

Contemporary Intellectual Property: Law and Policy (6th edn)

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p. 240 7. Rights akin to copyright: database right and performers' rights

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Abstract

This chapter considers two rights similar to copyright in many ways, in terms of both subject matter and the substantive contents of the rights: (1) the special or *sui generis* database right, which operates alongside the copyright in databases; and (2) performers' rights. Both rights have been relatively recently introduced into the armoury of intellectual property law. The chapter gives an account of each of these rights, comparing them with copyright but also underlining the differences between the regimes, and the reasons behind these differences. The chapter considers relevant the relevant international and EU frameworks and also highlights the nature and importance of these rights.

Keywords: copyright law, *sui generis*, database rights, performers' rights, digital environment

Introduction

Scope and overview of chapter

7.1 This chapter considers two rights closely akin to copyright in many ways, in terms of both subject matter and the substantive contents of the rights. Both rights have also been relatively recently introduced into the armoury of intellectual property law. The rights in question are (1) the special or *sui generis* database right (database right), which operates alongside the copyright in databases (for which see para 3.54–3.56); and (2) performers' rights. The chapter gives an account of each of these rights, comparing them with copyright, but also underlining the differences between the regimes, and the reasons behind these differences.

7.2 Learning objectives

By the end of this chapter you should be able to describe and explain:

- the database right;
- performers' rights;
- the ways in which each of these rights compares with copyright;
- the reasons why these rights have been created and are distinct from copyright.

7.3 The chapter first explores the database right, explaining the reasons for its introduction by the Database Directive 1996 and considering in detail its exposition by relevant ECJ and UK jurisprudence. The chapter then turns to performers' rights, again providing an introduction to the rights in their present form, and considering also developments now in prospect. So, the rest of the chapter looks like this:

- Database right (7.4–7.25)
- Performers' rights (7.26–7.48)

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Database right

Introduction

7.4 The Database Directive 1996¹ not only harmonised the copyright protection of databases in the EU, but also introduced an additional, special (*sui generis*) database right to protect those commercially valuable and expensively created databases henceforth believed to be excluded from copyright in some member states (notably the UK) by the higher originality requirement now imposed under the Directive (see para 3.55–3.56).² The UK implemented the Directive in the Database Regulations 1997.³ The database right is founded in EU law, that is, it exists solely because of the Directive. After the withdrawal of the UK from the EU, it remains in force unchanged in all material respects, and previous ECJ case law continues to be applicable,⁴ although the UK is no longer required to follow new ECJ decisions (para 1.62). However, the qualification rules have changed and the database right is now only available domestically, that is, from 1 January 2021, only UK citizens, residents, and businesses are eligible for new database rights.⁵ UK databases created from this date are no longer eligible to receive such protection in the EEA, and vice versa.⁶ The database rights that existed in the UK and EEA prior to 1 January 2021 will continue to exist until the end of their duration, as they are guaranteed by the 2019 Withdrawal Agreement.⁷ The purpose of database right protection is to provide ‘a commercial right so as to encourage the creation of valuable databases’⁸ and ‘is intended to ensure that the person who has taken the initiative and assumed the risk of making a substantial investment in terms of human, technical and/or financial resources in the setting up and operation of a database receives a return on his investment by protecting him against the unauthorised appropriation of the results of that investment’.⁹ However, the right ‘does not constitute an extension of copyright protection to mere facts or data’.¹⁰

Criteria for protection to arise

Definition of a database

7.5 The definition of database applying for copyright purposes (para 3.54) also applies for the database right: (1) independence of the constituent elements; (2) systematic or methodical arrangement of the elements; and (3) individual accessibility of the elements.¹¹ However, there is no requirement of originality in the sense of 'intellectual creation' for the database right to subsist; that is, the database contents must still be organised in a systematic or methodical way but the system or method need not be a personal intellectual creation.¹² A database can consist of copyright-protected elements and, a collection of data contained within a copyright-protected work like a novel can also be a qualifying database for the database right.¹³

p. 242 **Defining databases: (1) independence of the constituent elements**

7.6 The constituent materials must be separable without their informative, literary, artistic, musical, or other value being affected.¹⁴ So films as such are not databases, because there is interaction between script, music, sound recordings, and the moving images.¹⁵ But an entry in a telephone directory can be understood standing alone, and so the directory is a database. Sports fixtures, the subject of several ECJ references, provide more complex examples. Is the fixture information, 'X v Y', an item which can be understood on its own? Is it separate from the date information without which 'X v Y' is probably meaningless? Or is 'X v Y, 1 January 2010' the single item of information which can be understood on its own and which therefore renders the whole collection of such items a potentially qualifying database? Data relating to sporting activity is not precluded from recognition as a database¹⁶ and the combination of the date and time of, and the identity of two teams playing in, both home and away matches are covered by the concept of independent materials with autonomous informative value.¹⁷ As such, not only an individual piece of information, but also a combination of pieces of information can constitute independent materials, following which geographical information on an analog topographical map such as tracks appropriate for cyclists, mountain bikers, and inline skaters, is not precluded from being independent material provided their extraction does not affect the value of their informative content.¹⁸ Further, merely because there is a decline in the informative value of material once extracted from a collection, such as a church on a map, it can still be 'independent material' if it retains autonomous informative value; but the autonomous informative value of such material must be assessed from the perspective of each third party interested in extracting the material, instead of the perspective of the typical user of the collection concerned.¹⁹

Defining databases: (2) systematic or methodical arrangement of the elements

7.7 The purpose of this requirement is 'to exclude random accumulations of data and ensure that only planned collections of data are covered, that is to say, data organised to specific criteria'.²⁰ The arrangement required here need not be a physical one,²¹ but the ECJ has stated that the condition implies that the collection should be contained in a fixed base of some kind; such a base may be technical (eg electronic, electro-magnetic, or electro-optical processes), or something else (eg an index, table of contents, or a particular plan or method of classification), to allow retrieval of any independent material contained within it.²² Thus, the

arrangement involved is *conceptual*, that is to say, it is about the way in which the contents are presented to and retrievable by the user of the database. Alphabetical, chronological, or subject arrangements will be enough to meet this element of the definition of a database.²³

Defining databases: (3) individual accessibility of the elements

7.8 This requirement may seem ambiguous at first glance. Does it mean that the works or items comprising the database must be separately retrievable by the user and, if so, how must that access work? The ECJ has stated that a means of retrieving each of a database's constituent materials, technical or otherwise (as described in para 7.7), was what made it possible to distinguish a protected database from a mere collection.²⁴

p. 243 Nevertheless, this and the previous requirement do not appear to be difficult to satisfy. A table consisting of 33 electronic addresses was held to be systematically arranged and individually accessible by virtue of its arrangement into columns and rows.²⁵ A pdf document was held to have individual accessibility because the contents can be accessed 'through electronic conversion, through digital character recognition, or old-fashioned reading or re-typing'.²⁶

Exercise

Take a printed telephone directory or sports fixture list. When you access an item of information therein (eg a person's telephone number you want to call, a match you want to attend), is it 'individually accessible by electronic or other means' simply because you can read it and ignore the rest of what is visible on the printed page? Or is it accessible only alongside the other information on the page, and therefore not individually or separately retrievable? Compare what happens if you search an electronic telephone directory for a particular person, or a fixtures database for the match on a particular date, or for the date your team plays its local 'derby' game on its home ground. Should there be a different result according to whether the information is collected in print or electronic form?

Database right and copyright in a database

7.9 A database enjoying copyright protection is not precluded from also enjoying database right. The relevance of this is that database right confers protection against extraction and re-utilisation of the contents of the database where it amounts to a substantial part (see further para 7.16–7.20) rather than the copyright protection for the selection and arrangement of the contents. The database right protects the database itself, and no copyright is created in the underlying data.²⁷ The principal substantive ground for database right protection is the creator's substantial investment in obtaining, verifying, or presenting the contents of the database, and it is immaterial whether or not the database is also a copyright work; that is, is an intellectual creation of the compiler in its selection or arrangement.²⁸

Question

Can a copyright-protected database also be protected by the database right? Will a database protected by the database right also have copyright?

Obtaining, verifying, or presenting the contents of the database

7.10 Database right arises where there has been substantial investment in ‘obtaining, verifying or presenting the contents of the database’.²⁹ The first question to which this has given rise is whether, if the investment is in *creating* rather than *obtaining* data, database right is excluded. In other words, must the data exist before the investment is made? The ECJ’s answer to this question, in the leading cases decided in 2004, surprised many.

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■ *British Horseracing Board v William Hill Organization Ltd [2001]* *RPC 31 (Laddie J); [2002] ECDR 4 (CA); Case C-203/02 [2005] RPC 13 (ECJ);* *[2005] RPC 35 (CA)*

The British Horseracing Board (BHB) administered British horse-racing, creating the fixture lists each year, and distributing information about races to subscribers.³⁰ WHO were subscribers who used the BHB data in relation to their betting services. An issue arose between the parties about whether WHO’s unauthorised use of the BHB data in its new internet betting service infringed BHB’s database right. The Court of Appeal referred the question of whether ‘obtaining’ covered ‘creating’ as well as ‘compiling’ to the ECJ. The ECJ held that merely creating data did *not* amount to obtaining it, or to its verification or presentation. Investment in ‘obtaining’ involved the seeking out and collecting of existing independent materials in a database, not the investment in creation of such independent materials (paras 29–34). The Court of Appeal then applied this interpretation of the law to deny the existence of database right in BHB’s database, since BHB created the data rather than collecting it from existing independent sources. The decision appears to restrict considerably the scope of protection given by the database right.³¹

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-7-guidance-on-answering-the-discussion-points?options=showName>>

Explain why the exclusion of creation from obtaining limits the scope of the database right.

The difficult distinction between creating data and obtaining pre-existent data can be understood through decisions regarding databases containing information about football matches in England and Scotland. The ECJ provided the same reasoning as the horse-racing case in a group of cases concerned with football fixture lists (the *Fixtures cases*),³² meaning that organisation of football leagues by deploying sources for determining dates, times, and team pairings for home and away matches involves creating data. Subsequently, fixture lists have been denied database protection in the UK.³³

■ *Football Dataco Ltd v Sportradar [2012] ECC 26 (ChD) (Floyd J); [2013] ECC 12 (CA)*

F was a provider of Football Live database containing live data from football matches, such as goals and their times, scorers, assists, type of shot, etc. Such data would be provided by a football analyst, paid by F to be present at match grounds, to a sports information processor, as a running commentary, and entered into F's systems. F estimated the operation to cost £600,000 per season and exploited the database by licensing it to various customers. At first instance, Floyd J distinguished 'fixtures data' (eg team pairings), which are created by event organisers, from 'match data' (eg goals), which are created by the footballers, with the organisers only providing the environment for them to be scored. He held that 'factual data which is collected and recorded at a live event' relating to 'events outside the control of the person doing the collection and recording is not created by that person, but is obtained by him' (para 60). Collecting and recording data falls within the ordinary meaning of 'obtaining' but 'creating' suggests creation of new information.³⁴ The recording of existing facts, such as the fact of a goal which is created when the ball hits the back of the net, is not the same as creating new information (para 61). The Court of Appeal affirmed that F's database qualified for protection (paras 31–69). The Court rejected the argument that the act of recording a fact amounts to creation of data, or that data that has not been previously recorded (eg a goal) cannot be collected. Instead, it was noted that 'a scientist who takes a measurement would be astonished to be told that she was creating data. She would say she is creating a record of pre-existing fact, recording data, not creating it' (para 39). The requirement of seeking out 'existing independent materials' did not preclude 'measuring a temperature or recording an event' (para 49). Although 'Football Live' contained a mixture of data, both objective (eg goals and scorers) and subjective (eg man of the match), collected by one indivisible process, the objective elements were generated on the field and not as a result of F's resources (which were not used to create those elements but merely to collect the data that was generated). The Court held that it would be absurd for the database to lose protection because it included some subjective elements and the purpose of database right protection would be lost. However, the extraction of such subjective elements would not be protected by the database right (paras 61–68).

7.11 ‘Obtaining’ data is only one of three alternative ways in which an investment may be rewarded with database right. There may still be protection by way of ‘verification’ and ‘presentation’ for the creator of data later put into a database. Verification involves checking the accuracy, completeness, and reliability of the data once in the database, while presentation is about giving the database its function of processing information; that is, the resources used for the systematic or methodical arrangement of the data and the organisation of their individual accessibility.³⁵ So the concept includes materials necessary for the operation or consultation of the database by users such as thesaurus and indexation systems, as well as the structuring of the contents (the conceptual as distinct from the external format of the database). What is crucial is that, to be relevant for the establishment of database protection, investment in verification and presentation must be subsequent to and not part of the process of creation of the data.

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-7-guidance-on-answering-the-discussion-points?options=showName>>.

Consider the derivation of data from naturally occurring phenomena such as the weather or the genetic sequences of living creatures. Is that derivation an act of creation or obtaining for the purposes of database right? Read the Court of Appeal decision in *Football Dataco Ltd v Sportradar* [2013] ECC 12 at paras 31–69 and the sources mentioned therein.

Substantial investment

7.12 The investment necessary for the existence of database right need not be merely financial, but can include human, technical, and professional resources, as well as the expenditure of time, effort, and energy.³⁶ The substantiality of an investment may be measured qualitatively and/or quantitatively.³⁷ In her Opinion in *Fixtures Marketing v Svenska*, the Advocate General said that the substantiality of an investment is to be assessed ‘first in relation to costs and their redemption and secondly in relation to the scale, nature and contents of the database and the sector to which it belongs’. But she added that substantiality is not only a relative matter: ‘the Directive requires an absolute lower threshold for investments worthy of protection as a sort of de minimis rule’.³⁸ This was justified by reference to recital 19 of the Directive, which states that, as a rule (ie usually), the compilation of several recordings of musical performances on a CD does not represent a substantial enough investment to be eligible for the database right.³⁹ The difficulty is in using this rather specific example as a basis for determining what is the minimum threshold making an investment substantial, or indeed that there is such a requirement. The ECJ did not comment on this aspect of the Advocate General’s Opinion.

'Spin-off' databases

7.13 Are 'spin-off' databases—databases created as a by-product or a sort of side effect of activity and investment of resources which had other aims primarily in mind—excluded from database right protection? For example, investing in the creation of sports fixture lists or a horse-racing calendar is not done just to build a database, but to organise and structure the season of the sport in question and provide advance information for participants, the media, and potential spectators. The Advocate General took the view in the *Fixtures* cases that the Directive imposes no requirement as to the purpose for which the database is created and, in principle, spin-off databases could be protected.⁴⁰ The Court of Appeal has noted that the ECJ in *British Horseracing Board v William Hill Organization* had rejected the spin-off theory as the basis of excluding protection and essentially indicated that 'spin-off' databases can be protected by the database right if there is additional substantial investment directed specifically at the creation of the database, above and beyond, and independent of, the investment in data creation, most probably in the verification or presentation of the data contained within it.⁴¹

Key points on database right

- The right covers databases (collections of independent data, arranged systematically, individually accessible).
- Selection and arrangement need not be original (contrast copyright protection).
- There needs to be substantial investment (financial/human/technical/professional; qualitative and/or quantitative) in:
 - obtaining (not creating—horse-racing and football fixtures cases)
 - verifying
 - presenting

the contents of the database.

First ownership

7.14 The maker of a database is the first owner of the database right in it.⁴² There is a presumption that a name appearing on copies of a database as its maker is the maker unless the contrary is proved.⁴³ The maker is the person taking the initiative in obtaining, verifying, or presenting the database contents and assuming the risk of investing in those activities.⁴⁴ If, however, a database is anonymous, in the sense that it is not possible by reasonable inquiry to ascertain its maker's identity, and it is reasonable to assume that database right has expired, then extraction and re-utilisation of the database contents is not infringement.⁴⁵ There may be joint makers if two or more parties collaborate in taking the initiative and assuming the risk.⁴⁶ Where

p. 247 an employee makes a database in the course of employment, the employer is to be regarded as the maker in the absence of any agreement to the contrary.⁴⁷ There is also provision for Crown and parliamentary database right.⁴⁸

Duration

7.15 The database right has its own special period of duration which, on the face of it, is much shorter than any of the main copyright terms.⁴⁹ The right lasts for 15 years from the end of the year in which the making of the database was completed, or in which it was first made available to the public if that event occurs before the end of the first period (see Figure 7.1).

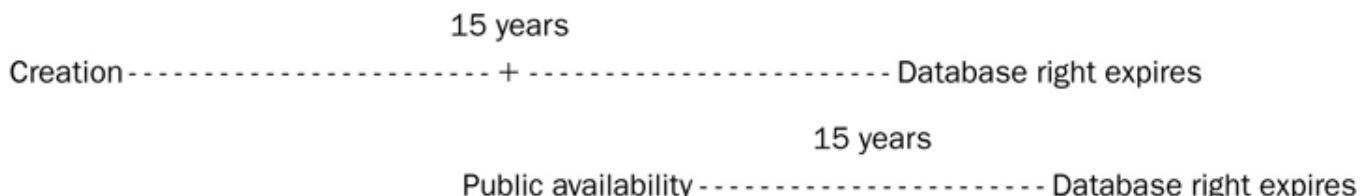


Figure 7.1 Duration of database right

However, the right can last much longer than either of these 15-year periods, because any substantial change to the contents of a database (eg arising from additions, deletions, or alterations to its content) which would result in the database being considered a substantial new investment will qualify the database resulting from that investment for its own new 15-year period of protection (see Figure 7.2). The same result might follow from a substantial investment in verification of the contents of the database.⁵⁰ A dynamic database could therefore end up with a rolling series of 15-year protections which will keep the right alive as long as the owner thinks it worthwhile to continue investment in it.⁵¹

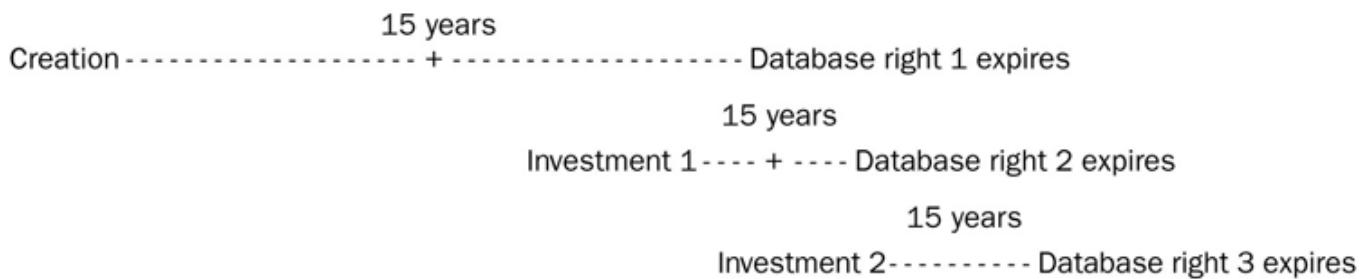


Figure 7.2 Duration of database right after substantial investment

Infringement

7.16 The database right has its own infringement regime distinct from that of copyright.⁵² *Unauthorised extraction from or re-utilisation of all or a substantial part of the database is prohibited.*

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↳ Extraction means ‘in relation to any contents of a database, ... the permanent or temporary transfer of those contents to another medium by any means or in any form’ (Database Regulations 1997 at reg 12(1)).

Re-utilisation means ‘in relation to any contents of a database, ... making these contents available to the public by any means’ (Database Regulations 1997, reg 12(1)).

Rental or lending of a database otherwise than for direct or indirect economic or commercial advantage through an establishment accessible to the public is not extraction or re-utilisation for these purposes;⁵³ but this does not apply to making available for on-the-spot reference use.⁵⁴ Payment which does no more than cover the establishment’s costs gives rise to no direct or indirect economic or commercial advantage.⁵⁵ The right to control sales is exhausted after the *first sale* of the database in either the UK or the EEA, as long as that sale was with the consent of the owner of the database right.⁵⁶

Extraction and re-utilisation of a substantial part

7.17 The meaning of the infringement provisions of the Database Directive was considered in detail by the ECJ in the *British Horseracing Board* case⁵⁷ (for facts of the case, see para 7.10). The following points emerge from the Court’s judgment:

- The terms ‘extraction’ and ‘re-utilisation’ must be interpreted in the light of the objective pursued by the database right (para 45). The concepts of extraction and re-utilisation are intended to have a wide definition, cannot be exhaustively defined, and must be ‘interpreted as referring to any act of appropriating and making available to the public, without the consent of the maker of the database, the results of his investment, thus depriving him of revenue which should have enabled him to redeem the cost of the investment’ (paras 51–52). The purpose of extraction and re-utilisation, whether for creating another database or a commercial or non-commercial purpose, is irrelevant (paras 47–48).
- Extraction and re-utilisation can be either direct or indirect; that is, either from the database itself, or from a copy of the database (paras 52–53). The context is provided by the facts of the case, where the defendants had obtained the data, not from BHB’s database, but from one of BHB’s licensed distributors. Since temporary transfer of database contents is specifically included in relation to extraction, it would appear that any unauthorised access to a database would be extraction. However, the ECJ said specifically, albeit delphically, that mere consultation of a database was not an act of extraction or re-utilisation, but gave no further guidance on this distinction (para 54).
- Extraction meant the transfer of contents of the database to another medium and covered any unauthorised act of appropriation. It does imply transfer in the sense that the contents in question must be transferred from the database altogether; there is extraction even when afterwards the contents remain on the database (paras 58, 59, and 67). So, for example, a printout from a database is an extraction.⁵⁸

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- Re-utilisation is making available to the public the database contents and covers any unauthorised distribution to the public. It therefore embraces both online transmission and distribution or rental/lending of the database, and is not limited to a right to first publication of the contents (paras 58, 59, and 67). Exhaustion only arises in relation to the sale of physical copies of the database (eg on CD and DVD).⁵⁹
 - Substantiality of the part of the database extracted or re-utilised can be assessed both quantitatively and qualitatively. A quantitative measure is the volume of data extracted compared to the volume of the contents of the whole database; while a qualitative measure is the scale of the investment required in relation to the material extracted or re-utilised. The intrinsic value of the data, as distinct from the cost of the investment, is not a relevant consideration for the qualitative measurement of the substantiality of a part (paras 70–72). Finally, ‘it must be held’, said the Court, ‘that any part which does not fulfil the definition of a substantial part, evaluated both quantitatively and qualitatively, falls within the definition of an insubstantial part of the contents of a database’ (para 73).

While the ECJ only gives guidance to national courts on the interpretation of Union law, it did make the following comment on how, in the light of its opinion, summarised in the previous points, on the meaning of the infringement provisions of the Database Directive, this case should be decided. Thus, as far as concerned the quantitative measure of whether a substantial part of the database had been extracted or re-utilised:

the materials displayed on William Hill’s internet sites, which derive from the BHB database, represent only a very small proportion of ... that database ... It must therefore be held that those materials do not constitute a substantial part, evaluated quantitatively, of the contents of that database (para 74).

With regard to qualitative measurement:⁶⁰

The intrinsic value of the data affected ... does not constitute a relevant criterion for assessing whether the part in question is substantial, evaluated qualitatively. The fact that the data extracted and re-utilised by WH are vital to the organisation of the [BHB] horse races ... is thus irrelevant to the assessment ... [of] substantial part (para 78).

Several subsequent decisions provide guidance on the interpretation of extraction, re-utilisation, and substantial part.

■ Case C-304/07 *Directmedia Publishing GmbH v Albert-Ludwigs-Universitat Freiburg* [2008] ECR I-7565 (ECJ)

This case concerned alleged infringement of a university’s database right in a list of poetry titles. D used the database as a guide to the creation of its CD-ROM entitled *1,000 poems everyone should have*, omitting certain poems, adding others, and critically examining each selection made by the professor

who created the original database. Despite D taking the texts of each poem from its own resources, the ECJ held that the concept of 'extraction' covered the transfer of material from a protected database to another database following an on-screen consultation of the first database and an individual assessment of the extracted contents. The Court noted that the objective of the Directive is to guarantee the maker of a database, created through substantial human, financial, or technical resource investment, a return on the investment involved without unauthorised appropriation of the results at a fraction of the cost needed to design it independently. As such, extraction is to be given a wide meaning (paras 33–34). The concept is 'not dependent on the nature and form of the mode of operation used' and covers an act of transfer of 'all or part of the contents of the database concerned to another medium, whether of the same nature as the medium of that database or of a different nature' (paras 35–36). Therefore, extraction is not limited to physical taking, and also includes taking that is preceded by the taker's critical evaluation of the material. The information 'extracted' from the database could be transferred in any way to another medium, such as manual recopying, photocopying, or downloading. It was irrelevant that the copied information was adapted into a different format. The objective pursued in the act of transfer was also immaterial.

■ Case C-545/07 *Apis-Hristovich EOOD v Lakorda AD [2009] 3 CMLR 3 (ECJ)*

A, which operated a legal database, claimed that L, which had been set up by two ex-employees of A, infringed its database rights by extracting without A's consent substantial parts of two modules of the

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database. These extracted elements, it was argued, were used by the defendants to develop a similar system. L argued that it had invested significant independent time and money in the new database. Any similarities to the two modules were argued to be due to the fact that the legal sources relied upon were publicly available. The Court held that protection could be claimed in database sub-groups provided that each sub-group qualified as a protected database. If they did, the level of extraction was compared against the amount of data in the sub-group. If they did not, the level of extraction was measured against the entire database, rather than its constituent parts. While 'extraction' should be given a broad definition, the purpose of extraction was irrelevant, as was the unique feature of the new database. Furthermore, the Court noted that the public availability of materials did not preclude protection as long as there had been qualitative and/or quantitative substantial investment when obtaining, verifying, or presenting the contents of the database. Additionally, the use of hyperlinks or other such similar features in both databases could be indicative, though not determinative, of extraction, as could such materials not available to the public.

■ **Case C-173/11 *Football Dataco v Sportradar* [2013] FSR 4 (ECJ); [2013] ECC 12 (CA)**

For the facts of this case, see para 7.10. F claimed database right infringement against S, a German company and its Swiss parent company which provided live football statistics via the internet through its service *Sport Live Data*. S held its data in a member state outside the UK but the public in the UK could access the service. The ECJ noted that the database right protection, although harmonised, is provided by the national law of a member state and as such acts of infringement must take place in that member state. It held that re-utilisation covers the act of sending data, previously extracted from a protected database, by means of a web server in member state A, to another person's computer in member state B, at their request, for the purpose of storage in that computer's memory and display on its screen. Such re-utilisation takes place, at least, in member state B, if there is evidence from which it may be concluded that the act discloses an intention on the part of the sender to target members of the public in member state B (para 47). The Court of Appeal held S liable for infringement.

■ **Beechwood House Publishing Ltd v Guardian Products Ltd [2011] EWHC 22 (PCC)**

B, a publisher of a database consisting of details of individuals associated with GP practices, put seeds—dummy or fictitious entries not belonging to real people but to addresses of its staff—in its database which led them to find out that G, a direct marketing information provider, was using information from its database for printed mail outs. Judge Birss QC held that 6,000 practice nurse records which were extracted by G for a mailing exercise, representing about 14 per cent of the database, was a quantitatively substantial part, even if it was at the lower end of what could be regarded as such. Alternatively, it was a qualitatively substantial part as the scale of human and financial investment they represented was significant.⁶¹

Repeated and systematic extraction/re-utilisation of insubstantial parts

7.19 Repeated and systematic extraction/re-utilisation of *insubstantial* parts of database contents may amount to the extraction/re-utilisation of a substantial part of those contents.⁶² In the *British Horseracing Board* case,⁶³ Laddie J held that the defendant's daily use of the BHB database was caught by this provision, but the issue of its meaning was referred to the ECJ by the Court of Appeal. The Advocate General made clear that repetition and system are cumulative rather than alternative requirements, and imply acts at regular intervals such as weekly or monthly. The ECJ noted that the purpose of the rule was to prevent circumvention of the basic exclusive right conferred by the Directive by a series of insubstantial acts which would cumulatively cause serious prejudice to the investment of the maker of the database. It went on to hold that

the prohibition affected repeated and systematic acts leading to the reconstitution of the whole database or a substantial part of it, whether or not the acts were carried out to create such a database. Third parties were also prevented from repeated and systematic making available to the public of insubstantial parts of the database.

7.20 The Directive says that the repeated and systematic acts must either (1) conflict with normal exploitation of the database; or (2) unreasonably prejudice the legitimate interests of its maker.⁶⁴ The ECJ held that this refers to serious prejudice to the database maker's investment by unauthorised acts the cumulative effect of which is (a) the reconstitution; or (b) making available to the public, of the whole or a substantial part of the contents of a protected database.⁶⁵ The Court concluded that the defendant's acts in this case would not result in the reconstitution of the BHB database, or in making it available to the public, so the prohibition did not apply. However, in *Innoweb v Wegener*, the ECJ held that an operator of a meta search engine re-utilises a database when it provides the user with the same search facility as the database, translates user queries by searching all the information on that database's search engine, and presents results in an order comparable to the database's engine.⁶⁶

Key points on infringement of database right

- The right is infringed by unauthorised extraction or re-utilisation of all or a substantial part of the database.
- Extraction is transfer of database contents to another medium (but removal is not needed).
- Re-utilisation is making database contents available to the public by any form of distribution.
- Extraction/re-utilisation are to be given a wide meaning and may be direct or indirect.
- Substantiality is measured both quantitatively and qualitatively, but the intrinsic value of the data is not a factor in this assessment.
- Repeated and systematic extraction/re-utilisation of insubstantial parts may cumulatively amount to extraction/re-utilisation of a substantial part.

Exceptions

7.21 The Database Regulations 1997 provides for exceptions for non-commercial research, teaching,⁶⁷ deposit libraries and disabled persons,⁶⁸ and public administration.⁶⁹ Unlike copyright, there are no exceptions for the purposes of criticism, review, and reporting current events. The Database Regulations do, however, make it clear that a lawful user of a database which has been made available to the public in any manner shall be entitled to extract or re-utilise an *insubstantial* part of the contents of the database for any purpose,⁷⁰ and that any term in an agreement purporting to limit this entitlement shall be void.⁷¹ This illustrates that contract provisions may not be used to extend the scope of the database right itself; it is infringed only by taking of a *substantial* part of the database contents (see paras 7.16–7.20). However, such a

p. 252 mandatory right for the 'lawful user' of a protected database is not available to users of unprotected databases (those that are not protected by either copyright or database right), authors of which are not precluded from laying down contractual limitations to prevent its use by third parties.⁷²

7.22 There is an exception, like copyright, permitting extraction for non-commercial research purposes from a database protected by the database right.⁷³ The database must have been made available to the public, and the person making the extraction must already be a lawful user apart from the exception. The source must be acknowledged. The exception covers only extraction of a substantial part of the database, so presumably extraction of an insubstantial part, not being infringement, requires no exception. It is worth noting that the ECJ has said in the *British Horseracing Board* case that mere consultation of a database is not extraction of the database.⁷⁴ No similar exception exists for the other act restricted by database right, re-utilisation.

7.23 There is also an exception to allow extraction (but, again, not re-utilisation) from a database made available to the public, by one already a lawful user of the database, for the purpose of illustration for teaching and not for any commercial purpose, as long as the source is indicated.⁷⁵

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-7-guidance-on-answering-the-discussion-points?options=showName>>.

Why do the non-commercial research and teaching exceptions apply only to extraction of content from a database and not to its re-utilisation?

Exercise

Compare the exceptions to database right with the exceptions to copyright in a database (see paras 5.17ff). Are the two systems compatible? Is it possible to exclude exceptions to database right by contractual agreement between the rightholder and user?

Key points on exceptions to database right

- The principal exceptions are for non-commercial research and teaching.
- These exceptions are only in relation to extraction and not to re-utilisation.

Commission's evaluation of database right

7.24 The database right is an example of EU law that goes beyond the provisions of the international treaties, by providing for rights that were unique to the EU. A fundamental concern then is whether the right is necessary and relevant. The first evaluation of the right by the European Commission noted that decisions of the ECJ had substantially curtailed the right.⁷⁶ The Commission's research also suggested that the database right had anyway failed to achieve its objective of boosting the global competitiveness of the European

p. 253 database industry. Abolition of the right was accordingly one of the options in the first evaluation, along with amendment of the Directive to reverse the effects of the Court decisions, repeal of the whole Directive, or doing nothing, simply awaiting further judicial decisions. The last always looked the likeliest outcome, and the cases that have emerged since have shown a broader view being taken of the right's scope. However, a recent decision has, arguably, given stronger contractual protection to unprotected databases, and consequently, made database protection far less attractive (para 7.21).

7.25 The Commission published a second evaluation in 2018 where it noted that the conclusions of the 2005 evaluation remain applicable and there was no evidence to show that the database right 'has been fully effective in stimulating investment in the European database industry, nor in creating a fully functioning access regime for stakeholders'.⁷⁷ However, it concluded that the benefits of the right, albeit moderate, are higher than the costs, and keeping the current status quo would be a good option, as reforming the right would be largely disproportionate at this stage. Despite this conclusion, several concerns, some of which were raised in the second evaluation, remain applicable. Since the right protects against extraction and re-utilisation of the contents of the database, and not merely the selection and arrangement thereof, does it preclude access to that which in the past has circulated freely amongst would-be users? An example which has been much discussed is scientific information, now commonly held on databases. Another example is public-sector datasets. The policy issues that remain here, as such, are fundamental: are the exceptions to the database right too narrow? What is the social cost of database right protection? Does the right serve any useful purpose, and should it be amended in any particular way?⁷⁸

Exercise

Read the second evaluation of the Database Right Directive 1996 published in 2018. What advantages and disadvantages of the database right are raised by relevant stakeholders in the evaluation? Do you agree with the Commission's conclusions?

Performers' rights

Introduction

7.26 Performers⁷⁹ were, historically, not well protected in the UK and the UK acts appeared to give rise to only criminal liability.⁸⁰ The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961 provided the international basis for performers' protection. But it only gives performers the possibility of 'preventing' a list of acts for the term of 20 years, rather than a right to authorise and prohibit them in advance.⁸¹ Thus, it was argued that the approach through the criminal law could continue.⁸² However, in 1977 the Whitford Committee⁸³ recommended that performers should be given a civil right of action for injunctions and damages, but that this should not amount to copyright. The Copyright, Designs and Patents Act 1988 (CDPA 1988) introduced a new framework for rights in performances.

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Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-7-guidance-on-answering-the-discussion-points?options=showName>>.

Look up the historical background to protection of performers' rights. Why was such protection weak?

7.27 The TRIPS Agreement accorded performers with similar rights as the Rome convention but for the longer duration of 50 years.⁸⁴ The WIPO Performances and Phonograms Treaty 1996 (WPPT) improved the protection available to performers at the international level, notably by providing moral rights for performances fixed in phonograms and live aural performances.⁸⁵ A number of EU directives also changed the position for performers: Rental Right Directive;⁸⁶ Satellite and Cable Directive;⁸⁷ Term Directive;⁸⁸ and InfoSoc Directive.⁸⁹ These developments lead to significant amendments to the CDPA 1988, and resulted in a piecemeal accumulation of rules governing performers' rights.⁹⁰

7.28 The scope of performers' rights remains largely unchanged by the withdrawal of the UK from the EU.⁹¹ Much of EU-derived law in relation to performers' rights will continue to be applicable in domestic law, as 'retained EU law'.⁹² Both the UK and EU member states are party to the main international treaties applicable to the current framework of performers' rights, and under which the obligations for minimum standards of protection in the area arise (eg Rome Convention, WPPT). Consequently, despite the change to qualification rules for performers' rights,⁹³ reciprocal protection between the UK and EU member states will continue through the principles of such treaties.

Beijing Treaty on Audio-visual performances

7.29 The provisions in the WPPT concerning moral rights protect performers only in respect of their live aural performance and performances fixed in phonograms. This engendered a debate concerning moral rights for audio-visual performers (ie those whose performances are captured in television broadcasts, films, DVDs, and the like). WIPO convened a diplomatic conference in December 2000 to discuss the protection of audio-visual performances.⁹⁴ After nearly 12 years, in June 2012, it adopted a new international treaty,⁹⁵ the Beijing Treaty on Audiovisual Performances, which entered into force in April 2020.⁹⁶ It accords moral rights of attribution and integrity to audio-visual performers in their live performances and performances fixed in audio-visual fixations.⁹⁷ However, ever since the 2000 conference, WIPO's member states, particularly the producer countries, have had concerns over the extent to which moral rights of audio-visual performers might hinder the exploitation of collective works. Hence, the Beijing Treaty includes an agreed statement in relation to Article 5 allowing modifications which are consistent with the normal exploitation of audio-visual performances (eg compression or dubbing in existing or new media). Contracting members can also provide performers with equitable remuneration for (instead of a right to authorise) the broadcasting or communication to the public of performances in audio-visual fixations.⁹⁸ The UK is yet to ratify the Beijing Treaty.

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Exercise

The UK intends to ratify the Beijing Treaty, and in preparation, the UK Intellectual Property Office (IPO) undertook a consultation exercise in 2021 seeking views on implementing the main provisions of the treaty.⁹⁹ At the time of writing, the outcome of this exercise is pending.

In 1999 the UK IPO (then the Patent Office) had carried out an extensive consultation exercise on the implementation of the moral rights provisions in WPPT,¹⁰⁰ asking also whether they should be extended to audio-visual performers. Predictably, the responses fell into two broad camps:

- performers, authors, and film directors favoured a broad implementation of the rights and an extension to audio-visual performers;
- film and television producers, film distributors, cinema exhibitors, broadcasters, record producers, and theatres argued for narrow implementation restricted to the obligations under the WPPT, with no extension to audio-visual performers.

Find out whether the IPO's consultative exercise for the Beijing Treaty is complete. If so, look up the outcome and find out how the stakeholders in the two camps noted above responded to the exercise? Have any recommendations been made to amend the moral rights provisions in the CDPA, and if so, do they address the concerns of such stakeholders?

Current law on performers' rights

7.30 The CDPA 1988 provides for two distinct kinds of civil rights in performances, being non-property rights (personal and non-assignable) and property rights (assignable). In addition, performers also have moral rights and equitable remuneration rights. A performer is not defined in the Act, but a performance means a dramatic performance (including dance or mime), a musical one, a reading or recitation of a literary work, or a performance of a variety act or any similar presentation.¹⁰¹ The term 'variety act' is not defined. It can include performances by magicians, clowns, jugglers, or acrobats (all involving human performers).¹⁰² It can also include an animal act where a human and animal are working together, with each playing 'a necessary part', particularly where their presentation has been rehearsed.¹⁰³ The performance must be 'live' and given by one or more 'individuals'.¹⁰⁴ However, there is no requirement for a performance to be in public and in any performance given by more than one person, each performer would be entitled to rights in their own part.¹⁰⁵ Performers' rights arise in respect of qualifying performances: a performance given by a qualifying individual or one that takes place in a qualifying country.¹⁰⁶

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Question

The Edinburgh Festivals, which take place every year in the summer, see a plethora of interesting, diverse, and ingenious individuals engaged in all manner of behaviour. Under the statutory definition of a performance, would the following meet the requirements:

- an individual dressed as a Greek Goddess standing stock still on an upturned bucket in the middle of the Royal Mile;
- a group of individuals attentively engaged in drawing collaborative pictures on the pavement;
- a group of individuals in Princes Street Gardens intently following instructions given by a keep-fit expert, the purpose of which is to teach the elderly to keep fit;
- an individual juggling with balls of fire whilst on top of a monocycle;
- a group of individuals improvising jokes based upon audience suggestions;
- a group of models parading around Edinburgh Castle showing off the latest collections by up-and-coming Scottish designers;
- a heated debate between Professor Alexander McCall Smith and an audience over whether the latest course of action taken by Precious Ramotswe was morally justifiable.

Categories of performers' rights

7.31 Figure 7.3 shows performers' rights by reference to the CDPA 1988.

Property rights in recordings of performances	Non-property rights against 'bootlegging'	Equitable remuneration right	Moral rights
reproduction (182A)	fixation and live broadcasting without consent (182)	on any public playing or broadcasting of commercially published sound recording (182D)	right to be identified (205C)
distribution (182B)	public performance and communication to the public of recording made without consent (183)	on transfer of rental right in a film or sound recording (191G)	right to object to derogatory treatment (205F)
rental (182C)	dealings in illicit recordings (184)		
lending (182C)			
making available (182CA)			

Figure 7.3 Categories of performers' rights

p. 257 **Performers' property and non-property rights**

7.32 The majority of performers' rights are divided into two main categories:¹⁰⁷

- performers' non-property rights: rights against bootlegging and use of bootleg recordings (recordings of live performances made without performers' consent);
- performers' property rights: rights in recordings of performances.

The main distinctions between the non-property and property rights are:

- non-property rights cannot be assigned, although they are transmissible on death, whereas the property rights are capable of transfer and assignation;¹⁰⁸
- infringements of non-property rights are actionable only as breach of statutory duty, whereas infringement of property rights are actionable in the same way as other property rights, including copyright.¹⁰⁹

Performers' property rights

7.33 A performer's property rights are infringed by the following (compare with the economic rights conferred by copyright: see para 4.9–4.11):

- **Reproduction**

By a person who, without consent, either directly or indirectly makes a copy of a recording of the whole or any substantial part of a qualifying performance.¹¹⁰

- **Distribution**

By a person who, without consent, issues to the public the original recording, or copies of a recording of the whole or any substantial part of a qualifying performance.¹¹¹ The rights are exhausted once copies are placed into circulation within the UK-EEA area by or with the consent of the performer (but note consent is still required for rental or lending).¹¹²

- **Rental and lending**

By a person who, without consent, rents or lends to the public the original recording, or copies of a recording of the whole or any substantial part of a qualifying performance.¹¹³ *Rental* means the making of a copy of a recording available for use, on terms that it will or may be returned for direct or indirect economic or commercial advantage, and *lending* means making a copy of a recording available for use on terms that it will or may be returned otherwise than for direct or indirect economic or commercial advantage through an establishment which is accessible to the public.¹¹⁴

- **Making available**

By a person who, without consent, makes available to the public a recording of the whole or any substantial part of a qualifying performance by electronic transmission in such a way that members of the public may access the recording from a place and at a time individually chosen by them.¹¹⁵

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Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-7-guidance-on-answering-the-discussion-points?options=showName>>.

Which of the economic rights conferred by copyright (para 4.9) is not to be found in the previous list?
Why not?

Performers' non-property rights

7.34 A performer's non-property rights are infringed by the following (again, compare with the economic rights conferred by copyright: see para 4.9):

- **Fixation; live broadcasting**

By a person who, without consent:

- makes a recording of the whole or any substantial part of a qualifying performance directly from the live performance;
- broadcasts live, the whole or any part of a qualifying performance;
- makes a recording of the whole or any substantial part of a qualifying performance directly from a broadcast of the live performance.¹¹⁶

No damages will be awarded against a defendant who shows that at the time of the recording he believed on reasonable grounds that consent had been given.¹¹⁷

- **Public performance; communication to the public**

Where a person, without consent, shows or plays in public or communicates to the public, a recording of the whole or any substantial part of a qualifying performance where the person knows or has reason to believe the recording was made without the performer's consent.¹¹⁸

- **Dealings in illicit recordings**

Where a person, without consent, imports into the UK otherwise than for private or domestic use, or in the course of business possesses, sells or lets for hire, or exposes for sale or hire, or distributes, an illicit recording of a qualifying performance.¹¹⁹

Non-property rights and exclusive recording contracts

7.35 Where a performer enters into an exclusive recording contract with another person under which that person is entitled to the exclusion of all other persons (including the performer) to make a recording of one or more of his performances with a view to their commercial exploitation,¹²⁰ consent of *both* the person having exclusive recording rights and the performer is necessary for:

- recording of the whole or any substantial part of the performance;¹²¹
- using the recording: showing or playing in public the whole or any substantial part of the performance, or communicating to the public the whole or any substantial part of the performance;¹²² and
- dealing with the recording: importing it into the UK otherwise than for private or domestic use, or selling or letting for hire, or distributing, the performance in the course of a business.¹²³

Exercise

- p. 259
- ↳ Why are performers' rights classified into property and non-property rights? Are there coherent policy objectives underlying this aspect of the law? What would you do to reform the law in this area and what would be your underlying objectives in suggesting such reform?

Infringement of performers' property and non-property rights

7.36 A lack of consent is the basis of infringement for performers' property and non-property rights; the presence or absence of consent is a question of fact, and consent can be express or implied, oral or in writing, requiring no formalities in order to be effective.¹²⁴ The question for the court is 'whether viewing the facts objectively the words and conduct of the rights owner as made known to the user indicated that the rights owner consented to what the user was doing'.¹²⁵

Restrictions on the scope of performers' property and non-property rights

7.37 The CDPA 1988 details various permitted acts in relation to performers' property and non-property rights.¹²⁶ These may be compared with the exceptions to copyright (see Chapter 5). The permitted acts include such matters as things done for purposes of non-commercial research and private study;¹²⁷ text and data analysis;¹²⁸ criticism, review, quotation, or news reporting;¹²⁹ caricature, parody, or pastiche;¹³⁰ copies for disabled persons;¹³¹ illustration for instruction;¹³² certain uses by educational establishments and libraries;¹³³ recording of folksongs;¹³⁴ and recording for time-shifting.¹³⁵ The exceptions largely cover the same ground as those to be found in the 1988 Act as defences to an action of infringement of copyright.¹³⁶

Moral rights

7.38 The CDPA 1988 provides moral rights for performers in any qualifying performance delivered or broadcasted 'live' (whether audio or visual) and in sound recordings of a qualifying performance (ie the audio component fixed in phonograms).¹³⁷ Performances in audio-visual fixations are not accorded moral rights.¹³⁸

Right to be identified

7.39 A performer will be given the right to be identified as performer whenever a person:¹³⁹

- produces or puts on a qualifying performance that is given in public;
- broadcasts live a qualifying performance;
- communicates to the public a sound recording of a qualifying performance; or
- issues to the public copies of such a recording.

p. 260 ← The right to be identified is one:¹⁴⁰

- in the case of a performance that is given in public, to be identified in any programme accompanying the performance or in some other manner likely to bring his identity to the notice of a person seeing or hearing the performance;
- in the case of a performance that is broadcast, to be identified in a manner likely to bring his identity to the notice of a person seeing or hearing the broadcast;
- in the case of a sound recording that is communicated to the public, to be identified in a manner likely to bring his identity to the notice of a person hearing the communication;
- in the case of a sound recording that is issued to the public, to be identified in or on each copy or, if that is not appropriate, in some other manner likely to bring his identity to the notice of a person acquiring a copy.

However, the right to be identified will not be infringed unless it has first been asserted,¹⁴¹ and is also hedged with a number of exceptions including:¹⁴²

- where it is not reasonably practicable to identify the performer;
- in relation to any performance given for the purposes of reporting current events;
- in relation to any performance given for the purposes of advertising any goods or services;
- where certain acts (eg news reporting) are permitted in relation to performers' property and non-property rights.

Right to object to derogatory treatment

7.40 A performer has a right to object where a performance.¹⁴³

- is broadcast live, or
- by means of a sound recording the performance is played in public or communicated to the public,

with any distortion, mutilation, or other modification that is prejudicial to the reputation of the performer.

Again, this right is subject to a number of exceptions including:¹⁴⁴

- in relation to any performance given for the purposes of reporting current events;
- by modifications made to a performance which are consistent with normal editorial or production practice.

A performer may also waive the rights to be identified and to object to derogatory treatment.¹⁴⁵

Exercise

Compare and contrast a performer's rights of attribution and to object to derogatory treatment with those conferred on authors under sections 77–82 of the CDPA 1988 (see para 6.4–6.21).

Performers' equitable remuneration rights

7.41 An aspect of performers' rights which appears to be distinctive is the right to equitable remuneration. Two such rights are available to performers, introduced as a result of the Rental Right Directive (para 7.27):¹⁴⁶

- p. 261
- A performer can claim equitable remuneration from the owner of the copyright in the sound recording¹⁴⁷ where a commercially published sound recording of a qualifying performance (but not a film) is played in public or communicated to the public otherwise than under the 'making available to the public' right.¹⁴⁸ The right may not be assigned except to a collecting society for the purpose of enabling it to enforce the right on the performer's behalf.¹⁴⁹ The amount payable is as agreed by the parties¹⁵⁰ or, failing agreement, application may be made to the Copyright Tribunal to determine the amount payable.¹⁵¹ Any agreement purporting to exclude or restrict the right to equitable remuneration, or purporting to prevent a person questioning the amount of equitable remuneration or to restrict the powers of the Copyright Tribunal, is of no effect.¹⁵²
 - A performer retains a right to equitable remuneration where she transfers (or is presumed to transfer) her rental right in a film or sound recording to the producer.¹⁵³ Any agreement purporting to exclude or restrict the right to equitable remuneration is of no effect.¹⁵⁴ The right may not be assigned by the performer except to a collecting society for the purpose of enabling it to enforce the right on her behalf.¹⁵⁵ The Copyright Tribunal has jurisdiction to determine the amount payable failing agreement.¹⁵⁶

7.42 In *Phonographic Performance (Ireland) Ltd v Ireland*,¹⁵⁷ the ECJ held that a hotel was liable to pay equitable remuneration for the communication to the public of a sound recording, in addition to that paid by the broadcaster, when it provides televisions or radios in the guest bedrooms to which it distributes a broadcast signal. In contrast, in *Società Consortile Fonografici (SCF) v Del Corso*,¹⁵⁸ the ECJ held that a dentist who played a radio in his surgery whilst patients were present was not liable to pay equitable remuneration. The use of the concept of 'communication to the public' appearing in the Rental Right Directive and the InfoSoc Directive (para 7.27) is different in contexts, and pursues similar but divergent objectives: in the former, performers are only given a right to equitable remuneration, while in the latter authors are given exclusive rights. However, it has been held that the concept should be given the same meaning in relation to the rights provided under both the Directives, since there is 'no evidence' that the EU legislature wished to confer on the word a different meaning in the respective contexts.¹⁵⁹ Consequently, the criteria and case law discussed at paras 4.57–4.63 are of relevance here.

Exercise

What other areas of copyright and related rights contain provisions for equitable remuneration? Should such schemes be extended more generally across the area of copyright and related rights? Why do we not move from the 'property' system we have at present to one which is merely a right to remuneration for exploitation?

Key points on performers' rights

- Performers' rights subsist as per the definition of a performance.
- Performers have property and non-property rights.
- Performers have two types of equitable remuneration rights.
- Performers have moral rights, except in audio-visual fixations.

p. 262 Duration of rights

7.43 The rights conferred in relation to a performance expire at the end of the period of 50 years from the end of the calendar year in which the performance takes place.¹⁶⁰ If a recording of a performance, other than a sound recording, is released during that period, the rights expire 50 years from the end of the calendar year in which it is released.¹⁶¹ If a sound recording of a performance, is released during that period, the rights expire 70 years from the end of the calendar year in which it is released.¹⁶²

7.44 A recording is released when it is first published, played, or shown in public or communicated to the public.¹⁶³ Where a performer is not a national of the UK, the duration of rights is that to which the performer is entitled in the country of which he is a national, provided this does not exceed the period to which he would be entitled if he were a UK national.¹⁶⁴ Moral rights of performers endure for the same period as the performers' economic rights.¹⁶⁵

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-7-guidance-on-answering-the-discussion-points?options=showName>>

Why are all performers not given rights lasting for the same duration as authors of works protected by copyright? Should they be?

7.45 The current duration of performers' rights in sound recordings resulted from the implementation of the Term Directive 2011 in the UK,¹⁶⁶ which extended the duration of performers' rights in sound recordings to 70 years (see para 7.43).¹⁶⁷ The initial proposal for the Directive appeared to be primarily motivated by the following: many of the most popular sound recordings made in the 1950s and 1960s started falling into the public domain; the belief that session musicians are outliving the current 50-year term and are left without income when their rights expire;¹⁶⁸ such musicians only have the protection of performers' rights as their contribution to the musical work is insufficient to attract copyright. The preamble to the Directive also states that 'the socially recognised importance of the creative contribution of performers should be reflected in a level of protection that acknowledges their creative and artistic contribution'. However, the term extension proposal was widely criticised by many academics, primarily on the ground that the main benefit of the extension will fall to the record labels.¹⁶⁹ It was also argued that given the inherent inequality of bargaining position in the relationship between the labels and the performers, it is unlikely that performers will see any increase in revenue. The Commission clearly sought to address these concerns in the additional rights created in the Directive (see para 7.46). Although economic analysis may not support the term extension, it is arguable that the natural rights justifications for copyright do not support a distinction between performers and authors.¹⁷⁰

p. 263 Additional benefits for performers

7.46 The implementation of the Term Directive 2011 (see para 7.27) introduced a contractual benefit, and specific economic benefits for musical performers who have assigned the rights in the sound recording of a performance to the producer (eg a record company):¹⁷¹

- A 'use-it-or-lose-it' provision: the performer can terminate the contractual agreement at the end of 50-year period, provided certain conditions are met: the producer fails to issue to the public copies of the sound recording in sufficient quantities or make it available on demand by electronic transmission. While this provision may allow the performer to terminate the agreement if the recording is not being exploited, the conditions above make it difficult to do so in practice.
- A session fund: a performer who had assigned their rights for a one-off payment (a non-recurring payment arrangement is common for non-featured 'session musicians') is entitled to an annual supplementary remuneration from the producer. The producer pays 20 per cent of their gross revenue earned during the extended 20 years of protection to a collecting society for such distribution. This is to ensure that musical performers receive some benefit from the term extension.
- Clean slate provision: a performer who had assigned their rights for recurring payments (an arrangement common for 'featured musicians') is entitled to the full agreed royalties from the revenue earned during the extended 20 years of protection and the producer cannot withhold or deduct sums

that may be allowed under the assignment agreement (eg deductions of any initial advance paid from the royalties due). This is to ensure that it is the performers that fully benefit from the term extension and not the producers alone.

Question

On the adoption of the Term Directive 2011, the then European Commissioner Michel Barnier noted that the term extension introduced therein will 'make a real difference for performers'.¹⁷² An EU review of the Directive's implementation has noted that the additional benefits accruing only for the extended 20 year period is a modest achievement in relation to performers' welfare and it is too early to draw concrete conclusions on the long term effects of the Directive.¹⁷³ A UK review has concluded that the domestic implementation has 'on the whole been successful at providing artists with a revenue stream for an extended period of time'.¹⁷⁴

Have a look at the two reviews. Do you think the legal changes resulting from the Directive have actually improved the position of performers?

The nature of performers' rights

7.47 As will be evident from the preceding summary, the characterisation of performers' rights within the UK statutory regime is far from clear. One opinion is that performers' rights should not be considered as falling under the head of copyright,¹⁷⁵ while admitting that, since the inclusion of performers' property rights in the legislation, those rights have now 'inched ... close to copyright'.¹⁷⁶ Others have said that although the performers' property rights granted by the 1988 Act were not described as copyright, 'in effect new copyrights were conferred on performers'.¹⁷⁷

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7.48 Nor is it easy to classify performers' rights as neighbouring or media rights as traditionally understood in the UK. Although UK legislation does not formally distinguish between authorial and other works, that distinction still underlies a good part of the assumptions on which the legal framework is built. In this context, authors' rights are understood to refer to the works created by authors such as books, plays, music, and art. By contrast, neighbouring or entrepreneurial or media rights are derivative, and in general it is the investment in technical and organisational skill that is being protected, rather than the creative effort. Perhaps in response to this conundrum, performers' non-property rights which are personal and non-assignable rights have been described as 'a form of neighbouring right to copyright'.¹⁷⁸ The Act makes clear that the rights conferred in relation to performers are independent of any copyright in, or moral rights relating to, any work performed or any film or sound recording of, or broadcast including the performance.¹⁷⁹ For these reasons some have referred to performers' rights as 'rights associated with copyright',¹⁸⁰ or as 'related rights'¹⁸¹ which is perhaps the most suitable terminology to use. Yet performers appear rather closer to authors as figures with a claim to the law's protection, and the introduction of moral rights for the former as well as the latter makes the analogy even closer.¹⁸²

Question

How should performers' rights be characterised in relation to copyright?

Further reading

Books

General

R Arnold, *Performers' Rights* (6th edn, 2021)

L Bently, B Sherman, D Gangjee, and P Johnson, *Intellectual Property Law* (6th edn, 2022), Ch 13

N Caddick, G Harbottle, and U Suthersanen (eds), *Copinger & Skone James on Copyright* (18th edn, 2021), Chs 12, 18

E Derclaye, *The Legal Protection of Databases: A Comparative Analysis* (2008)

D Llewelyn and T Aplin, *Cornish, Llewelyn and Aplin Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (9th edn, 2019), Chs 14.4, 20.2

Articles

T R Hill, 'He goes left, he goes right, he claims he has performers' rights: the case for granting sportspersons protection for unique in-game performances' [2020] EIPR 84

E Derclaye and M Husovec, 'Sui generis database protection 2.0: judicial and legislative reforms' [2022] EIPR 323

p. 265 ↩ R Arnold, 'Reflections on "The Triumph of Music": copyrights and performers' rights in music' [2010] IPQ 153

S Atkinson, 'Sir Cliff Richard's victory: an extra 20 years for copyright protection in sound recordings and performers' rights where a sound recording of the performance is released' [2014] EIPR 75

D Liu, 'The Beijing Treaty on Audiovisual Performances and its impact on the future of performers' rights under English law' [2015] EIPR 81

J Thomson, 'The Database Directive: a clean bill of health?' [2019] EIPR 228

Websites

Beijing Treaty on Audiovisual Performances: www.wipo.int/treaties/en/ip/beijing ↩

European Commission, Protection of Databases: <https://ec.europa.eu/digital-single-market/en/protection-databases> ↩

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Notes

¹ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

² Database Directive 1996, recitals 1–12, 38–39.

³ Copyright and Rights in Databases Regulations 1997 (SI 1997/3032) and amended since by the Copyright and Rights in Databases (Amendment) Regulations 2003/2501. See generally E Derclaye, *The Legal Protection of Databases: A Comparative Analysis* (2008); T Aplin, *Copyright Law in the Digital Society: The Challenges of Multimedia* (2005), 41–73.

⁴ *DRSP Holdings Ltd v O'Connor* [2021] EWHC 626 (Ch) at para 186.

⁵ See reg 18 for qualification requirement of the database maker. References to 'EEA' were removed from Database Regulations 1997 and replaced by 'United Kingdom', through Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019, reg.28.

⁶ The UK government guidance notes the following implication: 'UK owners of databases created on or after 1 January 2021 should consider whether they can rely on alternative means of protection in the EEA – for example licensing agreements or copyright, where applicable.' See UK government, Guidance on 'Sui generis database rights' (30 January 2020) www.gov.uk/guidance/sui-generis-database-rights.

⁷ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Art 58, as endorsed by leaders at a special meeting of the European Council on 25 November 2018.

⁸ *Football Dataco v Sportradar* [2013] ECC 12 at para 60.

⁹ *Innoweb v Wegener Case C-202/12* [2014] Bus LR 308 (ECJ) at para 36.

¹⁰ *77m Ltd v Ordnance Survey Ltd* [2019] EWHC 3007(Ch) at para 265.

¹¹ Database Regulations 1997, regs 6 and 12(1).

¹² So, eg, an arrangement of surnames in alphabetical order would attract database right provided the other criteria for protection are met.

¹³ *Football Dataco v Sportradar* [2013] ECC 12 at paras 24–29.

¹⁴ Case C-444/02 *Fixtures Marketing Ltd v OPAP* [2004] ECR I-10549 (ECJ) at para 29.

¹⁵ See also Database Directive 1996, recital 17: 'a recording or an audio visual cinematographic, literary or musical work as such does not fall within the scope of this Directive'.

¹⁶ Case C-444/02 *Fixtures Marketing Ltd v OPAP* [2004] ECR I-10549 (ECJ) at paras 23 and 32–35.

¹⁷ Case C-604/10 *Football Dataco Ltd v Yahoo! UK Ltd* [2012] ECDR 10 (ECJ) at para 26.

¹⁸ Case C-490/14 *Freistaat Bayern v Verlag Esterbauer GmbH* [2016] ECDR 6 (ECJ) at paras 20–21.

¹⁹ *ibid*, paras 24 and 27.

²⁰ Case C-444/02 *Fixtures Marketing Ltd v OPAP* [2004] ECR I-10549 (AG) at para 40.

²¹ Database Directive 1996, recital 21.

²² Case C-444/02 *Fixtures Marketing Ltd v OPAP* [2004] ECR I-10549 (ECJ) at para 30.

²³ Although note that for copyright protection to subsist in a database, there is the additional requirement of originality in that the selection and arrangement must be an 'intellectual creation', for which see further para 3.55.

²⁴ Case C-444/02 *Fixtures Marketing Ltd v OPAP* [2004] ECR I-10549 (ECJ) at paras 31–32.

²⁵ *Forensic Telecommunications Services Ltd v Chief Constable of West Yorkshire Police* [2011] EWHC 2892 (Ch).

²⁶ *Technomed Ltd v Bluecrest Health Screening Ltd* [2017] EWHC 2142 (Ch) at para 69.

²⁷ *Football Dataco v Sportradar* [2013] ECC 12 at para 24.

²⁸ Database Regulations 1997, reg 13.

²⁹ *ibid.*

³⁰ For a useful analysis of the legal outcomes of the whole litigation, see J Jenkins, 'Database rights' subsistence: under starter's orders' (2006) 1 JIPLP 467.

³¹ See MJ Davison and PB Hugenholtz, 'Football fixtures, horseraces and spin offs: the ECJ domesticates the database right' [2005] EIPR 113; T Aplin, 'The ECJ elucidates the database right' [2005] IPQ 204.

³² Cases C-338/02 *Fixtures Marketing Ltd v Svenska Spel AB* [2005] ECDR 4 (ECJ) at paras 24–31; C-444/02 *Fixtures Marketing Ltd v OPAP* [2004] ECR I-10549 (ECJ) at paras 40–47; and C-46/02 *Fixtures Marketing Ltd v Oy Veikkaus Ab* [2005] ECDR 2 (ECJ) at paras 34–42.

³³ *Football Dataco Ltd v Brittens Pools Ltd* [2010] RPC 17 (ChD) at para 92; *Football Dataco Ltd v Brittens Pools Ltd* [2011] ECDR 9 (CA) at paras 10–12.

³⁴ See also *British Sky Broadcasting Group plc v Digital Satellite Warranty Cover Ltd (In Liquidation)* [2012] FSR 14 (Ch D) at paras 19–21.

³⁵ Cases C-338/02 *Fixtures Marketing Ltd v Svenska Spel AB* [2005] ECDR 4 (ECJ) at para 27; C-444/02 *Fixtures Marketing Ltd v OPAP* [2004] ECR I-10549 (ECJ) at para 43; C-46/02 *Fixtures Marketing Ltd v Oy Veikkaus Ab* [2005] ECDR 2 (ECJ) at para 37; and C-203/02 *British Horseracing Board Ltd v William Hill Organization Ltd* [2005] RPC 13 (ECJ) at paras 34–41. See also recital 20 of the Database Directive 1996, recital 20.

³⁶ Database Regulations 1997, reg 12(1); Cases C-338/02 *Fixtures Marketing Ltd v Svenska Spel AB* [2005] ECDR 4 (ECJ) at para 28; C-444/02 *Fixtures Marketing Ltd v OPAP* [2004] ECR I-10549 (ECJ) at para 44; and C-46/02 *Fixtures Marketing Ltd v Oy Veikkaus Ab* [2005] ECDR 2 (ECJ) at para 38.

³⁷ Database Regulations 1997, reg 12(1); Cases C-338/02 *Fixtures Marketing Ltd v Svenska Spel AB* [2005] ECDR 4 (ECJ) at para 28; C-444/02 *Fixtures Marketing Ltd v OPAP* [2004] ECR I-10549 (ECJ) at para 44; and C-46/02 *Fixtures Marketing Ltd v Oy Veikkaus Ab* [2005] ECDR 2 (ECJ) at para 38.

³⁸ C-338/02 *Fixtures Marketing Ltd v Svenska Spel AB* [2004] ECR I-10497 at paras 38–39 (AG) (for both quotations).

³⁹ Database Directive 1996, recital 19.

⁴⁰ C-338/02 *Fixtures Marketing Ltd v Svenska Spel AB* [2004] ECR I-10497 at paras 41–45, 57 (AG).

⁴¹ *Football Dataco v Sportradar* [2013] ECC 12 (CA) at paras 53–54. See also, Cases C-338/02 *Fixtures Marketing Ltd v Svenska Spel AB* [2005] ECDR 4 (ECJ) at paras 23–29; C-444/02 *Fixtures Marketing Ltd v OPAP* [2004] ECR I-10549 (ECJ) at paras 39–45; and C-46/02 *Fixtures Marketing Ltd v Oy Veikkaus Ab* [2005] ECDR 2 (ECJ) at paras 33–39.

⁴² Database Regulations 1997, reg 15.

⁴³ Database Regulations 1997, reg 22.

⁴⁴ Database Regulations 1997, reg 14(1).

⁴⁵ Database Regulations 1997, reg 21.

⁴⁶ Database Regulations 1997, reg 14(5).

⁴⁷ Database Regulations 1997, reg 14(2); cf *Cureton v Mark Insulations Ltd* [2006] EWHC 2279, where an issue was ownership of a database in an agency relationship, and Bean J held that a sales agent was the first owner of a customer database prepared on behalf of and paid for by its principal.

⁴⁸ Database Regulations 1997, reg 14(3)–(4A).

⁴⁹ Database Regulations 1997, reg 17 (see also reg 30).

⁵⁰ Database Regulations 1997, reg 17(3). Database Directive 1996, Recital 55.

⁵¹ See the Opinion of the Advocate General in Case C-203/02 *British Horseracing Board Ltd v William Hill Organization Ltd* [2005] RPC 13, paras 143–54.

⁵² Database Regulations 1997, reg 16.

⁵³ Database Regulations 1997, reg 12(2).

⁵⁴ Database Regulations 1997, reg 12(4).

⁵⁵ Database Regulations 1997, reg 12(3).

⁵⁶ Database Regulations 1997, reg 12(5) as amended by Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations 2019/265, reg 7. Despite Brexit, the UK is unilaterally participating in the EEA regional exhaustion regime.

⁵⁷ [2005] RPC 13.

⁵⁸ See also para 100 (AG); [2001] RPC 31 at para 57.

⁵⁹ See also para 109 (AG).

⁶⁰ This and the preceding issue were not considered when the case returned to the Court of Appeal, since there it was decided that the database in question was not protected by the *sui generis* right ([2005] RPC 35).

⁶¹ For another example of a successful case of database infringement, see *Forensic Telecommunications Services Ltd v Chief Constable of West Yorkshire* [2011] EWHC 2892 (Ch).

⁶² Database Regulations 1997, reg 16(2).

⁶³ [2001] RPC 31 (Laddie J); [2002] ECDR 4 (CA); Case C-203/02 [2005] RPC 13 (ECJ).

⁶⁴ Database Directive 1996, Art 7(5); not transposed as such in the 1997 Regulations.

⁶⁵ [2005] RPC 13 at para 89.

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⁶⁶ Case C-202/12 [2014] Bus LR 308 (ECJ). See also Case C-762/19 *CV-Online Latvia v Melons* [2021] ECDR 17 (post-Brexit ECJ judgment) suggesting that infringement of the database right by extraction or re-utilisation also requires an adverse effect on the database maker's investment in the obtaining, verification or presentation of that content.

⁶⁷ Database Regulations 1997, reg 20.

⁶⁸ Database Regulations 1997, regs 20A and 20B.

⁶⁹ Database Regulations 1997, reg 20 and Sch 1. See also *77m Ltd v Ordnance Survey Ltd* [2019] EWHC 3007(Ch).

⁷⁰ Database Regulations 1997, reg 19(1).

⁷¹ Database Regulations 1997, reg 19(2). Note the absence of equivalent provision preventing contractual override in other exceptions.

⁷² Case C-30/14 *Ryanair v PR Aviation* [2015] ECDR 13 (ECJ). The decision has been criticised for giving stronger contractual protection to unprotected databases, especially sole-source databases, as a result of which both user access and the functioning of the internal market is hindered; see M Borghi and S Karapapa, 'Contractual restrictions on lawful use of information: sole-source databases protected by the back door?' [2015] EIPR 505.

⁷³ Database Regulations 1997, reg 20; cf the equivalent copyright exception, discussed at para 5.25.

⁷⁴ [2005] RPC 13 at para 54.

⁷⁵ Database Regulations 1997, reg 20.

⁷⁶ See European Commission Working Paper, First Evaluation of Directive 96/9/EC (2005).

⁷⁷ European Commission, Staff Working Document, Evaluation of Directive 96/9/EC (2018), p.46. The evaluation was supported by an external study. See <https://ec.europa.eu/digital-single-market/en/protection-databases>.

⁷⁸ The Commission is reviewing some aspects of the Database Directive in relation to data generated from Internet-of-Things devices. See https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1113.

⁷⁹ See generally R Arnold, *Performers' Rights* (6th edn, 2021).

⁸⁰ See Dramatic and Musical Performers' Protection Act 1925; *Rickless v United Artists Corp* [1988] QB 40.

⁸¹ Arts 7 and 14; cf Arts 10 and 13.

⁸² D Llewelyn and T Aplin, *Cornish, Llewelyn and Aplin Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (9th edn, 2019), para 14.030.

⁸³ Cmnd 6732.

⁸⁴ TRIPS, Art 14.

⁸⁵ WPPT, Art 5.

⁸⁶ Originally Council Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property; consolidated later in European Parliament and Council Directive 2006/115/EC. For a challenge to the UK implementation of the Rental Right Directive, see *Phonographic Performance Limited v Department of Trade and Industry and Another* [2004] 3 CMLR 31 (ChD).

⁸⁷ Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

⁸⁸ Originally Council Directive 93/98/EEC harmonising the term of protection of copyright and certain related rights; it was replaced by a consolidated version, European Parliament and Council Directive 2006/116/EC; amended then by Directive 2011/77/EU (see para 7.45–7.46).

⁸⁹ Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society.

⁹⁰ The current law is to be found in the CDPA 1988, Part II, as amended.

⁹¹ Other than qualification rules and specific areas of reciprocal protection.

⁹² European Union (Withdrawal) Act 2018, ss 2 and 6.

⁹³ Specific reference to 'EEA' has been removed from CDPA 1988, s.206, as a result of Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019, reg 22.

⁹⁴ For a full discussion, see S von Lewinski, 'The WIPO Diplomatic Conference on Audiovisual Performances: a first résumé' [2001] EIPR 333.

⁹⁵ After attendance by 156 member states, six intergovernmental organisations, and 45 non-governmental organisations, the highest level of participation to date at a WIPO diplomatic conference. See www.wipo.int/dc2012/en.

⁹⁶ www.wipo.int/treaties/en/ip/beijing [<http://www.wipo.int/treaties/en/ip/beijing>](http://www.wipo.int/treaties/en/ip/beijing).

⁹⁷ Article 5(1).

⁹⁸ Article 11.

⁹⁹ www.gov.uk/government/consultations/beijing-treaty-on-audiovisual-performances-call-for-views [<http://www.gov.uk/government/consultations/beijing-treaty-on-audiovisual-performances-call-for-views>](http://www.gov.uk/government/consultations/beijing-treaty-on-audiovisual-performances-call-for-views).

¹⁰⁰ UK Patent Office, 'Moral Rights for Performers: A Consultation Paper on Implementation in the UK of the WIPO Performances and Phonograms Treaty Obligations on Performers' Moral Rights and on Further Developments in WIPO on Performers' Moral Rights' (1999).

¹⁰¹ CDPA 1988, s 180(2); on definition of a performance see D Liu, 'Performers' rights: muddled or mangled? Bungled or boggled?' [2012] EIPR 374.

¹⁰² *Heythrop Zoological Gardens Ltd v Captive Animals Protection Society* [2016] EWHC 1370 (IPEC) at paras 32–33, where Birss J cites with approval R Arnold, *Performers' Rights* (5th edn, 2015) para 2.15–2.17.

¹⁰³ *Heythrop Zoological Gardens Ltd v Captive Animals Protection Society* [2016] EWHC 1370 (IPEC) at paras 36 and 40.

¹⁰⁴ CDPA 1988, s 180(2).

¹⁰⁵ In *Bamgboye v Reed* [2002] EWHC 2922 (QB) it was held that a performance can be one that is made in a recording studio as there is no need for an audience.

¹⁰⁶ CDPA 1988, s 181.

¹⁰⁷ See CDPA 1988, ss 192A and 191A.

¹⁰⁸ See CDPA 1988, ss 192A and 191B.

¹⁰⁹ See CDPA 1988, ss 194 and 191I.

¹¹⁰ CDPA 1988, s 182A.

¹¹¹ CDPA 1988, s 182B(1).

¹¹² CDPA 1988, s 182B. Despite Brexit, the territorial scope for exhaustion of this right is the UK and EEA taken together, through Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations 2019/265, reg4 (4).

¹¹³ CDPA 1988, s 182C.

¹¹⁴ CDPA 1988, s 182C(2)(a), (b). There are other definitions in this section; eg the terms 'rental' and 'lending' do not include making available for the purpose of public performance, playing, or showing in public or broadcasting. In addition, the expression 'lending' does not include making available between establishments which are accessible to the public (CDPA 1988, s 182C(3), (4)).

¹¹⁵ CDPA 1988, s 182CA.

¹¹⁶ CDPA 1988, s 182(1).

¹¹⁷ CDPA 1988, s 182(3).

¹¹⁸ CDPA 1988, s 183.

¹¹⁹ CDPA 1988, s 184(1).

¹²⁰ CDPA 1988, s 185(1).

¹²¹ CDPA 1988, s 186(1).

¹²² CDPA 1988, s 187(1)(a), (b).

¹²³ CDPA 1988, s 188(1)(a), (b).

¹²⁴ *Henderson v All Around the World Recordings Limited* [2013] EWPCC 7 at paras 39–47.

¹²⁵ *ibid*, para 48.

¹²⁶ CDPA 1988, s 189.

¹²⁷ CDPA 1988, Sch 2, para 1C.

¹²⁸ CDPA 1988, Sch 2, para 1D.

¹²⁹ CDPA 1988, Sch 2, para 2. See also *Heythrop Zoological Gardens Ltd v Captive Animals Protection Society* [2016] EWHC 1370 (IPEC) at paras 42–44.

¹³⁰ CDPA 1988, Sch 2, para 2A.

¹³¹ CDPA 1988, Sch 2, para 3A–3E.

¹³² CDPA 1988, Sch 2, para 4.

¹³³ CDPA 1988, Sch 2, paras 5–6H.

¹³⁴ CDPA 1988, Sch 2, para 14.

¹³⁵ CDPA 1988, Sch 2, para 17A.

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¹³⁶ See corresponding permitted uses in Chapter 5. Oddly, the exception to performers' rights for certain uses of orphan works in CDPA 1988, Sch 2, para 6I, has survived, albeit unintelligibly, as the corresponding exception for copyright has been repealed due to Brexit (see para 5.59).

¹³⁷ CDPA 1988, s 205C(1), 205F(1).

¹³⁸ This would change if, and when, the UK ratifies and implements the Beijing Treaty (para 7.29).

¹³⁹ CDPA 1988, s 205C(1).

¹⁴⁰ CDPA 1988, s 205C(2).

¹⁴¹ CDPA 1988, s 205D(1).

¹⁴² CDPA 1988, s 205E.

¹⁴³ CDPA 1988, s 205F(1).

¹⁴⁴ CDPA 1988, s 205G.

¹⁴⁵ CDPA 1988, s 205J.

¹⁴⁶ In Case C-265/19 *RAAP v PPL(Ireland) Ltd* [2020] ECDR18, the ECJ held that non-EEA performers are also entitled to such rights.

¹⁴⁷ CDPA 1988, s 182D.

¹⁴⁸ CDPA 1988, s 182CA(1). See also Case C-147/19 *Atresmedia v AGEDI* [2020] ECDR 21.

¹⁴⁹ CDPA 1988, s 182D(2).

¹⁵⁰ CDPA 1988, s 182D(3).

¹⁵¹ CDPA 1988, s 182D(5). The Tribunal may order any method of calculation and payment of equitable remuneration it may determine to be reasonable in the circumstances, taking into account the importance of the contribution of the performer to the sound recording (CDPA 1988, s 182D(6)).

¹⁵² CDPA 1988, s 182D(7).

¹⁵³ CDPA 1988, s 191F–191H.

¹⁵⁴ CDPA 1988, s 191G(5).

¹⁵⁵ CDPA 1988, s 191G(2). The collecting society must be an organisation which has as its main object, or one of its main objects, the exercise of the right to equitable remuneration on behalf of more than one performer, CDPA 1988, s 191G(6).

¹⁵⁶ Remuneration shall not be considered inequitable merely because it was paid by way of a single payment or at the time of the transfer of the rental right (CDPA 1988, s 191H(4)).

¹⁵⁷ Case C-162/10 *Phonographic Performance (Ireland) Ltd v Ireland* [2012] ECDR 15 (ECJ).

¹⁵⁸ Case C-135/10 *Società Consortile Fonografici (SCF) v Del Corso* [2012] ECDR 16 (ECJ).

¹⁵⁹ Case C-117/15 *Reha Training v GEMA* [2016] 3 CMLR 40 (ECJ) at paras 29–34.

¹⁶⁰ CDPA 1988, s 191(2)(a).

¹⁶¹ CDPA 1988, s 191(2)(b).

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¹⁶² CDPA 1988, s 191(2)(c).

¹⁶³ No account is to be taken of any unauthorised act (CDPA 1988, s 191(3)).

¹⁶⁴ CDPA 1988, s 191(4).

¹⁶⁵ CDPA 1988, s 205I.

¹⁶⁶ Directive 2011/77/EU was implemented through the Copyright and Duration of Rights in Performances Regulations 2013 (SI 2013/1782).

¹⁶⁷ The rights of performers in other performances did not change. While the extension applied to performances which were still protected at the time, it did not revive any rights which had expired, see Term Directive 2011, Art 1(2).

¹⁶⁸ See the opinion of the then European Commissioner, Charlie McCreevy at http://europa.eu/rapid/press-release_IP-08-240_en.htm?locale=en <http://www.europa.eu/rapid/press-release_IP-08-240_en.htm?locale=en>.

¹⁶⁹ Criticism of the extension can be found in B Farrand, 'Too much is never enough? The 2011 Copyright in Sound Recordings Extension Directive' [2012] EIPR 297; Gowers Review of Intellectual Property (HM Treasury 2006), para 4.33; Centre for Intellectual Property Policy & Management, Centre for Intellectual Property and Information Law, Institute for Information Law, and Max Planck Institute for Intellectual Property, Competition and Tax Law, 'The Proposed Directive for a Copyright Term Extension—A Backward-Looking Package', Letter to the Commission (27 October 2008), 8; N Helberger et al, 'Never forever: why extending the term of protection for sound recordings is a bad idea' [2008] EIPR 174.

¹⁷⁰ See, eg, R Arnold, *Performers' Rights* (6th edn, 2021).

¹⁷¹ CDPA 1988, s 191HA and 191HB.

¹⁷² M Barnier, 'Copyright: extension of the term of protection for performers' (12 September 2011) http://ec.europa.eu/archives/commission_2010-2014/barnier/headlines/news/2011/09/20110912_en.html <http://www.ec.europa.eu/archives/commission_2010-2014/barnier/headlines/news/2011/09/20110912_en.html>.

¹⁷³ 'Implementation of the Directive 2011/77/EU: copyright term of protection', a study requested by the JURI Committee of the European Parliament (2018) [www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2018\)604957](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604957).

¹⁷⁴ UK IPO, Copyright term extension for sound recordings: Post implementation review (2018).

¹⁷⁵ D Llewelyn and T Aplin, *Cornish, Llewelyn and Aplin Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (9th edn, 2019), para 11.002.

¹⁷⁶ ibid, para 14.036.

¹⁷⁷ N Caddick, G Harbottle, and U Suthersanen (eds), *Copinger & Skone James on Copyright* (18th edn, 2021), para 12.08.

¹⁷⁸ D Llewelyn and T Aplin, *Cornish, Llewelyn and Aplin Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (9th edn, 2019), para 14.032.

¹⁷⁹ CDPA 1988, s 180(4)(a).

¹⁸⁰ L Bently et al, *Intellectual Property Law* (6th edn, 2022), Ch 13.

¹⁸¹ N Caddick, G Harbottle, and U Suthersanen (eds), *Copinger & Skone James on Copyright* (18th edn, 2021), para 1.06.

¹⁸² The distinction between joint author and performer was considered in the case of *Fisher v Brooker* [2009] 1 WLR 1764 (HL); see also L McDonagh, 'Rearranging the roles of the performer and the composer in the music industry: the potential significance of Fisher v. Brooker' [2012] IPQ 64.

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