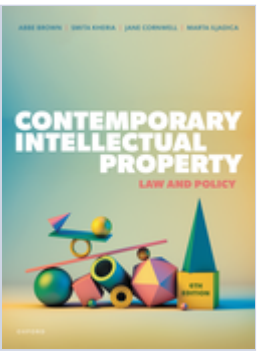

Contemporary Intellectual Property: Law and Policy (6th edn)
Abbe Brown, Smita Kheria, Jane Cornwell, and Marta Iljadica

6. Copyright 5: authors' rights, and exploitation of copyright

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Abstract

This chapter begins by examining the rights granted exclusively to authors—moral rights and artist's resale right. It discusses 'moral rights' first, that is, the right to be identified as the author of the protected work, and to have that work's integrity respected by others, followed by the artist's resale right. The rest of this chapter discusses fundamental rules and controls on exploitation and use of copyright. This includes dealings in copyright, such as assignment and licensing; specific features of copyright exploitation, for example collective licensing; and also contemporary issues related to the use of copyright works, for example the challenge of orphan works for users, and the application of technological protection measures by right owners to prevent unauthorised use of or access to protected works.

Keywords: copyright law, authors' rights, moral rights, ownership, resale right, assignment, licensing, collecting societies, orphan works, technological protection measures

Introduction

Scope and overview of chapter

6.1 This chapter begins by considering authors' rights, dealing first with 'moral rights', that is, the right to be identified as the author of the protected work, and to have that work's integrity respected by others, and then with the artist's resale right. The second half of the chapter discusses exploitation and use of copyright. It discusses a range of rules relevant to exploitation of copyright, and also highlights some contemporary issues.

6.2 Learning objectives

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

- the moral rights of the author to be identified and to have the work's integrity respected;
- the artist's resale right;
- the basic rules on assignment and licensing of copyright;
- contemporary issues relating to exploitation of copyright, including the regulatory controls on exploitation, contractual practices, licensing of orphan works, and the legal protection of technical protection measures.

6.3 The author's moral rights to be identified and to have the integrity of a work respected are discussed first, along with the right to prevent false attribution, and the special right of privacy in relation to certain commissioned photographs. Unlike moral rights, the artist's resale right enables authors to take a share of the profit made by others from sales of their original art works, and is highly economic in nature. Commercial exploitation of copyright by a right owner takes place within the context of the general framework of laws in any particular country (eg contract, commercial, and employment laws). Specific rules govern dealings with rights in copyright-protected works, such as assignment and licensing. Specific challenges arise due to the weak bargaining position of authors in contractual relationships. There are also
p. 208 specific features of copyright exploitation, for example collective licensing, and also specific challenges faced in the exploitation and use of copyright works, for example orphan works. Finally, during the exploitation of copyright, right owners may also use technological protection measures (TPMs) to prevent unauthorised use of or access to works. This chapter addresses all these issues and looks like this:

- Author's moral rights (6.4–6.21)
- Artist's resale right (6.22–6.26)
- Exploitation of copyright (6.27–6.52)
- Technical protection measures and rights management information systems (6.53–6.64).

Author's moral rights

International background

6.4 As noted in its historical introduction (para 2.8), the Berne Convention 1886 developed the concept of *non-transferable (inalienable) moral rights* (to claim authorship and to object to derogatory treatment of the work prejudicial to the author's honour or reputation (Art 6*bis*)).[1] Moral rights thus recognise certain non-economic interests which an author (but no one else) may continue to exercise in respect of a work even though no longer owner of the copyright or of the physical form in which the work was first created and recorded, this last being particularly important in respect of artistic works. The rights are reinforced by their

recognition in the 1948 Universal Declaration of Human Rights: 'everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author' (Art 27(2)).[2]

6.5 As also noted in para 2.25, moral rights first developed in Continental European legal systems, and were not recognised in UK law until introduced by the Copyright, Designs and Patents Act 1988 (CDPA 1988).[3] In the Continental traditions, moral rights are plainly seen as an important aspect of copyright, protecting significant interests of authors. This is unlike the far more cautious approach to moral rights seen in Anglo-American traditions. Yet, European Union (EU) directives have nothing substantive to say about moral rights.[4] The Commission Copyright Paper 2004, consistent with the emphasis it generally placed on the economic rights in European reforms, saw 'no apparent need to harmonise moral rights protection at this stage'.[5] It took the view that the lack of harmonisation or reform of moral rights did not affect the functioning of the internal market, noting that 'no evidence exists in the digital environment either that the current state of affairs does affect the good functioning of the Internal Market'.[6] While it is possible to imagine situations where export of a lawful product from a weak moral rights member state could be blocked in one with stronger rights, the good functioning of the internal market should not have been the only relevant consideration on the issue of harmonisation of authors' rights in Europe. Moral rights exemplify an area that has been untouched by EU harmonisation, and as such, unaffected by Brexit. Since moral rights are valued more in Continental traditions, any codification or reform process of moral rights before Brexit would have required a compromise between the Continental and British approaches. However, in a post-Brexit
p. 209 policy-making environment, without the barrier of accommodating a weaker British moral rights regime, the EU might find it easier to harmonise these rights in the future, should it choose to do so.

The law in the UK

6.6 The two principal moral rights introduced in the UK by the CDPA 1988 are:

> **Paternity**: *the right to be identified as author* of a literary, dramatic, musical, or artistic work, or as director of a film (CDPA 1988, s 77).
>
> **Integrity**: *the right* of such *authors and directors to prevent derogatory treatment of their work* (CDPA 1988, s 80).

Moral rights of paternity and integrity are accorded to authors of a range of copyright-protected works (literary, dramatic, musical, and artistic works) and directors of copyright-protected films. Under the heading of 'moral rights', the 1988 Act also deals with *prevention of false attributions* to any literary, dramatic, musical, or artistic works and films,[7] and a *right of privacy in certain photographs and films*.[8] It should be noted, however, that these are not usually seen as moral rights in other legal systems, or under the Berne Convention.

Question

What moral rights are recognised in the UK?

Characteristics of moral rights

6.7 In the UK, the moral rights of paternity and integrity subsist as long as copyright subsists in the works in question.[9] This contrasts with the position in some Continental European countries, where the moral rights are of indefinite duration.[10] Being conceived as highly personal to the author, moral rights are not assignable[11]—that is, transferable to third parties—but they can be waived by an instrument in writing signed by the person giving up the right.[12] It is also not an infringement of the moral rights to do anything to which the person entitled to the right has consented.[13] In these ways, UK moral rights are significantly weaker than their Continental counterparts. Infringements of the rights are treated as breaches of statutory duty, giving rise to remedies such as injunction and damages.[14]

Question

May the owner of moral rights choose not to enforce them?

p. 210

Key points about moral rights in general

- The main moral rights are the rights of paternity and integrity.
- These moral rights last for the same length of time as the economic rights (see paras 3.115ff).
- The rights are inalienable, but can be waived, while the holder may also consent to acts which would otherwise be infringements.

Paternity right

6.8 The precise extent of the right to be identified as the author of a copyright work varies according to the nature of the work. When it is required, the identification must be clear and reasonably prominent so as to bring the identity of the author or director to the attention of the public.[15] The right applies to the whole or any substantial part of a work.[16] Identification is required in the following circumstances:

Literary and dramatic works (excluding song lyrics)

Whenever the work is published commercially, performed in public, or communicated to the public, or whenever copies of a film or sound recording including the work are issued to the public, or when any of these events occur in relation to an adaptation of the work.

Musical works and song lyrics

Whenever there is commercial publication or copies of a sound recording are issued to the public, or where it is the soundtrack of a film available to the public, or when any of these events occur in relation to an adaptation.

Artistic works

Whenever there is commercial publication or public exhibition, or when a visual image is communicated to the public, or included in a film available to the public. In the case of three-dimensional artistic works, the author must be identified when copies of graphic works representing them or photographs of them are issued to the public. The author of a work of architecture in the form of a building has the right to be identified on the building as constructed, by appropriate means visible to persons entering or approaching the building.

Films

Whenever the film is shown in public, communicated to the public, or copies of the film are issued to the public.

Question

When must the author of a work be identified?

Paternity must be 'asserted'

6.9 There is no infringement of the right of paternity unless it has been previously asserted by the author.[17] Assertion is by *statement in writing* to that effect, either in any assignation of copyright in the work or in any other instrument in writing signed by the author (eg in a licence or in a warning letter to an infringer, actual or potential).[18] The requirement may well offend against the Berne Convention provision that the enjoyment and exercise of rights under the Convention (which include moral rights) shall not be subject to any formality.[19] The assertion may be general or in relation to any specified act or acts. A statement that the right has been asserted will commonly be found in the prelim pages of books, usually saying something like, 'The right of XYZ to be identified as the author of this work has been asserted in accordance with the Copyright,

Designs and Patents Act 1988.' The Act contains *no requirement that paternity be asserted before the publication of a work*; but any delay in asserting the right is to be taken into account by a court in deciding whether or not to grant a remedy for breach of the right.[20]

■ *Sawkins v Hyperion Records* [2005] RPC 32 (CA)

For the facts, see para 3.30. Hyperion issued a CD of Lalande's music with the statement 'With thanks to Dr Lionel Sawkins for his preparation of performance materials for this recording'. Since this did not identify Sawkins as the author of a copyright work, the attribution right was held infringed. Sawkins had previously asserted his right with a letter during pre-recording negotiations with Hyperion in which he stated that the CD sleeve notes should bear the legend '© Copyright 2002 by Lionel Sawkins'.

■ *Walmsley v Education Ltd* 2014 WL 2194626

W was accepted to have asserted his moral rights in two photographs through: asserting copyright and his status as author in the copyright rubric in the book where they were used as illustrations; and, through a watermark stating '(c) John Walmsley 1969 all rights reserved' on many copies of the photos appearing on the internet. It was noted that while an assertion is necessary at some point in time, it is not required continuously or every single time the copyright work is used.

Question

How and when must 'paternity' be asserted to be effective? Have the authors of this book asserted their rights of paternity?

Public exhibition of artistic works

6.10 There are some special provisions in respect of the *public exhibition of artistic works*. If the author affixes his name to the original or a copy when he or the first owner parts with possession of it, he has asserted the moral right to be identified as its author against any subsequent possessors, whether or not the original identification is still present or visible on the work.[21] Further, where the author licenses the making of copies, the author's moral to be identified in the event of the public exhibition of a copy made in pursuance of the

licence, may be asserted through a statement in the licence.[22] This affects the licensee and anyone into whose hands a copy made in pursuance of the licence comes, regardless of whether or not he has notice of the assertion.[23]

Exercise

A city council commissions a large, bronze statue of a phoenix to stand in the city's main square, symbolising its post-industrial renaissance. The sculpture is erected and becomes a popular success. However, no information is provided at the site about the identity of the sculptor, although it is
p. 212 ↵ publicised in newspapers at the time of the commission and again at the unveiling ceremony. The sculptor also identifies herself as the creator on her website, and her name is mentioned in official tourist and business guides. The commissioning contract contained no provisions about identification of the sculptor at the site, but it did give the council merchandising rights such as the reproduction and sale of miniatures of the sculpture, and the marketing of T-shirts bearing its image. Now the sculptor has approached the council, requesting that she be identified at the site of the sculpture and on merchandising material. Must the council comply with this request?

Limits on the right to be identified as author or director

6.11 The right to be identified as author does not exist in respect of computer programs, the design of typefaces, or computer-generated works.[24] Where copyright first vested in an employer, nothing done or authorised by him infringes the author's right to be identified.[25] Certain acts permitted in respect of the copyright in a work—fair dealing for certain purposes, for example—are not to be taken as infringements of the moral right to be identified as author.[26] The right does not apply to works in which Crown or parliamentary copyright subsists, unless the author or director has previously been identified as such on or in published copies of the work.[27] Nor does it apply to publications in newspapers, magazines, or similar periodicals, or in an encyclopaedia, dictionary, yearbook, or other collective works of reference where the work was made for the purposes of such publication.[28]

Discussion point

For answer guidance visit **www.oup.com/he/brown6e** *<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-6-guidance-on-answering-the-discussion-points?options=showName>*.

What is the reason for these limitations on the right of paternity?

Key points about the moral right of paternity

- Paternity is the right to be identified as the author of a work.
- It applies in varying ways to literary, dramatic, musical, and artistic works and films, but not to computer programs.
- The right must be asserted by a statement in writing.
- An employer who owns the copyright in a work cannot infringe the employee-author's moral rights.

Right of integrity

6.12 The author of a work or director of a film has the right to object to *derogatory treatment* of his work. This moral right does not need to be asserted in any formal way. The right applies to the treatment of the whole or any part (without a requirement that it be a substantial part) of the work.[29] Derogatory treatment will occur when there is:[30]

> *addition* to, *deletion* from or *alteration* to or *adaptation* of a work which *amounts to distortion or mutilation* of the work or is otherwise *prejudicial to the honour or reputation* of the author or director.

p. 213 ↵ There must be a *treatment* of the work (in the form of addition, deletion, alteration, or adaptation) and such treatment must be *derogatory* (a distortion or mutilation that must also be prejudicial to the author's honour or reputation).[31] But a translation of a literary or dramatic work will not amount to derogatory treatment, nor will an arrangement or transcription of a musical work involving no more than a change of key or register.[32] The right affects those who:

- publish commercially, perform in public or communicate to the public, or issue to the public copies of a film or sound recording of, or including, a literary, dramatic, or musical work (CDPA 1988, s 80(3));
- publish commercially, exhibit in public, communicate to the public, show or issue to the public copies of a film including images of, an artistic work (CDPA 1988, s 80(4)(a), (b));
- issue to the public copies of a graphic work or photograph of works of architecture in the form of models, sculptures, or works of artistic craftsmanship (CDPA 1988, s 80(4)(c)). Note that the author of a building has only the right to require that his identification be removed from it in the event of derogatory treatment (s 80(5));
- show in public, communicate to the public, or issue to the public copies of, a film (CDPA 1988, s 80(6)).

If any of these activities includes a derogatory treatment of a work to which the right pertains, the right of integrity has been infringed.[33] Further, dealing in an article which infringes this right will also attract a secondary infringement liability.[34]

Question

Identify the common features of the various situations in which the moral right of integrity may be infringed.

Discussion point

For answer guidance visit **www.oup.com/he/brown6e** *<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-6-guidance-on-answering-the-discussion-points?options=showName>*.

How far may the right of integrity be compared to one of private censorship?

6.13 There have been few cases to date in the UK courts about the right of integrity, and they exhibit a cautious approach: 'while the term "treatment" has been more favourably interpreted, most authors have failed in showing that the treatment meted out to their works is "derogatory"'.[35]

■ *Morrison Leahy Music Ltd v Lightbond Ltd* [1993] EMLR 144

L produced a sound recording entitled 'Bad Boys Megamix' which took bits of the music and words from five George Michael compositions (the copyright of which MLM owned) and put them together in snatches lasting from ten to 65 seconds, where the works from which they were taken lasted from three minutes, 22 seconds to six minutes, 45 seconds. An injunction was granted as it was plainly *arguable* that such relatively short snatches did alter the character of the original works by removing them from their original context and creating a new one.

p. 214

■ *Tidy v Natural History Museum Trustees* (1995) 39 IPR 501

T, a cartoonist, produced large-scale dinosaur cartoons to hang in the museum. It was held that the right of integrity did not entitle T to prevent the re-publication of the cartoons on a much smaller scale in a book being published by the museum trustees.

■ *Pasterfield v Denham* [1999] FSR 168

P was commissioned by Plymouth City Council in 1988 to design promotional leaflets for the Plymouth Dome, a tourist attraction. The leaflet used devices of a satellite, a German bomber formation, and a detailed cut-away drawing of the Dome's interior. In 1994, the council commissioned D to produce a new leaflet for the Dome: this included copies of the satellite and bomber formation, along with a smaller and altered version of the cut-away drawing. The alterations included the omission of features on the edge of the original drawing and a variation in colouring. It was held that these differences were so trivial that they could only be seen by close inspection, and so could not amount to derogatory treatment. Mere distortion/mutilation is not sufficient unless such distortion/mutilation also prejudices the author's honour or reputation. Such prejudice must be to the author's honour or reputation *as an artist*, and it was not enough that the artist themselves felt aggrieved.

■ *Confetti Records v Warner Music UK Ltd* [2003] EMLR 35

The composer of a musical work called 'Burnin' sued for derogatory treatment by way of mixing it on a compilation album with rap material referring to violence and drugs. It was held that merely distorting or mutilating a work did not infringe the right of integrity; prejudice to the author's honour and reputation was also required. In giving evidence the composer made no complaint about the treatment of 'Burnin', and the Court should not infer prejudice for him. The words of the rap were for practical purposes in a foreign language the content of which was not proved, and they were anyway hard to decipher. All this went against any conclusion that the treatment infringed the right of integrity.

■ *Harrison v Harrison* [2010] ECDR 12

JP had written the first edition of a book and its second edition was edited and published by JD. JP claimed that the second edition was prejudicial to his honour or reputation. Fysh J noted that 'treatment' is a broad general concept implying a spectrum of possible acts, 'from the addition of, say, a single word to a poem to the destruction of the entire work' (para 60). The generality of the term 'treatment' is limited by the requirement of prejudice to the honour or reputation of the author to arise from such treatment. It was held that there was no infringement of the integrity right because it is not enough for the author to point to a 'miscellany of arguable trivia' to substantiate a case for derogatory treatment (para 66).

■ *Delves-Broughton v House of Harlot Ltd* **[2012] EWPCC 29**

D took a photograph depicting a model in a forest wearing clothes supplied by H which H included in its website after cropping it, reversing the image, and removing the background. On D's claim for infringement of integrity right, it was found that considerable time and effort had been spent in the composition of the photograph for which D considered the forest to be particularly important. The judge held that the changes to the photograph amounted to distortion, that such treatment of the work was therefore derogatory and awarded £50 for it. Surprisingly, the judge noted that the changes were not prejudicial to D's honour or reputation. The approach in this case is inconsistent with earlier cases; previous authorities (noted above) were not referred to in the judgment which also lacked any clear reasoning for the outcome. As such, the decision is arguably unreliable.

6.14 In contrast to the position in the UK, the potentially wide scope of this right can be illustrated with well-known decisions from other jurisdictions: for example, the French decision that the moral rights of the film
p. 215 director John Huston were infringed by the colourisation of his black-and-white film 'The Asphalt Jungle', even although the colouriser had a contractual right to do so and there was no right of integrity in Huston's home territory of the United States;[36] in a Canadian case it was held that the integrity of a sculpture in a public place was infringed by festooning it with Christmas decorations.[37]

Exercise

A local authority commissions a new concert hall and paintings to be hung in its entrance hall. The paintings are unpopular and much criticised in the local media for their abstract character. Following an election leading to a change of party in control of the authority, and amidst much publicity, the council orders the removal of the paintings to storage, and their replacement with cartoons humorously depicting aspects of local life. Can either the architect of the hall or the painter object to the council's action on the basis of their rights of integrity? You may find it helpful in thinking about this problem to consider the Indian case of *Sehgal v Union of India* [2005] FSR 39.

Limits on the right of integrity

6.15 The limits on the kinds of work affected by the right of integrity are similar to those operative in the right of paternity:[38] for example, computer programs, computer-generated works,[39] publications in collective works,[40] and works where the employer, Crown, or Parliament has the first copyright.[41] There are some important further limits on the integrity right, however. It does not apply in relation to any work made for the purpose of reporting current events, since otherwise the traditional sub-editing process could be severely hampered.[42] In the case of anonymous and pseudonymous works where it is reasonable to suppose

that copyright has expired,[43] no act will infringe the right of integrity if it would not infringe copyright.[44] The right is not infringed by anything done for the purpose of avoiding the commission of an offence, or complying with a duty imposed by or under an enactment.[45] Finally, anything done by the BBC for the purpose of avoiding the inclusion in a programme of anything which offends against good taste or decency or which is likely to encourage or incite crime or lead to disorder or to be offensive to public feeling will not infringe the right of integrity.[46]

Exercise 1

Before the 1988 Act came into force, the author of a play about the Falklands War to be broadcast on the BBC strenuously objected to the Corporation's cutting of passages that presented the Prime Minister Mrs Thatcher in an unfavourable light.[47] Would that author now be able to make a claim under the right of integrity, and would the BBC be able to plead its privileged position (described previously) in its defence?

p. 216

Exercise 2

Would Elinor Glyn have been able to argue that the film satire 'Pimple's Three Weeks (without the option)' infringed the moral rights in her novel *Three Weeks* (see *Glyn v Weston Feature Film Co* [1916] 1 Ch 261)?

Exercise 3

To what extent are authors able to use the right to control the way in which their works are presented to the world—for example, through distasteful association, packaging, or advertising, or through adaptations in other media which travesty their work (at least in their view)?

Exercise 4

Consider the case of *Galerie d'Art du Petit Champlain inc v Théberge* [2002] 2 SCR 336 (Supreme Court of Canada), discussed at para 4.43. Was the artist's right of integrity infringed in that case?

Exercise 5

Could an author who had become dissatisfied with the quality of his work demand its withdrawal from public circulation, on the basis that its continued availability would damage his honour and reputation?[48] Consider in this connection the old Scottish case of *Davis v Miller* (1855) 17 D 1166.

Exercise 6

Consider the case of *Hugo v SA Plon* [2007] ECDR 9 (Cour de Cassation, France) in which the moral right of Victor Hugo (1802–85) in his famous novel *Les Misérables* (published 1862 and out of copyright) was held not infringed by the publication in 2001 of two works purporting to be sequels to the novel and using characters from it. French law requires respect for the author's name, title, and work. Apart from the questions of location, term, and assertion, would it have been possible to sue on these facts for infringement of the UK moral rights of paternity or integrity?

Meaning of publishing commercially

6.16 Both the rights of paternity and integrity arise, inter alia, when a work is published commercially. Commercial publication means issuing copies of the work to the public at a time when copies made in advance of the receipt of orders are generally available to the public (eg through a retail outlet), or making the work available to the public by means of an electronic retrieval system.[49]

Key points on the moral right of integrity

- The right is to prevent derogatory treatment of copyright works when they are published or otherwise put before the public.
- Derogatory treatment is distortion or mutilation of a work or treatment which is otherwise prejudicial to the honour or reputation of the author.
- The UK courts have not given the right expansive scope in their decisions on the matter.

p. 217

False attribution of authorship

6.17 A person has a right not to have a work falsely attributed to him as author or director.[50] This is the counterpart of the right to be identified as the author. There is a potential secondary liability for dealers in copies which infringe this right.[51] The right applies to the whole or any part (without any requirement of substantiality) of the work.[52] The right subsists until 20 years after a person's death.[53] This creates the curious possibility of false attribution being lawful 20 years and one day after the death of the person.

■ *Clark v Associated Newspapers Ltd* [1998] 1 All ER 959

In this case[54] the *London Evening Standard* published a series of articles entitled 'Alan Clark's Secret Election Diary' or 'Alan Clark's Secret Political Diaries' set beside a photograph of Clark, a prominent Conservative politician and an author well known for the publication of his personal diaries, which were 'malicious, lecherous and self-pitying, and … enormous fun'. The *Standard* articles sought to parody or spoof the real diaries, and contained a statement that 'Peter Bradshaw … imagines what a new diary might contain'. The statement was in a font bigger than that of the main text but much smaller than the heading and title. It was held that there had been a false attribution. The statement of attribution had to have a clear single meaning, but the law did not require proof of damage, nor was there a cure for the attribution in the 'counter-messages' about Bradshaw's contribution. If 'counter-messages' are to be effective, they have to be as bold, precise, and compelling as the false statement.

■ *Harrison v Harrison* [2010] ECDR 12

JP had written the first edition of a book and its second edition was edited and published by JD. JP claimed that the promotion of the second edition, through testimonials on the back cover of the second edition which referred to the first edition, created the impression that both editions were, contrary to fact, written by the same author. The Court held that there was false attribution of authorship because the single message to the reader from the back cover was praise for the author responsible for the creation of the first edition, not the publisher, who would usually produce a number of books on different subjects and, without any indication to the contrary, the reader would assume that the author of the title had not changed (para 55).

Right of privacy of certain photographs and films

6.18 A person who for private and domestic purposes commissions the taking of a photograph or the making of a film has, where copyright subsists in the resulting work, the right not to have copies of the work issued to the public, the work exhibited or shown in public, or the work communicated to the public.[55] The statutory right applies in relation to the whole or any substantial part of the photograph or film.[56] Any person

doing or authorising one of these acts is liable as an infringer. An example would be the display of wedding photographs in the photographer's shop window where that was not authorised contractually or otherwise.[57] The right is not infringed where the act occurs in the context of certain specified acts which would not infringe copyright in the work (eg incidental inclusion).[58]

p. 218

Moral rights reform

6.19 The subject of moral rights is otherwise and in general underplayed in recent international, European, and domestic negotiations, discussions, and instruments. One policy issue in relation to moral rights is whether they should be stronger. In the UK, moral rights cannot be alienated, but it simply means that these rights cannot be the subject of commerce in themselves; they may be waived, albeit this requires writing. Further, the paternity right must be 'asserted' before it can apply, and it is not generally available to authors whose works are created in the course of employment. In all these respects, the British moral rights are weaker than the systems found, for example, in some other EU member states.[59]

6.20 That a strong moral rights regime is nonetheless in the public interest has been argued on the following grounds:

- a trade mark-like function of assuring the public as to the origin and quality of the work;
- social reward (prestige, status, recognition) going to where it belongs;
- cultural preservation, helping to maintain the record of the country's culture;
- author empowerment in connection with the exploitation of their work.

The rights may also be considered particularly significant in an online digital world, where works can be speedily and endlessly transmitted and retransmitted, readily modified and reshaped, and integrated, in whole or in part, in other works. Even if economic interests in the digital environment can be as effectively defended by way of contract as by copyright, it is much less clear that this is so with the moral rights, since it will not necessarily be the author who is making the product available to the public (contractually or otherwise). Many of the functions of moral rights identified previously could also be of great importance in a world of open access publishing, to ensure author recognition. After much debate, the rights are recognised in the Creative Commons licences (paras 6.51–6.52). Such licences preserve the paternity right by contractually requiring attribution but do not always preserve the integrity right.[60] The right of integrity causes concern because it might seem to hamper the ability of users to rework existing material in their own works. However, the royalty-free and irrevocable nature, and potentially worldwide scope, of such licences also underlines the need for a quid pro quo and some legal recourse to protection of an authors' reputation.

6.21 If the arguments in favour of a stronger moral rights regime are accepted, then questions follow about the present UK position, in particular the position with regard to:

- the exclusion of employees from the paternity right in their work (para 6.11);
- the need to assert paternity right (para 6.9);
- whether waivers of moral rights should be allowed (para 6.7);

- regulation of waivers for unconscionability;
- duration (paras 6.7 and 6.17)—it is not clear, especially in the light of some of the underlying policies referred to previously, why there should be a time limitation on any of the moral rights; on the other hand, moral rights which endure beyond an author's lifetime may be an undue limitation of the public domain, putting powers capable of amounting to censorship in the hands of people other than the person in whose interest the rights were created;
- the name of the rights, at least in the UK, where 'moral' in the context of rights tends to suggest, at least to the uninformed, 'not legal', and so to devalue their significance; 'author's personality rights', while cumbersome, might better convey what the law seeks to protect here.

p. 219

Exercise

Take each of the points previously listed, and consider how, if at all, the present UK rules on moral rights should be reformed.

Artist's resale right

Background

6.22 The Berne Convention 1886 provides (Art 14*ter*) for an author's inalienable resale right (*droit de suite*) in works of art and original manuscripts, giving him a right to a share of the proceeds of any sale of the work after the first transfer by the author. This right is, however, optional for Berne states. In a significant move, in 2001, the Resale Right Directive was enacted in the EU, to be implemented in the member states for the benefit of living artists by 2006 and for those who had died before then by 2012 at the latest.[61] It applies only to works of art and not to literary or musical manuscripts, thus taking partial advantage of the option of resale rights under Art 14*ter* of the Berne Convention. The Directive gives the artist a right to a share of the proceeds of any resale of the original of his work after the sale by the artist to a first purchaser. While the Directive's objective is primarily economic, its content also owes much to moral right ideas, notably the resale right's inalienability from the author of the work to which they attach (see further at para 6.7). However, it is worth noting that this authors' right is not a moral right, as a result of its highly economic character. The Directive was enacted against British opposition, but the majority of the then EU member states already had such a system in place and perceived distortion in the European art market resulting from the variability of the national laws, as well as an injustice to the artist, who gained no benefit from the value others came to place on the original of his work.

6.23 The artist's resale right was introduced in the UK on 14 February 2006, in implementation of the EU Resale Right Directive 2001.[62] The UK has retained the resale right on withdrawal from the EU. Consequently, the UK rules remain largely unchanged except in relation to qualification.[63] However, reciprocal protection between the UK and EU member states will continue.[64]

The law in the UK

6.24 The author of a work of graphic or plastic art in which copyright subsists has a right to a royalty on any sale of a work that is a resale subsequent to the first transfer of ownership by the author.[65] The right subsists as long as the copyright subsists,[66] one effect of this being that 'only the originals of works of modern and contemporary art … fall within the scope of the resale right'.[67] In general, and in the fashion of a moral right, this right cannot be assigned,[68] waived,[69] or shared[70] by the author, although it can be transmitted on death, whether by will or the rules of intestate succession,[71] and the right may be transferred to a charity.[72] But the right can be exercised *only* through a collecting society.[73] The holder of the right can choose which such collecting society to mandate for this purpose,[74] but in the absence of such a transfer of management, the collecting society managing copyright on behalf of artists (eg the Design and Artists' Copyright Society (DACS))[75] is deemed mandated to manage the right[76]—that is, collect the resale royalty in return for a fixed percentage or fee of the money so ingathered.[77] The amount of the royalty is calculated in relation to the resale price,[78] the resale price being taken to be the price obtained for the sale net of any tax payable on the transaction and converted into euros at the European Central Bank reference rate prevailing at the contract date.[79] The (not especially generous) royalty rates[80] are shown in Figure 6.1.

p. 220

Portion of the sale price	Percentage amount
From 0 to 50,000 euro	4%
From 50,000.01 to 200,000 euro	3%
From 200,000.01 to 350,000 euro	1%
From 350,000.01 to 500,000 euro	0.5%
Exceeding 500,000 euro	0.25%

Figure 6.1 Royalty rates table

A resale becomes liable to the royalty where the buyer or the seller or the agent of either is acting in the course of a business of dealing in works of art, and the sale price is not less than €1,000.[81] The persons liable to pay the royalty are the seller *and*, if acting in the course of a business of dealing in works of art, the seller's agent, the buyer's agent if there is no seller's agent, and, where there are no such agents, the buyer.[82] The liability of these parties is joint and several.[83] The liability to make the payment arises on completion of the resale.[84]

6.25 A number of other points should be made about the artist's resale right:

- The royalty is only payable on the *resale of works of graphic or plastic art* in which copyright subsists. Works of graphic or plastic art include, for example, a picture, collage, painting, drawing, engraving, print, lithograph, sculpture, tapestry, ceramic, glassware item, or photograph.[85] The work sold must be the one which the artist created. The resale of a *copy* of a work of art is not subject to the royalty right unless it is one of a limited number made by the author or under his authority.[86]

- The royalty is only payable on a resale *after* the *first transfer of ownership of the work of art by the author*. While the author's first transfer of ownership will typically be a sale to another person, the transaction need not be for any consideration,[87] and so might be a gift. Transfer also includes transmission on death by will or by intestate succession, and disposal of the work by the author's personal representatives for estate administration purposes, as well as disposal by the administrator of the author's insolvent estate.[88]

p. 221

- Where the seller previously acquired the work directly from the author less than three years before the resale *and* the sale price now does not exceed €10,000, there is no liability to a resale royalty.[89]
- There are complex *transitional* provisions. Resale royalties are not payable in respect of contracts concluded before 14 February 2006, but the right does otherwise apply to works made before that date.[90] Where the artist died before 14 February 2006, rules for determination of artist's successors are provided.[91]
- The Secretary of State is required to review the regulations periodically.[92]

6.26 The purpose of an artist's resale right is succinctly summarised in one of the recitals to the Resale Right Directive:[93]

> ... to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art ... to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works.

Crudely, the model is one of the impecunious artist forced to sell his creations, only to see others later earning riches from dealings in those creations. As already noted, the right did not exist in the UK before 14 February 2006, but it was found in the majority of other EU member states, albeit with variable rules. The harmonisation under the Directive was thus intended to eliminate the differences found in the EU, in order to remove an obstacle to the operation of a single European market in this field. The Directive was highly contested, because the resale right is not widely found outside Europe, and there was significant concern that what is effectively a form of tax on dealings in art would drive business away from Europe to other centres such as the United States (in particular New York).[94] The UK was particularly concerned because the success of its international art market could be attributed, some thought, to the absence of artist's resale right. More fundamentally, it can be argued against the right that those who make successful businesses through dealing in art are not necessarily merely enriching themselves on the back of the artist, but play a significant independent role in ensuring that art works generate wealth.[95] On the other hand, DACS argued that the right 'enables artists to have a share in the increasing value of their work and allows artists' estates to continue to care for an artist's legacy' noting in its White paper, reviewing ten years of the artist's resale right in the UK, that there has been no evidence to support any negative impact on the UK art market or diversion of sales to non-artist's resale right markets.[96]

Discussion point

For answer guidance visit **www.oup.com/he/brown6e** *<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-6-guidance-on-answering-the-discussion-points?options=showName>*.

Why should resale right be limited to works of art? Why are there no equivalent rights for authors of literary, dramatic, and musical works in relation to their manuscripts, as provided in the Berne Convention, Article 14*ter* (para 6.22)? (Note recital 19 of the Resale Right Directive: 'the harmonisation brought about by this Directive does not apply to original manuscripts of writers and composers').

p. 222

Key points about artist's resale right

- The aim of the right is to enable artists to take a share of the profit made by others from sales of their original art works.
- The right lasts for the same period as the copyright in the work.
- The right is inalienable, although it transmits on death.

Exploitation of copyright

6.27 Copyright is a property right.[97] It is primarily a negative right of exclusion, similar to other IPRs, providing no positive entitlement to privilege or success in the market (see para 1.43). However, in practical terms, copyright has both an external and internal aspect in how it benefits the right owner: the external aspect enables the right owner to exclude others from the market by enforcing the rights granted exclusively to them (see Chapter 4 for infringement and Chapter 21 for enforcement procedures and remedies available to the right owner); the internal aspect enables the right owner to exploit and use the rights exclusively granted to them through contractual arrangements, usually for financial return.[98] This section considers only the second aspect: the exploitation and use of copyright. Contracts play a crucial role in the exploitation of copyright. The acts restricted by copyright (see para 4.9) can be transferred by assignment, by testamentary disposition, or by operation of law, as personal or moveable property, and they can also be licensed,[99] all of which can endure beyond the author's lifetime. Key issues in relation to contractual exploitation, including those regulated by the 1988 Act,[100] and contemporary issues are discussed below.

Assignment

6.28 The owner of copyright may choose to assign that right to a third party. An assignment (known as assignation in Scotland) is the transfer of ownership of copyright from one party to another. When copyright is assigned, the assignee stands in the shoes of the assignor and can deal with the right as they wish. An assignment of copyright can be partial in terms of the manner of exploitation and time.[101] A prospective copyright owner can also assign future copyright, that is 'copyright which will or may come into existence in respect of a future work or class of works or on the occurrence of a future event'.[102] To be effective, an assignment must be in writing, and signed by, or on behalf of, the assignor.[103] 'Writing' is broadly defined to include 'any form of notation or code, whether by hand or otherwise and regardless of the method by which, or medium in or on which, it is recorded'.[104] An instrument that is signed and written 'may amount to an assignment of copyright even though the word "copyright" is not used, if, on its true construction, it was intended that copyright should thereby pass', and 'it is not necessary that the words "grant" or "assign" be used if an intention to assign can be gathered from the context'.[105] There is no requirement for the assignment to be registered. However, without a signed document the requirements of a legal assignment are not fulfilled.[106]

p. 223

Question

Find out whether, and to what extent, the rules on assignations are different for other IPRs?

Licensing

6.29 Licensing is a central feature of exploitation and use of copyright. An author may be the first owner of copyright, but may not have the resources or the expertise to exploit their works protected by copyright. For instance, a music band may need the help of a record label to produce and market a song. Literary authors may need the assistance of a collecting society to enable them to monitor some uses of a work (eg photocopying of literary works) and to receive a return from exploitation. If the author does not assign the copyright in her work, then she will need to enter into a licence to permit such exploitation and management of the bundle of rights that copyright provides. When copyright is owned by more than one person jointly, then a licence by all the owners is required.[107]

6.30 Copyright licences can be exclusive, non-exclusive, or sole. An exclusive licence means a licence in writing, signed by or on behalf of the copyright owner, by which the owner licenses a third party to carry out some or all of the restricted acts to the exclusion of all others including the owner.[108] A sole licence permits the owner of the copyright to exploit the right as well as the person to whom she has licensed the work. A non-exclusive licence permits the owner to exploit the right and also to license as many other people as she wishes to carry out the same act. The 1988 Act sets out no formalities for a non-exclusive licence. Licences for copyright can carve up an author's exclusive rights in many ways in order to maximise the opportunities for financial return to them.[109] So they could cover some but not all of the rights pertaining to a particular work.

For example, the author of a book might license the right to one publisher to publish the book in hardback, but another publisher may be granted the serial rights. Or one publisher may be given permission to publish the book in English, but another the translation rights. One director might be given permission to turn a work into a play, another to turn the work into a film. Licences also tend to be limited in terms of duration and territory and include terms of financial return (eg royalty calculation, costs to be deducted).

Exercise

Imagine scenarios where these different types of copyright licence might be used and consider why it might be appropriate to use one type of licence rather than another in any given set of circumstances. Consider the interests that require to be met when making a choice.

Assignment or licence?

6.31 Sometimes a question can arise as to whether a document is an assignment or a licence. In a case involving rights to the song 'A Whiter Shade of Pale', the House of Lords stated that in order for there to be an implied assignment:[110]

> (a) it would have been obvious to Mr Fisher [the assignor] (as well as Essex [the record company]) that his interest in the musical copyright was being, or had to be, assigned to Essex [the record company], or, which may amount to the same thing, (b) the commercial relationship between the parties could not sensibly have functioned without such an assignment.

p. 224 ↵ The House of Lords ruled that there was no implied assignment and that the recording contract merely granted the record company the right to exploit the original recording.[111] The general principles applicable to construction of contracts also apply to the determination of whether a copyright contract is an assignment or a licence.[112]

6.32 If a reverter clause is present in an agreement, a question may arise as to whether the agreement is a licence or an assignation. *In JHP Ltd v BBC Worldwide Ltd*[113] it was held to be an exclusive licence rather than an assignation. The Court reviewed the relevant authorities. In *Chaplin v Frewin*[114] an agreement in a publishers' contract whereby the publishers should, during the legal term of the copyright, have the exclusive right of producing, publishing, and selling a work in volume form in any language throughout the world was held to be an assignment of copyright. In *Messager v BBC*[115] the composers and authors of an opera granted to the proprietor of the theatre the sole and exclusive right of representing a play, in which it was provided that the copyright in the music of the play should remain the property of the composer and in certain events the right of representation should 'revert to and become again the absolute property of [the composer and the authors]'. The Court in that case said that there had been use of 'inept language in which to describe the mere cessation of a licence and … much more apt to describe the reversion to the licensors of rights which had been assigned'. The Court in *JHP* came to the conclusion that:[116]

> the concept of reverter (rather than of termination or cessation) is strongly suggestive of the assignment or a transfer of a property right that does not depend for its existence on the very agreement which contains the reverter provision itself. But … there is no general principle that a reverter clause automatically indicates an assignment.

Copyright contract practices: authors' weak bargaining position

6.33 In UK law there are few statutory controls on contracts negotiated between individual authors and exploiters in the field of copyright and related rights. As seen above, these controls are largely concerned with formalities of execution (eg assignment, exclusive licence) and flexibilities in terms of what can be transferred (eg partial assignment, assignment of future copyright).[117] They do not regulate the substantive terms on which a work may be exploited. However, in practice, an author may have a weak bargaining position when entering contractual relationships, and several difficulties may be encountered due to the inequality of bargaining power as between the author and the exploiter. For instance, contracts between authors and exploiters might be non-negotiable and provided to authors on a 'take it or leave it' basis, or they may contain terms which are one-sided and overwhelmingly in favour of the exploiters. In such situations, general principles of contract law have sometimes been called upon to give relief to the author, albeit with limited success. In other instances, specific statutory provisions have been created to ensure that authors benefit from exploitation of their works in certain situations. In practical terms, collecting societies (para 6.42), trade unions, and professional organisations representing authors also play a role in representing authors' interests and strengthening their bargaining position to some extent. These issues are discussed below.

Copyright contract practices: the music company and the musician

6.34 Perhaps the most well-known examples of contractual controls on copyright licences as between the author and exploiter arise in the entertainment field, most particularly in the music sector. Recording companies have long argued that their business model is predicated on the success of a minority of musicians. The financial return that the companies receive from this minority enables them in turn to engage other musicians. To ensure that the record company can profit from the future success of the few, it is in the interests of the record company to enter into a relationship with a musician for as long as possible. Equally, the record company will not want to be bound to the unsuccessful musician, and in particular it does not want to be under any obligation to publish and distribute music that may not have found favour in the market. This has caused some problems where record companies have signed musicians in the early stages of their career, and where the musicians have not had the benefit of independent advice in relation to the contract into which they entered. A few examples where general principles of contract law have been called upon to give relief to the musician are now discussed.

p. 225

Restraint of trade

6.35 In *Schroeder Music Publishing v Macaulay*,[118] Macaulay entered into a standard form agreement with Schroeder Music Publishing in which he agreed to assign the copyright in his works to the publisher for five years and, if the royalties exceeded £5,000, for a further five-year period. However, Schroeder was not required to exploit the works. The House of Lords held that this agreement was invalid as it was in restraint of trade. Lord Reid was particularly concerned as to the one-sided nature of the contract, which assigned the copyright in the work to the publisher, but which did not require the publisher to exploit that work:[119]

> it appears to me to be an unreasonable restraint to tie the composer for this period of years so that his work will be sterilised and he can earn nothing from his abilities as a composer if the publisher chooses not to publish. If there had been … any provision entitling the composer to terminate the agreement in such an event the case might have had a very different appearance. But as the agreement stands not only is the composer tied but he cannot recover the copyright of work which the publisher refuses to publish.

6.36 The doctrine is, however, not without its limits. Georgios Panayiotou (aka George Michael) challenged his contract with Sony Music Entertainment,[120] from which he wanted to resile on the ground that it was in restraint of trade. The history between the parties was complex, and a number of changes to their contractual relationship had occurred during the 1980s, the last of which was in 1988. The High Court refused to set aside the agreement, largely because it was considered that to do so would be contrary to public policy.

Undue influence

6.37 In *O'Sullivan and Another v Management Agency*[121] Gilbert O'Sullivan had entered into various contracts with a management agency and publishing company without receiving any independent advice. The Court of Appeal held that the onus was on those asserting that the agreements were valid to show that they had been entered into with full information as to the nature of the transaction—which was not so in this case.[122]

Question

Despite these examples, there have been few other cases in which the contractual arrangement between a musician and a record company has been challenged in court. Why do you think this is the case? When considering this question, you might like to browse the Musicians' Union website at www.musiciansunion.org.uk <*http://www.musiciansunion.org.uk*>. What activities does the Musicians' Union undertake on behalf of its members? Does it assist its members regarding the contractual relationships they might enter into? If so, how?

p. 226 **6.38** It is not only in the music industry that difficulties may be encountered due to the inequality of bargaining power as between the author and the exploiter. To assist, a number of different societies representing the interests of the author have developed best practice guidelines as well as specimen agreements that an author can use in negotiations. Further, the Writers' Guild has negotiated a raft of minimum terms agreements applicable as between their members and organisations such as the BBC, ITV,[123] and the Producers Alliance for Cinema and Television (PACT); Equity does the same for performers' rights (see Chapter 7) with respect to the exploitation of performances in, for example, cinema and on television.[124]

Question

Do other authors' organisations (eg Society of Authors, Scottish Artists' Union, Association of Illustrators) assist their members in relation to copyright contracts, and if so, how?

Copyright contracts and equitable remuneration

6.39 Although there are few statutory controls on copyright contracts negotiated between individual authors and exploiters, one exception is in relation to the rental right in a film or sound recording belonging to the author. When the right is voluntarily, or is presumed to be, transferred to a producer, the author retains a right to equitable remuneration for the rental.[125] This right cannot be transferred or waived, although it can be assigned to a collecting society or may transfer by testamentary disposition or operation of law. The level of remuneration is to be determined by agreement or, failing agreement, by the copyright tribunal. Consequently, the author has an unwaivable right to benefit from successful exploitation of the work, albeit in this relatively narrow area.[126] In contrast to the position of authors, performers not only benefit from similar provisions in relation to the rental right, there are also further statutory controls in place for them (paras 7.41, 7.46).[127]

Reform of authors' rights

6.40 A policy question is whether there should be legal reform to improve the bargaining position of authors in contractual relationships. For instance, whether a right to remuneration should be extended in the area of copyright? Or if a literary work becomes a bestseller, should the author, who might have assigned or licensed exclusive rights to the publisher, be entitled through a statutory mechanism to benefit from the financial success of the work? In some jurisdictions, measures can be found within copyright and related rights legislation which are protective of the author. For example, the copyright framework in Germany provides that an author is entitled to equitable or adequate remuneration for the exploitation of a work, to be judged by the standard of the prevailing levels in the industry.[128]

6.41 Recent EU reform in the area of copyright (see para 2.15) acknowledges the weak bargaining position of authors in contractual relationships. Chapter 3 of the Copyright Directive 2019,[129] entitled 'Fair remuneration
p. 227 in exploitation contracts of authors and performers' specifically aims at benefitting authors (and also

performers, see Chapter 7) once their works have been exploited through a contractual relationship, but it does not address the formation of contracts. Article 20 sets out a contract adjustment mechanism, whereby authors and performers, or their representatives, are entitled to claim additional, appropriate, and fair remuneration from the exploiter when the remuneration originally agreed is disproportionately low compared to the subsequent revenues derived from the exploitation of the work concerned. The mechanism is restricted to situations where there are no collective bargaining agreements providing for a comparable mechanism. Article 22 provides for a right of revocation for author and performers where there is a lack of exploitation of work, potentially opening the doors for the author to exploit the work themselves or engage other exploiters. The Directive also provides for transparency obligations under Article 19 to ensure that authors receive relevant and comprehensive information on the exploitation of their works from their exploiter, particularly in relation to modes of exploitation, revenues generated, and remuneration due. Finally, Article 18 sets out an overarching obligation on EU member states to ensure that authors and performers are entitled to receive appropriate and proportionate remuneration in the context of exploitation contracts, leaving it to the member states to use suitable mechanisms, while accounting for the principle of contractual freedom and a fair balance of rights and interests.

Exercise

Due to Brexit, the UK is not required to implement the Copyright Directive 2019.[130] However, the issue of legal reform to better protect authors in contractual relationships has arisen in the context of a UK Parliamentary inquiry on the impact of music streaming, including on the income of artists in the industry.[131] The inquiry's recommendations include introduction of author protective measures for musicians and ensuring 'that creators in the UK are not worse served than they would have been had the UK remained in the European Union'.[132] The UK government hasn't taken any legislative action in response to such recommendations.[133]

Should the UK introduce provisions similar to, or inspired by, those in Articles 18–23 of the Copyright Directive 2019 to ensure that authors benefit from the financial success of their works? Should the UK go further and introduce a general fairness requirement in copyright contracts, limiting the freedom to contract, to protect authors?[134]

Key points on dealings with rights in copyright-protected works

- Copyright is a property right and the rights restricted by copyright can be transferred by assignment, by testamentary disposition, or by operation of law, as personal or moveable property, and can also be licensed.
- Both an assignment and an exclusive licence are required to be in writing, signed by or on behalf of the copyright owner.

- The doctrines of restraint of trade and undue influence can sometimes control copyright contractual practices.
- Equitable remuneration is available for authors who transfer the rental right in a sound recording or film.

p. 228

Collective licensing

6.42 Exploiting works protected by copyright can cause practical problems for both the copyright owner (whether an author, or an exploiter) and the prospective licensee. A copyright owner can find it difficult to keep track of third parties who wish to exploit those works in one form or another. Similarly, a licensee may wish to incorporate a large number of works protected by copyright into their repertoire, but have difficulty in tracing the copyright owners to obtain permission. For example, educational establishments and businesses often make copies of published literary works which do not fall under the fair dealing provisions in the copyright legislation[135] and broadcasters frequently use musical works which are protected by copyright. In order to facilitate the management of these rights, collecting societies were introduced.[136] Authors of works protected by copyright are able to assign or license their rights to the collecting societies (or the collecting society will act as agent on their behalf), which then manage the rights on behalf of their members. Thus, the authors are saved from having to spend a lot of time on administration, and those who wish to exploit the works have one place from which they can seek permission to use them.

6.43 Examples of collecting societies currently operating in the UK include the Copyright Licensing Agency (CLA) which represents both publishers and authors of literary and visual works (through their own bodies), and the PRS for Music (formerly the Performing Rights Society (PRS)) which represents composers, authors, and publishers of music. Different societies operate in different ways. For instance, a collecting society could have copyright assigned to it and then administers licences and enforces copyright as the owner of the copyright. Alternatively, it could be authorised by its members to license the work on their behalf, that is, there is no assignment of the copyright. Royalties could be distributed to the members in proportion to the use made of a particular work, for example assessed by a census or a sample.[137] In addition, there is also provision in the CDPA 1988 for statutory extended collective licensing, under which a licensing body such as a collecting society can be authorised by the Secretary of State to grant licenses not just on behalf of its right holder members, but also on behalf of non-member right holders.[138]

Question

Have a look at the websites of the Authors' Licensing Collecting Society (ALCS) www.alcs.co.uk <*http://www.alcs.co.uk*>, PRS for Music www.prsformusic.com <*http://www.prsformusic.com*>, Phonographic Performance Limited (PPL) www.ppluk.com <*http://*

www.ppluk.com>, and DACS www.dacs.org.uk <*http://www.dacs.org.uk*>. Find out who these organisations represent, what rights they manage on behalf of their members, and how they administer such rights? Can you find any similar organisations in other jurisdictions?

6.44 Collecting societies occupy a powerful role, both in relation to the authors of the works, and in relation to users: they can control a very large repertoire of works, set terms for membership and administration of rights in relation to authors, and also the terms (including royalty rates) on which works are licensed, or not licensed, to individuals and groups. Consequently, some oversight of their activities has been found to be essential. The 1988 Act sets out the regulatory framework for oversight of copyright licensing schemes and the activities of collecting societies. It defines both licensing schemes and licensing bodies, and gives the Copyright Tribunal broad powers to monitor the licensing schemes of collecting societies.[139] Thus, for
p. 229 instance, those parties who wish to take a licence from the collecting society but who feel that the terms are unfair or where the society might have refused to grant them a licence, may take a complaint and have it heard by the Tribunal.[140]

■ *Universities UK v The Copyright Licensing Agency* [2002] RPC 36

In this case, universities in the UK asked the Copyright Tribunal to rule on the terms of the Higher Education Copying Accord promulgated by the CLA and which allows, inter alia, students in higher education institutions to make copies, up to a certain amount, of published works during the currency of their educational courses. Negotiations had broken down on matters concerning both the scope of and the fee for the licence. The Copyright Tribunal made an order referring to both of these matters: the course pack provision (which had required separate negotiation each time a 'course pack' was provided to a class of students), so disliked in education, was to be abolished, artistic works were to be included in the licence, and the fee was to be set at £4.00 per full-time enrolled student.

The 1988 Act also contains powers exercisable by the Secretary of State or the Competition and Markets Authority in relation to collecting societies and anti-competitive practices (see also paras 20.75–20.83).[141] In addition, the Collective Management of Copyright Regulations 2016[142] set out a range of obligations of collecting societies, particularly towards their right holder members. These obligations were introduced as a result of the 2014 EU Directive on collective management which aimed to set down a high standard of governance, financial management, transparency, and reporting on collecting societies,[143] and also facilitate multi-territorial licensing (see para 20.83). Obligations on UK collecting societies under these regulations, including multi-territorial licensing, have been retained post-Brexit, even though EEA collecting societies have no obligation anymore to represent UK right holders or catalogues of UK collecting societies for online licensing of musical rights.[144]

Further licensing issues

Compulsory licences

6.45 There are few provisions for compulsory licences in the UK because international obligations under the Berne and Rome Conventions mean that compulsory licences will be granted in respect of the exploitation of copyright in only limited circumstances. The Berne Convention 1886 allows for the grant of compulsory licences for broadcasting, and mechanical licences for musical works, both subject to conditions.[145] Under the Rome Convention 1961 compulsory licences may only be granted as regards broadcasting or communication to the public of phonograms.[146] However, unlike patents, there is no broader power for facilitating compulsory licences (see para 12.9).

p. 230

Orphan works licensing scheme

6.46 If a user wishes to use a substantial part of an existing protected work in a new work, then permission must be obtained from the owner of the copyright. Since copyright is an unregistered right and copyright in author works extends well after the death of the author (and the date of that event may be difficult to ascertain), would-be users and re-publishers of works who wish to comply with the law frequently find it impracticable or impossible to take the necessary steps to do what they want to do lawfully, that is, find out whether a work is still in copyright and, if so, who is now the owner. Tracing copyright owners can be a complex, costly, and time-consuming activity, particularly where a work may be out of print, the copyright may have devolved amongst countless heirs, or the work may simply have been forgotten about. Where an owner cannot be located after reasonable inquiry, some term the work an 'orphan work'. Orphan works have been the subject of intense discussion at international, European, and national policy-making levels in recent years.[147]

6.47 The problem of orphan works was summarised in a UK Government Policy Statement:[148]

> [I]t benefits no-one to have a wealth of copyright works be entirely unusable under any circumstances because the owner of one or more rights in the work cannot be contacted. This is not simply a cultural issue; it is also a very real economic issue that potentially valuable intangible assets are not being used, and an issue of respect for copyright if they are being used unlawfully.

Despite the obvious difficulty such orphan works may create, it took a number of years for there to be a legislative solution. The Hargreaves Review 2011 proposed establishing licensing and clearance procedures for orphan works—a suggestion subsequently investigated further in the Hooper Report.[149] Consequently, in October 2014, a statutory licensing scheme for orphan works was introduced in the UK, administered through the Intellectual Property Office (IPO).[150]

6.48 The UK licensing scheme enables an applicant to apply for a licence to use an orphan work having carried out a 'diligent search' for the right holder and met other formalities.[151] An application fee is payable, and if successful, a fee is also payable for the licence to use the work. The IPO may grant a licence for non-

exclusive use of the work in the UK for no more than seven years. The use can be commercial or non-commercial, and the licence acts as if it was granted by the right owner of the work. The IPO may refuse to grant a licence if a diligent search has been inadequate or if the proposed use by the applicant is not appropriate. The IPO also maintains an orphan works register of works for which applications have been made, and works for which licences have been granted. Consequently, any right owner whose work has been licensed can contact the IPO to claim the licence fee paid; or a right owner whose work is the subject of an application can ask the IPO to the stop the application.

Exercise

Explore the UK Orphan works register at www.orphanworkslicensing.service.gov.uk/view-register *<http://www.orphanworkslicensing.service.gov.uk/view-register>*. Find out the number of applications made, and the number of licences granted, and the types of works for which applications are made and licences granted. Do you think the UK licensing scheme for orphan works is functioning effectively?

p. 231 ↵ **6.49** A key challenge in allowing use of orphan works without authorisation of the right owner is ensuring an adequate balance between interests of rights owners and users (eg addressing the right owners' concerns about abuse of such permitted use while allowing sufficient uses, and an easy and efficient mechanism for the users). Whether the UK's licensing scheme achieves such balance remains to be seen. An alternative solution to the orphan works problem would be enabling use of such works as a permitted act (see para 5.59). A completely different solution to the problem of orphan works would be a copyright registration system, but that would presumably be a radical step too far, since it is inconsistent with the Berne Convention.

Individual online licensing schemes

6.50 The digital environment has opened up opportunities for authors for self-publishing and for making creative works available over the internet themselves. As such, the onus falls upon authors to choose and use an appropriate licence (although there is no obligation to do so) when disseminating works online. In some such instances, authors may wish to use restrictive licences such as those that keep all rights reserved to the author, or which only permit very limited use. In other instances, authors may wish to provide a more permissive licence, enabling wide dissemination and re-use of their works, rather than a restrictive licence. A number of individual online licensing schemes that facilitate the dissemination and re-use of creative work have proliferated. These initiatives are interesting in that they operate within the existing copyright framework but are designed to meet the challenges imposed by what many perceive to be the opaque boundaries of the law on re-use of works protected by copyright.

Creative Commons

6.51 Perhaps the best known of these is Creative Commons (CC). Its aim is to offer a range of licences that can be used by authors and artists. Started in the United States, it has now become international. Creative Commons was inspired originally by the 'open source' movement which began in connection with computer software and was conceived in opposition to the existence of copyright in such material. The credo was that software should be made available in such a way that others might use and build upon it, especially in developing new software, as this was the best way to facilitate further such innovation. This does not necessarily mean that the software must be made available free of charge, but rather that copyright should not be used to block further development of what already exists. However, in order to grant an effective licence removing any restrictions of use, or granting wide use, copyright must subsist.[152] There is a certain irony in the fact that copyleft needs copyright in order to function.

6.52 Creative Commons offers a suite of standardised permissive irrevocable licences under which users are given advance permission for various uses of the work (eg to copy and distribute the work), as long as due credit is given to the original work. The starting point is that some or more uses are permitted in all the types of CC licences, whereas the underpinning assumption of traditional licences is that no use is allowed unless expressly permitted. Since CC licences enable authors (or other right holders) to select which rights they wish to reserve and which they wish to offer, it is argued, to be an appropriate way to support and encourage creativity in the online environment[153] While other licensing schemes have been trialled or were established in response to the complexities which arise when licensing digital content online,[154] the CC licence scheme is undoubtedly the largest and the one that has outlasted the others.

Six different licences are available:[155]

p. 232 ↵

i. CC BY Attribution: lets others distribute, remix, tweak, and build upon the work, including for commercial purposes, as long as the author is attributed.

ii. CC BY-SA Attribution—ShareAlike: lets others remix, tweak, and build upon a work, including for commercial purposes, as long as the author is attributed and the new creation is licensed under identical terms.

iii. CC BY-ND Attribution-NoDerivs: allows for commercial and non-commercial redistribution as long as the author is attributed and the work is passed on unchanged.

iv. CC BY-NC Attribution-NonCommercial: lets others remix, tweak, and build on the work for non-commercial purposes, as long as the author is attributed.

v. CC BY-NC-SA Attribution-NonCommercial-ShareAlike: lets others remix, tweak, and build on for non-commercial purposes as long as the author is attributed and the new work is licensed on identical terms.

vi.

CC BY-NC-ND Attribution-NonCommercial-NoDerivs: allows download and unchanged non-commercial sharing of the work as long as attributed.

Exercise

Go to the Creative Commons webpage and have a browse around it. How many works licensed under a CC licence do you think are available today? Can you find cases where the courts have upheld the licence or addressed an aspect of the licence?

Key points on copyright licensing

- Collective licensing is a notable feature in copyright exploitation.
- Collecting societies are subject to regulatory oversight.
- Compulsory licences may be granted in respect of copyright in only very limited circumstances laid down in the Berne and Rome Conventions.
- The UK has a statutory licensing scheme for orphan works.
- Several licensing schemes have emerged in recent years to facilitate individual licensing of digital works protected by copyright, the most well known of which is Creative Commons.

Technical protection measures and rights management information systems

6.53 In the process of exploiting copyright works, producers and exploiters of digital works may wish to deploy digital rights management systems to restrict unauthorised access to and use of the works. Digital rights management systems (DRMs)—the generic term for collectively referring to technical protection measures (TPMs) and rights management information systems (RMIs) together—allows right holders to do so, and were of critical importance to the creation of markets using the new forms of distribution made possible by the internet and digitisation. Therefore, DRMs themselves received specific legal protection at both the international and EU level.

p. 233

Historical background

6.54 The Software Directive 1991 provided that there should be appropriate remedies in national legislation against a person putting into circulation, or possessing for commercial purposes, any means the sole intended purpose of which was to facilitate the unauthorised removal or circumvention of any technical device applied to protect a computer program.[156] The aim of this legislation was to support the pragmatic answer to the problems of protecting electronic or digital works deployed to ensure that users and consumers paid for their access and use. That answer had been provided by the technology itself: products could be locked behind technological barriers (or 'walls' or 'fences'), for example, encryption, passwords, activation codes, and so on, requiring payment and/or authorisation by electronic means before they could be opened up or set aside. Other examples operate through interaction between software and hardware: the former is encrypted and will only operate if the latter contains a device or key with which decryption is possible. Such devices protecting against unauthorised access are commonly known as *technical protection measures* (TPMs).[157]

6.55 The New York case of *Universal Studios Inc v Corley* provides an explanation of one well-known such TPM, the 'content scramble system' (CSS) protecting DVDs:[158]

> CSS is an encryption scheme that employs an algorithm configured by a set of 'keys' to encrypt a DVD's contents. The algorithm is a type of mathematical formula for transforming the contents of the movie file into gibberish; the 'keys' are in actuality strings of 0's and 1's that serve as values for the mathematical formula. Decryption in the case of CSS requires a set of 'player keys' contained in compliant DVD players, as well as an understanding of the CSS encryption algorithm. Without the player keys and the algorithm, a DVD player cannot access the contents of a DVD. With the player keys and the algorithm, a DVD player can display the movie on a television or a computer screen, but does not give a viewer the ability to use the copy function of the computer to copy the movie or to manipulate the digital content of the DVD.

From 1989, making and supplying devices to enable such TPMs to be evaded was made equivalent to infringement of copyright itself and, in the UK, also invited criminal penalties. In the early days, the primary kind of protected work was the computer program; but databases, CDs, commercial websites on the internet, and DVDs quickly joined the ranks of works technologically protected against unauthorised copying.

6.56 The WCT 1996 and the InfoSoc Directive 2001 contained further provisions designed to support and strengthen the rules against circumvention devices and their use, and also extended protection to 'electronic rights management information systems' (RMIs). The latter are electronic tags or fingerprints included in copies of digital products, enabling them to be traced and identified electronically wherever they may be in use, lawfully or otherwise. The systems typically identify the software, the copyright owner, and the rights held by that party and the users of the work, respectively. The information in the system may well often appear on the computer screen when the work is installed or run. Such systems are of particular importance in the internet context, through which most tracing and identification activity is likely to be conducted.[159] As a result of the InfoSoc Directive, UK law on the protection of DRMs was substantially amended and added to, and it is to the present position that we now turn.

p. 234

Question

Explain the difference between technological protection measures and electronic rights management systems.

Law in the UK

6.57 There are specific provisions for TPMs in relation to computer programs.[160] Any technical device applied to a computer program that is intended to prevent or restrict acts unauthorised by the copyright owner *and* restricted by copyright is protected. Making, dealing in, or possessing for commercial purposes a circumvention device while knowing or having reason to believe that it will be used to make infringing copies makes the person in question liable as an infringer of copyright in his own right.

6.58 The rules for TPMs are similar in respect of copyright works that are not computer programs (eg broadcasts, databases, sound recording CDs, film DVDs, websites), but wider in scope.[161] Here there is a provision that the person who circumvents an effective technological measure, knowing or having reasonable grounds to know that he is pursuing that objective, is to be treated as a copyright infringer.[162] So now we are dealing with actual circumvention, and not just the manufacture of, dealing in, or commercial possession of a circumvention device. The rules apply to protect not just technical devices, but any effective technological measures applied to the work. This covers any technology, device, or component designed in the normal course of its operation to protect a copyright work, that is, to prevent or restrict acts unauthorised by the copyright owner *and* restricted by copyright.[163] These measures are 'effective' if use of the work within the scope of the acts restricted by copyright is controlled by the copyright owner through either (1) an *access control* or protection process such as encryption, scrambling, or other transformation of the work; *or* (2) a *copy control* mechanism.[164]

Question

What are the differences between the protection of technical protection measures for computer programs and the protection of those for other kinds of copyright work?

6.59 In *Nintendo Co Ltd v Playables Ltd and Another*,[165] Floyd J held that both section 296 and section 296ZD were infringed by the defendants who imported and sold mod-chips which allowed users to play pirated games on Nintendo's consoles. Technical devices had been applied to the copyright computer programs in the games console and game cards and the sole purpose of mod-chips was to circumvent them. On the

question of knowledge, the Court held that since it was well known that mod-chips were used for piracy and given the minor proportion of the market represented by lawful use and the large numbers sold, the defendants did not have a realistic prospect of asserting lack of knowledge of unlawful uses.

Technical protection systems being developed by the entertainment industries include ones built into the hardware used to access and copy digital works, such as DVD players and games consoles. For instance, an encryption code in the work that prohibits access is more effective if the work has to be run through a chip embedded in a computer which decrypts the work, rather than simply relying on the code itself. Are systems so constructed in the hardware subject to the protection for 'effective technological measures'? ↵ What falls within the concept of an effective technological measure? Are there any limitations to the scope of protection offered?[166]

p. 235

■ *Sony v Ball* [2005] FSR 9

This was another case about the territorially based protection of Sony's *PlayStation 2*. B produced mod-chips to fit the console and trick it into believing that unauthorised or foreign DVDs being played had the necessary embedded code. It was held that summary judgment could be granted to prevent sales of B's chips in the UK (but not elsewhere). It did not matter that Sony's protection system was partly in the hardware (the console) and only partly in the software (the games DVD).[167]

■ C-355/12 *Nintendo Co Ltd v PC Box Srl* [2014] ECDR 6 (ECJ)

This reference to the ECJ by the Milan District Court concerned Nintendo games and consoles, which were manufactured such that they had to recognise each other in order for the game to work. The aim was to ensure that only games produced under a licence by Nintendo could be played. P manufactured devices which would allow other games, not produced or authorised by Nintendo, to be played on the console. The ECJ found that Article 6 of InfoSoc Directive 2001 required a member state to provide adequate legal protection against circumvention of any 'effective technological measure' which must be understood to include a protection system that was incorporated both in the hardware (the console) as well as the DVD (housing the copyright protected video game itself, see para 3.16) where the aim of the required interaction between the two was to prevent or to limit acts adversely affecting rights of the copyright holder. The Court also confirmed that legal protection is granted 'only with regard to technological measures which pursue the objective of preventing or eliminating, as regards works, acts not authorised by the rightholder of copyright referred' and 'those measures must be suitable for achieving that objective and must not go beyond what is necessary for this purpose' (para 31). This makes it necessary to examine whether other measures could have caused less interference with the activities of third parties, while still providing comparable protection to the right holder's rights (para 31). It is for the national court to determine this. In doing so, it is relevant to take account

of: the relative costs of different types of technical measures; their technological and practical aspects; their effectiveness in protecting right holders, although the effectiveness doesn't have to be absolute; and, the purpose of circumvention devices. Evidence of actual use of circumvention devices will be relevant, in particular, how often they are in fact used to disregard copyright and how often they are used for non-infringing purposes.

Rights management information systems

6.60 The approach to the protection of rights management systems is likewise to make it akin to infringement of copyright knowingly and without authority to remove or alter digital rights management information associated with a copy of a copyright work or which appears in connection with a communication of the work to the public.[168] Also caught is the person who knowingly and without authority distributes, imports for distribution, or communicates to the public copies of a copyright work from which the RMI has been removed or altered.[169] In both cases the person so acting must know, or have reason to believe, that the action induces, enables, facilitates, or conceals an infringement of copyright.

p. 236

Persons enjoying the anti-circumvention rights

6.61 The people who can sue under any of the anti-circumvention rights are:

- those who have issued copies of the protected work, or communicated it, to the public;
- the copyright owner or his exclusive licensee.[170]

In addition, with regard to devices protecting computer programs, the owner/exclusive licensee of any intellectual property right in the protection device itself may take action.[171]

Dealing in apparatus for unauthorised reception of transmissions

6.62 A person who makes charges for the reception of broadcasts provided from a place in the UK, or who sends encrypted transmissions of any other description from a place in the UK, has the same rights and remedies as a copyright owner in respect of infringement against a person dealing in any apparatus or device designed or adapted to enable or assist persons to receive the programmes or other transmissions when they are not entitled to do so, or publishing information calculated so as to enable or assist them.[172] The provisions may also be applied in relation to services provided from outside the UK.[173] There are criminal law sanctions against manufacturing, dealing in or with, or installing, maintaining, or replacing unauthorised decoders (counterfeit or stolen viewing cards, or illicit devices); punishments include imprisonment and/or fines.[174]

Controlling TPMs and RMIs

6.63 Arguably TPMs are also capable of preventing use permitted under the copyright exceptions (Chapter 5) and, indeed, when a work has fallen out of copyright altogether (eg at the expiry of its term) or when the work never had copyright. Yet copyright law gives protection to TPMs, which makes their circumvention illegal as long as the protected work is made available by way of contractual terms. Thus, technology has the potential to create protection akin to copyright for works which have never had, or have ceased to have, copyright, as well as to extend protection beyond the scope of copyright where that exists.[175] Consequently, TPMs can set up a world in which right holders and would-be users *contract* for the use of the copyright work, raising complex questions about the interrelationship between exceptions to copyright, TPMs, and contract rights.

6.64 The InfoSoc Directive, in the fourth paragraph of Article 6(4), appears to give pre-eminence to contractual terms over copyright exceptions, where works are made available in such a way that they may be accessed from places and at times individually chosen by users. This reinforces the position of the right holder barring access in order to create an opportunity to establish a contractual nexus under which the user pays for his use; and it is really only against the right holder who wishes to deny access in order to be paid for the privilege that exceptions and limitations giving access regardless of the right holder's wishes are of any significance. Concerns that the legal protection of TPMs had the potential to deprive copyright exceptions of their content and value are also addressed in Article 6(4) of the Directive by a provision which requires member states to take:

> appropriate measures to ensure that right-holders make available to the beneficiary of an exception or limitation provided for in national law [in accordance with the Directive] the means of benefiting from that exception or ↵ limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

p. 237

The UK implemented Article 6(4) in the following rather complex fashion.[176] Where the application of any effective technological measure to a copyright work other than a computer program prevents a person from carrying out a permitted act in relation to that work, then that person (or a person who is a representative of a class of persons prevented from carrying out a permitted act) may complain to the Secretary of State (ie the relevant government minister). The Secretary of State may thereupon issue written directions to the copyright holder, with which the latter must comply. The complainant must be someone who has lawful access to the protected copyright work. This provision only applies to certain (and not all) permitted acts.[177] It includes, for example, research and private study, as well as making a copy available for a disabled person. It is noteworthy, however, that it does not apply to criticism, review, and news reporting, despite the particular importance which the courts have attributed to these exceptions in the interests of freedom of speech and expression (see Chapter 5).[178] None of this is applicable, however, where the copyright work in question has been 'made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them'.[179] So, for example, there

can be no complaint about TPMs and RMIs attached to music files downloaded from the iTunes service.[180] This would seem to suggest that the only complaint likely to be successful is one where access is completely blocked.

Question 1

Who may apply to the Secretary of State that the application of a TPM is preventing the exercise of an exception to copyright?

Question 2

What kinds of order may the Secretary of State make?

Question 3

What must be shown before the Secretary of State will issue an order?

Key points on TPM and RMI protection

- During exploitation of copyright works, TPMs and RMIs, generically known as digital rights management (DRM) systems, enable right owners to prevent unauthorised access to and use of them.
- TPMs are any technological means within a copyright product designed to prevent acts restricted by copyright unless the authorisation of the copyright owner is obtained, usually by electronic means provided within the system.
- p. 238 ↵ RMIs are electronic systems built into digital products which record information about the identity and use of the product, thus enabling their tracing and the pursuit of unauthorised uses.
- Copyright legislation prohibits circumvention of TPMs and removal or alteration of RMIs, treating these as infringements of copyright if carried out with knowledge, or reasonable grounds to know. The law is more limited with regard to computer programs.
- The legislation also treats as a form of infringement manufacturing or dealing in devices designed to circumvent TPMs or in products whose RMIs have been removed or altered.

- Concerns arise about the scope of TPMs, especially when they can prevent use permitted under copyright exceptions.

Further reading

Books

General

L Bently, B Sherman, D Gangjee, and P Johnson, *Intellectual Property Law* (6th edn, 2022), Chs 10–13

N Caddick, G Harbottle, and U Suthersanen (eds), *Copinger & Skone James on Copyright* (18th edn, 2021), Chs 11, 15, 20, 26, and 27

Moral rights

E Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (2006)

FW Grosheide, 'Moral rights' in E Derclaye (ed), *Research Handbook on the Future of EU Copyright* (2009), Ch 10

S Kheria, 'An exploration of the dissonance between protection of moral rights in the UK and creative practitioners' perspectives' in A Favreau (ed), *La propriété intellectuelle en dehors de ses frontiers* (2019)

MT Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (2011)

Artist's resale right

S Stokes, *Artist's Resale Right (Droit de suite): UK Law and Practice* (3rd edn, 2017)

Exploitation of copyright

L Guibault, 'Relationship between copyright and contract law' in E Derclaye (ed), *Research Handbook on the Future of EU Copyright* (2009), Ch 20

L Guibault and C Angelopoulos, *Open Content Licensing: From Theory to Practice* (2011)

Technological protection measures and rights management information

P Akester, *A Practical Guide to Digital Copyright* (2008), Ch 6

Articles and reports

Exploitation of copyright

S Dusollier, 'EU Contractual Protection of Creators: Blind Spots and Shortcomings' (2018) 41 (3) Colum JL & Arts 435

European Parliament Legal and Parliamentary Affairs Committee Study, 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive' (2017)

European Parliament Legal Affairs Committee Study, 'Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States' (2014)

p. 239 ↵ D Gervais, 'The cultural role(s) of collective management organizations' [2018] EIPR 349

M Kretschmer, 'Copyright and Contract Law: Regulating Creator Contracts: The State of the Art and a Research Agenda' (2010) 18(1) J Intell Prop L 141

N Scharf, 'Creative Commons-ense? An analysis of tensions between copyright law and Creative Commons' 12(5) [2017] Journal of Intellectual Property Law & Practice 376

Orphan works

A Ross, 'Orphan works—the law's in place; now here's the process' [2015] Ent LR 40

Technical protection measures and rights management information systems

P Akester, 'The new challenges of striking the right balance between copyright protection and access to knowledge, information and culture' [2010] EIPR 372

P and R Akester, 'Digital rights management in the 21st century' [2006] EIPR 159

M Favale, 'Death and resurrection of copyright between law and technology' 23 (2014) Information & Communications Technology Law 117

Websites

Intellectual Property Office, Guidance on orphan works: www.gov.uk/guidance/copyright-orphan-works *<http://www.gov.uk/guidance/copyright-orphan-works>*

Notes

[1] See in general E Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (2006), Chs 5–7.

[2] Note also the International Covenant on Economic, Social and Cultural Rights 1966, Art 15(1): 'the States Parties to the present covenant recognize the right of everyone … to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.

[3] See E Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (2006), Chs 13, 14.

[4] See InfoSoc Directive 2001, recital 19. See also the Database Directive 1996, recital 28: 'whereas the moral rights of the natural person who created the database belong to the author and should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works; whereas such moral rights remain outside the scope of this Directive'.

[5] Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related right SEC(2004) 995, 16.

[6] ibid.

[7] CDPA 1988, s 84.

[8] CDPA 1988, s 85.

[9] CDPA 1988, s 86(1).

[10] For example, France (E Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (2006), Ch 8); cf Germany (Ch9). Compare Canada, the United States, and Australia, also discussed in ibid, Chs 12, 16, 18.

[11] CDPA 1988, s 94.

[12] CDPA 1988, s 87(2)–(4).

[13] CDPA 1988, s 87(1).

[14] CDPA 1988, s 103. Note that an injunction may prohibit the doing of any act infringing the right of integrity unless a disclaimer is made dissociating the author or director from the treatment of the work (s 103(2)). For a discussion on measuring damages for breach of moral rights, see *Walmsley v Education* 2014 WL2194626 at 13.

[15] CDPA 1988, s 77(2)–(7).

[16] CDPA 1988, s 89(1).

[17] CDPA 1988, s 78(1).

[18] CDPA 1988, s 78(2).

[19] Berne Convention 1886, Art 5(2).

[20] CDPA 1988, s 78(5).

[21] CDPA 1988, s 78(3)(a) and (4)(c).

[22] CDPA 1988, s 78(3)(b).

[23] CDPA 1988, s 78(4)(d).

[24] CDPA 1988, s 79(2).

[25] CDPA 1988, s 79(3). See *Front Door (UK) Ltd (t/a Richard Reid Associates) v Lower Mill Estate Ltd* [2021] EWHC 2324.

[26] CDPA 1988, s 79(4), (4A), (5).

[27] CDPA 1988, s 79(7).

[28] CDPA 1988, s 79(6).

[29] CDPA 1988, s 89(2).

[30] CDPA 1988, s 80(2).

[31] *Pasterfield v Denham* [1999] FSR 168; *Confetti Records v Warner Music UK Ltd* [2003] EMLR 35.

[32] CDPA 1988, s 80(2)(a).

[33] CDPA 1988, s 80(1).

[34] CDPA 1988, s 83.

[35] S Kheria, 'An exploration of the dissonance between protection of moral rights in the UK and creative practitioners' perspectives' in A Favreau (ed), *La propriété intellectuelle en dehors de ses frontiers* (2019), 175.

[36] *Huston v Turner Entertainment Inc* (1992) 23 IIC 702.

[37] *Snow v Eaton Centre Ltd* (1982) 70 CPR (2d) 105 (Ont).

[38] See generally CDPA 1988, ss 81 and 82, and para 6.11.

[39] CDPA 1988, s 81(2). But there is a right of integrity in a typeface.

[40] CDPA 1988, s 81(4).

[41] CDPA 1988, s 82.

[42] CDPA 1988, s 81(3).

[43] CDPA 1988, ss 57 and 66A; also see paras 3.103–3.104 and 3.119.

[44] CDPA 1988, s 81(5).

[45] CDPA 1988, s 81(6)(a), (b).

[46] CDPA 1988, s 81(6)(c). There is no specific exemption for commercial broadcasters, which will therefore have to rely on the general exemption in respect of avoiding the commission of offences or breach of a statutory duty (see note 45).

[47] cf *Frisby v British Broadcasting Corporation* [1967] Ch 932, where a similar complaint was dealt with as a matter of interpreting the author's contract.

[48] The example is drawn from the well-known French case of *Eden v Whistler DP* 1900, I 497, where the famous artist was allowed to refuse to deliver a portrait to its commissioner, despite previously exhibiting it himself. The permission was conditional on Whistler repaying his fee and undertaking not to exhibit the painting again. On honour, see E Adeney, 'The moral right of integrity: the past and future of "honour"' [2005] IPQ 111.

[49] CDPA 1988, s 175(2).

[50] CDPA 1988, s 84.

[51] CDPA 1988, s 84(3)–(7).

[52] CDPA 1988, s 89(2).

[53] CDPA 1988, s 86(2).

[54] See also on the passing-off aspects of this case in Chapter 16.

[55] CDPA 1988, s 85(1).

[56] CDPA 1988, s 89(1).

[57] See also *McCosh v Crow & Co* (1903) 5 F 670 and *Pollard v Photographic Co* (1889) 40 Ch D 345; *Carina Trimingham v Associated Newspapers* [2012] EWHC 1296 (QB).

[58] CDPA 1988, s 85(2).

[59] Empirical research suggests a dissonance between the legal framework in the UK and reality of everyday creative practices, in that authors and artists place significant importance on the moral rights of paternity and integrity, inter alia for reasons such as respect and personal reward, as well as maintenance of artistic reputation. See S Kheria, 'An exploration of the dissonance between protection of moral rights in the UK and creative practitioners' perspectives' in A Favreau (ed), *La propriété intellectuelle en dehors de ses frontiers* (2019).

[60] For example, the CC BY licence (4.0 International) requires authors to agree to waive and/or agree not to assert the integrity right, to the extent necessary to exercise the licensed rights, eg adaptation. Although this facilitates adaptation when it might otherwise infringe the integrity right, it can also be seen as a curtailment of authors' moral rights.

[61] EC Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art (Resale Right Directive 2001).

[62] Resale Right Directive 2001 was implemented by the Artist's Resale Right Regulations 2006 (SI 2006/346), amended by Artist's Resale Right (Amendment) Regulations 2009 (SI 2009/2792) and 2011 (SI 2011/2873). See generally S Stokes, 'Droit de suite: an artistic stroke of genius? A critical exploration of the European Directive and its resultant effects' [2012] EIPR 305.

[63] References to EEA in Artist's Resale Right Regulations 2006 have been removed and replaced by the UK as a result of Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019, reg 29.

[64] 'Nationals of the UK and other countries that provide reciprocal treatment for UK nationals (including EU member states) will continue to receive resale rights in the UK and those countries. This is in accordance with the Berne Convention and provisions in the UK/EU TCA.' UK government, Guidance on 'Protecting Copyright in the UK and EU' (30 January 2020) available at https://www.gov.uk/guidance/protecting-copyright-in-the-uk-and-eu#artists-resale-right *<https://www.gov.uk/guidance/protecting-copyright-in-the-uk-and-eu#artists-resale-right>*

[65] Artist's Resale Right Regulations 2006, regs 3(1) and 4. A sale is a transfer of ownership of the work from seller to buyer under a contract in exchange for a money consideration called the price (Sale of Goods Act 1979, s 2 and reg 2 (definition of 'sale')). The author is the person who creates the work (reg 2, definition of 'author'). For a presumption that the author is the person whose name appears on the work as such, see reg 6. For requirements as to nationality of author, see reg 10.

[66] Artist's Resale Right Regulations 2006, reg 3(2).

[67] Resale Right Directive 2001, recital 17.

[68] Artist's Resale Right Regulations 2006, reg 7(1). Any charge on a resale right is void (reg 7(2)).

[69] Artist's Resale Right Regulations 2006, reg 8(1).

[70] Artist's Resale Right Regulations 2006, reg 8(2). Note, however, the provisions for cases of joint authorship, where resale right is owned in common unless otherwise agreed in writing (reg 5).

[71] Artist's Resale Right Regulations 2006, reg 9. The person into whose hands the right is transmitted may likewise transmit it. The ECJ, in Case C-518/08 *Fundacion Gala-Salvador Dali v ADAGP* [2010] ECDR 13, ruled that national law provisions reserving the benefit of the right to artist's heirs at law alone, to the exclusion of testamentary legatees, is not precluded by the Directive.

[72] Artist's Resale Right Regulations 2006, reg 7(3)–(5).

[73] Artist's Resale Right Regulations 2006, reg 14(1).

[74] Artist's Resale Right Regulations 2006, reg 14(3).

[75] See the DACS website at www.dacs.org.uk <*http://www.dacs.org.uk*>.

[76] Artist's Resale Right Regulations 2006, reg 14(2).

[77] Artist's Resale Right Regulations 2006, reg 14(5)(b).

[78] Artist's Resale Right Regulations 2006, reg 3(3).

[79] Artist's Resale Right Regulations 2006, reg 3(4).

[80] Artist's Resale Right Regulations 2006, sch 1.

[81] Artist's Resale Right Regulations 2006, reg 12(2), (3).

[82] Artist's Resale Right Regulations 2006, reg 13(1), (2). See also Case C-41/14 *Christie's France SNC v Syndicat national des antiquaries* [2015] ECDR14 on who can bear the cost of resale royalty.

[83] Artist's Resale Right Regulations 2006, reg 13(1).

[84] Artist's Resale Right Regulations 2006, reg 13(3). The liable person may withhold payment until evidence of entitlement to be paid the royalty is produced (reg 13(3)).

[85] Artist's Resale Right Regulations 2006, reg 4(1).

[86] Artist's Resale Right Regulations 2006, reg 4(2).

[87] Artist's Resale Right Regulations 2006, reg 12(1).

[88] Artist's Resale Right Regulations 2006, reg 3(5).

[89] Artist's Resale Right Regulations 2006, reg 12(4).

[90] Artist's Resale Right Regulations 2006, reg 16(1).

[91] Artist's Resale Right Regulations 2006, reg 16(2).

[92] Artist's Resale Right Regulations 2006, reg 17.

[93] Resale Right Directive 2001, recital 3.

[94] For a discussion of the impact of the resale right in the UK, see S Blakeney, 'The great debate—using artistic licence to resist the artist's resale right' [2011] Ent LR 22; S Stokes, 'Artist's resale right—good intentions, bad law' [2013] Ent LR 35.

[95] J Merryman, 'The proposed generalization of the droit de suite in the European Communities' [1997] IPQ 16.

[96] DACS, 'Ten years of the Artist's Resale Right: Giving artists their fair share' (2016) 2 and 8, at www.dacs.org.uk/DACSO/media/DACSDocs/reports-and-submissions/Ten-Years-of-the-Artist-s-Resale-Right-Giving-artists-their-fair-share-DACS-Feb-16.pdf <http://www.dacs.org.uk/DACSO/media/DACSDocs/reports-and-submissions/Ten-Years-of-the-Artist-s-Resale-Right-Giving-artists-their-fair-share-DACS-Feb-16.pdf>.

[97] CDPA 1988, s 1(1). Contrast ss 94–95, whereby moral rights cannot be assigned but are transmissible on death.

[98] S Kheria, 'Visual arts: artists' voices from the field' in A Brown and C Waelde (eds), *Research Handbook on Intellectual Property and Creative Industries* (2018).

[99] CDPA 1988, ss 90(1), 92. See also s 93 for copyright to pass under a will in case of an unpublished work.

[100] CDPA 1988, Chapters V, VII, and VIII.

[101] CDPA 1988, s 90(2).

[102] CDPA 1988, s 91(1) and (2). See also *PRS v B4U Network* [2014] FSR 17 (CA).

[103] CDPA 1988, ss 90(3), 91(1). This provision refers to legal ownership of copyright and does not affect equitable ownership. See *Sprint Electric Ltd v Buyer's Dream Ltd* [2018] EWHC 1924 (Ch).

[104] CDPA 1988, s 178.

[105] *Penhallurick v MD5 Limited* [2021] EWCA Civ 1770 at para 28.

[106] Although there could be an equitable assignment; see, eg, *Fresh Trading v Deepend Fresh Recovery* [2015] EWHC 52 (Ch).

[107] CDPA 1988, s 173(2).

[108] CDPA 1988, s 92(1).

[109] Whether such exploitation of copyright *in fact* leads to financial return for authors and benefits them is a separate issue, for an exploration of which see S Kheria, 'Copyright in the everyday practice of writers' in J Jefferies and S Kember (eds), *Whose Book Is It Anyway? A View from Elsewhere on Publishing, Copyright and Creativity* (2019).

[110] *Fisher v Brooker and another* [2009] UKHL 41 at para 50.

[111] ibid, paras 57 and 58.

[112] For a recent summary of relevant principles, see *Mei Fields Designs Ltd v Saffron Cards and Gifts Ltd* [2018] EWHC 1332 (IPEC) at para 83.

[113] [2008] EWHC 757 (Ch).

[114] [1966] Ch 71.

[115] [1929] AC 151.

[116] *JHP Ltd v BBC Worldwide Ltd* [2008] EWHC 757 (Ch) at para 14. In *Crosstown Music Co 1 LLC v Rive Droite Music Ltd* [2010] EWCA Civ 1222, it was held that a provision in an assignment of copyright allowing automatic reversion of the rights to the assignor on a future event, was a valid partial assignment within the CDPA 1988, s 90(2).

[117] These rules also do not derive from EU law so will be unaffected by Brexit.

[118] [1974] 1 WLR 1308. See also *Elton John v James* (1983) [1991] FSR 397.

[119] [1974] 1 WLR 1308 at 1313–14. For another example of restraint of trade, see *Proactive Sports Management Ltd v Rooney* [2011] EWCA Civ 1444, which concerned footballer Wayne Rooney and a contract dealing with exploitation of his image rights.

[120] *Panayiotou and Others v Sony Music Entertainment* [1994] EMLR 229.

[121] [1985] QB 428.

[122] The doctrines of restraint of trade and undue influence may be subject to acquiescence: *Zang Tumb Tuum Records Ltd v Johnson* [1993] EMLR 61.

[123] Writers' Guild www.writersguild.org.uk *<http://www.writersguild.org.uk>*.

[124] Equity www.equity.org.uk *<http://www.equity.org.uk>*.

[125] CDPA 1988, ss 93A and 93B. Relevant authors pertaining to a sound recording or film are set out in s 93B(1). Although the right was introduced as a result of EU harmonisation, it has been preserved despite Brexit.

[126] The only other statutory mechanism through which an author has an entitlement to benefit from the exploitation of her work is under the resale right (para 6.22).

[127] Musical performers' right to equitable remuneration where a commercially published sound recording is played in public or otherwise communicated to the public (see para 7.41), and the additional protective measures (see para 7.46). Such benefits attempt to address the weak bargaining position in which performers involved in the production of sound recordings may find themselves.

[128] German Copyright Act (*Urheberrechtsgesetz*) 1965, as last amended in 2021, ss 11 and 32.

[129] Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market. See further, European Parliament Legal and Parliamentary Affairs Committee Study, 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive' (2017); Study for the European Commission, 'Remuneration of Authors and Performers for the Use of Their Works and the Fixations of Their Performances' (2015); European Parliament Legal Affairs Committee Study, 'Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States' (2014).

[130] Nor does the UK government intend to. See UK Parliament, 'Copyright: EU Action', Question for Department for Business, Energy and Industrial Strategy, 16 January 2020 available at https://questions-statements.parliament.uk/written-questions/detail/2020-01-16/4371 *<https://questions-statements.parliament.uk/written-questions/detail/2020-01-16/4371>*

[131] https://committees.parliament.uk/work/646/economics-of-music-streaming/ *<https://committees.parliament.uk/work/646/economics-of-music-streaming/>*

[132] House of Commons DCMS Committee, Economics of Music Streaming, Second Report of Session 2021–22, 511.

[133] Copyright (Rights and Remuneration of Musicians, Etc.) Bill, a private members' bill, proposing author protective measures was debated in the UK Parliament, but rejected by the UK government.

[134] See further WR Cornish, 'The author as risk-sharer' (2003) 26(1) Columbia J Law and the Arts 1.

[135] See Chapter 5.

[136] See generally D Gervais, *Collective Management of Copyright and Related Rights* (2015); see UK government guidance at www.gov.uk/guidance/licensing-bodies-and-collective-management-organisations <http://www.gov.uk/guidance/licensing-bodies-and-collective-management-organisations>.

[137] PRS uses the following methods, in order of preference, for distribution: census, sample and analogy. See www.prsformusic.com/royalties/royalty-payment-dates/prs-distribution-policy <http://www.prsformusic.com/royalties/royalty-payment-dates/prs-distribution-policy>.

[138] CDPA 1988, s 116B, and Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 (SI 2014/2588).

[139] See CDPA 1988, ss 116, 117–123. For example, in *BPI v MCPS* [2008] EMLR 5, the Copyright Tribunal confirmed that songwriters, composers, and publishers should receive 8 per cent of gross revenues from online music service providers for on-demand services including downloads and subscription streaming services, 6.5 per cent of revenues for interactive webcasting services, and 5.75 per cent for non-interactive webcasting.

[140] See *In Respect of the Appeal of Phonographic Performance Ltd v The Appeal of the British Hospitality Association and Other Interested Parties* [2008] EWHC 2715 (Ch); also *CSC Media Group Ltd v Video Performance Ltd* [2011] EWCA Civ 650 (CA); *PPL v British Hospitality Association* [2010] EWHC 209 (Ch); CT 127/14 *ITV Network Ltd v Performing Right Society Ltd* [2016] 6 WLUK 631 affirmed in [2017] EWHC 234 (Ch). On licenses for foreign copyrights, see *BBC v MCPS* [2018] EWHC 2931.

[141] CDPA 1988, s 144.

[142] SI 2016/221.

[143] Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, recital 9.

[144] UK government, Guidance on 'Collective rights management in the EU' (30 January 2020) https://www.gov.uk/guidance/collective-rights-management-in-the-eu <https://www.gov.uk/guidance/collective-rights-management-in-the-eu>

[145] Berne Convention 1886, Arts 11*bis* (2) and 13.

[146] Rome Convention 1961, Art 12.

[147] One of the earliest investigations took the form of an inquiry by the US Copyright Office. See http://copyright.gov/orphan <http://copyright.gov/orphan>.

[148] IPO, 'Government Policy Statement: Consultation on Modernising Copyright' (July 2012), 7.

[149] R Hooper and R Lynch, 'Copyright Works: Streamlining Copyright Licensing for the Digital Age' independent report (IPO, 2012). The *Gowers Review of Intellectual Property* in 2006 had recommended that a proposal should be put to the European Commission to introduce a provision on orphan works in the form of a directive.

[150] CDPA 1988, s 116A, introduced by the Copyright and the Rights in Performances (Licensing of Orphan Works) Regulations 2014 (SI 2014/2863).

[151] See www.gov.uk/guidance/copyright-orphan-works <http://www.gov.uk/guidance/copyright-orphan-works>.

[152] See, eg, J Boyle, 'A manifesto on WIPO and the future of intellectual property' (2004) 9 Duke Law & Tech Rev 1; A Guadamuz, 'Viral contracts or unenforceable documents? Contractual validity of copyleft licenses' [2004] EIPR 331.

[153] For a critique of Creative Commons, see N Elkin-Koren, 'What contracts cannot do: the limits of private ordering in facilitating a Creative Commons' (2006) 74 Fordham L Rev 375.

[154] For example, AE ShareNet, see J Gilding and C Fripp, 'AEShareNet: Reflections on an innovative venture to move copyright licensing into the digital age' (2003) 52 The Australian Library Journal 5; or the Creative Archive, see www.bbc.co.uk/creativearchive <http://www.bbc.co.uk/creativearchive>.

[155] For full details, see http://creativecommons.org/licenses <http://creativecommons.org/licenses>.

[156] Software Directive 2009 (Software Directive 1991 was consolidated into Directive 2009/24/EC), Art 7(1)(c).

[157] See further G Davies, 'Technical devices as a solution to private copying' in IA Stamatoudi and PLC Torremans (eds), *Copyright in the New Digital Environment* (2000); 'Digital Rights Management', Report of an Inquiry by the All Party Internet Group (June 2006). For an international perspective, see P Akester, *A Practical Guide to Digital Copyright* (2008), Ch 6.

[158] 273 F 3d 429 (2nd Cir, 2001) at 436-437.

[159] See further P and R Akester, 'Digital rights management in the 21st century' [2006] EIPR 159; 'Digital Rights Management', Report of an Inquiry by the All Party Internet Group (June 2006).

[160] CDPA 1988, s 296.

[161] Section 296ZA–ZF, implementing InfoSoc Directive 2001, Art 6; s296ZA provides civil remedies while s296ZB provides criminal sanctions.

[162] CDPA 1988, s 296ZA.

[163] CDPA 1988, s 296ZF(1), (3).

[164] CDPA 1988, s 296ZF(2).

[165] [2010] FSR 36.

[166] In the context of s 296ZB, see *R v Higgs (Neil Stanley)* [2008] FSR 34 (CA); see also *R v Gilham* [2009] EWCA Crim 2293 (CA); *Nintendo Co Ltd and Another v Playables Ltd and Another* [2010] FSR 36 (Ch). See generally D Booton and A Macculloch, 'Liability for the circumvention of technological protection measures applied to videogames: lessons from the United Kingdom's experience' (2012) Journal of Business Law 165.

[167] See A Macculloch, 'Game over: the "region lock" in video games' [2005] EIPR 176.

[168] CDPA 1988, s 296ZG(1), (3).

[169] CDPA 1988, s 296ZG(2).

[170] CDPA 1988, s 296(2), 296ZA(3), and 296ZG(3), (4).

[171] CDPA 1988, s 296(2)(c).

[172] CDPA 1988, s 298(1), (2).

[173] CDPA 1988, s 299(1)(b).

[174] CDPA 1988, s 297A.

[175] N Braun, 'The interface between the protection of technological measures and the exercise of exceptions to copyright and related rights: comparing the situation in the US and the EU' [2003] EIPR 496; W Davies and K Withers, *Public Innovation: Intellectual Property in a Digital Age* (Institute of Public Policy Research, 2006), 46–48, 84–87.

[176] CDPA 1988, s 296ZE, as amended by Copyright and Related Rights (Marrakesh Treaty etc.) (Amendment) Regulations 2018.

[177] CDPA 1988, Sch 5A, Part 1, as amended by the 2014 reforms to copyright exceptions (see Chapter 5).

[178] P Akester, 'Technological Accommodation of Conflicts between Freedom of Expression and DRM: The First Empirical Assessment' (2009) at https://ssrn.com/abstract=1469412 <*https://ssrn.com/abstract=1469412*>.

[179] CDPA 1988, s 296ZE(9).

[180] Example suggested in W Davies and K Withers, *Public Innovation: Intellectual Property in a Digital Age* (Institute of Public Policy Research, 2006), 23.

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