statutes'.

² See Lord Evershed in *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 WLR 273, at 281.

³ Davey LJ: '[A] literary work is intended to afford either information and instruction, or pleasure, in the form of literary enjoyment. The sleeve chart before us gives no information or instruction. It

One of the more significant decisions in recent times concerning the concept of a literary work is *NLA v. Meltwater* [2010] EWHC 3099 (Ch) and [2011] EWCA Civ 890.

In *Meltwater* Proudman J was asked to consider whether copyright might subsist in the headline for a newspaper article as a free-standing original literary work. Taking a cue from the European Court of Justice's decision in *Infopaq International A/S v. Danske Dagblades Forening* (C-5/08), and noting that 'headlines involve considerable skill in devising' and that 'they are specifically designed to entice by informing the reader of the content of the article in an entertaining manner' (para.70), Proudman J concluded that 'headlines are capable of being literary works, whether independently or as part of the articles to which they relate' (para.71). Her decision was upheld on appeal, Jackson LJ noting that it was 'plainly correct'.

3.2. Dramatic works

Dramatic works were first protected as a distinct category of protected subject matter by the *Dramatic Literary Property Act* 1833. The CDPA provides a fairly limited definition in setting out that a dramatic work 'includes a work of dance or mime' (s.3(1)).

In *Norowzian v. Arks Ltd* [2000] FSR 363 the claimant had made a short film, *Joy*, with a single dancer as the protagonist. The film had no dialogue and made use of an editing technique referred to as 'jump cutting'. Arks, who were the advertising agents for the Guinness group, approached Norowzian to make an ad campaign entitled *Anticipation*, influenced by *Joy*. Norowzian refused; Arks made their ad campaign anyway.

Norowzian alleged infringement arguing that his film was a dramatic work. At first instance the judge held that *Joy* could not be a recording of a dramatic work as the editing technique employed created a visual image that could not be recreated in the real world. That is, a work of dance or mime had to be capable of actually being performed. In the Court of Appeal, however, it was held that the expression 'dramatic work' should be given its ordinary and natural meaning, which was *a work of action, with or without words or music, which was capable of being performed before an audience*. With this definition in mind, the court continued that a film could be *both* a recording of a dramatic work, but also a dramatic work in and of itself in that it was a work of action that was capable of being performed before an audience.

So, from *Norowzian*, a 'dramatic work' has two components: (i) it must be a 'work of action'; and (ii) it must be 'capable of being performed'. And, in relation to the

does not add to the stock of human knowledge or give, and is not designed to give, any instruction by way of description or otherwise; and it certainly is not calculated to afford literary enjoyment or pleasure' (428).

latter, we now know that a film itself might amount to a dramatic work as it is capable of being performed (that is: played).⁴

3.3. Musical works

Music embodied in print form (that is, sheet music) has been copyright protected since *Bach v. Longman* (1777) 2 Cowp 623 in which Lord Mansfield held that music was a form of ‘writing’ that qualified for protection under the *Statute of Anne* 1710:

Music is a science; it may be written; and the mode of conveying the ideas, is by signs and marks. A person may use the copy by playing it; but he has no right to rob the author of the profit, by multiplying copies and disposing of them to his own use. If the narrow interpretation contended for in the argument were to hold, it would equally apply to algebra, mathematics, arithmetic, hieroglyphics. All these are conveyed by signs and figures. There is no colour for saying that music is not within the Act.

Today, a musical work is defined in the CDPA as ‘a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music’ (s.3(1)). In practice what qualifies as ‘music’ is rarely likely to give rise to any great problem. What is clear however is that lyrics, actions, and so on, are not protected as part of the musical work, but are copyright works in themselves (that is, as literary or dramatic works).

3.4. Artistic works

The first artistic works to be granted copyright protection were engravings (*Engravers’ Copyright Act* 1735). These were followed by calico designs (1787), certain works of sculpture (in 1798, and then in 1814), drawings, paintings, and photographs (in 1862), and then ‘works of artistic craftsmanship’ (in 1911).

The CDPA defines artistic works as including:

- (i) Graphic works, photographs (excluding a film), sculptures and collages *irrespective of artistic quality* (s.4(1)(a)) (emphasis added)
- (ii) Works of architecture being a building or a model for a building (s.4(1)(b))
- (iii) Works of artistic craftsmanship (s.4(1)(c))

Graphic works are further defined by the Act as including: paintings, drawings, diagrams, maps, plans, charts, engravings, etchings, lithographs, woodcuts, or any similar works (s.4(2)) (a non-exclusive definition). A photograph is defined as ‘a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film’ (s.4(2)).

⁴ Note that, in *Norowzian*, the Court of Appeal ultimately decided that there was no infringement as the defendant’s film had not reproduced a substantial part of the claimant’s work (for commentary on the concept of ‘substantial taking’, see 9.2 below).

3.5. Sound recordings

Sound recordings were first afforded protection under the *Copyright Act 1911* in which they were protected as if they were musical works. In the CDPA, sound recording is defined to mean:

- (i) a recording of sounds, from which the sounds may be reproduced, or
- (ii) a recording of the whole or part of a literary, dramatic or musical work, from which the sounds reproducing the work or part may be produced

regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced (s.5A(1)). As a result, the Act provides protection for vinyl records, tapes, compact discs, digital audio tapes and other media which embody recordings.

3.6. Films

Under CDPA a 'film' is defined as a recording on any medium from which a moving image may be produced by any means (s.5B(1)), a broad definition which encompasses celluloid films, video recordings, disks, and so on. Moreover, under *Norowzian*, a film itself might be considered to be a dramatic work, of which the director and the scriptwriters may be co-authors.⁵

3.7. Broadcasts

The idea of protecting broadcasts within the copyright regime involves accommodating an important difference between broadcasts and other types of copyright protected works. A broadcast does not involve the creation of a work, *per se*, as is the case with literature, drama and art, but rather involves the provision of a service (an action).

Broadcasts are not fixed (although they can be) but are ephemeral acts of communication. To protect a broadcast is to protect *the signal* which is transmitted.

Broadcasts were first protected in the UK by the *Copyright Act 1956*. Analogous protection to that afforded to broadcasts was extended to cable programmes from 1 January 1985.⁶ The CDPA recognised both as two separate categories of subject matter, a distinction that was subsequently abandoned (as of 31 October 2003) following the implementation of the European *Information Society Directive 2001*. In its amended form, a broadcast is defined as an: 'electronic transmission of visual images, sounds, or other information which:

- (a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them; or

⁵ Note: under the CDPA, there is no requirement that the film be 'original', in the same way that literary, dramatic, musical, and artistic works are required to be original. (For a discussion of the concept of 'originality' see 4.2. below.)

⁶ *Cable and Broadcasting Act 1985*, s.22.

(b) is transmitted at a time determined solely by the person making the transmission for presentation to members of the public' (s.6(1)).

The definition requiring that transmission only be 'electronic' means that the protection provided by the legislation covers transmission both by wire and wireless, terrestrial and satellite transmission, as well as analogue and digital broadcasts.

By referring to 'visual images, sound, or other information' the definition will also cover a broad range of content, such as radio and television.

The statutory definition of a broadcast, however, does exclude certain forms of transmission. The requirement that transmissions be for 'simultaneous reception by members of the public' excludes a transmission between individuals (telephone calls, faxes, e-mails, and so on) as well as transmissions on private networks (institutional intranets). It also excludes transmission in which the recipient decides the time of the transmission (that is, on-demand services). Moreover, s.6(1A) specifically excludes 'any Internet transmission' (albeit subject to three reasonably generous exceptions).⁷

3.8. Typographical arrangements

This category of protection was introduced as part of the *Copyright Act 1956* (s.15): the typographical arrangement of published editions. A published edition is currently defined as 'a published edition of the whole or any part of one or more literary, dramatic or musical works' (s.8(1)). There is no requirement that the published edition be of a previously unpublished work. That is, a new published edition of a literary work that is no longer in copyright (or, in other words, a work that is in the public domain) is copyright protected.

Note, however, this does not prevent someone else publishing the work itself; it simply prohibits the reproduction of that particular typographical layout and arrangement.

4. PROTECTION CRITERIA

In order for a work to be copyright-protected, as well as falling within one of the relevant categories of protected subject-matter, it is necessary to establish that it satisfies the various criteria for protection. These requirements will differ depending upon the category of protected subject-matter within which the work falls. In general, however, there are three requirements to bear in mind: (i) fixation: that the work is recorded in material form; (ii) originality: that the work is 'original'; (iii) qualification: that the work qualifies for protection under UK law.

⁷ The exceptions are as follows: an Internet transmission falls within the definition of a 'broadcast' if it is: (i) a transmission taking place simultaneously on the Internet and by other means; (ii) a concurrent transmission of a live event; or, (iii) a transmission of recorded moving images or sounds forming part of a programme service offered by the person responsible for making the transmission, being a service in which programmes are transmitted at scheduled times determined by that person (s.6(1A)).

4.1. Fixation

It is a general presumption of copyright law in the UK that all subject-matter should exist in some permanent form before it can be copyright-protected.

Consider *Merchandising Corp. of America* [1983] FSR 32: In this case Adam Ant tried to prevent others from re-producing his 'look' by arguing that his ('Prince Charming') make-up was a copyright work of art. The court held that make-up was not capable of attracting copyright protection as it was transitory in nature, lacking the permanence associated with a work of art. Lawton LJ commented that a 'painting is not an idea: it is an object; and paint without a surface is not a painting'.

Generally, when considering artistic works – such as a photograph – the point of creation and the point of fixation occur in the same moment. However, this is not necessarily true for the other three categories: literature, drama, and music. The CDPA provides that copyright will not subsist in a literary, dramatic or musical work 'unless and until it is recorded, in writing or otherwise' (s.3(2)).

In addition, the CDPA states that, in relation to literary, musical, and dramatic works, the fixation requirement will be satisfied even when the recording is carried out by someone other than the creator of the work, and, with or without their permission (s.3(3)).

4.2. Originality

There are no technical requirements to be met before a work will be copyright-protected (that is, the work does not need to be registered, unlike other forms of intellectual property such as patents and trademarks). However, this does not mean that every literary, dramatic, musical or artistic work will also be a copyright work. There is a minimum criterion set out in the CDPA which requires that all literary, dramatic, musical and artistic works be *original* before they will be copyright (s.1(1)).

But, what exactly does originality mean? How high (or low) is this threshold set? Peterson J in *University of London Press* [1916] 2 Ch 601 commented as follows:

The word original does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas ... the Act does not require that the expression must be in an original or novel form, but that the work *must not be copied from another work* – that it should originate from the author.

While UK case law on the concept of originality is not always consistent, the courts are generally in agreement so long as the author has expended a considerable amount of labour, skill and judgment in the production of the work in question, then the work should be copyright-protected (this is often referred to as the *sweat of the brow theory*). This sets the threshold for protection at a very low level in that the expenditure of *non-creative skill and labour* can result in the work in question attracting copyright protection.

Recently, in *NLA v. Meltwater* [2010] it was argued that the decision of the ECJ in *Infopaq International A/S v. Danske Dagblades Forening* (C-5/08) introduced a

concept of creativity ‘which is not merely a different means of expressing skill, judgment and labour but [one that] requires a higher threshold of originality’. Jackson LJ, in the Court of Appeal, rejected the argument commenting as follows:

[19] The word “original” does not connote novelty but that [the work] originated with the author. This test was clearly established in the domestic law of England by the decision of Peterson J in *University of London Press* [1916] ... approved by the House of Lords in *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 WLR 273. ...

[20] Although the Court [in *Infopaq*] refers to an “intellectual creation” it ... clearly relates such creation to the question of origin not novelty or merit. Accordingly, I do not understand the decision of the European Court of Justice in *Infopaq* to have qualified the long standing test established by the authorities referred to in paragraph 19 above.

That is, the exercise of *non-creative skill and labour* remains the threshold for satisfying the criterion of originality under the CDPA.

That said, there are limits to what the law will protect. For example, in *The Reject Shop v. Robert Manners* [1995] FSR 870 the question for the court concerned whether an enlarged photocopy of a drawing was in itself an original artistic work. The court rejected the claim commenting that the act of photocopying the work was a ‘wholly mechanical’ exercise, and so lacked the requisite originality.

Another instance in which the labour and skill expended fail to satisfy the originality requirement arises when the labour expended is regarded as *trivial or insignificant*. On this issue, Proudman J recently commented that ‘[w]hat is required for artistic originality is *the expenditure of more than negligible or trivial effort or relevant skill* in the creation of the work’ (emphasis supplied).⁸ *Cramp v. Smythson* [1944] AC 329, for example, concerned the selection of seven tables at the front of a diary, consisting of such things as: days and dates of the year; tables of weights and measures; postal information, and so on. Viscount Simon rejected that these selections might be considered to be original, remarking that the material involved ‘commonplace information which is ordinarily useful and is ... commonly found prefixed to diaries’.

Moreover, even when the creator of a work has expended considerable labour in the creation of the same, in some cases, this has been held not to be sufficient; that is, it is the *wrong kind of skill and labour*. So, for example, in *Interlego AG v. Tyco Industries Inc* [1989] the issue at hand concerned whether there was copyright in drawings of lego bricks. After Lego’s patents and designs in the bricks in question expired in 1975, the company tried to argue that copyright existed in drawings of the bricks which they had produced in 1973. These drawings were based upon earlier drawings of bricks, and so the question arose as to whether the 1973 drawings exhibited sufficient originality to warrant new copyright protection. The Privy Council rejected the claim that the 1973 drawings were original. Lord Oliver commented as follows: ‘copying *per se*, however much skill or labour may be devoted to the process, cannot make a work original’. He continued: ‘[A] well

⁸ *Future Publishing v. The Edge Interactive Media* [2011] EWHC 1489 (Ch).

executed tracing is the result of much labour and skill but remains what it is, a tracing'. In relation to artistic works, he considered, the change in the work must be 'visually significant'; that was not the case here, and so, the drawings lacked originality.

4.2.1. Originality in the US and elsewhere

The position in the UK, where the exercise of non-creative labour can give rise to an original copyright-protected work, can be compared with the position in other jurisdictions. In the US, for example, the courts have adopted a slightly higher threshold, requiring that work exhibit a certain amount of creativity in its production. *Feist Publications v. Rural Telephone Service Co.* (1991) 499 US 340 involved the issue of whether a White Pages directory (that is, a phone book) was a copyright work. Justice O'Connor, delivering the sole opinion of the American Supreme Court, stated:

Original, as the term is used in copyright means only that the work was independently created by the author (as opposed to copied from other works) and that it possesses at least some *minimal degree of creativity*.⁹

Similarly, in Germany, for example, case law suggests that there is a requirement of some minimal degree of creativity, and in France, originality is said to require 'the imprint of the author's personality' on the work or something amounting to an intellectual contribution to the same.

More recently the Israeli Supreme Court considered the concept in *Premier League v. Sports Betting Board* (2010).¹⁰ The claimant alleged infringement of its lists of information on football matches in England (and Scotland) – primarily fixture lists. The Supreme Court rejected the claim to copyright protection commenting that compiling the list on the basis of scheduled matches was not remotely creative. It established a combined test which requires both investment of independent skill and effort alongside evidence of a degree of creativity. Both investment and creativity elements need to be satisfied for the work to be original, and the court made clear that a lack of creativity could not be compensated by substantial investment (or vice versa). The court also commented that, while the concept of investment would not normally raise any difficulties, 'the creativity test will ultimately determine whether a work satisfies the originality requirement'.

⁹ This approach has been specifically rejected in Australia: *Desktop Marketing Systems Ltd v. Telstra Corporation Ltd* (2002); the Federal court affirmed that laborious collection of data was sufficient to render a telephone directory an 'original literary work'. Similarly, see the Canadian Supreme Court decision of *CCH Canadian v. Law Society of Upper Canada* [2004] in which the court held that copyright existed in headnotes of judicial opinions, stating that 'imagination or creative spark' was not a necessary element of originality. At the same time, however, the Supreme Court explained that labour alone would not ordinarily suffice to demonstrate originality, and that the skill and judgement required to produce the work must not be so trivial that it could be characterised as a purely mechanical exercise.

¹⁰ For commentary, see G. Oron, "Reappraising originality under Israeli copyright law – the Premier League v Sports Betting Board decision" [2010] *IIC* 708-17.

Moreover, the court did not limit its ruling to tables and compilations only, or indeed to any specific category of protected subject matter.

4.3. Qualification (ss.154-56)

Before a work will be protected within the UK, the work must qualify for protection. The CDPA prescribes certain factors that will give the work a sufficient connection with the UK which concern: authorship; the country of first publication; and, the place of transmission (for broadcasts). Essentially, if the author is a British citizen or was domiciled or resident within the UK at the time when the work was created, then the work will qualify for protection. Similarly, if the work was first published (or transmitted) within the UK it will qualify for protection.

5. AUTHORSHIP

The concept of the author is central to copyright law. Each copyright work must have an author. The identity of the author is determined by the CDPA which sets out that the author 'in relation to a work, means *the person who creates it*' (s.9(1)). For those situations in which it may be more difficult to determine who the author of a particular work is, the statute also provides some further guidance. In relation to the more 'entrepreneurial' works, the CDPA tends to define the author as the person who makes the arrangements for the creation of the work. For example, for sound recordings this will be the producer (s.9(2)(aa)); for a film this will be the producer and the principal director (s.9(2)(ab)); for a literary, dramatic, musical or artistic work which is computer-generated it will be the person by whom the arrangements necessary for the creation of the work are undertaken (s.9(3)).

In certain circumstances it may not be possible to ascertain who the author of a literary, dramatic, musical, or artistic work is (particularly when the author of the work does not wish his or her identity to be revealed). To address this, the CDPA includes the concept of works of 'unknown authorship'. A work is of 'unknown authorship' if the identity of the author is unknown and it is not possible for a person to ascertain his or her identity by reasonable inquiry (s.9(4)(5)).

What, however, if there is more than one author?

There are two different situations to consider here: (i) where the distinct contributions of the several authors can be identified; (ii) where the nature of the collaboration means that each respective contribution cannot meaningfully be distinguished from each other.

In the first case each of the authors will own the copyright in the individual contributions they make. In the second case, where the contribution of one author is not distinct from another, there exists a situation of joint authorship.

The CDPA defines a work of joint authorship as one 'produced by a collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors' (s.10(1)). When establishing that a work is of joint authorship, there are three things to consider:

- (i) that each of the authors contributed in some way to the making of the work
- (ii) that the work has been produced through a process of collaboration, meaning that, when setting out to create the work, the authors were working to some form of shared plan
- (iii) that the respective contributions are not distinct or separate from each other

Determining that a work is jointly authored is important for various reasons. For example, where there are two or more authors the duration of the copyright term is based on the date of the death of the last of the authors to die (s.12(8)).

6. AUTHORSHIP and OWNERSHIP

In general, given that copyright in a work subsists from the point of creation, the first owner of the copyright in the work will also be the author of that work (s.11(1)). However, while ownership of the copyright in a work may change hands many times throughout the period of the copyright term, the authorship of the work will never change.

6.1. Joint authorship and joint ownership

Joint authors of a work will normally be the joint owners of the copyright in the work.

It is not necessary for joint authors to contribute equally to the creation of the work to enjoy *equal ownership* of the work. Traditionally, joint authorship was *presumed* to result in the authors sharing the work in equal shares. In *Beckingham v. Hodgins* [2003] FSR 238, for example, the claimant argued he was the co-author of the song *Young at Heart* made famous in the 1980s by the defendant's band *The Bluebells*. The claimant was held to be the author of a fourteen note introduction (played on the fiddle) to the main song; as a result, the court assumed that the claimant and the defendant were entitled to *equal shares* in the copyright.

However, courts do sometimes determine ownership of copyright in proportion to the contribution made by each of the authors. In *Fisher v. Brooker* [2006] EWHC 3239 (HC) (concerning the copyright in *A Whiter Shade of Pale*) the court declared that the claimant was entitled to a 40% share of the musical work in question.¹¹

6.2. The implications of joint ownership

There are two different forms of joint ownership to be aware of: (i) a joint tenancy, in which, on the death of the first joint owner, the copyright in the work will pass

¹¹ Blackburne J commented as follows: 'I see no reason in principle why Mr Fisher's share in the Work should not be something less than an equal undivided share if the circumstances justify that result'. Similarly, see *Bamgboye v. Reed* [2002] EWHC 2922 (QB) in which the court declared the claimant to be entitled to a 33% share of the musical work in question (para.77).

to the remaining owner; (ii) a tenancy in common, in which on the death of the first joint owner, the copyright will pass under her will, or, if there is no will, to her next of kin under the laws on intestacy. Generally speaking the joint owners of copyright work will hold the work as *tenants in common*.¹²

One important consequence of joint ownership is that you cannot simply acquire a licence to use a given work from one of the joint owners only. That is, one joint owner cannot grant a licence to use a work that is binding on their co-owners (s.173(2)); you must get permission to use the work from all relevant joint owners.

Moreover, if joint owner A grants a licence to a third party to make use of the work, without the consent of the other joint owners B and C, then A will infringe the copyright of B and C by authorising the use of the work without their permission.

6.3. Work created by employees

Although the general rule is that the author of a work will also be the first owner of the copyright in that work, this is not always the case. The main exception to this rule is set out in s.11(2): 'Where a literary, dramatic, musical or artistic work, or a film, is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to agreement to the contrary'.

There are three main aspects to consider here: Who is an employee? Was the work made in the course of her employment? Is there an agreement to the contrary effect?

Normally, determining whether someone is an employee (or simply working on a freelance basis or under a contract of service) is fairly straightforward. More interesting questions tend to arise, however, when considering whether the work was made by the employee during the course of her employment.

Noah v. Shuba [1991] FSR 14: Dr Noah produced a medical pamphlet, *A Guide to Hygienic Skin Piercing*, while he was working as a consultant in the Communicable Disease Surveillance Centre of the Public Health Laboratory Service (PHLS). Although Dr Noah had discussed with the work with his colleagues in work, had used the PHLS library in its preparation, had the manuscript typed up by secretary and had secured the PHLS's agreement to print and publish the Guide at its expense, it was held not to have been written in the course of his employment. Of some importance to the judge in arriving at this decision was the fact that he had written the draft at home in the evenings and at the weekends, and that he had done so on his own initiative and not at the instigation of or on the direction of his employers.

6.4. Freelance work

The situation existing between the employer and an employee will generally only apply where the employee is under a contract of service (that is, when the

¹² Note: the concept of a joint tenancy does not really exist in Scots Law; in Scotland, the co-ownership of copyright would always proceed on the basis of ownership in common.

employer is paying her salary on a PAYE basis). However, when work is carried out on a freelance basis, as a one-off event, or on terms that the individual is responsible for her own time, equipment, tax etc., then the employer will not automatically own the copyright in the work that has been created.

However, in certain circumstances, the courts may infer that an independent contractor (a freelancer) is working subject to an implied obligation to assign the copyright to the person commissioning the work. This may give rise to a *trust* such that the person who commissions the work is the *equitable owner* of the copyright in the work. (A trust refers to a legal relationship between a trustee (or trustees) and a beneficiary (or beneficiaries); the trustees hold the trust property (in this case, the copyright in the work) in their name, but it is not held for them but rather on trust for the beneficiaries (who benefit from the trust property)).¹³

In *Griggs v. Raben Footwear* [2004] FSR 31, for example, the claimants were the distributors of Dr Marten's 'AirWair' footwear. In 1988 they commissioned the advertising agency, Jordan, to produce a logo. Evans, who did the freelance work for Jordan, produced the logo (and was paid on his standard rate of £15 per hour). In 2002 Evans purported to assign copyright in the logo to *Raben Footwear*. Prescott QC, sitting as Deputy High Court judge, held that while Evans was the author and first owner of the legal title in the work he created, nevertheless, an agreement that copyright was to belong to Griggs was to be implied. This, he continued, was necessary to give *business efficacy to the arrangement* under which it was clearly contemplated that Griggs would be free to use the logo and prevent others from using the same; this could only be achieved if there was an implied agreement to assign the copyright in the work to the claimants (or give them a perpetual licence, which solution would have been less convenient for the claimants). The decision was upheld on appeal.

6.5. Crown copyright and Parliamentary copyright

The Crown is the owner of the copyright in any work made on or after 1 August 1989 by an officer or servant of the Crown (including government ministers, diplomats, civil servants, members of the armed forces, and so on), in the course of his or her duties (s.163(1)). Crown copyright is administered on behalf of the Crown by the Queen's Printer and Controller of Her Majesty's Stationary Office (HMSO). The Controller, who is now based at The National Archives, is responsible for publishing all statutes and statutory instruments alongwith guidance on Crown copyright.¹⁴

Parliamentary copyright protects any work made by or under the direction or control of the House of Commons or the House of Lords. The copyright in the work is owned by the House under whose direction or control the work is made. If the

¹³ Note: under Scots Law the mechanism for addressing this situation would not be through the imposition of a trust; rather, a court would order a transfer of title based on a claim for unjust enrichment.

¹⁴ For further information, see: <http://www.nationalarchives.gov.uk/information-management/our-services/crown-copyright.htm>.

work is made under the direction of both Houses, they are the joint first owners of the copyright (s.165(1)). Works made under the direction or control of either House include: any work made by an officer or employee of that House in the course of her duties; and any sound recording, film or live broadcast of the proceedings of that House. However, the CDPA provides that a work 'shall not be regarded as made by or under the direction or control of either House by reason only of its being commissioned by or on behalf of that House' (s.165(4)).

7. STATUTORY PRESUMPTIONS ABOUT AUTHORSHIP AND OWNERSHIP

The CDPA sets out a number of presumptions relating to the authorship and ownership of copyright which apply to work created both before and after 1 August 1989.¹⁵

It is important to remember that these are presumptions only; they will not apply in the face of contrary evidence or proof of authorship or ownership.

Section 104 sets out presumptions relevant to literary, dramatic, musical and artistic works. Key presumptions are as follows; (i) where a name purporting to be that of the author appears on a copy of a published work (or on the work when it was first made), that person is presumed to be the author of the work as well as the first owner of the copyright (s.104(2)); (ii) where there is no author's name, but the name of the publisher appears on a copy of the work as first published, then the publisher is presumed to be the owner of the copyright (s.104(4)). Also, if the author's identity is unknown and cannot be ascertained by reasonable inquiry, the work is presumed to be an original work (s.104(5)).

Section 105 sets out presumptions relevant to sound recordings and films. It provides that statements on sound recordings and films about the date and place of first publication, and about ownership of copyright in the work, shall be presumed to be correct until the contrary is proved (s.105(1)(2)).

8. OWNERSHIP OF WORK CREATED BEFORE 1 AUGUST 1989

In relation to work created before 1 August 1989 (when the CDPA came into force), it is important to appreciate that the first owner of the copyright in a work is determined by the law in force at the time when the work was made or completed (CDPA, Schedule 1, paragraph 11(1)).

Typically, the first ownership of copyright in works created before 1 August 1989 vested in the author (as is the case under the 1988 Act), however, this is not always the case. As such, given the historical nature of archival material, it is important to be familiar with the relevant provisions of earlier copyright legislation such as the 1956 and 1911 *Copyright Acts* (the forerunners to the CDPA), the *Fine Arts Copyright Act 1862* (which concerns copyright in mid- to late nineteenth century paintings, drawings and photographs), and the *Copyright Act*

¹⁵ Note however that if the alleged infringement occurred before 1 August 1989, then the presumptions under previous relevant legislation will apply (that is, the 1911 and 1956 Acts).

1842 (which concerns copyright in mid- to late nineteenth century literary, dramatic and musical works).

8.1. Work created under the 1956 Act

8.1.1. Work created by employees

Similar to the CDPA, the default position under the 1956 Act is that, in the absence of any agreement to the contrary, copyright in work made by an employee in the course of her employment shall be owned by her employer (s.4(4)). This relates to works created between 1 June 1957 (when the 1956 Act came into force) and 31 July 1989 (after which the CDPA came into force), but is subject to the exceptions discussed below.

8.1.2. Work created by employed journalists

Special rules apply to the ownership of copyright in literary, dramatic and artistic works created by a journalist in the course of her employment for the purpose of publication in a newspaper, magazine or periodical. In this case, the employer is entitled to the copyright in the work but only in relation to publication in the newspaper or magazine. In all other respects, the copyright in the work remains with the employed journalist (s.4(2)). Note: this is subject to any agreement to the contrary.

8.1.3. Commissioned works of art

In relation to photographs, paintings, drawings and engravings made on commission for money (or money's worth), the copyright shall vest in the person commissioning the work, and not the author (s.4(3)). Note: this is subject to any agreement to the contrary.

8.1.4. Crown copyright

The 1956 Act provides that the copyright in any literary, dramatic, musical or artistic work, sound recording or film, made by or under the direction or control of the Crown or any government department vests in the Crown (s.39(1)(5)).

Note that the scope of s.39 (work prepared 'under the direction or control' of the Crown or government) is much broader than the analogous provisions under the CDPA.¹⁶

8.2. Work created under the 1911 Act

8.2.1. Work created by employees

¹⁶ For further discussion, see Padfield, T., *Copyright for Archivists and Records Managers*, 5th ed. (London: Facet Publishing, 2015), 3.2.28.

Similar to the CDPA, the default position under the 1911 Act is that, in the absence of any agreement to the contrary, the copyright in a work made by an employee in the course of her employment shall be owned by her employer (s.5(1)(b)). This relates to works created between 1 July 1912 (when the 1911 Act came into force) and 31 May 1956 (after which the 1956 Act came into force), but is subject to a number of exceptions discussed below.

8.2.2. Work created by employed journalists

Special rules apply to the ownership of articles or other contributions to newspapers, magazines and periodicals. Under the 1911 Act, in the absence of any agreement to the contrary, the right to publish the work remains with the author otherwise than as part of a newspaper, magazine or periodical (s.5(1)(b)).

8.2.3. Commissioned works of art

In relation to engravings, photographs or portraits made on commission for valuable consideration, then, subject to any contrary agreement, copyright shall vest in the person commissioning the work (s.5(1)(a)).¹⁷

8.2.4. Crown copyright

Section 18 of the 1911 Act provides that the copyright in any work prepared or published by or under the direction or control of the Crown or any government department belongs to the Crown. Moreover, the Act makes clear that s.18 extends to work created both *before and after* the 1911 Act came into force.

Note that the scope of this provision (work prepared 'under the direction or control' of the Crown or government) is much broader than the analogous provisions under the CDPA.¹⁸

8.3. Work created before 1 July 1912

Before the 1911 *Copyright Act*, the UK copyright regime was made up of a number of different copyright acts. Copyright in literary, dramatic and musical works was regulated by the *Copyright Act* 1842. Copyright in paintings, drawings and photographs was regulated by the *Fine Arts Copyright Act* 1862. Copyright in works of sculpture was regulated by the *Sculpture Copyright Act* 1814. Copyright in engravings was regulated by the *Engravers Copyright Acts* 1735 and 1766.

None of these Acts set out any general rules about work created by employees in the course of their employment. Apart from the specific provisions discussed below, whether copyright in work created in the course of employment belonged

¹⁷ Note the difference between the scope of this provision and s.4(3) of the 1956 Act. Whereas the 1956 Act refers generally to photographs, engravings, paintings and drawings, the 1911 Act only makes reference to engravings, photographs or *portraits*.

¹⁸ For further discussion, see Padfield, 3.2.28.

to the employer or to the employee was a matter for the courts to decide at common law. Unfortunately, nineteenth century jurisprudence on this issue was not very consistent or clear. Often, although not always, the courts would conclude that the author (employee) owned the copyright even though the work had been created in the course of employment.

8.3.1. Work created by journalists

The *Copyright Act 1842* provides that in relation to an author employed to produce work for publication in any book, encyclopaedia, magazine, review or periodical (or any other work published by instalment), the copyright in the work vests in the employer (as if she were the author of the work). However, the author retains the right to publish the work separately and, in any event, all relevant rights revert to the author after a period of 28 years (s.18).

8.3.2. Commissioned works of art

The *Fine Arts Copyright Act 1862* provides that in relation to any painting, drawing or photograph made for or on behalf of another person for a good or a valuable consideration, ownership of the copyright in the work vests in the person commissioning the work, unless copyright has been expressly retained by the author in writing (s.1).

8.3.3. Crown copyright

See the commentary in section 8.2.4.

9. ECONOMIC RIGHTS AND INFRINGEMENT

9.1. Primary Infringement: the acts restricted by copyright ...

In certain circumstances, making use of a copyright work without the permission of the copyright owner will infringe the copyright in that work. Copyright infringement can be one of two types: either *primary* or *secondary*. Primary infringement concerns the unauthorized performance of any of the 'acts restricted by copyright'; secondary infringement, by comparison, provides owners with protection against those who, in effect, aid and abet the primary infringer or deal in infringing copies.

The 'acts restricted by copyright' represent the bundle of economic rights which the copyright owner enjoys for the duration of the copyright term. Section 16 of the CDPA provides that the acts restricted by copyright include the right to:

- (i) Copy the work: the reproduction right (further defined in s.17)
- (ii) Issue copies of the work to the public: the distribution right (see s.18)
- (iii) Rent or lend the work to the public: the rental right (see s.18A)

- (iv) Perform, show, or play the work in public: the public performance right (see s.19)
- (v) Communicate the work to the public: the communication right (see s.20)
- (vi) Make an adaptation of the work or do any of the above in relation to an adaptation: the adaptation right (see s.21)

Doing any of these acts without permission (and outside the scope of the exceptions to copyright) will infringe copyright in the work, and the owner will be entitled to some form of relief or compensation.

Moreover it will generally not make any difference that the copy takes a different form from the original. For example, converting a two-dimensional image into three dimensions and vice versa; turning a story into a ballet; copying a photograph by painting; turning a drawing such as a cartoon into a sketch or a piece of theatre.

It should be noted, however, that not all of these rights are granted to all copyright owners. What rights the copyright owner may have will depend upon the type of work under consideration. For example:

- (i) performing or showing an artistic work in public is not an offence under s.19 of the CDPA
- (ii) the public communication right does not apply to the typographical arrangement of published editions (see s.20 for further details)
- (iii) the right to make an adaptation of a work only applies to literary, dramatic, or musical works, but not to artistic works, sound recordings, films or broadcasts (see s.21 for further details)

9.1.1. Copying: the reproduction right (s.17)

Copying includes reproducing a literary, dramatic, musical or artistic work 'in any material form' including 'by electronic means' (s.17(2)) as well as making copies that are 'transient or are incidental to some other use of the work' (s.17(6)).

In relation to artistic works the CDPA also provides that copying includes 'the making of a copy in three dimensions of a two-dimensional work and the making of a copy in two-dimension of a three-dimensional work' (s.17(3)).

The definition of reproduction in relation to sound recordings and films is narrower than it is in relation to works of literature, drama, music or art. So for example, with a sound recording, it is only that recording that is protected. If someone else re-records the same song then this will not infringe the copyright in the sound recording (although it may of course infringe the copyright in the music, lyrics, and so on).

There is no explanation within the CDPA of what amounts to the copying of a broadcast, however, it seems clear that making any audio-recording of a radio broadcast, or an audio-visual recording of any images forming part of a television

broadcast would involve copying the broadcasts in question (as well as the contents of the broadcasts, be they sound recordings, films, and so on).

In relation to typographical arrangements, the CDPA adopts a particularly narrow definition of copying as 'making a facsimile copy of the arrangement' (s.17(5)); this concept seems to be confined to reproduction by way of reprography, photocopies, scanning, and so on (see s.178). So, re-typing a work in a different font would not infringe.¹⁹

9.1.2. Issuing copies to the public: the distribution right (s.18)

This involves the right to issue physical copies of the work in question to the public; that is: to put copies of the work into commercial circulation. The right extends to 'copies of a work' including 'the issue of the original' (s.18(4)). Once these copies are in circulation then the right no longer applies. This means, in effect, that the copyright owner cannot control the resale or redistribution of those particular copies (consider, for example, the second-hand book market: the resale of second-hand books does not fall within the scope of the copyright regime).

9.1.3. Renting or lending to the public (s.18A)

Originally the CDPA only provided a limited rental right in relation to sound recordings, films and computer programs. However, following the implementation of the *Rental Rights Directive* (92/100/EEC) copyright in literary, dramatic, musical and artistic works now incorporates the exclusive right to rent and lend copies of the work to the public. This rental right, unlike the distribution right, is *not exhausted* by the first sale of copies of that work to the public.

9.1.4. Performing, showing, or playing the work in public (s.19)

The public performance right applies to literary, dramatic and musical works, but not to artistic works or to typographical arrangements of published editions (s.19(1)). The Act also makes clear that the playing or showing of a work in public is an act restricted by copyright in a sound recording, film or broadcast (s.19(3)).

Performance is defined by the Act to include the 'delivery' of 'lectures, addresses, speeches and sermons' as well as 'any mode of visual or acoustic presentation, including presentation by means of a sound recording, film, or broadcast the work' (s.19(2)).

Where, however, other means of delivery are employed, for example, the playing of copyright protected music on a radio in a restaurant, the person who infringes the public performance right in the music, is not the broadcaster (or the person who supplied the radio apparatus) but the owner of the restaurant (s.19(4)).

¹⁹ See: *NLA v. Marks & Spencer* [2003] 1 AC 551.

9.1.5. Communication to the public: the communication right (s.20)

The communication right was introduced in October 2003 as a result of the implementation of the *Information Society Directive* (A.3), and it is distinguished from the performance right by the fact that the public is not present at the place where the communication originates.

Within the UK the communication right is confined to 'electronic communication', and is said to include both 'broadcasting' and 'making available'.

While the broadcasting right was first introduced in the *Copyright Act 1956*, the concept of 'making available' is of more recent provenance having its roots in the *WIPO Copyright Treaty 1996*.

Whereas broadcasting is based on the premise of *simultaneous reception*, the concept of 'making available' involves individual communications to persons who are members of the public (for example, interactive on-demand transmissions). The communication right can be assumed to cover most internet transmissions.

9.1.6. Adaptation (s.21)

The adaptation right extends to literary, dramatic and musical works, but not to artistic works, sound recordings, films or broadcasts. The CDPA defines the concept of adaptation differently for literary, dramatic and artistic works. For example, the adaptation of a literary work is defined to include translation, dramatization, and representation in pictorial form (s.21(3)(a)), whereas the adaptation of a musical work is defined to mean the arrangement or transcription of the work (s.21(3)(b)).

While the concept of adaptation is defined quite narrowly within the CDPA, the line between reproduction and adaptation is not always easy to draw. In many cases the same act might be both a reproduction of the work as well as an adaptation of the same. Equally, many acts that do not amount to adaptation may nevertheless fall within the scope of the reproduction right. So, for example, abridging a literary work without permission will not infringe the adaptation right but will almost certainly infringe the reproduction right.

9.2. ... but only in relation to a substantial part of the work

Section 16 of the CDPA sets out the various acts restricted by copyright. This part of the legislation also states, however, that references to doing such an infringing act only operate in relation 'to the work as a whole or any substantial part of it' (s.16(3)(a)). This means that it is permissible to make use of another's copyright work as long as you are not copying any more than a substantial part of that work.

Where, however, do you draw the line between a substantial and an insubstantial amount? It is often said that this question of substantiality will depend upon the *quality* of what has been taken rather than the *quantity*. In *Sillitoe v. McGraw-Hill Book Co (UK) Ltd* [1983] FSR 545 Mervyn Davies QC observed that '[s]ubstantiality

is a question of fact and degree determined by reference not only to the amount of work reproduced but also to the importance of the parts reproduced’.

In general, there has been a shift in recent times in relation to what the courts will regard as a substantial part of a copyright-protected work. Previously, someone might be held to have infringed if the part in question was an essential, vital or significant part of the protected work; now, however, courts seem willing to find infringement so long as the part used is not ‘insignificant’ (or *de minimis*).

9.3. Strict liability offences

One of the key features of the acts restricted by copyright is that they are based upon the notion of *strict liability*. That is, the state of mind of the person alleged to have committed an offence is irrelevant when determining whether an infringement has taken place. It makes no difference whatsoever that the person infringing the copyright did not intend to infringe, or was even aware that she was infringing another’s copyright. Intention and knowledge on the part of the alleged infringer are irrelevant.

Francis Day & Hunter v. Bron [1963] Ch 587: In this case the Court of Appeal accepted that a person could be guilty of primary infringement even where the copying had occurred upon a *subconscious level*. Willmer LJ observed that in such actions ‘it is not necessary to prove anything in the nature of mens rea’. ‘Subconscious copying,’ he continued, ‘is a possibility which, if it occurs, may amount to an infringement of copyright’.

Acts of primary infringement can be contrast with acts of secondary infringement in this regard. In all cases of secondary infringement, liability turns upon the defendant having the requisite ‘knowledge’ that they were committing an offence (see below).

It is worth noting that an individual responsible for infringement is always personally liable for that infringement, even if it was carried out during the course of employment. The employer will also be jointly liable.

9.4. Authorising another (without permission)

Copyright is infringed by any person who performs any of the acts restricted by copyright without the licence of the copyright owner, or by someone who *authorises* another person to do the infringing act (s.16(2)). There is nothing in the CDPA that requires the authorisation to take place within the UK, provided that the infringing act takes place within the UK. So, in *ABKCO Music & Records v. Music Collection International Ltd* [1995] RPC 657 a Danish company granted a licence to an English company to manufacture and issue to the public recordings of the claimant’s sound recordings in the UK (and in Ireland). It was held that the act of authorisation was not limited territorially unlike the restricted acts themselves.²⁰

²⁰ See also: *Football Dataco Ltd v. Sportradar* [2010] EWHC 2911 (Ch), para.28 (‘It is common ground that, where authorisation of an act of infringement of United Kingdom copyright is relied on, the act of authorisation does not have to occur in the United Kingdom, provided that the primary act of infringement so authorised does’; per Floyd J).

In *Monckton v. Pathe Freres Pathephone Ltd* [1914] 1 KB 395 the court held that to authorise an infringement was to 'sanction, approve, or countenance' the action, which formulation was capable of fairly wide meaning.

However, in *CBS Songs Ltd v. Amstrad Computer Electronics* [1988] AC 1013 the House of Lords defined the term more restrictively. Lord Templeman, agreeing with the dictum of Atkin LJ in *Falcon v. Famous Players Film Co* [1926] 2 KB 474, suggested that, in the context of copyright infringement, authorisation means 'the grant or purported grant, which may be express or implied, of the right to do the act complained of'.²¹

Similarly, in *Twentieth Century Fox Film v. Newzbin* [2010] EWHC 608 Kitchin J commented that to authorise 'means the grant or purported grant of the right to do the act complained of. It does not extend to mere enablement, assistance or even encouragement'.

Other jurisdictions take different approaches to the concept of authorisation. For example, in the Australian case of *Universal Music Australia v. Cooper* [2005] FCA (14 July 2005) Tamberlin J held that a website (mp3s4free.net) which provided links to other online locations where sound recordings could be copied was liable for authorising infringement.²² The Court found that the site was designed to, and did, facilitate infringing downloading, and that the defendant knew of, or approved of, its use in this manner.

Within the context of a library or archive, if users have access to self-service photocopiers or scanners the institution should ensure that notices about the limits of permitted copying are displayed prominently beside these machines. Similarly, organizers of exhibitions should, perhaps, be seen to discourage photography by the public, as taking photographs of works displayed in exhibitions may well infringe the copyright in those works. In both cases, it is important that institutions make very clear they are not authorising any copying, and that they accept no responsibility for any unlawful copying by members of the public.

9.5. Secondary infringement

The CDPA also provides for various forms of secondary infringement, which are more relevant to individuals or organizations that deal with infringing copies or facilitate infringements of the copyright-protected work.

Simply *possessing* copies in the course of a business can be enough to trigger liability if you know or suspect that the copies are infringing someone's copyright (s.23(a)). Moreover, a business is defined as including 'a trade or profession' (s.178) which will almost certainly encompass the work of a library or an archive.

²¹ In this case it was held that Amstrad were not authorising copyright infringement by the manufacture and sale of twin cassette tape recorders which facilitated unauthorised copying of tapes; the court considered that the machines could be used for legitimate purposes.

²² This was under s.101(1A) of the *Australian Copyright Act 1968* (as amended by the *Copyright Amendment (Digital Agenda) Act 2000*).

Sections 22-27 of the CDPA deal with these acts of secondary infringement; they include:

- (i) importing an infringing copy (s.22)
- (ii) possessing or dealing with an infringing copy in the course of a business (s.23)
- (iii) providing the means for making an infringing copy (s.24)
- (iv) permitting the use of a premises for an infringing performance (s.25)

Unlike situations of primary infringement, however, the *knowledge* of the offending party *is relevant* to the commission of an offence. That is, liability turns upon the defendant 'knowing or having reason to believe' that the activities in question are unlawful (what is generally referred to as *actual or constructive knowledge*).

10. DEFENCES TO AN ALLEGATION OF INFRINGEMENT

If accused of copyright infringement, one might respond by questioning whether: (i) the work is copyright-protected; (ii) it satisfies the necessary criteria for protection; (iii) there are any public policy reasons for denying the work copyright protection.

In addition, you might argue that: (i) you have permission to make use of the work; (ii) you are using an idea contained with the work, but not the expression of that idea; (iii) you are using no more than an insubstantial part of the work; (iv) the copyright owner has compromised her position on account of acquiescence; (v) your actions fall within one of the many statutory defences to copyright infringement (that is, the permitted acts); or, (vi) your use of the work was otherwise in the public interest.

10.1. Permission to use

One obvious way to avoid liability for copyright infringement is to ask the copyright owner for permission to make use of the work.

10.2. Idea/Expression dichotomy

See above (section 2.2.) for commentary on the difference between copying ideas (which is lawful) and copying the way in which those ideas have been expressed (which may infringe).

10.3. Insubstantial copying

See above (section 9.2.) for commentary on insubstantial copying under s.16(3)(a) of the CDPA.

10.4. Acquiescence, laches and estoppel

Acquiescence, laches and estoppel are a group of related arguments that might affect the availability of certain equitable (discretionary) remedies such as the grant of an injunction. That is, the copyright owner may be aware of activities that might infringe his copyright but choose to do nothing about it for a long time; the delay on the part of the copyright owner may be sufficient to bar a claim to equitable relief.

10.5. The permitted acts: limitations and exceptions to copyright

Every copyright regime throughout the world limits the copyright owner's rights in specific ways by allowing certain things to be done with the work without the need for the owner's permission. These *permitted acts* represent an attempt to strike a balance between the economic rights of the copyright owner and other uses considered to be socially, culturally, politically or economically beneficial.

The CDPA provides a number of exceptions to the rule that permission is required before you can make use of a copyright work (ss.28-76). There are general exceptions designed to facilitate the use of work by anyone, for example, for the purposes of research and private study, for criticism and review, or for reporting current events. Other exceptions are intended to enable the use of copyright material within certain institutional contexts, for example, by educational institutions, by libraries and archives, or to facilitate parliamentary or judicial proceedings.

10.5.1. Fair dealing

Some exceptions to copyright actually allow for the use of *the entire copyright work*; for example, performing a literary, dramatic or musical work before an audience of teachers and pupils at an educational establishment (s.34). Other types of permitted act introduce the notion of *fair dealing*; for example, fair dealing with a work for the purposes of reporting current events will not infringe the copyright in that work (s.30(2)).

While the concept of *fair dealing* is not defined within the CDPA it will generally be relevant to consider the alleged infringer's purpose in using the work, the proportion of the work she makes use of, her motive in using the work, and the status of the original copyright work. The courts will not allow a defence of fair dealing if they consider that the real motivation behind the alleged infringer's use of the work is in fact to produce a commercially competitive product. In *Hubbard v. Vosper* [1972] 2 QB 84 Lord Denning commented as follows:

[F]irst consider the number and extent of the quotations ... Then you must consider the use made of them. If they are used as the basis of comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, they may be unfair. Next you must consider the proportions. To take long extracts and attach short comments may be unfair. But short extracts and long comments may be fair. Other considerations may come to mind also. But when all is said and done it must be a matter of impression.

While it is not possible to provide precise guidelines as to what will or will not be considered fair, more recent decisions have indicated a number of factors worth bearing in mind that may be of relevance.

In *Ashdown v. Telegraph Group* [2002] RPC 5 Lord Phillips identified three factors of particular importance: (i) commercial competition with the claimant; (ii) prior publication; (iii) the amount and importance of the work taken.

In *Fraser-Woodward* [2005] EMLR 22 Mann J considered the following guidelines to be relevant: (i) the motives of the user; (ii) whether there is fair dealing is a matter of impression; (iii) excessive use can render the use unfair; (iv) the *actual* purpose of the work; (v) the amount of work taken; (vi) that the permissible amount of work reproduced may differ depending on the work in question (photographs; works of art, and so on); (vii) reproduction should (in essence) conform with the so-called 'three step test' (first set out in the Berne Convention A.9(2)²³).

Whatever else can be said, it seems clear that the courts will test the question of fairness *objectively*; as Aldous LJ put it in *Hyde Park*: 'the court must judge the fairness [of the use] by the objective standard of whether a fair minded and honest person would have dealt with the copyright work [in that manner]'.²⁴

10.6. Use that is in the public interest

In addition to the permitted acts, the CDPA also provides that nothing in the Act 'affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise' (s.171(3)).

The meaning and scope of s.171(3) was considered in *Ashdown v. Telegraph Group Ltd* [2002]. Phillips MR accepted that 'rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the Copyright Act, notwithstanding the express exceptions to be found in the Act'. In such circumstances he considered that the court 'is bound, in so far as it is able, to apply the Act in a manner that accommodates the right of freedom of expression'.

Phillips MR, however, was careful to state that '[w]e do not consider that this conclusion will lead to a flood of cases where freedom of expression is invoked as a defence to a claim for breach of copyright. It will be very rare for the public interest to justify the copying of the form of a work to which copyright attaches'.

11. SPECIFIC EXCEPTIONS FOR LIBRARIES AND ARCHIVES

Within this section we consider the way in which the copyright regime impacts two principal activities within the archive sector: copying archive material for

²³ Article 9(2) of the Berne Convention provides as follows: 'It shall be a matter for the legislation in the countries of the Union to permit the reproduction of [literary and artistic works] in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author'.

²⁴ Reiterated by Peter Gibson LJ in *NLA v. Marks and Spencer* [2001] Ch 257 (CA) (para.44).

preservation purposes; and, copying archive material to improve access to and use of that material on the part of the public. These specific exceptions have been reformed by the *Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014*. The following commentary incorporates the changes implemented by the 2014 Regulations.

11.1 Preservation copying

With respect to action taken for preservation purposes, s.42 of the CDPA provides that the librarian, archivist or curator of a library, archive or museum may make a copy of any item in that institution's permanent collection²⁵ for two distinct purposes: (i) in order to preserve or replace that item in that collection (s.42(1)(a)); or, (ii) in order to replace an item in the permanent collection of another institution which has been lost, destroyed or damaged (s.42(1)(b)).²⁶

Reliance on this exception is subject to two conditions.

First, the item in question must be included in the part of the collection kept wholly or mainly for the purposes of reference on the institution's premises, or in a part of the collection not accessible to the public, or is available on loan only to other libraries, archives or museums (s.42(2)). Second, it must not be reasonably practicable to purchase a copy of the item for either preservation or replacement purposes. In practice, the second criterion is relatively easy for archivists to satisfy. Given the unique nature of the records typically held in archive collections, the likelihood of being able to purchase another copy of the item in question will be very limited (if not completely impossible).

Finally, in relation to preservation copying, the CDPA makes clear that references to a librarian, archivist or curator include 'a person acting on behalf of a librarian, archivist or curator' (s.43A(5)).

11.2. Copying unpublished work

²⁵ While the term 'permanent collection' is not defined within the CDPA, Padfield had previously written that it should be understood to include material on 'indefinite or permanent deposit.' whereas it 'will probably not include material on loan at the whim of the depositor, and will certainly not include material on temporary deposit, for instance for conservation or exhibition purposes' Padfield, T., *Copyright for Archivists and Records Managers*, 4th ed. (London: Facet Publishing, 2010), 5.3.7. Recently, he has phrased it as '...further conditions confine the exception to works that are wholly or mainly for reference on the premises; works that are not accessible to the public; and works that are available on loan only to other libraries, archive or museums. The intention appears to be to exclude material that is available for loan to the public.' (2015), 5.4.8. There are however problems with tying the preservation clause to the items that an archive holds within its permanent collection, and especially in relation to digital material. In particular, it would preclude making preservation copies to facilitate appraisal in advance of accessioning an item into the archive.

²⁶ In relation to s.42(1)(b), the library, archive or museum *receiving* the replacement copy must not be an institution that is conducted for profit (s.42(4)). The CDPA defines 'conducted for profit' in relation to a library, archive or museum as: '[an institution] established or conducted for profit or which forms part of, or is administered by, a body established or conducted for profit' (s.43A(4)).

At present copying unpublished work in archives can be carried out under two separate statutory regimes: s.43 of the CDPA and s.7(6) of the 1956 *Copyright Act*.

Understanding when a work has been published is obviously crucial to the operation of both regimes. Section 175(1) of the CDPA defines ‘publication’ as meaning ‘the issue of copies to the public’. In the case of a literary, dramatic, musical or artistic work this includes making the material available to the public ‘by means of an electronic retrieval system’ such that posting these types of materials online would constitute publication.²⁷ By contrast, films and sound recordings that have been made available to the public online are not considered to have been published.²⁸ Moreover, s.175(5) provides that ‘no account shall be taken for the purposes of this section of any unauthorised act’. That is, if material has been published without the permission of the copyright owner then, for the purposes of the CDPA, the work remains unpublished.²⁹

11.2.1. Copying unpublished work under the CDPA: s.43

Under s.43 of the CDPA a librarian or archivist can make and supply a single copy of the whole or part of an unpublished work without infringing copyright in the work. This is subject to a number of conditions and limitations:

- (i) the copy must be supplied in response to a request from a person who has provided the librarian or archivist with specific information (see below) relating to the request set out in a declaration in writing (s.43(1)(a))
- (ii) the librarian or archivist must not be aware that the information provided by the person requesting the copy is false (s.43(1)(b))
- (iii) the work must not have been published or communicated to the public before deposit with the library or archive (s.43(3)(a))
- (iv) the copyright owner must not have prohibited the copying of the work (s.43(3)(b))

Note: unlike the preservation exception (s.42), s.43 does *not* impose any restriction on copying material that is not in the institution’s permanent collection.³⁰

²⁷ In relation to literary, dramatic and musical works, the following actions do not constitute publication: performance of the work, or communication to the public (other than for the purposes of an electronic retrieval system) (s.175(4)(a)). In the case of an artistic work, the following do not constitute publication: exhibition of the work; issuing to the public copies of a work of architecture, a sculpture, or a work of artistic craftsmanship; issuing to the public copies of a film including the work; or communicating the work to the public (other than for the purposes of an electronic retrieval system) (s.175(4)(b)).

²⁸ CDPA, s.175(4)(c).

²⁹ Moreover, the Act provides that if copyright does not subsist in the work then the concept of unauthorised means ‘by or with the licence of the author’. See CDPA s.178 for the definition of ‘unauthorised’.

³⁰ See, for example, Padfield (2015, at 5.4.8) who notes that as there is ‘no requirement for deposit to be on any particular terms’, the provision ‘presumably covers material even on short-term deposit for any reason’.

The information to be included in the declaration in writing by the person requesting the copy is as follows:

- (i) the name of the person who requires the copy and the material which that person requires
- (ii) a statement that the person has not previously been supplied with a copy of that material
- (iii) a statement that they require the copy for the purposes of private study or non-commercial research, that they will only use it for those purposes, and that they will not supply the copy to any other person (s.43(2))

These relevant declarations in writing can be provided in a digital format, for example, by email.

Whereas previously a person provided with a copy of material under s.43 was required to pay a statutory sum of money for that copy (a sum not less than the cost attributable to the reproduction costs involved), the 2014 Regulations now make clear that a library or archive can *choose* to make a charge (or not) at its own discretion.³¹

Finally, in relation to copying under s.43, the CDPA makes clear that references to a librarian or archivist include 'a person acting on behalf of a librarian [or] archivist' (s.43A(5)).

11.2.2. Copying unpublished work under the 1956 Act: s.7(6)

As well as copying under s.43 of the CDPA, s.7(6) of the 1956 Act remains in force and permits the copying of certain unpublished works created before 1 August 1989.³² In particular, s.7(6) provides that where an unpublished literary, dramatic or musical work has been open to public inspection in a library, museum or other institution within the UK, it may be copied by any person without infringing copyright in the work or in any accompanying illustrations. Copying under s.7(6) is conditional on the author having died more than 50 years before, and the work in question being more than 100 years old. In addition, the copying must be 'for the purposes of research or private study, or with a view to publication'. As with s.43, there is no restriction as to the quantity of the work that can be copied.

Although s.7(6) only allows copying of literary, dramatic and musical works, and it would not permit copying where the author of the work is unknown,³³ relying upon this provision nevertheless offers the archivist and the user a number of obvious advantages over s.43 of the CDPA. First, s.7(6) extends to unpublished

³¹ 'Where a library or archive makes a charge for supplying a copy under this section, the sum charged must be calculated by reference to the costs attributable to the production of the copy' (s.43(4)).

³² See CDPA, Schedule 1, para.16 which provides that s.7(6)(7)(8) and (9)(d) continue to apply in relation to existing works.

³³ On this point, Padfield is typically pragmatic: 'It seems probable that if the work is of a sufficient age that the author must have died at least 50 years earlier, that would be enough'; Padfield (2015), 5.4.14.

work held in a 'library, museum, or other institution' (including, of course, an archive). Second, there is no reason why an institution cannot make copies of a work for any other institution so long as the copying is made for the purpose of research or private study. Third, copies can be made for the purpose of commercial as well as non-commercial research. And fourth, s.7(6) explicitly anticipates subsequent publication of the work (whether by a user or an archive) without the need for the permission of the copyright owner.³⁴

In relation to this last point, the 1956 Act originally provided that anyone publishing work in accordance with s.7(6) would not be guilty of copyright infringement if the identity of the owner of the copyright in the work was not known and public notice was given of the intention to publish.³⁵ The duty to give notice of intended publication was abandoned when the CDPA was passed,³⁶ however publication will still infringe if the identity of the copyright owner is known and permission is not secured. That said, the legislation imposes no obligation to search for or attempt to identify the copyright owner.

11.3. Copying published work

11.3.1. Copying published work under the CDPA: s.42A

Whereas s.43 permits both libraries and archives to make copies of unpublished material, only libraries are specifically authorised under the CDPA to make copies of published material for their user community (s.42A). In short, the librarian of library which is not conducted for profit can make and supply a single copy of one article in any one issue of a periodical (s.42A(1)(a)), or a reasonable proportion of any other published work (s.42A(1)(b)), provided certain conditions are met.

The conditions are similar to those that apply under s.43 in relation to copying unpublished work. That is, the copy is supplied in response to a request from a person who has provided the librarian with specific information set out in a declaration in writing (s.42A(2)(a)), and the librarian is not aware that the information provided is false (s.42A(2)(b)).³⁷ Moreover, as with s.43, there is no requirement that the work being copied be held in the permanent collection of the library.

³⁴ Moreover, s.7(8) provides that a work published in accordance with ss.7(6)(7) may also be 'broadcast' or 'transmitted to subscribers to a diffusion service' without infringing copyright therein.

³⁵ Copyright Act 1956, s.7(7).

³⁶ CDPA, Schedule 1, para.16.

³⁷ The information to be included within the declaration in writing is as follows: (i) the name of the person who requires the copy and the material which that person requires; (ii) a statement that the person has not previously been supplied with a copy of that material by the library; (iii) a statement that the person requires the copyright for private study or non-commercial research, that they will only use it for those purposes and will not supply the copy to any other person; (iv) a statement that, to the best of the person's knowledge, no other person with whom the person works or studies has made, or intends to make, at or about the same time as the person's request, a request for substantially the same material for substantially the same purpose (s.42A(3)).

An archive that contains a library of published reference material (such as books and periodicals) will no doubt be considered to be a library for the purposes of s.42A.³⁸ However, it is by no means clear that the same provisions will apply to published material held amongst the records in archive collections.³⁹

Finally, the CDPA makes clear that references to a librarian under s.42A include 'a person acting on behalf of a librarian' (s.43A(5)).

11.3.2. Copying published work in archives under s.29

It is worth noting that copying published material by an archivist may well be permissible in accordance with s.29 of the CDPA: fair dealing for research for a non-commercial purpose or private study.⁴⁰

Under s.29 anyone is entitled to make copies of work for private study or non-commercial research purposes, so long as the copying satisfies the criterion of fair dealing.⁴¹ Within the context of copying archival records and documents, the opportunity to copy material will, of course, be contingent upon the permission of the archive, and the archivist's duty to ensure the long-term preservation of unique, often fragile, archival material is not necessarily compatible with authorising users to copy such material themselves. However, s.29 anticipates that the copying can be carried out 'by a person other than the researcher or the student himself'⁴² and, in theory, there is no reason why this could not be by an archivist.

Padfield, however, sounds a cautionary note on this reading of the legislation. He argues that, as the CDPA contains specific provisions for copying by a librarian or an archivist, the defence of fair dealing under s.29 is unlikely to be available to an archivist 'who supplied copies outside the terms of those special provisions'.⁴³ Such caution is understandable, but the point has yet to be tested before the UK courts.

³⁸ See, for example, the commentary in Padfield (2015), 5.4.18.

³⁹ On this issue, a number of respondents to previous government consultations on copyright reform, including the Lord Chancellor's Advisory Council on National Records and Archives, argued for explicit parity between libraries and archives with respect to the copying of published work (See for example the submissions to the second stage consultation on the *Gowers Review* from: the Lord Chancellor's Advisory Council on National Records and Archives, the Libraries and Archives Copyright Alliance, the National Library of Wales, the Mills Archive Trust, and the Religious Archives Group (all documents available from the Intellectual Property Office on request)). That argument should be supported. There is no coherent reason for denying archives the same privileges under s.42A that libraries currently enjoy, and much to be gained by allowing parity of treatment.

⁴⁰ Indeed, copying under s.29 will also extend to unpublished work, although whether the work has been published or not is likely to be an influential factor in determining whether or not the copying is fair dealing.

⁴¹ In relation to copying for the purposes of research for a non-commercial purpose, the copying must also be accompanied by 'a sufficient acknowledgement'; CDPA, s.29(1).

⁴² CDPA, s.29(3).

⁴³ Padfield (2015), 5.3.9.

11.4. Making work available through dedicated terminals: s.40B

This exception, introduced by the *Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014*, provides that copyright in work is not infringed by a relevant institution making work available to the public by means of a dedicated terminal on its premises. The institutions entitled to rely on this exception are libraries, archives, museums and educational establishments, and the exception is subject to the following conditions:

- (i) the work in question must have lawfully acquired by the institutions
- (ii) it is made available to members of the public for the purposes of research or private study, and
- (iii) it is being made available in compliance with any purchasing or licensing terms to which the work is subject

There is one important point to note about the scope of this exception: unlike ss.42A and 43, which require a person to declare that they are requesting a copy of material from a library or archive for private study or *non-commercial* research, under s.40B institutions are free to make work available (on dedicated terminals) for *all* forms of research, whether commercial or non-commercial.

11.5. Copying public records: s.49

Section 49 of the CDPA provides that any public record open to public inspection, whether published or unpublished, may be copied, and a copy may be supplied to any person, without infringement.

Public records are defined with reference to the *Public Records Act 1958*, the *Public Records (Scotland) Act 1937*, the *Public Records Act (Northern Ireland) 1923* and the *Government of Wales Act 2006*, and any copying under s.49 must be carried out by an officer appointed under the relevant legislation, or with their authority.

Sometimes, however, records are not selected for permanent preservation under one of the Acts, but are presented to other repositories for disposal other than by destruction. In this situation, the exception set out in s.49 does not apply. As Padfield sets out: 'Such records cease, on presentation, to be public records but the copyright in them is unaffected, so that Crown copyright material, for instance, is still Crown copyright. Because they are no longer public records, [they] may be copied only in accordance with general provision such as fair dealing or, as appropriate, in accordance with the general regulations for libraries and archives'.⁴⁴

12. ORPHAN WORKS

Orphan Works are works that are still protected by copyright, but where the author or right(s) holder(s) are unknown, or cannot be identified or located after a

⁴⁴ Padfield (2015), 5.4.3.

diligent search. Given the age and size of archive collections, the circumstances under which they are deposited, and the implications of the 2039 rule,⁴⁵ large proportions of archive holdings are estimated to be orphaned.⁴⁶

This definition of an orphan work presents two issues for the archivist. First, it may be possible to identify the right holder of the orphan work, but it may not be possible to find contact details for them, or their heirs. If an archivist does find contact details, but doesn't receive a response to repeated attempts to gain permission from the right holder, does that mean the work is orphaned? In some cases, it will: in some cases, it won't. Differentiating between 'true' orphans and right holders who do not respond to permission requests can be impossible, leaving the archivist in a difficult position.

Secondly, an archivist may identify works in a collection that are 'partially' orphan. This occurs where a work has multiple rights holders, some of whom are identifiable and contactable, and some of whom are not. In order to use the work, the archivist must get permission from the known and contactable rights holders before considering the use of either of the orphan works 'solutions' outlined below, in order to address the unknown or uncontactable right holders in the work.

12.1. The EU Directive on certain permitted uses of orphan works

The EU Directive on certain permitted uses of orphan works became UK law through the Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014. This exception allows archives; publicly accessible libraries, educational establishments and museums; film or audio heritage institutions; and public service broadcasters to digitise works in their collections and make them available online or for broadcast for non-commercial purposes, after completion of a diligent search. Non-commercial in this instance allows institutions to charge for making the work available, but only enough to recover the costs of digitisation and making the work available online.

The regulations set out requirements for diligent search, but do not mandate specific sources: institutions are left to determine the search sources which would be most appropriate. Institutions are required to register as beneficiary organisations with the EU Intellectual Property Office (EUIPO). They are then required to provide information about the orphan works, which is made available

⁴⁵ The 2039 rule refers to the transitional provisions affecting certain unpublished works in the Copyright Designs and Patents Act 1988. Prior to the CDPA, unpublished works received perpetual copyright protection. In order to reduce this term, without depriving rights holders of their property, unpublished works were given the same term of protection as other works in 1988 – i.e. life of the author, plus 50 years. The 50-year term started on the 1st of January 1989, when the CDPA came into force. Therefore, the works will enter the public domain at midnight on the 31st of December 2039, 50 years later. This provision affects unpublished literary, dramatic, and musical works where the author has died; unpublished anonymous or pseudonymous literary, dramatic, musical or artistic works (other than photographs); unpublished engravings where the author has died, unpublished photographs taken on or after 1st June 1957, unpublished sound recordings made on or after 1st June 1957, and unpublished films. However, if such works have been made available to the public, this will affect how the duration of copyright is calculated. See Padfield (2015) for more details on duration of copyright.

⁴⁶ For example, see Korn, N. (2009) *In from the Cold*, JISC, London. Available at: <http://www.webarchive.org.uk/wayback/archive/20140615221324/http://www.jisc.ac.uk/media/document/publications/infromthecoldv1.pdf>

on the EUIPO Orphan Works database. The registry allows orphan works to be identified and searchable, so that rights holders can search the registry periodically to ensure their works haven't been misidentified as orphans. Other institutions can also search the registry, to ensure they don't complete further diligent searches for the same work.

Literary, dramatic and musical works can be registered using the database, as can phonograms, sound recordings and films. Standalone artistic works, such as photographs, paintings, illustrations, maps and plans **cannot** be registered as orphan works. Embedded works, where photographs and illustrations are embedded within books or magazine articles, are included within the scope of the exception.

No charge is made for using the registry, although the process of diligent search, recording information and data input or upload to the database will generate their own costs. Once a work is registered with the EUIPO, it is recognised as an orphan work across all 28 member states of the EU.

Archivists using the exception should be aware that the inclusion of unpublished works within the scope of the exception is problematic. The legislation states that unpublished works are included only where they were deposited by or with the approval of the rights holders. Further, unpublished works can only be made available where it is reasonable to assume the rights holder would not oppose the use to be made of the work.⁴⁷ Inevitably, many orphan works will not meet these requirements, or they cannot be met because there is no information available to assist the archivist in reaching such a judgement.

The exception offers the archivist a small amount of protection should a rights holder reappear and claim the orphan work. If such an event occurs, the archive must negotiate reasonable compensation with the rights holder.⁴⁸ If no agreement can be reached, the right holder and the archive can apply to the Copyright Tribunal for arbitration.

12.2. The Orphan Works Licensing Scheme

In addition to the exception provided by the EU Directive, the UK government enacted further legislation on orphan works simultaneously. The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 allowed the creation of the Intellectual Property Office (IPO) Orphan Works Licensing Scheme (OWLS) and a new orphan works register (separate from the EUIPO orphan works database).

The OWLS is available to any type of applicant; not just cultural institutions, and works can be licensed for both commercial and non-commercial purposes. Licenses must be sought for individual works. Applications are made online, from one to a maximum of thirty works in a single application, with application costs ranging from £20-80. Applicants are expected to pay both an application fee, to process the information supplied, and a license fee, for the use intended to be

⁴⁷ CDPA 1988 s.44B, and see Padfield (2015), s.5.2.19.

⁴⁸ It's worth noting that, depending on the type of work made available, reasonable compensation could mean no compensation. It would depend on the particulars of each individual case.

made of the work. Non-commercial licenses, charged at a flat fee of £0.10 per work, are available. Uses include:⁴⁹

- Free hand outs for live event, exhibition or similar;
- Use in a live event, exhibition or similar;
- In newsletter, bulletin, e-newsletter or e-bulletin;
- In non-commercial promotional material – print and digital;
- Digitise and make available on-line, including on social media;
- Preservation purposes;
- Use on stage or in performance;
- Educational purposes – use in learning/ training materials, including e-learning;
- Use in thesis/dissertation;
- Personal use.⁵⁰

Commercial use in this context is defined as “any uses (including by individuals as well as organisations) that make money from the work – such as selling copies of the work or directly charging for access to it whether any charges are intended to make a profit or just to cover costs.” License fees are available for a variety of uses, and are charged at a rate similar to those for non-orphaned works.

Payment of application and license fees is by credit or debit card only: the IPO does not provide a facility for invoicing. Licenses last for a maximum of seven years and they can be renewed on completion of an updated diligent search. Licenses are only valid for use within the UK: users cannot license a work for use in another country through OWLS.⁵¹

In contrast to the general sources listed for the exception, the IPO have provided extensive guidance on diligent search for different types of works, to be used in conjunction with making an application to the OWLS: film, music and sound; literary works; and still visual art. Each of these guidance documents include sources that can be checked for unpublished works, which will generally be of more interest to archivists than those for published works.⁵²

The OWLS provides more protection than the orphan works exception, although archivists should note that using the OWLS requires more administrative effort. The IPO grants licenses as if it were the absent rights holder, so the archive is

⁴⁹ Many of the uses permitted by the non-commercial orphan works license also fall within the scope of other exceptions: it may not be necessary to apply for a license, depending on the use you intend to make of the work. See section 11 for more details on some of the relevant exceptions.

⁵⁰ More information on the IPO OWLS application process is available at <https://www.gov.uk/guidance/copyright-orphan-works>

⁵¹ This is an obvious stumbling block within the scheme, given that very few digitisation projects are undertaken with the objective that the material only be available to view in the UK. It would also restrict any planned commercialisation activities to the UK.

⁵² The diligent search guidance is available at <https://www.gov.uk/government/publications/orphan-works-diligent-search-guidance-for-applicants>

protected should a rights holder come forward to claim the orphan work(s) at a later date.

12.3. Orphan works and risk management

It's worth noting that some institutions choose to manage and mitigate the risks associated with making orphan works available online without using either the orphan works exception or the OWLS. Institutions can do this in a variety of ways: tools can be used to assess the risk of making individual works available;⁵³ takedown policies can be used to remove material from websites where rights holders request it;⁵⁴ and insurance can be purchased in order to off-set the costs associated with infringement, should a rights holder complain or bring proceedings against an institution.⁵⁵ While it is worth bearing in mind that no UK archive service has ever been sued for copyright infringement, institutions should be aware that the Intellectual Property Enterprise Court (IPEC), established in 2012, provides a small claims track in England and Wales for disputes worth under £10,000.⁵⁶

Please note the Scottish Council on Archives does not take a view on the validity of a risk-managed approach to copyright infringement, and the guidance provided does not constitute legal advice.

⁵³ JISC funded the 'Web2Rights' resource which includes a variety of guidance documents, case studies, checklists, flowcharts and tools to help manage the issues associated with making material available online, including copyright. The resource is available at <http://www.webarchive.org.uk/wayback/archive/20100621140324/http://www.web2rights.org.uk/index.html>

⁵⁴ JISC and the Strategic Content Alliance have provided a template Notice and Takedown Policy and Procedures, available at https://sca.jiscinvolve.org/wp/files/2011/03/iDF144-SCA_TemplateNoticeTakeDown_Mar11_v1-02.pdf

⁵⁵ The UK Intellectual Property Office provide a guide to intellectual property insurance on their website, available at <https://www.gov.uk/guidance/intellectual-property-insurance>

⁵⁶ The UK Intellectual Property Office provide a guide to the Intellectual Property Enterprise Court on their website, available at <https://www.gov.uk/government/publications/intellectual-property-enterprise-court-a-guide-to-small-claims>