

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

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3. Copyright 2: subject matter, first ownership, and term

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Abstract

This chapter first examines the subject matter in which copyright subsists and the criteria for copyright protection as set out in the Copyright, Designs, and Patents Act 1988 (CDPA 1988). This centres on the concept of the ‘protected work’ and makes use of a distinction between what are sometimes known as ‘author works’ (literary, dramatic, musical, artistic, and film works) and ‘media works’ (typographical arrangements, sound recordings, broadcasts, and adaptations). It then considers the identification of the first owner of copyright when it comes into existence. It discusses the concept of joint authorship and ownership of copyright works when created in the course of employment. The final section discusses the duration of copyright.

Keywords: protected work, originality, fixation, author works, media works, authorship, copyright ownership, duration of copyright, copyright protection, CDPA 1988

Introduction

Scope and overview of chapter

3.1 This chapter initially examines the subject matter in which copyright subsists and the key requirements for protection. This centres on the concept of the ‘protected work’, and makes use of a distinction between what are sometimes known as ‘author works’ (literary, dramatic, musical, artistic, and film works) and ‘media works’ (typographical arrangements, sound recordings, and broadcasts). It then considers the identification of the first owner of the copyright when it comes into existence. Normally this is the author of the work, subject to certain exceptions, but this concept is not so easily applied to media works. This involves

further analysis of the legal notion of authorship and how it helps establish first ownership of copyright, and of the difference between ‘author’ and ‘media’ copyright works. Copyright is generally a right of limited duration, however, and the final section of the chapter expounds the various periods of time for which it lasts.

3.2 Learning objectives

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

- the subject matter that copyright protects, and the different categories of work used by the law;
- who is the first owner of copyright in a protected work (usually the author or equivalent);
- how long the protection of copyright lasts in relation to each of the categories of its subject matter.

3.3 Copyright is a form of property which comes into existence with the creation of its subject matter (no registration process is required, unlike patents, trade marks, or designs), so it is important to consider in detail the subsistence of copyright and the subject matter which the law protects. There are some important rules to identify the first owner of the right thus created. This is usually the author with author works, and an equivalent in the case of media works. Finally, copyright protection lasts for a specified period of time, the duration varying according to the subject matter protected. In sum, the chapter explains the subject matter of copyright protection, who is the first to benefit from the protection of copyright, and for how long the protection lasts. So, the rest of the chapter looks like this:

- Subject matter (3.4–3.46)
- Author works (3.47–3.78)
- ↵ Media works (3.79–3.85)
- First ownership (3.86–3.114)
- Duration of copyright (3.115–3.132).

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Subject matter

3.4 At the international level, the Berne Convention provides protection for literary and artistic works (requiring member states to provide protection for every production in the literary, scientific, and artistic domain—see para 2.8). The Rome Convention as supplemented in 1996 provides protection for sound recordings and broadcasts (para 2.9), and the World Intellectual Property Organization Copyright Treaty (WCT) includes computer programs and databases (see para 2.11).

3.5 Under the Copyright, Designs and Patents Act (CDPA) 1988, as now several times amended, the following eight categories of subject matter are protected by copyright:¹

- original literary, dramatic, musical, and artistic works (literary work including computer programs, databases, and compilations other than databases);
- films;
- sound recordings;
- broadcasts;
- the typographical arrangement of published editions of literary, dramatic, or musical works.

For any such subject matter to be protected under the CDPA 1988, the qualification requirements set out in the Act must also be met in that either the author of the work is a qualifying person or the first publication or broadcast of the work is in a qualifying country.²

3.6 The UK's withdrawal from the EU has had limited effect on the Act in relation to the rules on subsistence of copyright protection, the scope of protectable subject matter, and the rules on authorship and ownership. While minor amendments have taken place on qualification for copyright protection,³ reciprocal protection in the area will continue under the terms of relevant international treaties (eg Berne Convention, TRIPS, WCT) as both the UK and EEA countries are party to them (para 2.21). Although the current UK rules in relation to certain subject matter are framed in light of EU directives (Database Directive, Software Directive) and ECJ jurisprudence (eg author's intellectual creation standard for originality), the implementation of such directives is preserved as 'retained EU law'.

Protectable subject matter: UK and EU Law

3.7 In order for copyright to subsist under the CDPA 1988 there are some key requirements for protection. The starting point in assessing whether a subject matter can be protected by copyright is to ask if it qualifies as a 'work'. There must be a 'work' in the sense that copyright protects expressions and not ideas. The Act then requires work to be of a relevant kind, that is it fits into one of the above categories. Requirements specific to the relevant category of work must then also be met, for example, literary, dramatic, and musical works must be recorded in writing or otherwise; and, literary, dramatic, musical, and artistic works must be original. A number of general points in this regard follow, before turning to the detailed law of each category of work.

p. 54 ↩ **3.8** The EU directives also use the notion of a 'work' but the concept had not been harmonised until recently. In *Levola Hengelo BV v Smilde Foods BV*, the ECJ held that it is an autonomous concept that must be interpreted uniformly through the EU, and that for a subject matter to qualify for copyright protection, two cumulative conditions must be met: first, the subject matter must be *original* in the sense that it is the author's own intellectual creation; and second, only something which is the *expression* of the author's own intellectual creation may be classified as a 'work' (emphasis added).⁴ This open ended definition of a work, in that protectable subject matter need only fulfil these two conditions, is contrary to the closed list of categories of works in the 1988 Act. The ECJ, in a series of judgments since 2009, has also elaborated on what originality in the sense of the author's own intellectual creation means. This has also been somewhat at odds with the

originality standard developed through previous UK case law. These points of contention will be noted below, although the full impact of such ECJ jurisprudence in the UK remains enigmatic. As such, previous British case law, as relevant, will also be referred to.

Products may have more than one copyright

3.9 A very important point is that any product in the domain of the subject matter listed earlier (para 3.5) is quite likely to have more than one copyright in it. Thus, a book will have copyright as a literary work, but there will also be a copyright in its typographical arrangement, as would also be the case with printed dramatic scripts and musical scores. A database has copyright in the selection and arrangement of its contents,⁵ but this does not affect any copyright those items of content may have in their own right. A sound recording of a piece of music will involve subsistence of copyright, not only in the sound recording as such, but also, separately, one in the music. And if the work recorded is a song, there will be a further copyright in the song lyrics.⁶ A broadcast of a film or sound recording will have copyright as a broadcast, but this will leave unaffected the respective copyright in the film or sound recording. While the sound track accompanying a film is treated as part of the film for copyright purposes, a copyright may also subsist in the sound track as a sound recording.⁷ With the advent of digital technology, the multimedia product (eg a computer game, a film on a DVD, the BBC website), which consists of digitised material combining audio, video, text, and images still and moving played through a computer, and with which the user may interact, has become commonplace, raising difficult questions about the mixture of copyrights which such a product may have.⁸

Question

Explain what it means to say that a product may have more than one copyright, and give some examples.

Need for a work

3.10 Copyright protects works. Section 1 of the 1988 Act states the following:

(1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work—

... (2) ... “copyright work” means a work of any of those descriptions in which copyright subsists.

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While the concept of ‘work’ clearly refers to the subject matter protected by copyright, the concept is itself not further elaborated upon in the Act. To paraphrase the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the WCT (see paras 2.10–2.12), the concern in relation to the concept

of a ‘work’ here is, not with ideas as such, but with their expression.⁹ The concept is also clearly established in British case law: ‘it is trite law that there can be no copyright in an idea or concept’.¹⁰ But what amounts to protectable expression, and what is excluded from protection?

■ **Case C-310/17 *Levola Hengelo BV v Smilde Foods BV* [2018] Bus LR 2442**

The ECJ was asked whether EU law, under the InfoSoc Directive 2001, precludes the taste of a food product from being granted copyright protection. In this case, the question was whether the particular taste of a type of cheese is a work that can be protected by copyright. The ECJ held that the taste of a food product can be protected by copyright only if such a taste can be classified as a ‘work’ under the Directive. The notion of work requires the subject matter to be original and to be an expression of such originality (paras 35–37).¹¹ In relation to the second condition, the subject matter ‘must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form’ (para 40). The clear and precise identification of protectable subject matter is important for both authorities responsible for protection of copyright, and those competing in the economic exploitation of such subject matter. Avoiding elements of subjectivity is also important for legal certainty (para 41). The court also notes that a literary, pictorial, cinematographic, or musical work, is a precise and objective form of expression, but the taste of a food product cannot be identified with precision and objectivity, because it is essentially identified through taste sensations and experiences which are subjective and variable because they depend on the person consuming the product, and the environment or context in which the product is consumed. A precise and objective identification of taste is not yet possible through technical means in the current state of scientific development (paras 42–43). As such, the taste of a food product is precluded from copyright protection.

■ **Case C-683/17 *Cofemel—Sociedade de Vestuário SA v G-Star Raw CV* [2020] ECDR 9**

The case concerned copyright protection of clothing designs, for example jeans, sweatshirts, and t-shirts. The ECJ held that the protection of designs through design rights, and the protection ensured by copyright to such designs, are not mutually exclusive under EU law. The court reiterated the two cumulative requirements for a work set out in *Levola*, and held that designs are capable of classification as ‘works’ for copyright purposes, if the two requirements are met. However, national courts are precluded from imposing, as a criterion for copyright protection, an additional requirement that such designs generate a specific, aesthetically significant visual effect (para 56). This is because any aesthetic effect produced by a design is dependent on the ‘an intrinsically subjective sensation of beauty experienced by each individual who may look at that design. Consequently, that subjective

effect does not, in itself, permit a subject matter to be characterised as existing and identifiable with sufficient precision and objectivity' (para 53). While aesthetic considerations do play a part in creative activity, the generation of an aesthetic effect does not, in itself, make it possible to determine originality, that is whether the design resulted from the freedom of choice and personality of its author (para 54). As such, the fact that a clothing design generates a specific and aesthetically significant visual effect is irrelevant to the issue of whether it can be classified as a protectable work under the InfoSoc Directive.

Question

Do you think that musical and artistic works are identifiable with precision and objectivity, unlike taste? If the technology to precisely and objectively identify taste were invented, then should it fall within copyrightable subject matter?

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3.11 There can be difficult issues, however, in knowing *when* an expression, in whatever medium, reaches the level of a work capable of copyright protection. The ECJ's test does not suggest any requirement of minimum length or substance to constitute a work, only that the work is identifiable and also original. Nor has there been such a requirement of length in British case law: for example, musical copyright was found to exist in the four notes constituting the Channel 4 television theme.¹² More recently, newspaper headlines have been found to be independent literary works.¹³ On the other hand, single words, titles, the catchphrases of a TV personality, headings on computer menus, and individual command names in a computer program¹⁴ have been held to be too insubstantial to be literary works.

Discussion point 1

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oup.support.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-3-guidance-on-answering-the-discussion-points?options=showName>>.

Can '4 Minutes 33 Seconds', by the composer John Cage, be held to be a work? In this composition, an orchestra is on stage at the outset, but does not start to play any of its instruments. Instead, the members of the orchestra silently sit on the platform for a period of just over four-and-a-half minutes. If it is a work, does the fact that its author is generally regarded as a composer of music make the work musical? Are there any other possibilities? See further Cheng Lim Saw, 'Protecting the sound of silence in 4'33"—a timely revisit of basic principles in copyright law' [2005] EIPR 467.

Discussion point 2

How did Canadian judges address the notion of ‘work’ in *CCH Canadian Ltd v Law Society of Upper Canada* [2002] 4 FC 213 (CA). How does it compare to ECJ’s approach in *Levola*?

p. 57 3.12 While the general principle, that copyright protects the expression of a work rather than its ideas is central, it is also important not to be misled as to its scope. In considering the concept, bear in mind what constitutes infringement of copyright, for example see paras 4.9ff. Analysis of this part of the law shows it to be misleading to say that copyright protects no more than the form of expression. Otherwise it would not be possible for the author of a book to be able to control the exploitation of their work in other media such as film and broadcasting. Such adaptations will almost certainly adopt a distinct mode of expression, yet must be authorised by the author to be legitimate.¹⁵ The author of a two-dimensional artistic work may challenge a three-dimensional reproduction, and vice versa.¹⁶ Editors of anthologies and collections of material produced by others have a copyright, not so much in the words gathered together by them, as in the arrangement and ordering of the material.¹⁷ Of course this is a form of expression, but it shows that we should not take ‘form of expression’ in any narrow sense coloured by the idea that copyright prevents only slavish imitation. Thus a particular interpretation of historical events has been held capable of copyright protection.¹⁸ The best view seems to be that there is no copyright in ideas while they remain just that, but that once the ideas have been expressed in some form it would be wrong to assume that a different expression of the same ideas must necessarily be a new work with its own copyright, or cannot be an infringement of the earlier work.

Question

Give some examples to illustrate the difference between protectable expression and unprotectable ideas.

3.13 Lord Hoffmann said the following on this topic in *Designers Guild Ltd v Russell Williams (Textiles) Ltd*:¹⁹

Plainly there can be no copyright in an idea which is merely in the head, which has not been expressed in copyrightable form, as a literary, dramatic, musical or artistic work, but the distinction between ideas and expression cannot mean anything so trivial as that. On the other hand, every element in the expression of an artistic work (unless it got there by accident or compulsion) is the expression of an idea on the part of the author. It represents her choice to paint stripes rather than polka dots, flowers rather than tadpoles, use one colour and brush technique rather than another, and so on. The expression of these ideas is protected, both as a cumulative whole and also to the extent to which they form a 'substantial part' of the work. (para 24) ... My Lords, if one examines the cases in which the distinction between ideas and the expression of ideas has been given effect, I think it will be found that they support two quite distinct propositions. The first is that a copyright work may express certain ideas which are not protected because they have no connection with the literary, dramatic, musical or artistic nature of the work. It is on this ground that, for example, a literary work which describes a system or invention does not entitle the author to claim protection for his system or invention as such. The same is true of an inventive concept expressed in an artistic work. However striking or original it may be, others are (in the absence of patent protection) free to express it in works of their own: see *Kleeneze Ltd v DRG (UK) Ltd* [1984] FSR 399. The other proposition is that certain ideas expressed by a copyright work may not be protected because, although they are ideas of a literary, dramatic or artistic nature they are not original, or so commonplace as not to form a substantial part of the work. *Kenrick & Co v Lawrence & Co* (1890) 25 QBD 99 is a well-known example. It is on this ground that the mere notion of combining stripes and flowers would not have amounted to a substantial part of the plaintiff's work. At that level of abstraction, the idea, though expressed in the design, would not have represented sufficient of the author's skill and labour as to attract copyright protection (para 25).

3.14 Lord Hoffmann here connects the translation of unprotectable idea into protectable expression with the degree of originality.²⁰ Clearly, each case will turn on its own facts in this area, although it can perhaps be said that the higher the level of generality, or abstraction, of the idea of a work, the less likely it is to be protected as such.²¹ Note, however, the similarity with the ECJ's approach in *Levola*, requiring originality and identifiability for there to be a protectable expression. Lord Hoffmann also connects the expression of ideas with the nature of the work. A celebrated dictum in this regard is: 'You do not infringe copyright in a recipe by making a cake.'²² Similarly, a literary work consisting of instructions is not infringed by making a fabric according to it.²³

■ ***Interlego AG v Tyco Industries Inc* [1989] AC 217 (PC)**

Artistic copyright was claimed in engineering drawings modifying an earlier design by the same author (the Lego company). The visual impression from the two sets of drawings was much the same; the distinction lay mainly in the technical information as to dimensions and tolerances. It was held that the later drawings were not new works for the purposes of artistic copyright: the new ideas in the

second drawings were not artistic, but literary. ‘Nobody draws a tolerance, nor can it be reproduced three-dimensionally’ (per Lord Oliver at 258). This was important because literary copyright knows no equivalent to artistic copyright’s concept of three-dimensional infringement.

Work of a relevant kind

3.15 There must be a work of a relevant kind—literary, dramatic, musical, artistic, film, sound recording, broadcast, or published edition—that is, a work which does not fit into these expressed eight categories under the law does not receive copyright protection or causes uncertainty about the category to which it belongs.²⁴ The CDPA 1988 provides fairly short definitions of the different categories of works but case law has elaborated on the nature, scope, and limits of such categories (see paras 3.44ff). However, the categorisation of works into eight exhaustive categories (not to mention the sub-categorisation within that of artistic works) can be problematic, creating the possibility of a single work being protected in more than one category, or causing uncertainty about the category to which it belongs. Categorisation is not required under the Berne Convention: only protection of ‘literary and artistic work’, which includes ‘every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression’. The Convention provides an illustrative list of works, while elsewhere, and only so to speak incidentally, it refers to dramatic, musical, and cinematographic works. French law speaks of ‘works of the mind whatever their kind, form of expression, merit or purpose’ and gives thereafter an illustrative list. This approach reduces the need to struggle with categories, albeit it may carry its own obvious uncertainties. But these uncertainties also have the attractive feature of being perhaps more flexible than narrower categories in meeting the emergence of new kinds of work. It also limits the possibility of giving the categories unnecessary or cumbersome substantive content: that is, having rules making it matter whether a work is literary or artistic, musical or dramatic. A question of policy is therefore whether the requirement that a work falls into one of the relevant categories should continue to remain; or should there be a change in the law to make the categories illustrative only.

3.16 The closed list of categories of works protected under the 1988 Act may also be contrary to EU law. The UK system of providing an exhaustive list of subject matter, and its protected categories, appears to be at odds with recent ECJ jurisprudence which suggests that, provided a work is original in the sense of being the author’s own intellectual creation (for its meaning, see paras 3.32–3.35),²⁵ and the expression of author’s own intellectual creation is identifiable with sufficient precision and objectivity (para 3.10), it is capable of protection, at least with respect to the harmonised rights, whether or not the existing categories of work accommodate it. ECJ case law challenges the UK’s scheme of closed categories and suggests that new kinds of subject matter or unconventional subject matter which may not fit the categorisation in the 1988 Act can still be protected if they meet these two cumulative conditions. Consequently, it may no longer be possible to object that copyright does not subsist in a subject matter which is original and an identifiable expression, but is not one of the kinds of work listed in section 1(1)(a) of the 1988 Act.²⁶ The tension between UK and EU approaches has been acknowledged²⁷ but whether these EU developments will force a change in the way the UK courts view works capable of copyright protection or the way they interpret existing categories of works

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remains to be seen. In the meantime, categories continue to be relevant for assessing whether a work receives protection in the UK and the nature of such protection. Each category protected in the UK will be discussed in detail later in this chapter.

Key points so far on subject matter

- Copyright protects works which constitute expressions rather than ideas and information as such, and such expression must be identifiable with precision and objectivity.
- There must be a *work* of a relevant kind: literary, dramatic, musical, artistic, film, sound recording, broadcast, published edition.

Fixation

3.17 One way of establishing whether or not there is a work is to find a recording, or fixation, of the expression which constitutes the work.

The *Berne Convention* says that copyright subsists in literary and artistic works ‘whatever may be the mode or form of its expression’ (Art 2(1)), but then allows national law ‘to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form’ (Art 2(2)). Note that this means that member states have a choice as to whether to require fixation.

In the UK, the *CDPA 1988* provides that copyright does not subsist in a literary, dramatic, or musical work unless and until it is recorded in writing or otherwise (s 3(2)). ‘Writing’ includes 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 (s 178). There is no definition of ‘otherwise’!

3.18 The UK thus opts for an explicit requirement of fixation before any literary, dramatic, or musical work may enjoy copyright protection. The main form of fixation mentioned in the 1988 Act is writing; but the definition previously quoted is very broad and obviously capable of covering, for example, the use of shorthand.²⁸ In any event, writing is not the only possible method of recording literary, dramatic, and musical works, nor does the 1988 Act so limit its requirement. The electronic storage of work in digital form on discs and in computer memories is well known. Literary work means work which is spoken and sung as well as written,²⁹ while music and drama can be created in improvised performances as well as based upon scores and scripts. So far as concerns speech, singing, and music, the tape and cassette recorder have been familiar ways of making recordings for a long time, and film, video, and digital recording, including voice

p. 60 recognition software, can now be added to the list of methods of fixation sufficient to confer copyright on the work recorded. A further possibility might arise through lip-reading what a speaker is saying on a film without a sound track, as for example with closed-circuit TV (CCTV) cameras.

3.19 The requirement of fixation still means, however, that there is no copyright in the unrecorded spoken word, ad lib stage performance, or aleatory musical composition. Since the copyright does not come into existence unless and until the recording is made, copyright confers no right on a speaker to stop people making recordings of what is said. If there is any right at all to prevent recording of one's words, it must be sought in other branches of the law.³⁰ However, the 1988 Act expressly provides that, for the purposes of conferring copyright on a work by recording it, it is immaterial whether the work is recorded by or with the permission of the author, that is, the speaker.³¹ Thus, while I may eavesdrop on and record other people's telephone conversations without infringing copyright in what they say, as soon as the recording is made, the words have copyright and the subsequent reproduction and publication of these words elsewhere may be controlled by the speaker.³²

Question

What will constitute fixation of a work so that it can enjoy copyright?

■ *Norowzian v Arks Ltd (No 2)* [1999] FSR 79; *aff'd* [2000] FSR 363

N produced a film called 'Joy'. It showed a man dancing to music. Use of the editing technique known as 'jump cutting' made it appear that the man was making sudden changes of position not possible as successive movements in reality. An issue in the case was whether the film was a recording of a dramatic work. Rattee J held not, in the following passage later approved by the Court of Appeal:³³

'Joy', unlike some films, is not a recording of a dramatic work, because, as a result of the drastic editing process adopted by Mr Norowzian, it is not a recording of anything that was, or could be, performed or danced by anyone ... It may well be, in the case of 'Joy', that the original unedited film of the actor's performance, what I believe are called 'the rushes', was a recording of a dramatic work, but Mr Norowzian's claim is not in respect of copyright in them or their subject-matter. His claim is in respect of the finished film ([1999] FSR at 87–88, approved [2000] FSR at 367).

Discussion point

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How exact or good must a recording be to confer copyright on unscripted speech (eg a lecture), drama, or music? Do a student's non-verbatim lecture notes make the lecturer's extempore words protectable? Or a bootlegger's poor-quality and unauthorised recording of a live 'jamming' session by a musician?

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3.20 There is no explicit requirement of fixation in the 1988 Act with regard to artistic works, but it seems clear from the definitions within the category (see further at paras 3.60–3.75) that copyright will not exist until the work is recorded in either tangible or visible form.³⁴ For most artistic works, the presence of a record in tangible form is going to be straightforward. However, does the record need to be permanent, insofar as anything can be, or at least not in transient form? What about artistic works that are ephemeral? It has been held that a pattern embossed in a make-up powder palette (ie ephemeral 3D depressions in the powder which would dissipate on usage) can be protectable through their record in the underlying drawings.³⁵ In other words, the protectable work is the 2D drawing as an artistic work, of which the powders are a 3D reproduction, highlighting the importance of having 3D works recorded in clear and detailed underlying drawings or photographs. Similarly, films and sound recordings must both be 'recordings' on some medium from which sounds or moving images, as the case may be, can be reproduced.³⁶ Broadcasts, however, are electronic transmissions of visual images, sounds, or other information which need only be visible and/or audible to their intended audience.

Question 1

What is the significance of having an explicit fixation requirement for literary, dramatic, and musical works, but not for the other categories of copyright works?

Question 2

Is it possible to have copyright works which have not been 'fixed' in the sense just discussed?

3.21 As noted above, the Berne Convention allows national law ‘to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form’. The UK in general requires fixation of a work before copyright can come into existence, leading to some peculiar, even absurd, rules, the effect of which is that while unauthorised recording of my ad lib speech or aleatory musical creation cannot be prevented by copyright, I can nonetheless control the subsequent reproduction and publication of the recording which has made those words or music the subject of copyright. Other legal systems within the Berne Union exercise their discretion to avoid the imposition of any requirement of fixation. In the UK, the requirement in relation to literary, dramatic, and musical works appears intended to serve a mainly evidential purpose, but to be cast in a right-constituting form. A question of policy therefore is whether the requirement of fixation in UK law should be dropped, and the question of the existence of a literary, dramatic, or musical work be left as a matter of evidence (in which the existence of a recorded form is always likely to be the best kind of evidence).

Originality

3.22 Another important test of whether or not a work protected by copyright has been created is the requirement of originality. The 1988 Act says that to have copyright, literary, dramatic, musical, and artistic works must all be original.³⁷ There is no express requirement of originality as such in relation to films, sound recordings, broadcasts, and typographical arrangements of published editions,³⁸ but copyright does not subsist in a sound recording or film or typographical arrangement of a published edition which is, or to the extent that it is, respectively, a copy taken from a previous sound recording or film, or reproduces the typographical arrangement of a previous edition.³⁹

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↪ **3.23** There is no statutory definition of originality, except for databases which are a sub-category of literary works (see further para 3.33).⁴⁰ However, the concept has been developed through previous UK case law, which suggests that for a work to be original, it should originate from the author and must not be a copy of a preceding work. In addition, a common theme found in case law is the test of the *skill, labour, and judgment* which the author has invested in the work. Where this test is satisfied, there is likely to be a copyright in the result. But the production of a copy of a work may involve considerable labour and no little skill; yet in that case there will be no originality and no copyright (see all these themes developed further at paras 3.24–3.31). In contrast, the EU directives, through the language therein (eg the Database Directive), or their interpretation (InfoSoc Directive), refer to originality in the sense of being the ‘author’s own intellectual creation’. This standard for originality has been harmonised throughout the Union after the decision in *Infopaq* (see paras 3.34–3.35). As such, the British case law that has been developed over the years will be discussed first and then the EU developments and implications will be discussed.

Question

Which kinds of work must be ‘original’ to enjoy copyright protection?

Originality in the UK: a combination of factors

3.24 In order to be original, a work must not be a copy of a preceding work and should originate from the author. The underlying idea is still best expressed in the classic words of Peterson J:⁴¹

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

Originality, in other words, is not a high standard for entry into copyright protection. It imposes no requirement of aesthetic or intellectual quality: even the most mundane of works, rehearsing old ideas and information, has copyright if expressed in the author's own way. This is reinforced by other provisions of the copyright legislation: for example, that certain artistic works are protected 'irrespective of artistic quality', or that tables and compilations are to be counted as literary works.⁴² Another theme found in discussions of originality is the test of the skill, labour, and judgment which the author has invested in the work. Where this test is satisfied, there is likely to be a copyright in the result. Finally, there is the point succinctly made by Peterson J himself: 'What is worth copying is worth protecting.'⁴³ This is not in itself a test of the originality of the work that has been copied, but if someone has copied another's work, that tends to suggest the value of the latter and its possible need for copyright protection to ensure that the return goes to its author.

All these themes require some qualification, however. While what is worth copying is worth protecting, it is not always clear that copyright is the appropriate form of protection. With regard to ideas, 'as the late Professor Joad used to observe, it all depends on what you mean by ideas'.⁴⁴ Although copyright may

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↪ not specify intellectual or aesthetic qualities as essential for its protection, nonetheless courts do assess the fitness of works to the designated categories under the legislation, such as literary or dramatic, the identification of which may involve assessment of just such qualities. Similarly, the mere expenditure of skill and labour may not be sufficient to give rise to copyright if the end result is not a work of a 'literary nature' or likewise. The appropriate general conclusion seems to be that originality is not definable in terms of a single, simple test, but should rather be considered as a combination of factors, the relative importance of which may vary according to the nature of the case and the type of work in question.⁴⁵

Question

What are the main elements of originality in British case law for copyright purposes?

No requirement of quality or merit

3.25 It is easy to misunderstand the absence of any requirement that a work should possess intellectual or aesthetic merit. What is clear is that, in determining whether or not a work has copyright, the Court is not called upon to judge the work on standards of good or bad in its field. This would be much too subjective to be acceptable. On the other hand, the Court evaluates whether a work falls into one or other of the categories found in the copyright legislation, and this is bound to involve some effort to judge what objective qualities constitute a work of this kind.

■ *George Hensher Ltd v Restawile Upholstery (Lancashire) Ltd* [1976] AC 64

An example is the difficulty in which the House of Lords found itself in this case where it had to determine whether a rough prototype for a suite of furniture was a work of artistic craftsmanship (see further at paras 3.74–3.75). This required an understanding of how such a work might be identified—how to distinguish it from a sculpture, for example—which called for some sort of aesthetic judgment. It was held that the prototype was not a work of artistic craftsmanship.

■ *Green v Broadcasting Corp of New Zealand* [1989] 2 All ER 1056 (PC)

Similarly, in this case (see further para 3.57) the Privy Council had to grapple with the question of whether a few catchphrases used constantly by the host of a television talent show (*Opportunity Knocks*) constituted a dramatic work. The phrases included: ‘For [*competitor’s name*], opportunity knocks!’; ‘This is your show, folks, and I do mean you’; and ‘Make up your mind time’. The show also used a device called the ‘clapometer’ to measure the levels of applause attracted by each act. It was held that this did not amount to a dramatic work.

In both these cases, the works in question were excluded from copyright, not on the ground of lack of merit, but on the ground that they lacked the intellectual qualities of the categories under which copyright was claimed. Here there is some overlap with the requirement that skill, labour, and judgment should be employed by the author to gain copyright: is the work one which needed such qualities to be brought into existence?

Skill, labour, and judgment

3.26 The expenditure of independent skill, labour, and judgment by the author is often seen as the essence of originality in the field of copyright. The amount of skill, labour, and judgment required should be sufficient and more than minimal or negligible⁴⁶ but cannot be defined in ‘precise terms’ as it depends on the facts of

p. 64 the case and is a question of degree.⁴⁷ Use of the skill, labour, and judgment test can be seen in cases of copyright in a compilation, particularly where it is of information or material which was available before the publication of the work. In such cases, it is the skill and labour of the compiler in arranging the material which receives protection.⁴⁸ If this has occurred, it is unlikely that the resulting work will be merely derivative. In *Cramp v Smythson*,⁴⁹ on the other hand, it was held that tables and information printed on part of a pocket diary had no copyright because their selection and arrangement had not required the exercise of any judgment or taste by the compiler. Behind all this lies the idea that simple copying does not involve the requisite degree of activity to justify the award of copyright. This is so even though copying may require at least labour, and often skill and judgment as well, as Lord Oliver pointed out in *Interlego AG v Tyco Industries Inc*:

Originality in the context of literary copyright has been said in several well known cases to depend upon the degree of skill, labour and judgment involved in preparing a compilation ... that the amount of skill, judgment or labour is likely to be decisive in the case of compilations. To apply that, however, as a universal test of originality in all copyright cases is not only unwarranted by the context in which the observations were made but palpably erroneous. Take the simplest case of artistic copyright, a painting or a photograph. It takes great skill, judgment and labour to produce a good copy by painting or to produce an enlarged photograph from a positive print, but no one would reasonably contend that the copy painting or enlargement was an 'original' artistic work in which the copier is entitled to claim copyright. Skill, labour or judgment merely in the process of copying cannot confer originality ... A well-executed tracing is the result of much labour and skill but remains what it is, a tracing.⁵⁰

3.27 In the *Interlego* case the subject of the copyright claim was the design of Lego bricks, which included modifications of some technical importance in relation to earlier designs but where the visual impression was much the same. Skill and labour had been expended on the technical changes, but these did not change the artistic or visual character of the drawings. Accordingly, the later drawings were not original. Another case in which it was accepted that much effort, skill, labour, and investment of money had gone into the creation of the work in question, yet its author was not entitled to a copyright, is *Exxon Corporation v Exxon Insurance*.⁵¹ The claim was to literary copyright in the single word 'Exxon'. Here the failure was to achieve a literary work,⁵² rather than originality as such, but the point to be stressed in the context of the present discussion is that *effort, skill, labour, and judgment by itself is not necessarily enough for the result to have copyright*. It would seem that, while the presence of skill, labour, and judgment will often be very important, it has not been adopted as a universal test of originality, and that it is also necessary to consider exactly what type of skill, labour, and judgment has been involved in relation to the nature of the copyright claimed.⁵³

Question

Why are skill, labour, and judgment not *necessarily* enough for originality?

Independent but similar works

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3.28 As indicated by the dictum of Peterson J quoted at the outset of this section (para 3.24), ‘the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work’.⁵⁴ Thus, if two works are similar, it does not follow that one cannot be original in the sense of copyright law. Unless there is derivation of one from another, a link between them beyond the similarity, the question cannot arise. The point is perhaps most significant in the field of artistic works, particularly paintings and photographs, where certain subjects and themes (eg representations of well-known scenes, landmarks, and buildings) are or become well worn. Probably there is often some indirect derivation—influence may be a better word—in relation to earlier works in such cases, but it may well be difficult, if not impossible, to establish the absolute originality of a particular view, even in the limited copyright sense of the originator as the person who first gave expression to it.

Question

List again all the elements to be considered in dealing with issues about originality. Which do you consider the most significant?

Originality and derivative works

3.29 Derivative works, which draw on, even copy from, other works (whether or not such underlying works are protected or unprotected by copyright) can have their own copyright if they meet the requirement of originality.⁵⁵ The obvious examples in the material already discussed in this section are compilations and anthologies. Other straightforward instances in the literary world would be books and articles quoting or summarising source material, as for example in a legal textbook. Originality is not simply a matter of not copying, therefore. The pre-*Infopaq* UK examples given below suggest that while the author is copying, there is also a need to exercise independent skill and labour, whether that be in the selection of sources and quotations or in the choice of words in which to express the material, so that the work is not entirely derivative. Less straightforward may be the cases where a new edition of a text, or a new version of a drawing, is produced. If a new copyright is to be created, should the alterations be extensive and substantial?⁵⁶ If a text is printed unaltered from a previous edition and the editorial matter consists of annotations or appendices, then again, as long as these have independent value, there will be a new copyright, independent of that of the text, if any.⁵⁷

■ *Black v Murray* (1870) 9 M 341

B had published an edition of the poetry of Sir Walter Scott which had gone out of copyright. B published a second edition of the texts together with amendments, alterations, and editorial notes. M published what purported to be a reprint of B's first edition, but which included material taken from the second edition as well. It was held that the changes made in B's second edition had their own copyright, but that M's takings were substantial, and infringed copyright, only in relation to the editorial notes.

p. 66 3.30 Translations, adaptations, and dramatisations will attract their own copyright, even though manifestly derivative, as do arrangements, orchestrations, and transcriptions of musical works.⁵⁸ In the computer world, many programs are developed from existing ones, either by the creators themselves or by competitors engaging in 'reverse engineering', but it seems to be accepted that even when the end result is very close to the original work a new copyright has come into existence.

■ *Walter v Lane* [1900] AC 539

The House of Lords allowed *The Times* newspaper copyright in its reporter's verbatim transcript of a speech by Lord Rosebery, a leading politician of the day. Clearly, the reporter's work was derivative, but its creation had involved the expenditure of individual skill and effort. Since the case was decided before originality became a statutory requirement, it has been questioned whether the copyright would be accepted now, as otherwise an audio typist would acquire rights in dictated material.⁵⁹ However, a limited judicial view appears to favour the reporter's copyright established in *Walter v Lane*.⁶⁰

Question

Is there a relevant difference between a typist taking dictation or typing from material recorded on a Dictaphone, on the one hand, and a transcriber such as the journalist in *Walter v Lane*?

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

S edited the work of a late seventeenth/early eighteenth-century composer, L. The editing involved the insertion of notes missing or inaccurately recorded in L's original scores, the addition or correction of flourishes, and other performing indications and the supply of figuring which, in relation to the bass line of baroque works, was the foundation of the work. The expert evidence was that without this last the works could not have been performed in a modern recording session using the original sources. HR produced CDs of the music using S's editions but without a licence. It was held that HR had infringed S's copyright in the work. S's work was original, involving skill and labour over a considerable period of time, going beyond mere transcription.

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-3-guidance-on-answering-the-discussion-points?options=showName>>

Consider whether *Walter v Lane*, *Interlego v Tyco*, and *Sawkins v Hyperion Records* are correctly decided on the originality point. See further J Pila, 'An intentional view of the copyright work' (2008) 71 MLR 535 and NP Gravells, 'Authorship and originality: the persistent influence of *Walter v Lane*' [2007] IPQ 267.

3.31 In the *Interlego* case, Lord Oliver recognised that a derivative artistic work might be original where there was 'some element of material alteration or embellishment' in it by comparison with the previous work.⁶¹

■ *Bauman v Fussell* [1978] RPC 485 (CA)

A photograph of two cocks fighting each other was used as the basis of a painting. The composition of the subject matter was followed closely but the painter employed different colouring to heighten the dramatic effect of the representation. It was held that there was no infringement. It seems likely, therefore, that the painting would have been held to be original and so qualified for its own copyright.

Contrast the New York case of:

■ ***Bridgeman Art Library Ltd v Corel Corp* 25 F Supp 421 (1999)**

Kaplan J found that he was obliged to apply UK law in a case where the question was whether photographs of public domain works of art were the subject of copyright so that their unauthorised digitisation and inclusion in the defendants' CD-ROMs was infringement. It was held that, since the photographs aspired to create as accurate as possible a copy of the subject of the photograph, their work lacked originality under UK law and could not be protected (see further para 3.66).

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oup.support.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-3-guidance-on-answering-the-discussion-points?options=showName>>

Is this decision a correct application of the concept of originality? See further K Garnett, 'Copyright in photographs' [2000] EIPR 229; R Deazley, 'Photographing paintings in the public domain: a response to Garnett' [2001] EIPR 229; S Stokes, 'Photographing paintings in the public domain: a response to Garnett' [2001] EIPR 354; and R Arnold, 'Copyright in photographs: a case for reform' [2005] EIPR 303.

Consider further:

■ ***Antiquesportfolio.com plc v Rodney Fitch & Co Ltd* [2001] FSR 345**

It was held that a photograph of a single static item was an original artistic work, because it could be said that the positioning of the object, the angle at which it was taken, the lighting, and the focus were all matters of personal judgment, albeit in many cases at a very basic level.

Originality in EU law: Author's own intellectual creation

3.32 The UK has been seen to have a different tradition to Continental Europe with regard to originality. Speaking very generally, Continental systems require works to manifest 'intellectual creation' and the UK test of 'skill, labour, and judgment' is generally taken to be less demanding in comparison. However, it is the 'intellectual creation' standard which has so far been applied in those EU directives referring to originality. The Software Directive 1991 declared in Article 1(3) that 'a computer program shall be protected if it is original in the sense that it is the author's own intellectual creation'. The UK took no action to implement the

formula in its resultant legislation. The Commission noted that the UK's implementation was lacking a specific clause and whether this would lead to over-extensive protection of computer programs remained to be seen.⁶² However, it took no action to suggest that this failure involved non-compliance with the Directive. The Term Directive 1993 also provided in Article 6 that 'photographs which are original in the sense that they are the author's own intellectual creation shall be protected' in accordance with the term specified in the Directive but member states were also free to provide for the protection of other photographs. As such, this resulted in no changes in the CDPA 1998 with regards to originality.

p. 68 3.33 A different result occurred, however, in the implementation of the Database Directive 1996, which again used the phrase '*the author's own intellectual creation*' in defining the object of protection. This time the UK took action to implement it, and section 3A of the CDPA 1988 provided that a database is to be considered original 'only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation'. This meant that the test of originality for databases in the UK was no longer the same as for other literary works. As a result, many databases which would have been protected by copyright before section 3A was introduced were no longer protected. This is why the *sui generis* database right was created, establishing a special new and additional form of protection for databases, even if they did not attract copyright under the more rigorous originality test (see para 7.4). The aim was clearly to provide an alternative for those who would have had copyright in places such as the UK before the Directive. Therefore, the UK test for originality remained 'skill, labour, and judgment' for all works, except for databases, which required 'author's own intellectual creation'.

3.34 These developments raised concerns at least about the lack of express implementation of the higher standard of originality with regard to computer programs, and perhaps photographs, but also whether there should be an EU-wide and comprehensive test of originality for all copyright works. A Commission Consultation Paper in 2004⁶³ suggested that the 'intellectual creation' standard adopted in the Directives was necessary to take account of the special features or the special technical nature of software, photographs, and databases and that apart from these categories of works, member states remained free to determine the standard of originality. It also concluded that the lack of harmonisation of the concept of originality for other categories of works was not creating a problem for the functioning of the internal market and therefore there was no need for legislative action at the time. However, in *Infopaq v Danske Dagblades Forening*,⁶⁴ a reference made to the ECJ on infringement of the reproduction right and exceptions to copyright (both of which had been harmonised under the InfoSoc Directive 2001), the ECJ, in providing guidance on such matters, also clarified the meaning of originality. It held that copyright protection under the InfoSoc Directive only applies if a work is original in the sense of 'author's own intellectual creation'. Even though the Directive does not provide for originality, and as such was not seen to be harmonising the concept, the Court reasoned as follows:

- 34 It is, moreover, apparent from the general scheme of the Berne Convention, in particular arts 2(5) and (8), that the protection of certain subject-matters as artistic or literary works presupposes that they are intellectual creations.
- 35 Similarly, under arts 1(3) of Directive 91/250, 3(1) of Directive 96/9 and 6 of Directive 2006/116, works such as computer programs, databases or photographs are protected by copyright only if they are original in the sense that they are their author's own intellectual creation.
- 36 In establishing a harmonised legal framework for copyright, Directive 2001/29 is based on the same principle, as evidenced by recitals 4, 9–11 and 20 in the preamble thereto.
- 37 In those circumstances, copyright within the meaning of art. 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation.

Subsequent rulings of the ECJ have followed *Infopaq* to indicate that the test for originality has now been *de facto* harmonised for all works.⁶⁵

p. 69 **3.35** So what does 'author's own intellectual creation' mean? In *Infopaq*, in the context of a literary work, the ECJ noted that author's own intellectual creation is demonstrated in the form, the manner in which the subject is presented and the linguistic expression: that is, it is only through the choice, sequence, and combination of words that the author may express their creativity in an original manner and achieve a result which is an intellectual creation.⁶⁶ Subsequent ECJ case law has given similar guidance in relation to computer programs, photographs, and databases (see paras 3.52, 3.66, and 3.54–3.56).⁶⁷

■ Case C-833/18 *SI v Chedech/Get2Get* [2020] ECDR 10

The case concerned a bicycle which could be folded into three positions, one of which allowed it to be kept balanced on the ground. The issue before the ECJ was whether copyright protection can apply to a product whose shape is, at least in part, necessary to obtain a technical result. The court held that where 'the realisation of a subject matter has been dictated by technical considerations, rules or other constraints which have left no room for creative freedom or room so limited that the idea and its expression become indissociable' then it is not original in the sense of author's own intellectual creation (para 31). As such, if a shape of a product is solely dictated by its technical function then it cannot be the subject of copyright protection because it does not meet the requirement of originality. Consequently, in principle, functional shapes could be protected, but the national court must assess whether 'through that choice of the shape of the product, its author has expressed his creative ability in an original manner by making free and creative choices and has designed the product in such a way that it reflects his personality' (para 34).

ECJ jurisprudence shows that the key to demonstrating originality under EU law is the author's ability to exercise free and creative choices and to express personal creativity, or stamp a personal touch. In contrast, the lack of room for creative freedom due to technical considerations, rules, or other constraints, goes against an expression of author's own intellectual creation. The question in cases involving originality of derivative works would arguably be similar: whether the additions or alterations express the creativity of the author and have resulted from free and creative choices, rather than any technical considerations or constraints.

Originality in the UK: Post *Infopaq*

3.36 UK law on originality must be interpreted in light of the standard of 'author's intellectual creation'. However, an important question is whether the UK test of 'skill, labour, and judgment' is no longer relevant. This question is based on the assumption that 'author's intellectual creation' is different to and distinct from 'skill, labour, and judgment'.⁶⁸ Initially the UK courts hesitated in dealing with the issue. In the case of *Newspaper Licensing Agency Ltd v Meltwater Holding BV*, in the High Court, Proudman J while applying *Infopaq*, noted that it 'may sit awkwardly with some provisions of English law, that many questions remain unanswered by the ECJ and that the full implications of the decision have not yet been worked out'.⁶⁹ The Court of Appeal noted that the use of the term 'intellectual creation' in the *Infopaq* decision related to the question of origin of a work and not its novelty or merit, and as such, it has not qualified the long-standing test of originality, in that the work originates from the author, established by UK case law.⁷⁰ However, in *SAS*, the Court of Appeal, while reviewing the meaning of author's own intellectual creation under ECJ jurisprudence (in the context of assessing copyright infringement, see para 4.33), acknowledged that the EU test is not same as in the UK, and noted that 'if the Information Society Directive has changed the traditional domestic test, it seems to me that it has raised rather than lowered the hurdle to obtaining copyright protection'.⁷¹

p. 70 ↪ 3.37 Post-*Infopaq*, UK courts have not been consistent in the adoption of, or reference to, the EU standard of originality. At best, there has been a half-hearted attempt to embrace the author's own intellectual creation standard. Some decisions have ignored the standard.⁷² Some decisions have adopted the language of 'author's own intellectual creation' interchangeably with 'skill, labour, and judgment'.⁷³ Others have used both the language of 'author's own intellectual creation' and the guidance given by the ECJ in applying it.⁷⁴ Even if 'skill, labour, and judgment' and 'author's own intellectual creation' are different,⁷⁵ the result as to originality might be the same in most instances.⁷⁶ Unfortunately, there is no definitive answer to whether the EU directives and ECJ case law have substantively altered UK law on originality or whether the change is purely semantic.⁷⁷ While the full impact on the UK's test of 'skill, labour, and judgment' remains to be seen, it can be concluded that in the meantime, the language of 'author's own intellectual creation' and any ECJ guidance on it requires due consideration in assessing originality under UK law, and previous UK case law on originality will also continue to be relevant.⁷⁸

Key points on originality

- Literary, dramatic, musical, and artistic works must be ‘*original*’ to attract copyright.
- Originality is not a high standard, or a requirement of quality/merit/novelty.
- Although individual facts and circumstances are always significant, the following factors are often cumulatively of use in assessing originality under pre-*Infopaq* UK case law: work not copied; work is a product of author’s own skill, labour, and judgment.
- Post-*Infopaq* the test for originality has been *de facto* harmonised in the EU for all works to the author’s intellectual creation standard, and UK law must be interpreted in light of this standard.

Sound recordings, films, and published editions

3.38 With regard to sound recordings, films, and the typographical arrangements of published editions, there is no express requirement of originality; but no copyright arises in such a work to the extent that it reproduces another work in the same category. This is regardless of whether or not the earlier work had, or is still in, copyright. Thus a photographic reprint of an out-of-copyright book does not preclude others from making another edition of the same work using the same technique, although any additional editorial matter in the first work would have its own copyright in accordance with *Black v Murray*.⁷⁹ The matter is relevant in the film and recording industries, where digital technology has made it possible to re-record old material with greatly enhanced quality of sound and visual reproduction, with the possibility of embellishments such as colourisation of black-and-white films, or the stripping out of production effects in the original which are no longer wanted.⁸⁰ Although such re-recordings are derivative works, it may well be that the further technological input will be enough to mean that the new version is not merely a copy of the old but gains a new copyright.

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Exercise

Through use of a ‘sampler’, a digital recorder converts small samples of sound from other records into digits and stores them in microchips. These samples are then capable of electronic manipulation—for example, by slowing down or speeding up—and the results are then mixed to produce a new record. In effect, it is equivalent to a compilation of extracts from previous records. Quite apart from the question of the extent to which such activities infringe the copyrights in the original recordings, is the collection of samples itself a subject of copyright? (See further L Bently, ‘Sampling and copyright: is the law on the right track?’ [1989] JBL 113 and 405.)

Broadcasts

3.39 The position of broadcasts with regard to requirements of originality is different from that of sound recordings, films, and typographical arrangements. The CDPA 1988 provides that copyright does not subsist in a broadcast which infringes, or to the extent that it infringes, the copyright in another broadcast.⁸¹ The background to this is that merely broadcasting a programme which has already been put out has the effect of creating a new copyright. This is clear from the provisions of what is now section 14(5) of the 1988 Act, which states that ‘copyright in a repeat broadcast expires at the same time as the copyright in the original broadcast’. As the subsection goes on to say, however, ‘accordingly no copyright arises in respect of a repeat broadcast which is broadcast after the expiry of the copyright in the original broadcast’. It is also clear from this that only unauthorised repeats infringe the original copyright and are therefore unable to claim copyright themselves. This seems obvious, but it makes an important contrast with the forms of work discussed in the previous paragraph (para 3.38), where no copy, authorised or unauthorised, can bring a new copyright into existence.

The ‘originality’ threshold

3.40 The originality threshold illustrates the tensions in harmonising copyright in Europe involving different traditions of the UK (‘skill, labour, and judgment’ standard) and the Continent (‘author’s own intellectual creation’ standard). The question of how to choose between the two standards seems so far to have been resolved in favour of the Continental approach, especially in the light of recent ECJ jurisprudence. The UK’s withdrawal from the EU offers an opportunity for stronger harmonisation, and future codification within the EU, of the Continental tradition. On the other hand, it also offers scope to the UK to settle upon the standard required for assessment of originality that would be most suitable for developing a copyright law suitable for the digital environment.

3.41 The EU test is arguably a higher threshold than the UK one. There have been relevant developments in the common law world outside England, seeming to elevate ‘skill’ over ‘labour’ in the traditional test of originality. For instance, in the United States, the standard of ‘originality’ was recast by the Supreme Court in 1991, in *Feist v Rural Telephone Service Company Inc*,⁸² from a ‘sweat-of-the-brow’ test to one of ‘spark of creativity’. In Canada, the Supreme Court took up a mid-position, emphasising that originality lay, not in either labour and ‘sweat of the brow’ or ‘sparks of creativity’, but in the author’s exercise of skill and judgment.⁸³ Adoption of a higher-threshold criterion of originality (or equivalent) might remove from the ambit of copyright some of the relatively trivial and ephemeral material that has been within the scope of copyright. The disadvantage would be that someone (ultimately the courts) would have to take the decision as to which side of the line any given work fell. The possibility of seeming absurdity would be replaced by perhaps dangerous uncertainty.

3.42 An alternative approach would be to drop any threshold test whatsoever.⁸⁴ Possibly this might sit best in a world where copyright had been displaced by contract, with the material which its producer did not want disseminated to a wider world being protected by laws of confidentiality and privacy (for which see Chapters

17–18). The protection afforded by contract would be relevant for any item for which a buyer was prepared to pay; that of confidentiality and privacy for material which was indeed confidential or private and which the producer was not prepared to sell or give away.

3.43 The policy issue here is the desirability of threshold tests for ‘originality’ such as ‘skill, labour and judgment’, or ‘intellectual creation’, in particular in the digital environment, and what the consequences would be if there was a higher or lower threshold, or indeed no threshold test at all.

Author works and media works

3.44 Where Continental countries have a strong tradition of distinguishing between authors’ rights and neighbouring rights in substance as well as form, the UK awards copyright to both authors and entrepreneurial producers of works, albeit with differentiated content of rights—for example, clearly distinct copyright terms (see paras 3.115–3.129). For convenience, in the remainder of this chapter, literary, dramatic, musical, and artistic works and films will be collectively referred to as ‘*author works*’, and the other categories will be grouped as ‘*media works*’. The distinction is reflected in international conventions, and has already been discussed insofar as it can be derived from the international structure of copyright: the Berne Convention for literary and artistic productions, broadly conceived (see para 2.8) and the Rome Convention for sound recordings and broadcasts (see para 2.9). The distinction rests on a number of points, of which the most important conceptually is the idea that the second group relies essentially on the operation of machinery and technology, whereas the first depends upon one or more individuals as creator. The nature of authorship, as understood in the law of copyright, is dealt with in further detail later (paras 3.86–3.114). Another element may be that in author works *content* is protected, whereas with media works it is the *medium* itself, or the *signal*, that is protected, rather than the material embodied within it. So, a song or music have author copyright, while the sound recording and broadcast containing them are purely media ones. Note also that the distinction has some difficulties in dealing with photographs and films, although in the law and in this book, both are included in the author rather than the media work category. The point here is that anyone can get a result by wielding a camera, but does that make the person an author with protection for the content of the result?⁸⁵

3.45 The distinction between author and media works has practical consequences in differences in the rules applying to the two groups. The first owner of the copyright in an author work is generally the author,⁸⁶ whereas in the media work it is the person by whose investment (to be conceived more widely than the kind of investment that is authorship or composition) the work was produced. Only author works need be original to be protected,⁸⁷ meaning that they must be the author’s own intellectual creation.⁸⁸ Author works alone attract moral rights.⁸⁹ Author work copyright lasts significantly longer than media work copyright: with the former, it normally lasts for the lifetime of the author plus 70 years, while for broadcasts it is 50 years from the year in which the broadcast is made.⁹⁰

3.46 The distinction between author and media works raises several policy questions. For instance, the proliferation in use of digital technologies for production and dissemination of creative content challenges the relevance of the distinction. If, increasingly, all kinds of work are carried out and fixed (insofar as they are

ever fixed) in digital media, is the distinction between authorship and medium increasingly obsolescent? Further, in the post-modern world of culture generally, authors and artists are rejecting past understandings of their respective disciplines and consequent self-imposed limitations to seek more and more to cross boundaries and use the huge flexibility of digital technology to convey their message, whatever it may be, to the world. It seems most likely, however, that for the time being the basic distinction between author and other works will continue to be drawn, if only because it also underlies some of the basic international infrastructure, which will not be easily shifted. But, nonetheless, there may still be questions about the way in which UK law gives effect to the distinction. Only in the 1990s, for example, were films brought into author rather than media work protection in the UK, as a result of the Term Directive 1993 (Art 2). Also, there are major differences in substantive content between author and media works, as will be explained in detail later in the chapter.

Key points on author and media works

- The distinction between *author* and *media* work, rests in principle on the degree of individual, as opposed to technological creativity involved.
- The difference in rules applying to each of the groups is explained in detail later.

Author works

3.47 The following are the categories of author works:

- literary;
- dramatic;
- musical;
- artistic;
- films.

The distinctions between these groups of author works are not without importance, but in a number of recent cases the English courts have held that a work may belong to more than one of the categories. So, for example, circuit diagrams have been held to be both literary and artistic works,⁹¹ while a film has been held to be also a dramatic work.⁹² As Laddie J has pointed out, this is a different point from the one made earlier in this chapter (para 3.9), that one product may embody several copyrights:⁹³

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although different copyrights can protect simultaneously a particular product and an author can produce more than one copyright work during the course of a single episode of creative effort, for example a competent musician may write the words and the music for a song at the same time, it is quite another thing to say that a single piece of work by an author gives rise to two or more copyrights in respect of the same creative effort. In some cases the borderline between one category of copyright work and another may be difficult to define, but that does not justify giving to the author protection in both categories. The categories of copyright work are, to some extent, arbitrarily defined. In the case of a borderline work, I think there are compelling arguments that the author must be confined to one or other of the possible categories. The proper category is that which most nearly suits the characteristics of the work in issue.

From a taxonomic point of view there must be much to be said for the approach of Laddie J; what, after all, is the point of having categories if they are not mutually exclusive? And if they are not mutually exclusive, or fail to capture particular types of work adequately, should the categorisation not be abandoned or re-thought? The principle of Occam's razor might usefully be applied:⁹⁴ categories are not to be multiplied unnecessarily in copyright law, and perhaps the present UK statute is guilty of that offence (see further on this theme, paras 3.9, 3.15).⁹⁵

Exercise

Explain clearly the difference between copyright in a work and the several copyrights which may coexist in a product such as a book or a CD. Why does this distinction matter? Consider in particular the multimedia product (eg the BBC website, a computer game), which consists of digitised material combining audio, video, text, and images still and moving played through a computer, and with which the user may interact.

Literary works

3.48 The 1988 Act defines 'literary work' as follows in section 3(1):

any work other than a dramatic or musical work which is written, spoken or sung, and accordingly includes a table or compilation other than a database, a computer program, preparatory design material for a computer program, and a database.

This statutory definition is not exhaustive and there are a number of cases in which the courts have had to give an opinion one way or the other as a matter of impression. Standard examples of literary works protected by copyright would include novels, short stories, poetry, song lyrics, non-fiction books, and periodical articles. But, as already noted in the discussion of originality (para 3.25), the law does not require works to possess, or even to aspire to possess, aesthetic merit before they can be the subject of copyright as literary works. Trade catalogues,⁹⁶ examination papers,⁹⁷ a grid containing 25 letters and two separate rows

of five letters each,⁹⁸ and the critical apparatus or annotations attached to an edition of another work⁹⁹ may all be literary works. Moreover, while the work must have some meaning,¹⁰⁰ it is not necessary for it to be expressed in a conventional way, so that a work written in shorthand or in code may be a literary work.¹⁰¹ A knitting guide consisting of ‘various words and numerals ... which constitute detailed instructions intelligible to anyone who understands the production of knitwear’¹⁰² would presumably be a literary work.

p. 75 **Single words and phrases**

3.49 On the other hand, the courts usually had great difficulty in according copyright to single words and phrases as literary works.¹⁰³

■ ***Exxon Corporation v Exxon Insurance Consultants* [1982] Ch 119**

Copyright was claimed in the invented single word ‘Exxon’, which had been developed as a new company name with great expenditure of time and money by the company in question. The Court held that a literary work must be ‘intended to afford either information and instruction or pleasure in the form of literary enjoyment’,¹⁰⁴ and that this could not be the case with a single word, even though research and effort had been involved in its creation.

Similarly it has been said that in general the title of a work by itself does not have copyright,¹⁰⁵ while advertising slogans consisting of stock phrases or a few commonplace sentences have also been denied copyright as literary works.¹⁰⁶ It has been held in a number of cases that there is no copyright in the names of computer program commands, since they are merely ‘triggers’ for a set of instructions to be given effect by the computer.¹⁰⁷

3.50 But there are also recent departures from the generally negative view of short works of this kind, which demonstrate a renewed willingness on the part of the courts to recognise copyright in phrases.¹⁰⁸

■ ***Shetland Times v Wills* [1997] FSR 604**

The *Shetland Times* home page used its newspaper headlines as links to the material deeper within the site. The headline texts were used by the *Shetland News* website to act as the deep links on to the relative *Times* stories. But, in a *prima facie* view granting interim interdict, Lord Hamilton held that the headline texts had copyright, so that the actions of the *News* in copying them for reproduction on its own website was infringement. In defence of Lord Hamilton’s view, the creation of a headline does involve skill and labour, in that the reader’s attention has to be attracted, information about the relevant item conveyed, and (at least in the case of the tabloid press, which much favours punning and jokey headlines) entertainment provided.

■ **Case C-5/08 Infopaq International A/S v Danske Dagblades Forening [2009] ECDR 16 (ECJ)**

For the facts of this case, which related to an electronic news-cuttings service, see para 4.19. The ECJ stated that ‘words, considered in isolation, are not as such an intellectual creation of the author who employs them’ (para 45); but

the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences ... may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article (para 47).

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■ **Newspaper Licensing Agency Ltd v Meltwater Holding BV [2010] EWHC 3099 (Ch); [2011] EWCA Civ 890 (CA)**

For the facts of this case, which related to a media-monitoring service, see para 4.19. A question for determination was whether headlines in newspapers could be literary works which would attract copyright independently of the substantive article. In the High Court, Proudman J applied *Infopaq* and held that ‘headlines are capable of being literary works, whether independently or as part of the articles to which they relate. Some of the headlines ... with which I have been provided are certainly independent literary works within the *Infopaq* test’ (para 71). It was also concluded that ‘a mere 11 word extract may now be sufficient in quantity provided it includes an expression of the intellectual creation of the author’ (para 77). Both these conclusions were affirmed by the Court of Appeal, which rejected the argument that ‘a 256 character extract would be too short and factual to give a reader more than an idea of what the article is about but with no sense of the author’s intellectual creation’ (paras 27–28).

These cases reinforce that sentences in the form of headlines or extracts from newspaper articles can be independent literary works and protected if there is sufficient originality. It also means that slightly more elaborate texts, such as notes on what will be found through using a link, or material on help menus and ‘frequently asked questions’ facilities could also be protected.

Fictional characters

3.51 Whether, in principle, fictional characters from a literary or dramatic work could be protected in their own right has been an interesting academic question for a while, but hadn’t received meaningful judicial attention. However, in a recent case, a fictional character was held to be protectable under the category of literary work.

■ ***Shazam Productions Ltd v Only Fools the Dining Experience Ltd*** **[2022] EWHC 1379 (IPEC)**

S represented the writer of ‘Only Fools and Horses’ (OFAH), a well-known television comedy series, originally broadcast on the BBC, comprising, amongst others, the character of Del Boy. The defendants produced an interactive dining show, called ‘Only Fools The (cushty) Dining Experience’ (OFDE) where actors used the appearance, mannerisms, voices, and catchphrases of characters from OFAH. The judge noted that there has been no English case law on the point, and approached the protection of a character, from first principles. In applying the cumulative conditions set out in *Levola* (para 3.10), the judge concluded that the character of Del Boy had a particular combination of features, which were original in that they were the expression of the writer’s free and creative choices. And such features constituting the character could be precisely and objectively discerned from the scripts for all episodes of OFAH (each such script being held to be a dramatic work). Having concluded that the character as it appears in the scripts is a protectable work under EU law, the judge held that it ‘can be properly subsumed under the concept of a literary work for the purposes of the closed list of protected English works’ and this ‘does not require any strained interpretation of the CDPA’ (para 121). The case demonstrates the ability of the open-ended approach to ‘work’ under EU law to increase the scope of protectable subject matter, and possibly the limits to any meaningful role of categories once there is a work. It remains to be seen whether the approach in this case will be embraced or followed by UK courts in the future.

Question

What is needed for there to be a literary work?

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Computer programs as literary works

3.52 The CDPA 1988 states that a computer program¹⁰⁹ and its preparatory design material are literary works.¹¹⁰ The Act does not otherwise define the meaning of computer program. Jacob LJ has pointed out that the Software Directive implemented by the 1988 Act envisages one rather than two separate copyrights in the program *and* its preparatory material.¹¹¹ In general a computer program is a set of instructions to a computer to perform certain tasks. The production of a program is a complex process involving first the expression of an analysis of the functions to be performed as a set of algorithms (often most simply represented by means of a flow chart or some other logical flow diagram); secondly, its restatement (usually by a programmer, but also often by a computer) in a computer language (the source code); and, finally, the translation by a computer running under a compiler program of the source code into a machine-readable language (the object code).

■ Case C-406/10 *SAS Institute Inc v World Programming Ltd* [2012] EC-DR 22 (ECJ)

This reference involved questions on copyright protection available to computer programs under the Software Directive.¹¹² The ECJ held that the object of the protection is the expression in any form of a computer program which permits reproduction in different computer languages (para 35). As such, source code and object code are clearly protectable forms of expressions. Protection includes expression in the preparatory design material for a computer program which must be such that a computer program can result from it at some stage (para 36).¹¹³ Such matter as the logic, algorithms, and programming languages lying behind the source code comprise unprotectable ideas and principles.¹¹⁴ The functionality of a computer program, as well as programming language and format of data files used in a computer program, do not constitute a form of expression of that program (para 39). The Court also noted that ‘keywords, syntax, commands and combinations of commands, options, defaults and iterations consist of words, figures or mathematical concepts which, considered in isolation, are not, as such, an intellectual creation of the author of the computer program’ and ‘it is only through the choice, sequence and combination of those words, figures or mathematical concepts that the author may express his creativity in an original manner and achieve a result, namely the user manual for the computer program, which is an intellectual creation’ (paras 66–67).

The lack of a definition of a computer program is to avoid failure to cover advances in the technology.¹¹⁵ Some examples of computer programs that have been protected are: a ‘hardware lock’ enabling a computer program to run (Australia);¹¹⁶ codes embedded in microchips within the computer (United States);¹¹⁷ and a video game simulating a game of pool (UK).¹¹⁸ It has been held that a GUI, which enables communication between the computer program and the user, is not a form of expression of a computer program because it ‘does not enable the reproduction of that computer program, but merely constitutes one element of that program by means of which users make use of the features of that program’.¹¹⁹

Question

What is the difference between source code and object code?

Tables and compilations

3.53 Tables and compilations may be literary works. Thus import and export lists,¹²⁰ railway timetables,¹²¹ television programme schedules,¹²² and football fixture lists¹²³ have been held to be literary works, as have poetry anthologies¹²⁴ and football pools coupons.¹²⁵ Character-based screen displays used for online booking of tickets on a ‘ticketless’ airline, providing a static framework within which the dynamic data supplied by

customers caused the booking software to operate were also held to be copyright tables, but in the same case a collection of computer programs was held not to be a compilation, since there was no overall design underlying the collection, simply an accretion of material over time.¹²⁶ Similarly, a list of 33 pairs of electronic addresses allowing police to recover deleted data from mobile phones was held not to be a compilation because it was not planned, lacked overall design, and was simply an accretion of data acquired by happenstance over time.¹²⁷ The component parts of a compilation may be out of copyright, but the compilation will still enjoy copyright as such.¹²⁸ But such material has always to be subjected to the test of originality before copyright can be claimed.

Question

What is it that copyright protects in relation to tables and compilations?

Databases

3.54 Until 1 January 1998, databases¹²⁹ were thought to be protected under UK law as ‘compilations’; but from that date the position was changed as a result of the implementation of the EU’s Database Directive 1996.¹³⁰ ‘Compilation’ now expressly does not include databases.¹³¹ A database is defined as:¹³²

a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.

This definition means that, unlike traditional compilations, database protection is not confined to collections the basic form of which is written, as distinct from other forms of expression (eg graphic). As per this definition, three specific elements are required for a work to be categorised as a database: (1) independence of the constituent elements; (2) systematic or methodical arrangement of the elements; and (3) individual accessibility of the elements. The meaning of each of these elements can be understood from the rulings of the ECJ and guidance from the Opinions of the Advocate General, and is set out in more detail in Chapter 7 (paras 7.6–7.8).

Databases include:¹³³

literary, artistic, musical or other collections of works or collections of other materials such as texts, sounds, images, numbers, facts, and data.

That is, they can be *multimedia works*. So, the elements of a database may be works in their own right, or simply items of information in textual, visual, or audio form. Many websites are database-driven, for example, particularly where they are interactive. But databases are not merely electronic compilations or collections; they can also be created in non-electronic media. The ECJ has indicated that the term ‘database’ is

intended to have wide scope.¹³⁴ The term is capable of including football fixture lists, telephone directories, trade directories, news websites, topographic maps, and pdf documents.¹³⁵ However, a database does not include computer programs used in the making or operation of databases accessible by electronic means.¹³⁶

Question

What is protected by the copyright (if any) in a database? What is the difference between a database and a compilation?

3.55 The CDPA 1988 expressly provides for the level of originality that a database must show:

if, and only if, by reason of the selection or *arrangement of the contents* of the database the database constitutes the *author's own intellectual creation* (s 3A(2); emphasis added).

This provision, introduced as a result of the Database Directive 1996, is generally taken to require a higher level of originality than the traditional 'skill, labour, and judgment' test used in the UK (see paras 3.26–3.27). One result of this provision was that many databases which would previously have been protected by copyright in the UK were no longer protected. For this reason, the Database Directive also introduced a special, or *sui generis*, database right for the protection of databases not covered by copyright. An account of this special right is given in paras 7.4–7.25. Another consequence of the special definition of originality is to make clear that database copyright covers not the contents of the database but their *selection or arrangement*—that is, the way in which the contents are structured.¹³⁷ It is this structure that must be the *author's own intellectual creation* (see further para 3.33).

3.56 As such for copyright protection to subsist, the subject matter must be a database, and must be the author's own intellectual creation by reason of the selection or arrangement of its contents.¹³⁸ The protection is offered to the selection and arrangement of the database, rather than to its contents as such, although the latter may attract copyright—or several copyrights—in their own right. It is irrelevant whether the collection is made up of materials from a source or sources other than the person making up the collection, materials created by that person, or a combination of the two.¹³⁹ The Database Directive says that, as a rule (ie normally), the compilation of several recordings of musical performances on a CD does not attract copyright protection as a database (see also para 7.12).¹⁴⁰

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■ **Case C-604/10 *Football Dataco Ltd v Yahoo! UK Ltd* [2012] ECDR 10 (ECJ)**

It was claimed that fixtures lists of English and Scottish football leagues were protected by copyright in databases and the Court of Appeal referred questions on the interpretation of the Database Directive.¹⁴¹ The ECJ held that national legislation is precluded from granting database copyright under conditions which are different than that of originality as laid down in the Directive. It then provided guidance on the meaning of ‘author’s own intellectual creation’. Copyright protection of database concerns the structure of the database; it does not concern the contents of the database or the elements constituting its contents, and does not extend to the data itself. As such, intellectual effort and skill expended on creating data is not relevant for assessment of database copyright (paras 30–33). The originality requirement for databases is satisfied when ‘through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by making free and creative choices ... and thus stamps his “personal touch”’ (para 38). In contrast, it is not satisfied ‘when the setting up of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom’ (para 39). There is no need for the author to ‘add important significance’ to the data through the selection or arrangement (para 41). The fact that the author had used significant labour and skill in setting up the database may be irrelevant if the labour and skill does not express originality in the selection or arrangement of the data; this is a matter for the national court to assess (para 42). As to whether the fixtures lists are original, the ECJ’s guidance on ‘intellectual creation’ seems particularly likely to *exclude* alphabetical or chronological ordering.

The lack of intellectual creation does not mean that the collection fails to be a database, however. Rather, the database does not have copyright; but it may still be protected by the *sui generis* database right, for which see further paras 7.4–7.25.

Question

Are the following databases: (1) newspapers; (2) websites; (3) multimedia works? If so, how far is the database covered as such by copyright?

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oup.support.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-3-guidance-on-answering-the-discussion-points?options=showName>>

Imagine a compilation which is not a database for legal purposes, that is, is not a collection of independent works or items of information, systematically arranged and individually accessible. Would the work you have thus imagined be protectable by copyright?

Dramatic works

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3.57 The 1988 Act indicates that a ‘dramatic work’ includes a work of dance or mime but does not provide further details.¹⁴² In *Norowzian v Arks Ltd (No 2)*, Nourse LJ noted that a dramatic work must be given its natural and ordinary meaning, and defined it as ‘a work of action, with or without words or music, which is capable of being performed before an audience’.¹⁴³ A screenplay is a dramatic work because its primary purpose is being performed, as opposed to being read, like a novel, which is a literary work.¹⁴⁴ A scene created to be part of the cover for a forthcoming album by the pop group Oasis was held not to be a dramatic work, since it involved no action.¹⁴⁵ The Privy Council has stated that a dramatic work must have ‘sufficient unity’ to be capable of performance, leading to a decision that the stock phrases and other aspects of the format of a television talent show did not constitute a dramatic work in themselves, being merely accessories to the show.¹⁴⁶ The sequence of images produced by a computer video game was held not to be a dramatic work, because it varied too much each time the game was played and lacked the unity for it to be a work capable of performance.¹⁴⁷ In *Banner v Endemol*, a claim for subsistence of copyright in a TV gameshow format called *Minute Winner* was dismissed because the show’s features were commonplace and indistinguishable from other game shows.¹⁴⁸ However, Snowden J took the view that ‘it is at least arguable, as a matter of concept’ for the format of a television game show or quiz show to be the subject of protection as a dramatic work, even though these types of shows ‘will contain elements of spontaneity and events that change from episode to episode’; and, protection will not subsist unless, as a minimum, two requirements are met:¹⁴⁹

(i) there are a number of clearly identified features which, taken together, distinguish the show in question from others of a similar type; and (ii) that those distinguishing features are connected with each other in a coherent framework which can be repeatedly applied so as to enable the show to be reproduced in recognisable form.

Question

How may a dramatic work be defined for copyright purposes?

3.58 The 1988 Act omits from its definition of dramatic work some words which appeared in the 1956 Act, that the phrase does not include a cinematograph film as distinct from a scenario or script for a cinematograph film.¹⁵⁰ Did this change mean that films, which retain their own copyright under the CDPA 1988,¹⁵¹ can now also be protected as dramatic works? In *Norowzian v Arks Ltd (No 2)*,¹⁵² the Court of Appeal concluded that a film which was a work of action and which could be performed before an audience could as a result also be a dramatic work. A film might be both a recording of a dramatic work and a dramatic work in itself; sometimes it might not be a recording of a dramatic work but would nonetheless itself be a dramatic work. The questions arising from overlapping categories are reduced inasmuch as films and dramatic works both attract moral rights, have more or less the same duration of copyright,¹⁵³ and enjoy the same categories of restricted acts.

Discussion point 1

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oup.support.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-3-guidance-on-answering-the-discussion-points?options=showName>>.

Is a television commercial a dramatic work?

Discussion point 2

How should works which contain a musical element but are intended for stage performance or to be made as a film—for example, an opera, a ballet, or the type of entertainment known as a ‘musical’—be characterised for the purposes of copyright?

Musical works

3.59 A musical work¹⁵⁴ is a work consisting of music, exclusive of any words or action intended to be sung, spoken, or performed with the music.¹⁵⁵ Words written to be sung to music thus do not form part of any musical work but have their own literary or dramatic copyright. Music, it might be thought, consists of sounds other than words, recorded in writing or otherwise. At the same time, the limits of the definition of music are unclear. It seems to go beyond the notes on a score to include the combination of melodies and harmonies, the figuring of the bass, ornamentation, and performance directions.¹⁵⁶ Music also covers the sampling and scratching of tracks by DJs of works composed by other artists which create a new work. Another problem is the example of John Cage’s ‘4 Minutes 33 Seconds’, which has already been mentioned on the question of what constitutes a work (para 3.11): is a deliberately created silence in a concert hall, lasting

for a fixed period, a musical work?¹⁵⁷ Most other gaps in the definition can probably be filled by the categories of literary, dramatic, and artistic work, or by sound recording copyright. Cage's work might be regarded as a dramatic one, for example inasmuch as it involves a performance before an audience.

Question

What is the definition of a musical work? Can you define music?

Artistic works

3.60 An artistic work¹⁵⁸ is defined¹⁵⁹ as:

- a graphic work, photograph, sculpture, or collage, irrespective of artistic quality;
- a work of architecture, being either a building or a model for a building;
- a work of artistic craftsmanship.

Note the use of the word 'means' in section 4(1) CDPA 1988 indicating that this list of artistic works is exhaustive.

p. 83 Graphic work, photograph, sculpture, or collage

3.61 The CDPA 1988 defines most, but not all, of these works:¹⁶⁰

- Graphic work includes any painting, drawing, diagram, map, chart, or plan, and any engraving, etching, lithograph, woodcut, print, or similar work.
- Photograph means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film.
- Sculpture includes any cast or model made for the purposes of sculpture.

Graphic works

3.62 The first point to note is that the definition of graphic work is non-exclusive, so that it may catch works other than those listed. Thus, the screen layouts of websites have been held to be graphic works, even though only recorded as such in digital code. The same case found that icons used in the displays were also graphic works, but as drawings.¹⁶¹ But the Court of Appeal has held that a common feature of graphic works as defined in the CDPA 1988 is their static and non-moving character. So, video games are not graphic works, while a series of drawings is a series of graphic works, not a single one.¹⁶²

Paintings

3.63 The word ‘painting’ is not defined by the Act. There has been a judicial attempt to do so:

■ *Merchandising Corporation of America v Harpbond* [1983] FSR 32

In a case decided under the 1956 Act, it was held that a painting required a surface before it could be a protected work. Paint without a surface is not a painting. From this premise it was concluded that a flamboyant style of facial make-up forming part of the distinctive image of Adam Ant, a well-known popular musician, could not be a painting for copyright purposes.¹⁶³ Works of graffiti could, under this definition, fall within the purview of artistic works for the purposes of copyright protection.¹⁶⁴

Question

Does the fact that the surface in question in the Adam Ant case was a person’s face take the work out of the judge’s definition of a painting?

Drawings

p. 84 3.64 The most significant of the categories of artistic work in terms of reported litigation is that of drawings. Examples of works held to be drawings include architects’ plans,¹⁶⁵ sketches of garments,¹⁶⁶ engineering and machine part drawings,¹⁶⁷ cartoon characters,¹⁶⁸ and trade mark and label designs.¹⁶⁹ The rudimentary nature of a drawing is no objection to copyright subsistence; thus, for example, a drawing of three concentric rings has been held to have artistic copyright.¹⁷⁰ Many of the cases concerning design drawings should now be read with caution, however. While such drawings retain copyright under the CDPA 1988, the scope of infringement has been severely restricted in relation to them, and the principal mode of protection is likely to be under design right. (See further Part III of this book.)

Diagrams, maps, charts, and plans

3.65 The special feature of all these kinds of work is that, while they have a strong visual dimension, at the very least literary matter also found on the work (words and numbers) is necessary for its full meaning to be comprehended or utilised. Indeed, between the 1911 and the 1956 Acts they were treated as literary works, and the appearance of the phrase ‘irrespective of artistic quality’ in the provision about graphic works (see para 3.72) is to be explained by the inclusion of this then new subject matter in the category of artistic works. One important effect of the change, in particular with regard to plans, is that as artistic works these two-dimensional works can be infringed by three-dimensional reproductions, which would not be so if they were literary works.¹⁷¹ This rule then had rather disastrous knock-on effects with regard to the protection of

industrial designs (see the online resources), and the scope of copyright infringement by three-dimensional reproductions in this context is now carefully restricted (see paras 9.79–9.93). But the rule remains in full effect outside industrial design protection.

Photographs

3.66 With regard to photographs,¹⁷² the 1988 Act's definition (see para 3.61) is clearly intended to cover continuing development in the technology of photography. The replacement of film by digital recording as the ordinary mode of photography well demonstrates the need for definitional flexibility of this kind. Photographs of antiques have been protected where they were taken with a view to exhibiting particular qualities such as colour, features, and other details because some degree of skill is involved in the lighting, angling, and judging of positioning in these circumstances.¹⁷³

■ **Case C-145/10 Painer v Standard Verlags GmbH [2012] ECDR 6 (ECJ)**

The ECJ held that a portrait photograph could be protected by copyright if the photograph is an intellectual creation of the author in that it reflects the author's personality, that is, the author expresses his creative abilities by making free and creative choices in the production of the photograph and stamps his 'personal touch'. Such choices can be made in several ways:

In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software (para 91).

The protection of the photograph is not inferior to any other work protected by copyright.

■ **Temple Island Collections Ltd v New English Teas Ltd [2012] FSR 9 (PCC)**

This case concerned two similar photos, by F and H, showing a London bus in red in the foreground in front of a black-and-white image of iconic London landmarks. Both photos had been altered using a computer ↩ program. Judge Birss QC referred to the decisions in *Infopaq* and *Painer* to state that copyright may subsist in a photograph if it is the author's own intellectual creation. The judge held that:

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A photograph of an object found in nature or for that matter a building, which although not natural is something found by the creator and not created by him, can have the character of an artistic work in terms of copyright law if the task of taking the photograph leaves ample room for an individual arrangement. What is decisive are the arrangements (motif, visual angle, illumination, etc.) selected by the photographer himself or herself (para 20).

The judge viewed F's image as not a mere photograph ('an image which is nothing more than the result of happening to click his camera in the right place at the right time') but as a photographic work (where the 'appearance is the product of deliberate choices and also deliberate manipulations by the author' such as choosing where to stand, when to click, as well as changes wrought after the basic image had been recorded), and noted that, 'the image may look like just another photograph in that location but its appearance derives from more than that' (para 66).

Discussion point 1

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Do the auto-focus, portrait, landscape, and action shot functions in a digital camera mean that there is insufficient input from the user of the camera to make his or her photographs with the camera original for copyright purposes?

Discussion point 2

Does the definition of a photograph cover the case whereby the camera records the image digitally and the photographer then adjusts the result electronically, for example to insert other images, as by putting the head of the prime minister on what is otherwise an image of a footballer; or merely editing out unwanted parts of the image captured? Is there still a photograph where the image has been digitally enhanced, for example by sharpening contrasts, or heightening/lowering colours?

Sculptures

3.67 Sculptures are plainly three-dimensional works and must be distinguished from works of architecture and of artistic craftsmanship. Casts and models for the purposes of sculpture are included in the category.¹⁷⁴ The vagueness of the statutory definition has been used by those seeking copyright protection for industrial designs.

■ *Wham-O Manufacturing Co v Lincoln Industries Ltd* [1985] RPC 127

In this case¹⁷⁵ it was held that wooden model prototypes for the Frisbee toy were sculptures.¹⁷⁶ The New Zealand Court held that sculpture could no longer be confined to the process of carving and modelling representations using natural materials, but should simply be thought of as the three-dimensional expression of an idea of its creator. The model fitted this conception, but not, the Court held, the Frisbee itself. A plastic injection process for mass production could not give rise to a sculpture.

3.68 Similar arguments were rejected in English cases, which have generally construed ‘sculpture’ narrowly, in accordance with its ordinary dictionary meaning. These authorities were reviewed in a powerful judgment by Mann J in the ‘Star Wars’ case, subsequently approved in the Court of Appeal and the Supreme Court:

■ *Lucasfilm Ltd v Ainsworth* [2009] FSR 2 (Ch D); [2009] EWCA Civ 1328 (CA); [2012] 1 AC 208 (SC)

A established a website in 2004 selling replica helmets and body armour used in the *Star Wars* films. Working from general designs prepared by L, A had previously created the moulds used to create the various pieces of armour used in the original 1977 film for the Imperial stormtroopers and other characters. These included white helmets, as well as armour referred to as the ‘cheese grater’, ‘jawbone’, ‘X-wing fighter pilot’, ‘rebel troop’, ‘TIE fighter’ helmets, and a ‘chest box’ worn by the TIE fighter pilots. L’s claim of copyright infringement against A was met with a counterclaim to enforce A’s alleged copyright in the helmets and armour as sculptures. It was held that the Imperial Stormtrooper helmet was not a sculpture within the meaning of the Act. It was a mixture of costume and prop, but its primary function was utilitarian. Mann J, at the first instance, indicated that ‘while it has an interest as an object, and while it was intended to express an idea, it was not conceived, or created, with the intention that it should do so other than as part of character portrayal in the film’ (para 121). Furthermore, he opined that it was not that it lacked artistic merit, but that it lacked artistic purpose. The same reasoning applied to the armour. Toy models marketed by L after the film

became successful were also not deemed to be sculptures for the reason that their primary purpose was for play. The *Wham-O* decision was disapproved for similar reasons: the purpose of the model for the Frisbee was not artistic. The Supreme Court held that:

it would not accord with the normal use of language to apply the term ‘sculpture’ to a 20th-century military helmet used in the making of a film, whether it was the real thing or a replica made in different material, however great its contribution to the artistic effect of the finished film ... it was the Star Wars film that was the work of art ... The helmet was utilitarian in the sense that it was an element in the process of production of the film (para 44).

Mann J provided the following multi-factorial approach on the meaning of sculpture:

- (1) Regard was to be had to the normal use of the word.
- (2) Nevertheless, the concept could be applicable to things going beyond what would normally be expected to be art in the sense of the sort of things expected to be found in art galleries.
- (3) It was inappropriate to stray too far from what would normally be regarded as sculpture.
- (4) No judgment was to be made about artistic worth.
- (5) Not every three-dimensional representation of a concept could be regarded as a sculpture, otherwise every three-dimensional construction or fabrication would be a sculpture.
- (6) It was of the essence of a sculpture that it should have, as part of its purpose, a visual appeal in the sense that it might be enjoyed for that purpose alone, whether or not it might have another purpose as well. The purpose was that of the creator and it was this underlying purpose that was important.
- (7) The fact that the object had some other use did not necessarily disqualify it from being a sculpture, but it still had to have the intrinsic quality of being intended to be enjoyed as a visual thing.
- (8) The process of fabrication was relevant but not decisive. There was no reason why a purely functional item, not intended to be at all decorative, should be treated as a sculpture simply because it had been (for example) carved out of wood or stone.

The Court of Appeal approved the judge’s reasoning and held that he had correctly applied his ‘multi-factorial approach’ (para 77) finding that ‘Neither the armour nor the helmet are sculpture’ (para 80). With regard to the toy stormtroopers it noted: ‘We are not dealing here with highly crafted models designed to appeal to the collector but which might be played with by his children. These are mass produced plastic toys. They are no more works of sculpture than the helmet and the armour which they reproduce’ (para 82). ↩ The Supreme Court, while affirming the multi-factorial approach, rejected the ‘elephant test’ proposed by the Court of Appeal. It stated that:

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Any zoologist has no difficulty in recognising an elephant on sight, and most could no doubt also give a clear and accurate description of its essential identifying features. By contrast a judge, even one very experienced in intellectual property matters, does not have some special power of divination which leads instantly to an infallible conclusion, and no judge would claim to have such a power. The judge reads and hears the evidence (often including expert evidence), reads and listens to the advocates' submissions, and takes what the Court of Appeal rightly called a multi-factorial approach. Moreover the judge has to give reasons to explain his or her conclusions (para 47).

In the light of this decision,¹⁷⁷ earlier cases denying protection to moulds for making functional cartridges¹⁷⁸ and prototypes of plastic dental impression trays¹⁷⁹ were correct, unlike the protection given to scallop-shaped ones for use in toasted sandwich-makers.¹⁸⁰

Discussion point 1

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-3-guidance-on-answering-the-discussion-points?options=showName>>.

Should ice sculptures be protected as sculptures? Is the snowman you make during a white Christmas so protected? See the case of *Islestarr Holdings Ltd v Aldi Stores Ltd* [2019] EWHC 1473.

Discussion point 2

Kinetic sculptures are sculptures with moving parts, or in which motion is incorporated as part of the design, so that the form or colour of the work may change continuously or from time to time. Does mobility or motion within the sculpture take it out of the dictionary definition of 'sculpture'? See also the Australian case of *Komesaroff v Mickle* [1988] RPC 204, for a similar issue with works of artistic craftsmanship.

Engravings

3.69 The *Wham-O* case (para 3.67)¹⁸¹ is also an authority on engravings, which the New Zealand Court held the markings on the surface of the Frisbee to be, along with the plastic injection mould. Engraving is first a process of cutting or incising images into material such as wood or metal, and then using the result for the purpose of producing prints of the image.¹⁸² In the 1956 Act it was defined to include etchings, lithographs, woodcuts, and prints, but photographs were expressly excluded.¹⁸³ Using this, it was held that an engraving included both the original engraved plate and the resulting print, and further that, given the apparent need to

exclude the process of producing prints known as photography, engraving was not confined to processes involving cutting into material to produce the plate.¹⁸⁴ This approach enabled the Court in *Wham-O* to hold that the mould was a plate and the Frisbee disc a 'print' thereof.¹⁸⁵

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Exercise

Compare the *Wham-O* case with *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* [1976] AC 64, discussed at paras 3.74ff. What, if any, policy reasons justify the different results reached in these cases with regard to the protection of models to be used in the mass production of consumer objects?

3.70 As already noted, however, the CDPA 1988 differs somewhat from the 1956 Act in respect of engravings. In particular, the word 'print' no longer appears either in juxtaposition (as with etchings, lithographs, and woodcuts) or in any definition. Nor is photography mentioned.¹⁸⁶ It is not clear whether this excludes the reasoning of the *Wham-O* decision, given that mere changes of expression in the 1988 Act do not necessarily entail departure from the previous law.¹⁸⁷ But considering the Act's overall policy of excluding copyright from the field of industrial design, it is suggested that the result in *Wham-O* should now be treated with caution, although its general discussion of both engravings and sculptures remains helpful. With regard to both categories of work, the case may be an example of a court anxious to protect the skill and labour of the plaintiff from piracy and forcing the facts rather uneasily into unsuitable concepts. Design rights probably offer more satisfactory solutions to such problems now.¹⁸⁸ In *Greenfield Products Pty Ltd v Rover-Scott Bonnar Ltd*,¹⁸⁹ an argument that a mould of a lawnmower engine was an engraving was rejected. Pincus J said:¹⁹⁰

It is not all cutting which is engraving ... The term does not cover shaping a piece of metal or wood on a lathe, but has to do with marking, cutting or working the surface—typically the flat surface—of an object ...

Collages

3.71 The last item specifically mentioned is the collage. A collage is an artistic equivalent to the literary compilation. The creator assembles diverse fragments of material, some of which may be extracts from other copyright or formerly copyright works, artistic and others, some of which may be incapable of copyright at all (eg a piece of string), and places them either on a single surface or in some other form of juxtaposition, often with incongruous effect. Without this specific reference in the CDPA 1988, there is an obvious danger that such works may fail to attract copyright on the ground of lack of originality or the inherent nature of the material used. Collage has been held not to be constituted by ephemeral collocation, whether or not with artistic intent, of random, unrelated, and unfixed elements.¹⁹¹

Artistic quality of graphic works, etc

3.72 An artistic work in any of the categories just discussed need not have aesthetic appeal or be a work of fine art in the ordinary sense, for it is provided that the copyright subsists 'irrespective of its artistic quality'.¹⁹² The phrase 'artistic work' is rather to be taken as an indication of the methods by which the work must be produced. On the other hand, with a very simple drawing, it may be difficult to show infringement of the copyright.¹⁹³ As a consequence, however, there can be difficult questions of definition where there is some overlap with other forms of work. Although it is clear that plain lettering cannot be the subject of artistic copyright,¹⁹⁴ fancy lettering, for example in a greetings card, a label, or a trade mark, may well be a drawing.

p. 89 In relation in particular to maps, charts, diagrams, and plans, lettering, words, and figures may form an integral part of the representation and would fall to be protected by artistic rather than literary copyright; but where a drawing is merely an explanatory adjunct to written material, the latter has literary copyright.¹⁹⁵

Works of architecture

3.73 Works of architecture¹⁹⁶ are either buildings or models for buildings and do not include architects' plans, which are dealt with as drawings for copyright purposes.¹⁹⁷ A building includes any fixed structure,¹⁹⁸ and it would appear from the use of the word 'any' that no consideration need be given to the question of artistic quality in determining whether or not a work of architecture has copyright, a view supported by an *obiter dictum* of Lord Reid.¹⁹⁹ As to the meaning of 'structure' earlier case law has held that a garden layout including stone walls, steps, and ponds had copyright as a structure;²⁰⁰ department store buildings²⁰¹ and semi-detached villas²⁰² have also been accorded copyright. It may be suggested that a building is an artificial structure attached to land, but difficult questions of definition can be seen by examining some of the leading cases on fixtures.²⁰³

Exercise

Consider, for example, the Scottish case of *Christie v Smith's Executrix* 1949 SC 572, which raised the question whether a summerhouse which rested on specially laid foundations on land by virtue of its considerable weight was sufficiently attached to the land to be a fixture (answer: yes). Was the summerhouse also a work of architecture for copyright purposes?

Works of artistic craftsmanship

3.74 The phrase 'artistic craftsmanship' is not defined in the CDPA 1988 and no single clear meaning has emerged from the cases on the subject.²⁰⁴ Considering the phrase in the context of the section on artistic works as a whole, it would appear to cover works in three dimensions which are not sculptures or buildings; since the decision of the House of Lords in *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd*,²⁰⁵ it has also been accepted that for a work to be one of artistic craftsmanship it must be of a quality making it capable of

being described as artistic. The problem which is fully but inconclusively discussed in *Hensher* is how the Court may test the issue of artistic quality without becoming involved in subjective discussion of the merits of a work.

■ *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* [1976] AC 64

H produced popular suites of furniture deploying a boat-shaped theme. Expert witnesses described the shape as 'flashy', 'horrible', 'middle of the road', 'mediocre', and 'slightly vulgar', although obviously quite a good commercial design, and a 'winner' in terms of its appeal to the market.²⁰⁶ R, competitors of H, produced similar-looking suites, and H sued for infringement of copyright, relying not on any right in the finished articles but in the original three-dimensional prototype of the design made before the furniture went into production. Their claim was that the prototype was a work of craftsmanship, artistic quality was not necessary for protection, and therefore the adjective 'artistic' added nothing to the legal meaning of the subject matter to be protected; accordingly, the prototype fell within the scope of copyright. All the judges in the House of Lords agreed with those of the Court of Appeal that the prototype was not a work of artistic craftsmanship, but there was considerable disagreement as to the reasons why this should be so.

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3.75 In *Hensher* the House of Lords rejected the view expressed by the Court of Appeal in the case, that the test was whether the work would be purchased for its aesthetic appeal rather than for its utility, but their Lordships differed among themselves about what the test should be and about whether it was a test of fact depending on the evidence or a test of law for the Court. One view was that the intention of the author of the work to produce a work of art was the critical factor, and this is supported in other earlier cases.²⁰⁷ A second view was to ask whether a substantial part of the public would regard the work as artistic, this being distinct from the question of whether or not the primary reason for purchasing it was its aesthetic appeal. But the most cogent speech in *Hensher* is that of Lord Simon of Glaisdale, who argued that works of artistic craftsmanship first came to be copyright subjects under the Copyright Act 1911 as a consequence of the influence of the Arts and Crafts movement of the nineteenth century, which emphasised the necessary connection between form and function. The phrase 'artistic craftsmanship' should therefore be construed as a whole rather than by separate examination of its constituent words. So, the question to be asked of a work in which copyright was claimed under this heading is: is this the work of one who was in this respect an artist-craftsman? The artistic merit of the work was thus not an issue to be considered. The question was to be answered on the evidence, and the best evidence was likely to be that of acknowledged artist-craftsmen or those concerned with training artist-craftsmen.²⁰⁸ The test of the creator's intention seemed to gain ground in decisions holding that a baby's raincape and a plastic dental impression tray were not works of artistic craftsmanship.²⁰⁹ If Lord Simon's historical analysis in *Hensher* is correct, then we should begin with articles which have some function to perform, for example furniture, crockery, cutlery, and clothing, and it should

not necessarily be an objection that the article is the subject of industrial production, or that its function is industrial, or indeed merely decorative. A difficult question is also whether there must be one individual artist–craftsman, or whether the concept of the work and the execution can be separated.

■ ***Lucasfilm Ltd v Ainsworth* [2009] FSR 2**

See also para 3.68 for the facts of this case. Mann J held that the intention of the creator was relevant in determining whether a work was one of artistic craftsmanship. The New Zealand case of *Bonz Group (Pty) Ltd v Cooke*²¹⁰ was approved and applied, in which the judge had considered *Hensher* and other authorities and concluded that for a work of artistic craftsmanship: ‘it must be possible fairly to say that the author was both a craftsman and an artist. A craftsman is a person who makes something in a skilful way and takes justified pride in their workmanship. An artist is a person with creative ability who produces something which has aesthetic appeal.’ Mann J stated that the artist and the craftsman did not have to be the same person but there had to be a proper nexus between them. The producer of the helmets in this case was a craftsman producing high-quality products with justifiable pride in his work. However, his works could not be described as works of artistic craftsmanship. They did not have the purpose of being aesthetically appealing. Instead, they were used to provide an impression in a film. Unlike a work of artistic craftsmanship, they were not intended to sustain close scrutiny.²¹¹

■ ***Response Clothing Ltd v The Edinburgh Woollen Mill Ltd* [2020] EWHC 148 (IPEC)**

R claimed copyright subsistence in a fabric design with a wave arrangement, and made on a knitting machine. HH Hacon noted the difficulties with *Hensher* and, surprisingly, concluded that no binding principles of law could be deduced from it. The judge preferred the approach in *Bonz*, and held that the fabric was a work of artistic craftsmanship. In doing so, he noted that the definition of a craftsman is not limited to objects made by hands without the help of a machine. In addition, aesthetic appeal can be of a nature which causes the work to appeal to potential customers, which was the case here as the fabric was a commercial success. Finally, the making and sale of multiple copies of a work does not itself preclude it from being a work of artistic craftsmanship. The judge acknowledged that the requirement of aesthetic appeal is inconsistent with the notion of a work under EU law (see *Cofemel* in para 3.10). However, he circumvented the issue by saying that because the fabric in question had aesthetic appeal, the relevant definition in *Bonz* had been satisfied, whether or not it is required. In other words, since he did not have to deny protection because of a lack of aesthetic appeal, the incompatibility between UK and EU approaches did not matter here.

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-3-guidance-on-answering-the-discussion-points?options=showName>>.

Could and should a recipe constitute a work of artistic craftsmanship? See TSL Cheng, 'Copyright protection of haute cuisine: recipe for disaster?' [2008] EIPR 93.

Exercise

Consider the two following cases and how, if at all, they may be reconciled (or distinguished).

■ *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134

SF was making a film called *Mary Shelley's Frankenstein*. RF took an unauthorised photograph of a scene from the film as it was being shot. The picture was later published in *The People* newspaper. SF claimed infringement of copyright in the actors' costumes and the set as works of artistic craftsmanship, and in the latex prostheses being worn by the star of the film (Robert de Niro), as either a sculpture or a work of artistic craftsmanship. In preliminary proceedings, all the claims of copyright were held to be arguable and an injunction was granted against RF.

■ *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444

CR devised a scene (a white Rolls Royce in a swimming pool with various other props, none of them made for the purpose) to be the background for a photograph of a pop group (Oasis) to appear on the cover of their forthcoming album. An unauthorised photograph of the scene was taken and published in *The Sun* newspaper, which also intended to market the picture as a poster. CR claimed copyright in the scene as a sculpture or work of artistic craftsmanship. It was held that the scene was not a sculpture, since its making involved no carving, modelling, or other techniques of sculpture. Nor was such an assemblage of *objets trouvés* a work of artistic craftsmanship, since neither subject nor result involved craftsmanship.

Films

3.76 A film²¹² is:²¹³

a recording in any medium from which a moving image may by any means be reproduced.

Again, there is apparent in this broad definition the effort of the CDPA 1988 to retain the ability to offer copyright protection whatever technical changes may occur in the film industry. Thus, the recording embodied in a video, a CD-ROM, or a DVD, or captured by a CCTV camera, has copyright just as much as if it were recorded on traditional translucent film. The sound track accompanying a film is part of the work for copyright purposes, although it may also have an independent copyright as a sound recording.²¹⁴ Computer games can be protected as films,²¹⁵ but it is very doubtful whether images consisting purely of written text and/or still pictures can ever be treated as film, even if the reader is able to move the material around on her screen by use of scroll bars, cursors, and other control mechanisms.²¹⁶

3.77 Questions of overlap with other copyright works and subject matter may sometimes arise with films. It has already been noted that a film may be a dramatic work.²¹⁷ The definition of a photograph excludes any part of a film,²¹⁸ so that there is no possibility of a film claiming copyright as a set of photographs; but modern still cameras may include motor drive units which enable photographs to be taken in very rapid sequence. If these are capable of being shown as moving images then there may be a film for copyright purposes. The converse case is the camera which is fixed on one place, for example part of the sky or the ground, and captures images at intervals; which when played in sequence at normal speed show speeded-up and striking images of cloud movement or plant growth.

3.78 For the purposes of infringement, a photograph may be a copy of a film.²¹⁹ It would seem to follow from this, and the exclusion of parts of a film from the definition of a photograph, that a publicity poster using an image from the film would not have a copyright in that image as such. The protection would be that of a film, and it would be achieved through the concept of indirect copying (see para 4.21). It has also been suggested that a completed set of drawings intended for use in a cartoon film will by itself be a film because it is capable of being shown as a moving picture.

Question

What is a film for copyright purposes? Is there an overlap with other categories of copyright work?

Media works

Sound recordings

3.79 A sound recording is defined as:²²⁰

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↩ ... either

- (a) a recording of sounds, from which the sounds may be reproduced, or
- (b) a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be reproduced.

Sounds in category (a) might include, for example, bird-song or sound effects for use in a dramatic production, while category (b) includes readings as well as, most importantly from a commercial point of view, music. The Act seeks to retain coverage against technical development in sound recording by providing that there will be copyright regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced.²²¹ Copyright subsists in every sound recording that is not a copy taken from a previous sound recording.²²² Accordingly, copyright will not subsist in the records, cassettes, and CDs as such as sold to the public, since these are merely copies of the producer's master recording. But to copy from such copies will still be infringement of the master recording's copyright.²²³

Question

Looking at the statutory definition of a sound recording given previously, what in essence is protected by the copyright in this subject matter?

Broadcasts

3.80 This embraces both television and radio. There is no significant difference in the technology involved in radio and television broadcasting, merely in the end result, television embracing visual images as well as sound. Under the law until 2003, a distinction was drawn between the wireless technology of broadcasting and the supply of programme services by cable, but this has been dropped as a result of the implementation of the InfoSoc Directive 2001. A broadcast is now defined as:²²⁴

an electronic transmission of visual images, sounds, or other information, either

- (a) transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them; or
- (b) transmitted at a time determined solely by the person making the transmission for presentation to members of the public.

The purpose of distinguishing between (a) and (b) is to accommodate the phenomenon of satellite alongside more traditional terrestrial wireless and cable broadcasting. The latter are covered by (a); (b) requires some explanation of satellite technology in broadcasting.

Satellite broadcasting

3.81 There are two main forms of satellite broadcasting:

- (1) point-to-point or fixed satellite broadcasts; and
- (2) direct broadcasting by satellite.

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The former involves the transmission of signals to a satellite by one broadcaster, which are then transmitted to another broadcaster, who includes the signals in his own transmissions. Familiar examples of this include the broadcasting by the BBC and ITV of sports events taking place in other countries, where the initial signal is sent by a broadcaster in the other country. With direct broadcasting by satellite, the signal of the originating broadcaster is transmitted through the satellite direct to the receivers of the public. These receivers may require special equipment to receive the signal, for example satellite dishes, and to decode it for the purposes of viewing. Signals broadcast from satellites may be encrypted or scrambled in order to ensure that only those so equipped—that is, subscribers to the service—can receive the signal in intelligible form. Sky Television provides an example of this technology currently familiar in the UK.

3.82 This simplified account of broadcasting technology helps in understanding some of the problems underlying the provisions in the CDDA 1988 defining broadcasting. Doubts as to whether a signal directed initially only to a satellite (the ‘up-leg’) could be a broadcast are removed, because it is an electronic transmission of visual images and sounds made at a time determined solely by the person making the transmission for presentation to members of the public. The purpose of the transmission is such a presentation, although as such the signal is not capable of lawful reception by the public. There were similar doubts as to whether the signal from the satellite (the ‘down-leg’) could be a broadcast if it was encrypted. The 1988 Act provides that an encrypted transmission shall be regarded as capable of being lawfully received by members of the public (and therefore a broadcast) only if decoding equipment has been made available to the public by or with the authority of the person making the transmission or the person providing the contents of the transmission.²²⁵

Teletext and internet transmissions

3.83 The definition of broadcasting makes clear that broadcasting is not restricted to the transmission of sounds and visual images, but can include other material such as teletext information services.²²⁶ Internet transmissions are in general not to be treated as broadcasts,²²⁷ since in general they are neither transmitted simultaneously to their audience nor does the transmitter decide the time of transmission (the recipient generally does that). However, an internet transmission can fall within the definition of a broadcast if:²²⁸

- (1) the transmission takes place simultaneously on the internet and by other means, such as conventional TV or radio (‘streaming’);
- (2) it is a concurrent transmission of a live event; or
- (3) it is a transmission of recorded moving images or sounds forming part of a programme service offered by the person responsible for making the transmission, being a service in which programmes are transmitted at scheduled times determined by that person.

Discussion point 1

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-3-guidance-on-answering-the-discussion-points?options=showName>>.

Consider ‘podcasting’, a method of distributing audio or audiovisual material on the internet, for playback on personal computers or mobile devices at a time chosen by the user. This technique is increasingly being used by broadcasting companies to allow viewers/listeners to see/hear programmes or other material at a time convenient to them.

Is a ‘podcast’ a broadcast for copyright purposes?

Discussion point 2

Consider also the possibility increasingly deployed in digital broadcasting, where the viewer may ‘pause and record’ a programme as it is transmitted, thereby allowing him to answer the doorbell or telephone without missing any part of the programme. What are the implications for the distinction between broadcasts and other forms of transmission?

p. 95 Repeats

3.84 Many broadcasts on television and radio are repeated once or more. Such repeats have a copyright separate from or additional to that of the original broadcast,²²⁹ unless it infringes the copyright in another broadcast or in a cable programme.²³⁰

Published editions of literary, dramatic, and musical works

3.85 Copyright subsists in the typographical arrangement of every published edition of a literary, dramatic, or musical work.²³¹ A new edition is not a reprint of the work reproducing the typographical arrangement of a previous edition, but some new mode of presenting the work. The concept of ‘edition’ used here should be distinguished from the use of the word in describing versions of, say, a textbook, where each successive edition involves a change, not only in the typographical arrangement but also in the content of the text thus presented. The same text may be published several times, but as long as each publication adopts a different typographical arrangement, there will be separate copyrights for the publishers.²³² Equally, the text itself may be out of copyright, but there will be a copyright in the typographical arrangement of any edition which is not a reproduction, in whole or in part, of a previous typographical arrangement.²³³

■ *Newspaper Licensing Agency Ltd v Marks and Spencer plc* [2003] 1 AC 551

M&S subscribed to a press-cutting service which provided a daily supply of photocopies of items of interest appearing in national and daily newspapers. The press-cutting service had a licence from the newspapers' collecting society, the NLA. M&S copied the photocopies for distribution to individuals within its organisation, but had no licence for this. The NLA sued for infringement of a copyright in the typographical arrangement of the published editions of the newspapers. The issue was whether the copyright subsisted only in the whole newspaper, or separately in each article within the newspaper. Giving the main speech, Lord Hoffmann said: 'In my opinion, the frame of reference for the term "published edition" is the language of the publishing trade. The edition is the product, generally between covers, which the publisher offers to the public' (para 14). While the articles each had literary copyright in their own right, this did not mean that each article as printed was a separate published edition, and a newspaper a collection of such editions. Lord Hoffmann added:

In the case of a modern newspaper, I think that the skill and labour devoted to typographical arrangement is principally expressed in the overall design. It is not the choice of a particular typeface, the precise number or width of the columns, the breadth of margins and the relationship of headlines and straplines to the other text, the number of articles on a page and the distribution of photographs and advertisements but the combination of all of these into pages which give the newspaper as a whole its distinctive appearance ... I find it difficult to think of the skill and labour which has gone into the typographical arrangement of a newspaper being expressed in anything less than a full page. The particular fonts, columns, margins and so forth are only, so to speak, the typographical vocabulary in which the arrangement is expressed (para 23).

First ownership

Introduction

3.86 It is necessary to consider ownership of copyright in two parts:

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- (1) the *initial ownership* of the copyright, which in general pertains to the *author or creator* of the work in question;
 - (2) ↵ given that copyright is an item of property, ownership of which may be transferred and which may also endure beyond the author's lifetime, the *transfer of copyright and consequent rights*.

This section considers only the first of these issues. The second issue is covered in the chapter on exploitation of copyright (see Chapter 6).

3.87 The *author* of a work is usually the *first owner* of the copyright in the work (CDPA 1988, s 11(1)). There is no *requirement of registration*, in contrast with most other forms of intellectual property, and *copyright will arise automatically with the creation of the work*. An *author is the person who creates the work* (s 9(1)), a concept readily applicable to most literary, dramatic, musical, and artistic works. However, the CDPA 1988 gives explicit definitions of who is to be taken as the author of sound recordings, films, broadcasts, and computer-generated works. Further, an important exception to first ownership following authorship is that the *employer will be the first owner of copyright in any literary, dramatic, musical, or artistic work or film authored by an employee in the course of employment unless there is an agreement to the contrary* (s 11(2)). In these provisions can be most clearly seen the UK's attribution of ownership and control of the work to the entrepreneur as distinct from the creator. Finally, there are *special rules relating to Crown and parliamentary copyright*, and copyright vested in certain international organisations.

Author of literary, dramatic, musical, or artistic work

3.88 With literary, dramatic, musical, and artistic works which are not computer-generated (for which see para 3.101), the author is the person who creates the work.²³⁴ There is a statutory presumption that, where a name purporting to be that of the author appears on copies of a literary, dramatic, musical, or artistic work when published, or when made, the person whose name so appears is the author of the work, and that the work was made in circumstances not involving that person's course of employment, Crown or parliamentary copyright, or the copyright vested in certain international organisations. Like any presumption, this may be rebutted by contrary proof.²³⁵ In general, the author is the person by whose 'skill and labour' (see paras 3.26–3.27), or by whose 'intellectual creativity' (post *Infopaq*, see paras 3.32–3.37), the work took on its final material form and achieved the *originality* required for copyright protection. The broad principle that copyright subsists, not in ideas but in the way in which ideas are expressed (see paras 3.10–3.14) should also be borne in mind here. Copyright law has thus not taken up the post-modern deconstructionist critique, which rejects what it calls 'the Romantic concept of the author', and argues that works are not so much the expression of an individual as of the whole society and culture in which they are made.²³⁶ Such analysis can be taken to undermine the individual author's claim to ownership of rights in the work and to highlight instead the claims that society as a whole is entitled to make. The foundation of copyright law remains, however, its recognition of the author's contribution against anyone or anything else.

Question

Who may be treated as the author of a literary, dramatic, musical, or artistic work?

p. 97 Joint authorship

3.89 However, the law does recognise that a work may have more than one author. There may be joint authorship of a work where it is.²³⁷

a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors.

Works of joint authorship are usually readily identifiable as such because the names of all authors appear on the work and no effort is made to separate their contributions. The presumption of authorship in favour of those whose names appear on copies of literary, dramatic, musical, or artistic works²³⁸ applies also to works of joint authorship. Complexities may arise where there is no express attribution to joint authors. However, a recent decision has helpfully drawn together the essence of joint authorship.

■ ***Julia Kogan v Nicholas Martin* [2019] EWCA Civ 1645 (CA)**

The case involved a dispute over the authorship of a screenplay of the film ‘Florence Foster Jenkins’. M, a writer, was accepted to be an author of the screenplay, but K, an opera singer, who was in a romantic relationship with M at the time of the screenplay’s creation, claimed to be a joint author. The Court of Appeal held that joint authorship has essentially four elements: (a) collaboration, (b) authorship, (c) contribution, and (d) non-distinctness of contribution. After reviewing previous case law on each of the elements, Floyd LJ, at para 53, concluded:

Drawing all of this together:

1. A work of joint authorship is a work produced by the collaboration of all the people who created it.
2. There will be a collaboration where those people undertake jointly to create the work with a common design as to its general outline, and where they share the labour of working it out. The first task for the court in such a case is to determine the nature of the co-operation between the putative joint authors which resulted in the creation of the work.
3. Derivative works do not qualify. Works where one of the putative authors only provides editorial corrections or critique, but where there is no wider collaboration, do not qualify. *Ad hoc* suggestions of phrases or ideas where there is no wider collaboration do not qualify.
4. In determining whether there is a collaboration to create a literary or artistic work it is never enough to ask “who did the writing?”. Authors can collaborate to create a work in many different ways. For example there may be joint authorship if one person creates the plot and the other writes the words, or if either or both of these types of labour is shared.
5. Joint authors must be authors, in the sense that they must have contributed a significant amount of the skill which went into the creation of the work. Again, it is not correct to focus exclusively on who fixed the work in writing. The statutory concept of an author includes all those who created, selected or gathered together the detailed concepts or emotions which the words have fixed in writing.
6. Contributions which are not “authorial” in the above sense do not count. What counts as an authorial contribution is acutely sensitive to the nature of the copyright work in question.
7. The question of what is enough of a contribution is to be judged by the *Infopaq* test, i.e. whether the putative joint author has contributed elements which expressed that person’s own intellectual creation. The essence of that term is that the person in question must have exercised free and expressive choices. The more restrictive the choices the less likely it will be that they satisfy the test.
8. ↩ The contribution of a putative joint author must not be distinct.
9. There is no further requirement that the authors must have subjectively intended to create a work of joint authorship.
10. The fact that one of the authors has the final say on what goes into the work may have some relevance to whether there is a collaboration, but is not conclusive. The author with the final say must be given credit in deciding on the relative proportions of ownership, for the extra work involved in making those choices.

11. It follows that the respective shares of joint authors are not required to be equal, but can reflect, *pro rata*, the relative amounts of their contributions.

Following a retrial, ordered by the Court of Appeal, Meade J applied the principles above and held that K was a joint author with a contribution of 20%. Even though M held the pen and had the final say, K's 'contribution was authorial because it resided in the creation, selection and gathering together of detailed concepts and emotions which the words have fixed in writing'.²³⁹

3.90 Collaboration suggests a process of cooperation between the authors in the furtherance of a common design to produce a work and even if one carries out a larger share of work than the other, each author is required to make a 'significant contribution'.²⁴⁰ However, a collaborative work must be distinguished from a derivative work in that if an author takes as their starting point the work of another and decides to adapt, embellish, or improve on it, then even if the resultant work may attract copyright it is not a work of joint authorship.²⁴¹ Does collaboration require a joint intention to create a joint work? In *Beckingham v Hodgins*,²⁴² the Court of Appeal held that the existence of a common intention to produce a joint work was not a requirement for a work of joint authorship. In assessing whether there is a collaboration it is not enough to simply ask who did the writing because if copyright protects the plot of a literary work for instance, then the skill which goes into devising the plot is as much part of creating the work, as the writing.²⁴³ Similarly, in assessing whether each person involved was an 'author', that is, they collaborated in 'creating' the work (as opposed to just fixation), it also is wrong to focus exclusively on the person who does the writing.²⁴⁴ The contribution made by a joint author must be 'authorial' although what is authorial would depend on the type of work in question. However, such authorial contributions should not be separate or distinct.²⁴⁵ If the contributions are distinct then each author can claim copyright in their distinct part, and there is no need for joint authorship.²⁴⁶

Question

When may a person be identified as a joint author?

Some particular examples of joint authorship decisions

3.91 A person who supplied some of the ideas for the plot of a play,²⁴⁷ a director who added ideas during the rehearsals and development of a play's script,²⁴⁸ and a person who had had the idea of using an outline drawing of a human hand as an indicator on a ballot paper,²⁴⁹ were all held not entitled to the copyright in the resultant works, while the ghostwriter of a jockey's memoirs was held to be the owner of the copyright therein as the person responsible for the language in which the work was cast.²⁵⁰ There have been a number of difficult cases where parties were working together in the production of new software.

■ *Fylde Microsystems Ltd v Key Radio Systems Ltd* [1998] FSR 449

The parties were cooperating (without a contract) in the development of radios. FM wrote software for installation in KRS's radios, which the latter then sold. The parties fell into dispute over ownership of the copyright in the software. KRS admitted that FM was the writer but argued that it was a joint author by setting the specification for the software, reporting errors and bugs, making suggestions as to the cause of faults, and providing technical information about the hardware in which the software had to operate. It was held that although KRS's activities involved much skill and labour, it was not of the nature of authorship, and the parties were not joint authors.

■ *Cyprotex Discovery Ltd v University of Sheffield* [2004] RPC 4

In this case²⁵¹ the university and a company (C) were engaged together under a contract in the development for practical application of software initially created by the university. The relationship broke down and an issue emerged as to whether the parties were joint authors of the software which had been developed under the contract. It was held that the university's contribution to the new software—provision of background information about the initial software, assistance in compilation of the technical specifications of what the new software should contain, and vetting the suggestions of third-party sponsors of the work—was not that of an author but of a client wishing to ensure the functionality of the new software when completed. It therefore had no claim to the copyright in the new software.

Exercise

Consider the case of two sets of solicitors negotiating and drafting written contracts on behalf of their respective clients. Is the contractual document which results a work of joint authorship or not? See David Vaver, 'Copyright in legal documents' (1993) 31 Osgoode Hall LJ 661.

3.92 Another quite common situation is the development of musical work by a group working together but developing the ideas by playing them on their instruments rather than writing them down.²⁵² Contrast the two following cases, where there were different results on the particular facts:

■ *Stuart v Barrett* [1994] EMLR 448

The case concerned the output of a pop group called Keep it Dark. S was the drummer and, after his expulsion from the group, he claimed joint authorship in the music of the band's songs. The music resulted from 'jamming' sessions at which, after one member of the group began with an opening phrase or series of notes, the group then played together, improvising and composing by ear; no one wrote down any notes. Thomas Morison QC held that the music was the result of joint authorship, although emphasising that there was no general rule for such group compositions. With regard to S's contribution, the judge said:

I also have no doubt that in principle a drummer may claim copyright in a piece of music if, as here, he had collaborated with the other members of the group to produce an original piece of music. Whilst the player of tuned percussion might be more readily recognisable as a contributor to a musical composition than a drummer, in my judgment it would be a misinterpretation of the drummer's contribution to composition in contemporary music, whether pop or otherwise, to reject his contribution in principle. I listened to some of the tapes produced in Court and I am in no doubt about the significance of the drum part to the whole of the work. The work is given shape and drive by the drummer and a good drummer, as I accept the plaintiff is, can significantly influence the whole composition (at 460).

■ *Hadley v Kemp* [1999] EMLR 589

This case originated in the break-up of the 1980s pop-rock band Spandau Ballet. The band's music was generally attributed to Gary Kemp (GK), one of its five members; three of the others claimed joint authorship on the basis that, although GK initiated the compositions, he did not write them down but presented them aurally to the other band members, from whence the material was developed by further performance. It was held on the evidence that the compositions remained those of GK and that the contribution of the other band members to the final product were matters of performance and not in the nature of composition (authorship).

Question

What is the distinction between the previous two cases?

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-3-guidance-on-answering-the-discussion-points?options=showName>>.

Is this book a work of joint authorship? What do you need to know to answer this question?

Nature of joint ownership: common property

3.93 In cases of joint authorship, all the authors own the copyright in the work.²⁵³ The main consequence of joint authorship for a work is that there is only one copyright in the whole work, the duration of which is tied to the death of the last-surviving author alone.²⁵⁴ The copyright is usually held by the authors as common property, subject to any circumstances or agreement to the contrary, each having a title to his own share which he can alienate and which passes to his estate on death.²⁵⁵ It would also follow that each co-owner is entitled to share in the management of the common property, meaning in this case that the consent of all must be obtained before any licence is granted.²⁵⁶ In any event, it is provided that where copyright is owned jointly any requirement of the licence of the copyright owner requires the licence of all the owners.²⁵⁷ It has been held, however, that a co-author may sue for infringement of copyright without the other authors.²⁵⁸

p. 101

Key points on joint authorship

- This arises where there is collaboration, authorship, contribution, and non-distinctiveness of contributions.
- Ownership is usually common, not joint: that is, there is one copyright, each party owning a share of the whole which passes to his estate on death; each may share in management, or sell the share.

Co-authorship

3.94 The definition of joint authorship makes it possible to distinguish what may be called works of co-authorship, that is, works produced by some collaboration but where the contributions of the collaborators are separate from each other.²⁵⁹ A song in which the words were written by one person and the music by another, where they were created to be used together, is specifically set out in the statute as a work of co-authorship.²⁶⁰ No other works are classified as works of co-authorship in the CDPA 1988. In a co-authored work each contributor has a separate copyright as the author of his part of the work.

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oup.support.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-3-guidance-on-answering-the-discussion-points?options=showName>>.

What is the position where a work is produced as apparently one of joint authorship within the meaning of the CDPA 1988, but the authors indicate, perhaps in a prefatory statement, that responsibility has in fact been divided along certain lines?

Compilations and authorship

3.95 Compilations must also be distinguished from both works of co-authorship and works of joint authorship: compilations have copyright and the compiler is an author even though there may be several different works by other authors represented in the compilation. The borderline can be unclear: thus, *Who's Who*, which is compiled from returns completed by the subjects of each entry, has been held to be a compilation rather than a collection of autobiographies, with the subjects each having copyright in their own contributions.²⁶¹

Authors of films

3.96 The authors of a film are its producer and principal director,²⁶² and the film will be treated as a work of joint authorship unless these two are the same person.²⁶³

p. 102 Sound recordings

3.97 The first copyright in a sound recording is owned by the producer.²⁶⁴

Broadcasts

3.98 The first copyright in every broadcast is owned by the person making the broadcast or, in the case of a broadcast which relays another broadcast by reception and immediate re-transmission, the person making that other broadcast.²⁶⁵ The person making the broadcast is the person transmitting the programme, if he has any responsibility for its contents, or any person providing the programme who makes with the person transmitting it the arrangements necessary for its transmission; a programme is any item included in a broadcast.²⁶⁶ An example of a situation where the transmitter has no responsibility for the contents is when he is simply transmitting a signal received from a satellite.

Published editions

3.99 The copyright in a published edition of a literary, dramatic, or musical work belongs to its publisher.²⁶⁷

Joint authorship and the media copyrights

3.100 There is no restriction of the concept of joint authorship to literary, dramatic, musical, and artistic works. As already noted, joint authorship arises with films; and there is express provision for joint authorship in broadcasts when a person provides a programme having made arrangements with the person actually transmitting it which are necessary for the programme's transmission.²⁶⁸ Joint authorship might also arise with sound recordings produced by joint ventures or other collaborations over arrangements needed to make the record.

Using computers: computer-generated works

3.101 Problems may arise with computers. It is obvious that a person composing a computer program is the author and (subject to the rules of employment discussed at paras 3.105–3.111) first owner of the copyright in the work. When a work is produced by use of a computer program, the computer can be seen as a tool or as an aid, meaning that the copyright in the work belongs to the person who employed the computer as a tool to enable this function.²⁶⁹ For instance, if a computer program, such as a word-processing package, is used in the production of another work, the appropriate analogy would appear to be with a person using a pen, typewriter, or paintbrush to create something, where the copyright would plainly be in the user of the tool rather than in its maker. If the human operator provides the skill and labour, or intellectual creativity, the output is computer-aided or computer-assisted.

p. 103 3.102 The CDPA 1988 introduces a further complication into this difficult area, the *computer-generated work*. This means that the work is generated by computer in circumstances such that there is no human author of the work.²⁷⁰ In such circumstances, the author is taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.²⁷¹ A work seems likely to be treated as computer-generated when the machine is merely provided with data by its operators, which it analyses and converts into output. The sequence of images generated in playing a computer video game has been held to be a computer- rather than player-generated work; the person playing the game was merely a player, not an author.²⁷² Recent developments in relation to Artificial Intelligence (AI) have raised the question of who owns works generated by AI.²⁷³ Literary, dramatic, musical, and artistic works require originality, and the formulation of skill and labour, or intellectual creativity, is tied to and grounded in human authorship. It is unclear how originality is to be applied when there is limited human input. Also, the user in such cases may well be distinct from the person by whom the arrangements necessary for the creation of the work were undertaken. More broadly, it is also worth questioning the rationale, if any, for according copyright protection to AI-generated works and how that might sit with the traditional justifications for copyright.

Question

Who owns copyright in works generated by AI? Should copyright subsist in such works?

The UK IPO ran a consultation on AI and IP between October 2021 and January 2022²⁷⁴ to seek evidence and views, inter alia, on three options for the section 9(3) provision on computer-generated works: make no legal change and copyright would apply to computer-generated works; remove protection for computer-generated works; replace the current provision with a new right of reduced scope and duration.

Which of these options do you support and why? Find out the outcome of the IPO's consultation. Have any recommendations been made to change the existing provision? Does the outcome achieve a balance between the competing interests of human authors, copyright owners, and developers and users of AI systems?

Anonymous and pseudonymous works

3.103 A literary, dramatic, musical, or artistic work may be composed in such circumstances that it is not possible to identify any author. The work is thus *anonymous*. Alternatively, authors may choose to use names or badges of identity other than their true names in connection with their works. The works will then be *pseudonymous*. Both are what the CDPA 1988 terms 'works of unknown authorship'.²⁷⁵ In both cases, copyright in the work remains with the author, whoever that may be, because where the identity is ascertainable by reasonable inquiry (eg where the identity of an author can be identified despite of the use of a pseudonym)²⁷⁶ the term of copyright is determined by reference to the date of that person's death.²⁷⁷ But there is a statutory presumption that, where no name purporting to be that of an author appears upon a published literary, dramatic, musical, or artistic work, and a name purporting to be that of the publisher does appear on copies of the work as first published, the person whose name appeared is presumed, until the contrary is proved, to have been the owner of the copyright at the time of publication.²⁷⁸ The presumption operates even in cases where the publisher is not a party.

■ *Warwick Film Productions v Eisinger* [1969] 1 Ch 508

WFP claimed that the executor of the author of an anonymous book had assigned its copyright to them. It was held that, as WFP had not rebutted the presumption that the publisher owned the copyright, their case on this point failed. Plowman J also said that it would not have helped WFP to prove who the author was; the presumption could only be rebutted by evidence that the publishers did not own the copyright. This seems to go too far: the basic position under the statute is that the author is the first owner of copyright and, in the case of published anonymous and pseudonymous works, if

his identity can be established his date of death determines the term of the copyright. Viewed in this context, the presumption that the publisher owns the copyright must be rebuttable by evidence of who the author was.

3.104 The presumption does not deal with either the unpublished work or the work where the name that appears as author is a pseudonym, and the identity of the author is not reasonably discoverable in either case. Ownership may then hang in something of a void in both cases; but the effects of this are mitigated by the provision that where it is reasonable to assume that copyright has expired or that the author died 70 years or more before the beginning of the current calendar year, then no act can constitute infringement of copyright.²⁷⁹

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oup.support.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-3-guidance-on-answering-the-discussion-points?options=showName>>.

What advice would you give to someone who wished to include in an anthology of verse a poem published in a student magazine in 1900 under the name 'John Smith', but who had no idea who John Smith was?

Employment

3.105 In general, where a literary, dramatic, musical, or artistic work, or a film, is made in the course of the author's employment by another person, the employer is entitled to the copyright in the work.²⁸⁰ The converse is, of course, that unless any contract under which a literary, dramatic, musical, or artistic work, or a film, is made is one of employment, the author will always be the first owner of the copyright.²⁸¹ An important issue as such is to determine whether the author is an employee at the time of creation of the work and whether there is a contract of employment. The CDPA 1988, in section 178, provides that the words 'employed', 'employee', 'employer', and 'employment' refer to employment under a contract of service or of apprenticeship.²⁸² Consequently, in determining ownership of copyright, it must be asked whether the author is under a contract of *service* or of apprenticeship, as opposed to a contract for *services*.²⁸³

3.106 The 1988 Act's general provisions on the effect of employment on copyright are subject to any agreement to the contrary, and it is worth noting that there are no formal requirements with respect to such agreements.²⁸⁴ Agreements can be implied from actions, as for example where universities have generally not claimed copyright in their academic employees' works, even though the production of such works might be said to be in the course of employment.²⁸⁵

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Question

When is an employer entitled to the copyright in an employee's work?

■ *Noah v Shuba* [1991] FSR 14 (Mummery J)

N was employed as an epidemiologist at the Public Health Laboratory Scheme (PHLS). He wrote a book entitled *A Guide to Hygienic Skin Piercing*. In accordance with the usual practice of the PHLS, under which employees retained copyright in works written by them, the book showed N as the author and copyright owner. In an action for copyright infringement which N brought against third parties, Mummery J stated *obiter* that the long-standing practice of PHLS with regard to employees' copyright works meant that N's contract contained an implied term against the application of the employment rule in the 1988 Act.

In the course of employment

3.107 Before the employer can claim any copyright in his employee's literary, dramatic, musical, or artistic work, it must be shown to have been made in the course of the author's employment.²⁸⁶

■ *Stephenson Jordan and Harrison v Macdonald and Evans* (1952) 69 RPC 10

A former employee of the plaintiffs had published a book made up of the texts of public lectures composed and delivered by him before various audiences, and also of a report prepared by him for a client of the plaintiffs. Both parts had been written during the period of his employment. It was held that copyright in the report belonged to the employers, because the author wrote it as part of what he was employed to do; but with regard to the text of the lectures, even though the employers had encouraged the author to give the lectures and had met his resultant expenses, it was held that the employers had no copyright. An analogy was drawn between the employee and a university lecturer, and it was said to be 'both just and commonsense' (per Lord Evershed at 18) that the latter rather than his university, had copyright in his lectures. The grounds for this view do not clearly appear in the case but it has been suggested that the employee was only employed to deliver and not to write the lectures. However, this appears inconsistent with the observation of Morris LJ that it had not been shown that the employee could have been ordered either to write or to deliver the lectures (at 24).

■ *Byrne v Statist Co* [1914] 1 KB 622

A member of the editorial staff of a newspaper made a translation into English of a speech reported in a foreign language for publication in the paper. The work was commissioned and paid for by his employers, but he carried it out in his own time and independently of his normal duties. It was held that he was the owner of the copyright, not having made the translation in the course of his employment.

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■ *Mei Fields Designs Ltd v Saffron Cards and Gifts Ltd* [2018] EWHC 1332 (IPEC)

M, was employed as a design director by MWL but was held to have designed greeting cards outside the course of employment. The Court noted that there is no single test for whether an act is carried out in the course of employment, this being a multifactorial assessment. The relevant factors, with no single factor being determinative, and the list not being exhaustive, may include:

(a) the terms of the contract of employment; (b) where the work was created; (c) whether the work was created during normal office hours; (d) who provided the materials for the work to be create; (e) the level of direction provided to the author; (f) whether the author can refuse to create the work/s; and (g) whether the work is “integral” to the business (para 42).

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oup.support.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-3-guidance-on-answering-the-discussion-points?options=showName>>.

Discuss whether a schoolteacher who writes and publishes a text for use in schools would have the copyright in it. Is there any difference in the position of the university lecturer who writes a book or articles? What about the composition of a database or a computer program by the same lecturer?

Presumption against employer

3.108 Where the name of a person purporting to be that of the author appears on a published copy of a literary, dramatic, musical, or artistic work, or on a work when it is made, it is presumed that he is the author and that he did not make that work in the course of his employment. The contrary must therefore be proved.²⁸⁷

Should employees be rewarded further?

3.109 Under UK (but not Continental) laws, where an employee creates a work in the course of employment, the employer gets first ownership of the resulting copyright. Given that the employer is an investor who is backing the production of copyright works, his gaining the copyright (at least in its economic aspects) and the return therefrom does not seem so dreadful as is sometimes suggested by those from systems more focused on copyright as reflecting more of personality rights than economic interests. The Software Directive, in Article 2(3), laid down that the economic rights in a computer program should go to the employer unless otherwise provided by contract, thus pointing Europeanisation for the digital environment in a UK or Anglo-American direction at that stage.

3.110 The UK model of giving an employer the first copyright in an employee's work, raises questions as to whether employees should be rewarded further, and if so, how to compensate them for the loss of the right that would otherwise (eg work created outside the course of employment) have fallen to them. Patent law provides a possible example: the employer is entitled to patent inventions by employees working in the course of their employment, but the employee has a right to participate in the economic benefit which the work brings to the employer (see para 12.29). However, that scheme does not appear to have been regularly used and is not easy to apply. But this may also be because well-advised employers put in place suitable or satisfactory schemes of their own devising as part of the contract of employment. Another model of possible relevance is the artist's resale right, introduced into UK law on 14 February 2006 (see paras 6.22–6.26). The right guarantees the original artist a share of the returns being earned from sales of the original art work, regardless of whether the artist still owns the copyright in the work in question.

p. 107 ↺ **3.111** Were an employee reward scheme along this or similar lines to be introduced into copyright, the question of whether it should be a default scheme subject to contract would have to be addressed.

Commissioned works

3.112 Employment should be distinguished from a *commission*.²⁸⁸ In the CDPA 1988, there are no express provisions on commissions as such, and so general principles will apply. The general principle is that the author will be the first owner of copyright unless otherwise agreed, for instance through a contract. This is particularly important because this is an area where the 1988 Act departed from its predecessor's position.²⁸⁹ If the parties agree that the commissioner is to have the copyright in the commissioned work, the agreement will have to take the form of an assignation by the author, which the 1988 Act requires to be in writing.²⁹⁰ In *Griggs v Evans*,²⁹¹ the Court of Appeal confirmed the general principles on the respective rights of the commissioner and author.²⁹²

- (1) the contractor is entitled to retain the copyright in default of some express or implied term to the contrary effect;
- (2) the contract itself may expressly provide as to who shall be entitled to the copyright in work produced pursuant to the contract ...
- (3) the mere fact that the contractor has been commissioned is insufficient to entitle the client to the copyright ... the client has to establish the entitlement under some express or implied term of the contract;
- (4) the law governing the implication of terms in a contract has been firmly established ...
- (5) where (as in the present case) it is necessary to imply the grant of some right to fill a lacuna in the contract and the question arises how this lacuna is to be filled ... The principle is clearly stated that in deciding which of various alternatives should constitute the contents of the term to be implied, the choice must be that which does not exceed what is necessary in the circumstances ... In short a minimalist approach is called for. An implication may only be made if this is necessary, and then only of what is necessary and no more;
- (6) accordingly if it is necessary to imply some grant of rights in respect of a copyright work, and the need could be satisfied by the grant of a licence or an assignment of the copyright, the implication will be of the grant of a licence only;
- (7) circumstances may exist when the necessity for an assignment of copyright may be established ... these circumstances are, however, only likely to arise if the client needs in addition to the right to use the copyright works the right to exclude the contractor from using the work and the ability to enforce the copyright against third parties. Examples of when this situation may arise include: (a) where the purpose in commissioning the work is for the client to multiply and sell copies on the market for which the work was created free from the sale of copies in competition with the client by the contractor or third parties; (b) where the contractor creates a work which is derivative from a pre-existing work of the client, e.g. when a draughtsman is engaged to turn designs of an article in sketch form by the client into formal manufacturing drawings, and the draughtsman could not use the drawings himself without infringing the underlying rights of the client; (c) where the contractor is engaged as part of a team with employees of the client to produce a composite or joint work and he is unable, or cannot have been intended to be able, to exploit for his own benefit the joint work or indeed any distinct contribution of his own created in the course of his engagement ... In each case it is necessary to consider the price paid, the impact on the Contractor of assignment of copyright and whether it can sensibly have been intended that the contractor should retain any copyright as a separate item of property;
- (8) if necessity requires only the grant of a licence, the ambit of the licence must be the minimum which is required to secure to the client the entitlement which the parties to the contract must have intended to confer upon him ...
- (9) the licence accordingly is to be limited to what is in the joint contemplation of the parties at the date of the contract, and does not extend to enable the client to take advantage of a new unexpected profitable opportunity ...

p. 108

As such, in the absence of any terms in the contract regarding ownership of copyright in a commissioned work, the Court will apply the usual contractual principles and may imply a term by taking a minimalist approach.

Crown copyright

3.113 The monarch is entitled to copyright²⁹³ in every work made in the copyright area by the monarch or an officer or servant of the Crown in the course of his duties.²⁹⁴ It seems that, for the most part, the position of the Crown is little different from that of any other employer, apart from the much longer duration of the copyright. It may have some unusual rights in respect of the works of former intelligence officers where these breach the lifelong duty of confidentiality owed to the Crown by such persons. According to some of the judges in *Attorney General v Guardian Newspapers Ltd (No 2)*,²⁹⁵ copyright in such works may vest in the Crown even though their creation occurs after the employment has ceased and cannot in any event be said to be in the course of the author's employment. The monarch is also entitled to copyright in every Act of Parliament, Act of the Scottish Parliament, Act of the Welsh and Northern Ireland Assemblies, or Measure of the General Synod of the Church of England.²⁹⁶ Finally, the monarch has copyright in works made in his private capacity. This is presumably affected by the special provisions as to the term of Crown copyrights, on the basis that such works are made by the monarch in terms of the section. Members of the royal family who make copyright works have the usual rights²⁹⁷ and are not affected by any aspect of Crown copyright, since their works are not made by the monarch.²⁹⁸

Parliamentary copyright

p. 109 3.114 The first ownership of copyright in works made by or under the direction or control of the House of Commons or the House of Lords²⁹⁹ falls to the relevant House, or, if it is made by or under the direction and control of both Houses, jointly to the two Houses.³⁰⁰ The CDPA 1988 also provides that the copyright of every Bill introduced into the UK Parliament is vested in one or both of the Houses.³⁰¹ Copyright in a public Bill belongs in the first instance to the House in which the Bill is introduced, and after the Bill has been carried to the second House to both Houses jointly.³⁰² Copyright in a private Bill belongs to both Houses jointly.³⁰³ Copyright in a personal Bill belongs in the first instance to the House of Lords, and after the Bill has been carried to the House of Commons to both Houses jointly.³⁰⁴ Copyright in a Bill ceases when it receives Royal Assent (in which case it becomes an Act and subject to Crown copyright) or on the withdrawal or rejection of the Bill.³⁰⁵ There are similar provisions for the Bills of the Scottish Parliament (first copyright belongs to the Scottish Parliamentary Corporate Body) and the Welsh and Northern Ireland Assemblies (first owner the Welsh and Northern Ireland Assembly Commissions, respectively).³⁰⁶

Question

Why was there no provision for Welsh Assembly copyright before the coming into force of the Government of Wales Act 2006, Sch 10, para 28?

Duration of copyright

Introduction

3.115 The rights conferred by copyright generally endure for a limited period of time only. The Berne Convention provides for a *minimum* period of the author's lifetime plus 50 years for the works to which it applies (Art 7), while the Rome Convention lays down another minimum of at least 20 years for sound recordings and broadcasts (Art 14). Various formulae are used in the UK legislation, generally involving a period of either 70 or 50 years from the end of the calendar year in which a given event occurred. The present position is the result of EU directives, with the first one enacted in 1993 and implemented in the UK in 1995.³⁰⁷ The rules on duration of copyright protection remain unchanged by the withdrawal of the UK from the EU as the implementation of such directives has been preserved. However, the preferential treatment previously given to EEA works has been removed.³⁰⁸ From 1 January 2021, for the purpose of copyright duration, EEA works are treated in the same way as non-EEA works, that is, the duration of copyright is that to which the work is entitled in the country of origin, provided this does not exceed the period provided in the UK.³⁰⁹ However, this will not have any immediate impact on UK or EEA works because of previous harmonisation of the term of protection.

3.116 In the following paragraphs, references to the 70- or 50-year periods should be understood as references to the above formulae. The use of 'the end of the calendar year' as part of the formula is to avoid disputes as to precisely when the event in question occurred. With literary, dramatic, musical, and artistic works, the copyright period is tied first to the lifetime of the author, with the 70-year period added on after his death (*post mortem auctoris*). This reflects recognition of the author's 'natural' right of property in his work, but it continues to be the period even where the copyright in the work is in other hands.³¹⁰ The extension of copyright beyond the author's lifetime was initially conceived as a form of protection for his family and descendants, but again the period applies even when the copyright has been transferred to others. With the media copyrights, there are shorter periods, such as a 50-year period, not tied to any particular lifetime, but rather to the making or publication of the work; reflecting views that works of this kind involve a lesser creative endeavour on the part of the individuals concerned; that the first owner will usually be a company, making it impossible to calculate the term by reference to a human life; and that the protection is essentially to support investment rather than creativity.

Economic rights in literary, dramatic, musical, and artistic works

3.117 All literary, dramatic, musical, and artistic works, published or unpublished, enjoy the relevant economic rights conferred by copyright—that is, the rights of reproduction, distribution, rental and lending, public performance, communication to the public, and adaptation (see further para 4.9)—until the end of the 70-year period after the author's death (see Figure 3.1).³¹¹

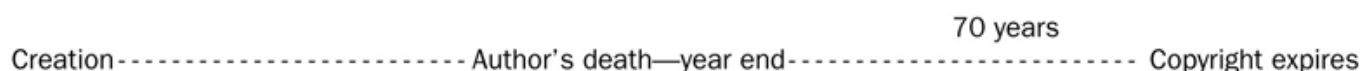


Figure 3.1 Duration of copyright in literary, dramatic, musical, and artistic works

Under the pre-1988 Act law, unpublished works could enjoy copyright for as long as they remained unpublished, which might mean in perpetuity. But under the 1988 Act there is now no possibility of a new perpetual copyright coming into existence. The perpetual copyrights which existed under pre-1988 legislation have had dates of expiry placed upon them (generally the end of the 50-year period from the end of the year when the 1988 Act came into force, meaning that there could be a sort of copyright bonanza on 1 January 2040).³¹² There is one exception to this, found in provisions added at a very late stage of the parliamentary progress of the 1988 Act, giving the Hospital for Sick Children, Great Ormond Street, London, a right without limit of time to a royalty in respect of public performances, commercial publications, or communication to the public of JM Barrie's *Peter Pan*, notwithstanding that the copyright therein expired on 31 December 1987. Although the 1988 Act does not preserve the work's copyright in so many words, the effect is much as though it had.³¹³

Question

If the author of a book published in 2010 was born in June 1956, when will the copyright in the book expire?

Computer-generated works

3.118 Where a literary, dramatic, musical, or artistic work is computer-generated (see para 3.102), the copyright expires at the end of the period of 50 years from the end of the calendar year in which the work was made,³¹⁴ as there is no reason to attach the work to the lifetime of any particular person.

p. 111 Anonymous and pseudonymous works

3.119 Anonymity and pseudonymity (see paras 3.103–3.104) affect only the period for which the copyright endures. The copyright continues until the end of the 70-year period following the end of the calendar year in which either (1) the work was made; or (2) the work was first made available to the public.³¹⁵ But if the identity of the author becomes known before the end of those periods, then the usual period of that person's lifetime plus 70 years applies.³¹⁶ Literary, dramatic, and musical works are made available to the public by performance in public or by being communicated to the public, although this definition does not exhaust the possible ways in which such works are made available to the public.³¹⁷ In the case of an artistic work, making available to the public includes exhibition in public, showing in public a film including the work, and communication to the public.³¹⁸ No account is taken, however, of any unauthorised act.³¹⁹

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oup.support.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-3-guidance-on-answering-the-discussion-points?options=showName>>.

A person is copying and collecting with a view to publication the verses engraved on tombstones in local churchyards, most of which appear to have been erected in the nineteenth or early twentieth century. The verses are otherwise unpublished and of unknown authorship. What steps should the collector take to avoid any danger of being sued for copyright infringement?

Works of joint authorship and co-authorship

3.120 The term of copyright for a work of joint authorship (see paras 3.89–3.93) is determined by reference, where appropriate, to the date of death of the author who died last.³²⁰ Copyright in the jointly authored work will therefore expire 70 years from the end of the calendar year in which there occurred the death of the author who died last of the group of joint authors. Where the identity of one or more of the authors is known, and the identity of one or more is not, copyright expires 70 years from the end of the calendar year in which died the last of the authors whose identity is known.³²¹ Songs which are set out as ‘co-authored works’ in the statute (para 3.94) are treated in the same way as a work of joint authorship for the purposes of duration.³²²

Question

When will the copyright in this book expire? How do the relevant rules affect moral rights?

Term of Crown copyright in literary, dramatic, musical, and artistic works

3.121 Where the monarch is entitled to the copyright in a literary, dramatic, musical, or artistic work, it subsists until the end of the period of 125 years from the end of the calendar year in which the work was made or, if the work is published commercially before the end of the period of 75 years from the end of the calendar year in which it was made, until the end of the period of 50 years from the end of the calendar year in which it was first so published.³²³ The 125-year period is therefore a maximum which may be shortened by commercial publication during the first 75 years after the work is made. Commercial publication consists in 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, or when the work is made available to the public by means of an electronic retrieval system.³²⁴ Crown copyright in sound recordings and films is of the same duration as for other owners.

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-3-guidance-on-answering-the-discussion-points?options=showName>>.

Why is Crown copyright in literary, dramatic, musical, and artistic works not subject to the usual rules on duration?

Crown copyright in Acts and Measures

3.122 The Crown copyright in Acts of Parliament, the Scottish Parliament, and the Welsh and Northern Ireland Assemblies, and Measures of the General Synod of the Church of England subsists until the end of the period of 50 years from the end of the calendar year in which Royal Assent or approval by Her Majesty in Council was given.³²⁵

Term of parliamentary copyright

3.123 Copyright in literary, dramatic, musical, or artistic works made by or under the direction or control of the Houses of Parliament subsists until the end of the period of 50 years from the end of the calendar year in which the work was made.³²⁶ Where copyright has subsisted in a parliamentary Bill, it ceases when the Bill receives the Royal Assent or is withdrawn or rejected or at the end of the parliamentary session.³²⁷ There are similar provisions for Bills of the Scottish Parliament and the Northern Ireland and Welsh Assemblies.³²⁸ If a Bill is rejected by the House of Lords but may be presented for Royal Assent by virtue of the Parliament Acts 1911 and 1949, copyright will continue to subsist in it notwithstanding the Lords' rejection.³²⁹

Films

3.124 Film copyright expires at the end of the period of 70 years from the end of the calendar year in which the death occurs of the last to die of (1) the principal director; (2) the screenplay author; (3) the dialogue author; or (4) the composer of music specially created for and used in the film. If the identity of one or more of these persons is unknown, but the identity of another is not, the relevant death date is that of the last whose identity is known. If the identity of none of these persons is known, the film copyright subsists as follows:³³⁰

- (1) until the end of the 70-year period from the end of the calendar year in which the work is first made; or
- (2) if, during period (1) it is made available to the public by being shown in or communicated to the public, 70 years from the end of the calendar year in which it is first so made available.

In determining whether a film has been made available to the public, no account is taken of any unauthorised act.³³¹ Finally, if there is no principal director, screenplay or dialogue author, or composer of music specially for the film, copyright expires at the end of 50 years from the end of the calendar year in which the film was made.³³²

Question

Remind yourself of who is to be treated as the author of a film (para 3.96). Are there any anomalies when you compare these rules with the rules about the duration of film copyright?

Sound recordings

3.125 The copyright in a sound recording subsists as follows:³³³

- (1) until the end of the 50-year period from the end of the calendar year in which the work is first made; or
- (2) if it is published before the end of period (1), 70 years from the end of the calendar year in which it is first published; or
- (3) if, during period (1) it is not published but is made available to the public by being played in or communicated to the public, 70 years from the end of the calendar year in which it is first so made available.

See Figure 3.2.

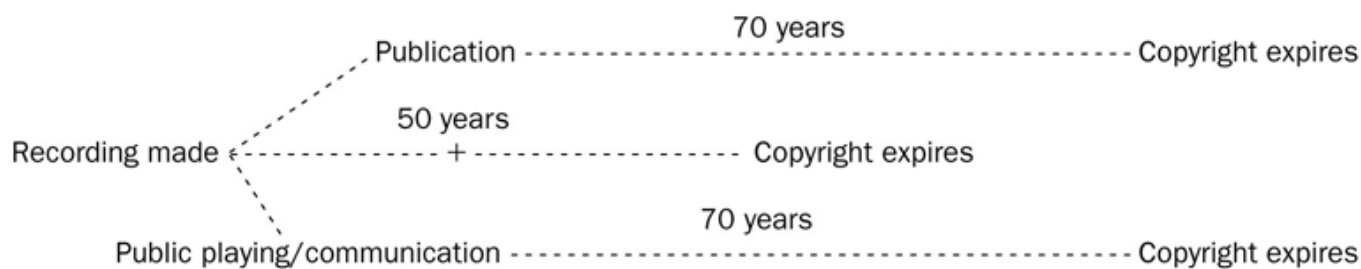


Figure 3.2 Duration of copyright in sound recordings

In determining whether a sound recording has been published, played in, or communicated to the public, no account is taken of any unauthorised act.³³⁴

3.126 The current term of copyright in sound recordings is the result of a recent and rather controversial term extension in the EU. In July 2008 the European Commission published a proposal for a Directive to extend the term for sound recordings from 50 to 95 years.³³⁵ The primary incentive behind this proposal was

to improve the position of performers (see paras 7.45–7.46). However, it faced strong opposition from academics, who questioned the potential for benefit to performers.³³⁶ Although the UK was originally against any term extension,³³⁷ it later became a strong supporter.³³⁸ The proposal led to a Directive which extended the term of protection for sound recordings from 50 years to 70 years,³³⁹ and was implemented in the UK on 1 November 2013.³⁴⁰

p. 114 **Broadcasts**

3.127 Copyright in a broadcast expires 50 years from the end of the year in which the broadcast is made.³⁴¹ Copyright in a repeat broadcast expires at the same time as the copyright in the original broadcast.³⁴²

Published editions

3.128 The publisher's copyright in the typographical arrangement of published editions of literary, dramatic, and musical works expires 25 years from the end of the calendar year in which the edition was first published.³⁴³

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-3-guidance-on-answering-the-discussion-points?options=showName>>.

Why is the publisher's copyright in its typographical arrangement so much shorter than other copyrights?

Expiry of copyright term in a single product

3.129 One issue relating to the term of copyright is whether, when a multiplicity of copyrights exists in a single product (eg the basic media right, depending on which medium the product is using, and the right or rights which subsist in the author work or works embodied in the product), they should all expire together, at least as regards reproduction of similar products. This issue results from the categorisation of works (see para 3.9) in that many products in the copyright domain are likely to enjoy more than one copyright (eg a sound recording). Each one of these rights may then have a different owner (see paras 3.86–3.114) and consequently, a different term of protection. The resulting variability in the term of protection in different elements of a single product can mean that while one element of the product is in the public domain, another is not. Several undesirable effects are possible: damage to the remaining copyright interest in the work in question; inhibition of perfectly lawful and appropriate free use of the product; or simply confused people. A

question of policy may therefore be whether, when a product enjoys multiple copyrights, these ought to stand and fall together, at least in relation to products of the kind in question; and this, whatever the duration of the rights may finally be.

Optimal duration of copyright

p. 115 3.130 As seen above, copyright is not unlimited in duration, and works which fall out of copyright at the end of their term are available to all for any purpose. However, one ongoing issue is what is the optimal duration of copyright. It is clear from economic studies that the precise duration of copyright is not governed by the need to incentivise production with the promise of a long-lasting reward should the product be successful. Production is generally governed by other incentives from the point of view of creative authors, and by much shorter-term calculations of likely return by copyright entrepreneurs. On the other hand, the length of copyright enables the author and the entrepreneur to take benefit from the development of new markets through changing technology (eg the emergence of the home video and DVD markets for films) and so encourages (and enables) them to take greater investment risks with new works only a very few of which will become such long-term winners. This is also true of the income generated by successful products over the lifetime of a successful product, whether or not there is relevant technological change. Empirical and economic analysis of the effects of the copyright term on entrepreneurial behaviour over time could be helpful in the formation of policy in this area.

3.131 On the basis of the economic literature to date, however, it seems quite likely that such a study would show the impact of the copyright term on economic behaviour and initial decision-making about creation and publication to be negligible, whatever the length of time involved, as long as it extends beyond the period needed to ensure 'lead time' (ie the benefit of being first to market with a particular product), and consequent opportunity to earn a profit on the investment made. Much more difficult would be the question of how to measure and assess the effects of works falling out of copyright at the expiry of term. This question would be raised in particular if it was decided, for example, to create a copyright of indefinite duration to support a world in which copyright owners contracted directly and online with would-be users for access to and use of works.

3.132 What then is the value, economically, socially, and intellectually, of works entering the public domain because they no longer enjoy copyright? One imagines that for the great majority of works it is nil or negligible; is there a point of time at which the enduring value of a relatively small number of works should be taken out of the ordinary interplay of market and social conditions (by giving them a long-enduring copyright) which otherwise produces a price for them as between supplier and customer? How far can copyright be analogised with, say, the antiques, paintings, or books markets, where some (but not many) very old works can command extremely high prices despite the absence of any particular legal protection of their exclusivity? Or do old works derive their value in these markets from uniqueness or rarity, and/or associations (eg famous former owners), whereas in the digital environment it is increasingly unlikely that any manifestation of a work will have that quality of uniqueness or rarity?

Further reading

Books

L Bently, B Sherman, D Gangjee, and P Johnson, *Intellectual Property Law* (6th edn, 2022), Chs 3–5, 7

N Caddick, G Harbottle, and U Suthersanen (eds), *Copinger & Skone James on Copyright* (18th edn, 2021), Chs 3, 4, 6

M van Eechoud, *The Work of Authorship* (2014)

D Llewelyn and T Aplin, *Cornish, Llewelyn and Aplin Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (9th edn, 2019), Chs 11, 20.1

E Rosati, *Copyright and the Court of Justice of the European Union* (2019)

E Rosati, *The Routledge Handbook of EU Copyright Law* (2021)

S Stokes, *Art and Copyright* (2021)

L Zemer, *The Idea of Authorship in Copyright* (2007)

Articles

Works

E Laskowska-Litak, ‘Between Scylla and Charybdis: a comparative look at copyright’s protected subject matter and the (CJ)EU harmonization’ (2019) 14 JIPLP 761

J Pila, ‘An intentional view of the copyright work’ (2008) 71 MLR 535

C Sganga, ‘The Notion of “Work” in EU Copyright Law after Levola Hengelo’ [2019] EIPR 415

Originality

E Rosati, ‘Originality in a work, or a work of originality: the effects of the Infopaq decision’ [2011] EIPR 746

A Waisman, ‘Revisiting originality’ [2009] EIPR 370

Musical works

A Rahmatian, ‘Music and creativity as perceived by copyright law’ [2005] IPQ 267

p. 116 Artistic works

S Clark et al, ‘A fabric design has been found to be a work of artistic craftsmanship: will Response Clothing cause a shift in how UK copyright is assessed?’ [2020] EIPR 612

J Pila, ‘The “Star Wars” copyright claim: an ambivalent view of the Empire’ (2012) 128 LQR 15

M Rushton, 'An economic approach to copyright in works of artistic craftsmanship' [2001] IPQ 255

T Rychlicki, 'Legal questions about illegal art' (2008) 3 JIPLP 393

Authorship and ownership

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

WR Cornish, 'Conserving culture and copyright: a partial history' (2009) 13 Edinburgh Law Review 8

J Dickenson et al, 'Creative machines: ownership of copyright in content created by artificial intelligence applications' [2017] EIPR 457

J Phillips, 'Authorship, ownership, wikiship: copyright in the twenty-first century' (2008) 3 JIPLP 788

J Pila, 'Who owns the intellectual property rights in academic work?' [2010] EIPR 609

Term

C Angelopoulos, 'The myth of European term harmonisation—27 public domains for 27 Member States' [2012] IIC 567

N Helberger et al, 'Never forever: why extending the term of protection for sound recordings is a bad idea' [2008] EIPR 174

Notes

¹ CDPA 1988, ss 1–8.

² CDPA 1988, s 153. See further CDPA 1988, ss 154–156.

³ References to EEA have been removed from CDPA 1988, ss 154–156, as a result of Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019, regs 14–16.

⁴ Case C-310/17 [2018] Bus LR 2442, paras 35–37. See also Case C-683/17 *Cofemel—Sociedade de Vestuário SA v G-Star Raw CV* [2020] ECDR 9, para 29.

⁵ CDPA 1988, s 3A.

⁶ Note how CDPA 1988, s 3(1) defines 'musical work' as excluding any words intended to be spoken or sung with the music.

⁷ CDPA 1988, s 5B(2), (5).

⁸ See I Stamatoudi, *Copyright and Multimedia Works: A Comparative Analysis* (2002); T Aplin, *Copyright Law in the Digital Society* (2005).

⁹ TRIPS, Art 9(2) makes it clear that copyright protection does not extend to ideas, procedures, methods of operation, or mathematical concepts as such.

¹⁰ Lord Salmon in *LB (Plastics) Ltd v Swish Products Ltd* [1979] RPC 551 at 633. The classic discussion of this distinction is in the US case of *Baker v Selden* 101 US 99 (1879). See also *University of London Press v University Tutorial Press* [1916] 2 Ch 601 and J Pila, ‘An intentional view of the copyright work’ (2008) 71 MLR 535.

¹¹ See also Case C-683/17 *Cofemel—Sociedade de Vestuário SA v G-Star Raw CV* [2020] ECDR 9, para 29.

¹² *Lawton v Lord David Dundas, The Times*, 13 June 1985. Another example might be the Intel Inside theme.

¹³ *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch); affirmed in [2011] EWCA Civ 890 (CA).

¹⁴ *Navitaire Inc v EasyJet Airline Co Ltd* [2006] RPC 3.

¹⁵ CDPA 1988, ss 16(1)(e) and 21.

¹⁶ CDPA 1988, s 17(3). See further para 4.26.

¹⁷ *Macmillan v Suresh Chunder Deb* (1890) ILR 17 Calc 951; *Macmillan v Cooper* (1923) 93 LJPC 113. Note also Berne Convention, Art 2(5): ‘Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.’

¹⁸ *Harman Pictures NV v Osborne* [1967] 1 WLR 723 (Charge of the Light Brigade); see further para 4.31.

¹⁹ [2001] FSR 11, paras 24 and 25.

²⁰ See further M Spence and T Endicott, ‘Vagueness in the scope of copyright’ (2005) 121 LQR 657.

²¹ *Plix Products v Winstone* [1986] FSR 63 per Prichard J at 92–94 (aff’d [1986] FSR 608); *Nova Productions Ltd v Mazooma Games Ltd* [2007] RPC 25 (CA), paras 31–55 (Jacob LJ).

²² *J & S Davis (Holdings) Ltd v Wright Health Group* [1988] RPC 403 per Whitford J at 414.

²³ *Abraham Moon & Sons Ltd v Thornber and Others* [2012] EWPCC 37, where a fabric ‘ticket stamp’—ie instructions to produce a design—was held to be both a literary and artistic work, but only the artistic work was infringed by a plaid design fabric.

²⁴ CDPA 1988, s 1(1), (2).

²⁵ Previously, the ECJ has held that a GUI (graphic user interface of a computer program) and a video game (in its entirety consisting of computer program, graphic, and sound elements), as a work, can be protected under the ordinary law of copyright by virtue of the InfoSoc Directive 2001, if they are the author’s own intellectual creation. See Cases C-393/09 *Bezpečnostní softwarová asociace v Ministerstvo kultury* [2011] ECDR 3 and C-355/12 *Nintendo v PC Box* [2014] ECDR 6.

²⁶ Provided the subject matter requires protection under the international framework, eg it is a literary or artistic work within the meaning of the Berne Convention, Art 2(1).

²⁷ *SAS Institute v World Programming* [2013] EWHC 69 (Ch) at para 27. In *Response Clothing Ltd v The Edinburgh Woollen Mill Ltd* [2020] EWHC 148, at para 27, the judge noted that ‘in the 300 years since the Statute of Anne a claimant has been required to show that his work falls within at least one of the categories identified for protection in the copyright statute of the day. In recent years, there may have developed a tension between the way this is approached in the 1988 Act and EU copyright directives which have entered into force.’

²⁸ See *Pitman v Hine* (1884) 1 TLR 82.

²⁹ CDPA 1988, s 3(1).

³⁰ See, eg, the Regulation of Investigatory Powers Act 2000 or breach of confidence.

³¹ CDPA 1988, s 3(3).

³² See, for further discussion, HL MacQueen, ‘“My tongue is mine ain”: copyright, the spoken word and privacy’ (2005) 68 MLR 349.

³³ See further on the *Norowzian* case, A Barron, ‘The legal properties of film’ (2004) 67 MLR 177.

³⁴ In *Abraham Moon & Sons Ltd v Thornber and Others* [2012] EWPCC 37, at para 104, it was noted that although s 4 on artistic works has no corresponding provision for fixation, ‘that is just because it is assumed section 4(1) inevitably requires a record of the work in a material form’.

³⁵ *Islestar Holdings Ltd v Aldi Stores Ltd* [2019] EWHC 1473. cf *Merchandising Corp of America v Harpbond* [1983] FSR 32.

³⁶ CDPA 1988, s 5A and 5B.

³⁷ CDPA 1988, s 1(1)(a).

³⁸ CDPA 1988, s 1(1)(b), (c).

³⁹ CDPA 1988, ss 5A(2), 5B(4), and 8(2). For broadcasts, see para 3.39.

⁴⁰ CDPA 1988, s 3A(2).

⁴¹ *University of London Press v University Tutorial Press* [1916] 2 Ch 601 at 608.

⁴² CDPA 1988, ss 3(1)(a) and 4(1)(a).

⁴³ *University of London Press v University Tutorial Press* [1916] 2 Ch 601 at 610.

⁴⁴ Lord Hailsham in *LB (Plastics) Ltd v Swish Products Ltd* [1979] RPC 551 at 629. Professor Cyril Joad (1891–1953) was a professor of philosophy at Birkbeck College London, who became famous through appearances on a BBC show, *The Brains Trust*, and the catchphrase with which he prefaced the answer to any question, ‘Well, it depends what you mean by ...’. This is also quite a useful phrase for a lawyer’s conversational armoury.

⁴⁵ For a discussion of the standards of originality for copyright protection, and whether all protected works have elements in common or are different in nature, see A Waisman, ‘Revisiting originality’ [2009] EIPR 370.

⁴⁶ *Ladbroke v William Hill* [1964] 1 WLR 273 (HL); *Express Newspapers plc v News (UK) Ltd* [1990] FSR 359.

⁴⁷ *Macmillan & Co Ltd v K & J Cooper* (1923) 93 LJPC 113.

⁴⁸ *ibid.*

⁴⁹ [1944] AC 329. Compare the decision of the US Supreme Court in *Feist Publications Inc v Rural Telephone Service Co Inc* 499 US 340 (1991), where it was held that there was no copyright in a telephone directory organised by alphabetical listing of surnames. But see further para 3.41.

⁵⁰ [1989] AC 217 (PC) at 262–63.

⁵¹ [1982] Ch 119 (CA).

⁵² See further paras 3.48ff.

⁵³ *Interlego AG v Tyco Industries Inc* [1989] AC 217 at 262.

⁵⁴ *University of London Press v University Tutorial Press* [1916] 2 Ch 601 at 608.

⁵⁵ It is worth noting that a derivative work, while being original, may also be infringing. One doesn't exclude the other.

⁵⁶ See *Technomed Ltd v Bluecrest Health Screening Ltd* [2017] EWHC 2142 (Ch), paras 131–34, where small visual and literary changes made to a stock image to create two drawings of a heart were held to be sufficient to create a new original work.

⁵⁷ *Black v Murray* (1870) 9 M 341 (editorial material in the works of Sir Walter Scott).

⁵⁸ See also Berne Convention, Art 2(3): 'Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.' And see the UNESCO Nairobi Recommendation: the Translator's Charter (1994), available at www.fit-ift.org <<http://www.fit-ift.org>>.

⁵⁹ *Robertson v Lewis* [1976] RPC 169 per Cross J at 174–75.

⁶⁰ See *Express Newspapers plc v News (UK) Ltd* [1990] FSR 359 per Sir Nicolas Browne-Wilkinson V-C at 365–66, preferring the views expressed in *Sands McDougall Pty Ltd v Robinson* (1917) 23 CLR 49 to those of Cross J. See further HL MacQueen, "'My tongue is mine ain': copyright, the spoken word, and privacy' (2005) 68 MLR 349 at 369–73.

⁶¹ [1989] AC 217 at 263.

⁶² European Commission Report on the implementation and effects of Directive 91/250/EEC, COM(2000) 199 final.

⁶³ European Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004) 995.

⁶⁴ Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECDR 16 (ECJ).

⁶⁵ See Case C-393/09 *Bezpečnostni Softwarová Asociace—Svaz Softwarové Ochrany v Ministerstvo Kultury* [2011] ECDR 3 (ECJ), para 45; Cases C-403/08 and C-429/08 *Football Association Premier League Ltd v QC Leisure, Murphy v Media Protection Services Ltd* [2012] 1 CMLR 29 (ECJ), para 97; Case C-145/10 *Painer v Standard Verlags GmbH* [2012] ECDR 6 (ECJ), para 87; *Nintendo v PC Box* C-355/12 [2014] ECDR 6 (ECJ), para 21; see also E Rosati, 'Originality in a work, or a work of originality: the effects of the Infopaq decision' [2011] EIPR 746.

⁶⁶ Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECDR 16 at paras 44–45.

⁶⁷ Case C-393/09 *Bezpečnostni Softwarová Asociace—Svaz Softwarové Ochrany v Ministerstvo Kultury* [2011] ECDR 3 (ECJ); Case C-145/10 *Painer v Standard Verlags GmbH* [2012] ECDR 6 (ECJ); Case C-604/10 *Football Dataco v Yahoo* [2012] ECDR 10 (ECJ); Case C-406/10 *SAS Institute Inc v World Programming Ltd* [2012] ECDR 22 (ECJ).

⁶⁸ See E Derclaye, 'Infopaq International A/S v Danske Dagblades-Forening (C-5/08): wonderful or worrisome? The impact of the ECJ ruling in Infopaq on UK copyright law' [2010] EIPR 247.

⁶⁹ *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch) at para 81.

⁷⁰ *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890 (CA) at para 20.

⁷¹ *SAS Institute Inc v World Programming Limited* [2013] EWCA Civ 1482 at para 37.

⁷² *Taylor v Maguire* [2013] EWHC 3804; *Racing Partnership Ltd v Done Brothers (Cash Betting) Ltd* [2019] EWHC1156.

⁷³ See, eg, tables and compilations: *Forensic Telecommunications Services Ltd v Chief Constable of West Yorkshire* [2011] EWHC 2892 (Ch); photographs: *Temple Island Collections Ltd v New English Teas Ltd* [2012] FSR 9.

⁷⁴ See *SAS Institute v World Programming* [2013] EWHC69 (Ch); *HRH The Duchess of Sussex v Associated Newspapers Limited* [2021] EWHC273(Ch); *Shazam Productions Ltd v Only Fools the Dining Experience Ltd* [2022] EWHC1379.

⁷⁵ The latter might still be a low hurdle. See *Technomed Ltd v Bluecrest Health Screening Ltd* [2017] EWHC 2142 (Ch) at paras 89, 96, 122, and 134.

⁷⁶ See D Rose and N O’Sullivan, ‘Football Dataco v Yahoo! Implications of the ECJ judgment’ (2012) JIPLP 792; see also *John Kaldor Fabricmaker v Lee Ann Fashions* [2014] EWHC 3779 (IPEC) at para 21.

⁷⁷ N Caddick, G Harbottle, and U Suthersanen (eds), *Copinger & Skone James on Copyright* (18th edn, 2021), para 3.187.

⁷⁸ For a detailed discussion of British and EU case law on originality, see L Bently et al, *Intellectual Property Law* (6th edn, 2022), Ch 4.

⁷⁹ (1870) 9 M 341 (discussed at para 3.29).

⁸⁰ See, eg, the colourisation of John Huston’s film, ‘The Maltese Falcon’ and, the removal from a 2003 re-release of The Beatles’ final album, ‘Let It Be’, of effects added in the original by the producer Phil Spector.

⁸¹ CDPA 1988, s 6(6).

⁸² 499 US 340 (1991).

⁸³ *Law Society of Upper Canada v CCH Canadian* [2004] 1 SCR 339.

⁸⁴ See further M Sherwood-Edwards, ‘The redundancy of originality revisited’ [2022] Ent LR 129.

⁸⁵ For an interesting discussion of this point, see R Arnold, ‘Copyright in photographs: a case for reform’ [2005] EIPR 303.

⁸⁶ In the case of films in the UK, joint authorship is attributed to the principal director and the producer (CDPA 1988, s 9(2)(ab)). Note also (1) the British concept of a computer-generated work where there is no human author (CDPA 1988, ss 9(3) and 178); and (2) that copyright in a work produced in the course of employment falls to the employer unless otherwise agreed (CDPA 1988, s 11(2)). Employment should be distinguished from a commission, where the copyright would remain with the author unless otherwise agreed.

⁸⁷ But note that there is no express requirement that a film be original (see CDPA 1988, s 1(1)(b), and para 3.38).

⁸⁸ See further paras 3.32–3.35.

⁸⁹ Apart from computer programs (CDPA 1988, s 79(2)(a)); see further para 6.11.

⁹⁰ See further paras 3.115–3.129 for copyright terms.

⁹¹ *Anacon Corp Ltd v Environmental Research Technology Ltd* [1994] FSR 659; *Electronic Techniques (Anglia) Ltd v Critchley Components Ltd* [1997] FSR 401; *Sandman v Panasonic UK Ltd* [1998] FSR 651.

⁹² *Norowzian v Arks Ltd (No 2)* [2000] FSR 363; *Abraham Moon & Sons Ltd v Thornber and Others* [2012] EWPC 37, where a fabric ‘ticket stamp’—ie instructions to produce a design—was held to be both a literary and artistic work.

⁹³ *Electronic Techniques (Anglia) Ltd v Critchley Components Ltd* [1997] FSR 401 at 413.

⁹⁴ For Occam's razor, see http://en.wikipedia.org/wiki/Occam's_Razor <http://www.en.wikipedia.org/wiki/Occam%27s_Razor>, or for a more reliable source, see JW Shavlik and TG Dietterich, *Readings in Machine Learning* (1990) 201–04.

⁹⁵ See further A Christie, 'A proposal for simplifying UK copyright law' [2001] EIPR 26; I Stamatoudi, *Copyright and Multimedia Works: A Comparative Analysis* (2002); T Aplin, *Copyright Law in the Digital Society* (2005), Ch 6; B Bandey, 'Over-categorisation in copyright law: computer and internet programming perspectives' [2007] EIPR 461.

⁹⁶ *Harpers v Barry Henry & Co* (1892) 20 R 133.

⁹⁷ *University of London Press v University Tutorial Press* [1916] 2 Ch 601.

⁹⁸ *Express Newspapers plc v Liverpool Daily Post & Echo plc* [1985] FSR 306.

⁹⁹ *Black v Murray* (1870) 9 M 341.

¹⁰⁰ *Fournet v Pearson* (1897) 14 TLR 82.

¹⁰¹ *Pitman v Hine* (1884) 1 TLR 82; *Anderson & Co v Lieber Code Co* [1917] 2 KB 469.

¹⁰² *Brigid Foley Ltd v Elliott* [1982] RPC 433 per Sir Robert Megarry V-C at 434; see also *Abraham Moon & Sons Ltd v Thornber and Others* [2012] EWPCC 37.

¹⁰³ Although single words and phrases can be accorded protection through other IP rights, see Chapters 13–16.

¹⁰⁴ Phrasing derived from *Hollinrake v Truswell* [1894] 3 Ch 420.

¹⁰⁵ *Francis Day & Hunter Ltd v Twentieth Century Fox Corp Ltd* [1940] AC 112 (PC) per Lord Wright at 123; *Rose v Information Services Ltd* [1987] FSR 254; cf *Dicks v Yates* (1881) 18 Ch D 76 per Jessel MR at 89.

¹⁰⁶ *Kirk v J & R Fleming* [1928–35] MCC 44; *Sinanide v La Maison Kosmeo* (1928) 139 LT 365 (CA).

¹⁰⁷ *Powerflex Services Pty Ltd v Data Access Corporation* (1996) 137 ALR 498 (Fed Ct Aus); aff'd (1999) 202 CLR 1 (HCA); *Navitaire Inc v EasyJet Airline Co Ltd* [2006] RPC 3 (Pumfrey J).

¹⁰⁸ See also P Sumpter, 'Copyright in slogans: another bald spot exposed' [2009] EIPR 287.

¹⁰⁹ See generally, D Bainbridge, *Legal Protection of Computer Software* (2008); S Gordon, 'The very idea! Why copyright law is an inappropriate way to protect computer programs' [1998] EIPR 10.

¹¹⁰ CDPA 1988, s 3(1)(b), (c). For the possibility of software patents, see Chapter 11.

¹¹¹ *Nova Productions Ltd v Mazooma Games Ltd* [2007] RPC 25 (CA), para 28.

¹¹² See further D Gervais and E Derclaye, 'The scope of computer program protection after SAS: are we closer to answers?' [2012] EIPR 565.

¹¹³ See Case C-393/09 *Bezpečnostní softwarová asociace v Ministerstvo kultury* [2011] ECDR 3 (ECJ) at paras 34–37.

¹¹⁴ Software Directive 1991, recitals 7, 13, 14, and 15 (note this is now consolidated into Directive 2009/24/EC); see *Navitaire Inc v EasyJet Airline Co Ltd* [2006] RPC 3 (Pumfrey J), for an example of denial of copyright to programming languages comprised by defined user command interfaces (despite its ad hoc character) and a collection of commands; see also *SAS Institute v World Programming* [2010] ECDR 15 (Arnold J) at para 217; [2013] EWHC 69 (Ch).

¹¹⁵ This argument succeeded in the Australian case of *Apple Computer Inc v Computer Edge Pty Ltd* [1986] FSR 537.

¹¹⁶ *Autodesk Inc v Dyason and Kelly* [1992] RPC 575 (HCA); criticised in *Cantor Fitzgerald v Tradition UK* [2000] RPC 95.

- ¹¹⁷ *NEC Corp v Intel Corp* 835 F 2d 1546 (1988). See also recital 7 of the Software Directive 1991.
- ¹¹⁸ *Nova Productions Ltd v Mazooma Games Ltd* [2006] RPC 14 (Kitchin J); aff'd [2007] RPC 25 (CA).
- ¹¹⁹ Case C-393/09 *Bezpečnostní softwarová asociace v Ministerstvo kultury* [2011] ECDR 3 (ECJ) at para 41.
- ¹²⁰ *Walford v Johnston* (1846) 20 D 1160; *Maclean v Moody* (1858) 20 D 1154.
- ¹²¹ *Leslie v Young* (1894) 21 R (HL) 57.
- ¹²² *Independent Television Publications Ltd v Time Out Ltd* [1984] FSR 64.
- ¹²³ *Football League v Littlewoods Pools* [1959] Ch 637.
- ¹²⁴ *Macmillan v Suresh Chunder Deb* (1890) ILR 17 Calc 951.
- ¹²⁵ *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL).
- ¹²⁶ *Navitaire Inc v EasyJet Airline Co Ltd* [2006] RPC 3 (Pumfrey J).
- ¹²⁷ *Forensic Telecommunications Services Ltd v Chief Constable of West Yorkshire Police* [2011] EWHC 2892 (Ch).
- ¹²⁸ *Ashmore v Douglas Home* [1987] FSR 553.
- ¹²⁹ See generally, E Derclaye, *The Legal Protection of Databases* (2008); T Aplin, *Copyright Law in the Digital Society: The Challenges of Multimedia* (2005), 41–73.
- ¹³⁰ Directive 96/9/EC on the legal protection of databases, Art 3(1), implemented in the UK by the Copyright and Rights in Databases Regulations 1997 (SI 1997/3032).
- ¹³¹ CDPA 1988, s 3(1)(a).
- ¹³² CDPA 1988, s 3A(1).
- ¹³³ Database Directive 1996, recital 17.
- ¹³⁴ Case C-444/02 *Fixtures Marketing Ltd v OPAP* [2005] ECDR 3 (ECJ), paras 20–24.
- ¹³⁵ See Case C-444/02 *Fixtures Marketing Ltd v OPAP* [2005] ECDR 3 (ECJ); Unauthorised reproduction of telephone directories on CDROM [2002] ECDR 3; *Société Tigest SARL v Société Reed Expositions France* [2002] ECC 29; *SA Prline v SA Communication and Sales and Sarl News Invest* [2002] ECDR 2 (Trib de Comm); *Danske Dagblades Forening v Newsbooster* [2003] ECDR 5; Case C-490/14 *Freistaat Bayern v Verlag Esterbauer GmbH* [2016] ECDR 6 (ECJ); *Technomed Ltd v Bluecrest Health Screening Ltd* [2017] EWHC 2142 (Ch).
- ¹³⁶ Database Directive, Art 1(3). Computer programs have copyright as such (see para 3.52).
- ¹³⁷ Case C-604/10 *Football Dataco Ltd v Yahoo! UK Ltd* [2012] ECDR 10 (ECJ).
- ¹³⁸ CDPA 1988, s 3A. See also for use of this formulation Council Directive on the legal protection of computer programs 91/250/EEC (now consolidated in Software Directive 2009), Art 1(3); but in the implementation of this Directive the UK did not see fit to use the phrase. See paras 3.32 and 3.33.
- ¹³⁹ Case C-444/02 *Fixtures Marketing Ltd v OPAP* [2004] ECR I-10549 (ECJ), para 25.
- ¹⁴⁰ Database Directive 1996, recital 19.
- ¹⁴¹ On the effects of this ruling, see D Rose and N O'Sullivan, 'Football Dataco v Yahoo! Implications of the ECJ judgment' (2012) JIPLP 792.

¹⁴² CDPA 1988, s 3(1).

¹⁴³ [2000] FSR 363 (CA) per Nourse LJ at 366–67.

¹⁴⁴ *Julia Kogan v Nicholas Martin* [2019] EWCA Civ 1645 at para 66.

¹⁴⁵ *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444.

¹⁴⁶ *Green v Broadcasting Corp of New Zealand* [1989] 2 All ER 1056 per Lord Bridge of Harwich at 1058.

¹⁴⁷ *Nova Productions Ltd v Mazooma Games Ltd* [2006] RPC 14 (Kitchin J); point not discussed in the Court of Appeal ([2007] RPC 25).

¹⁴⁸ [2017] EWHC 2600 at para 46. See also *The Ukulele Orchestra of Great Britain v Clausen* [2015] EWHC 1772 (IPEC), para 104; *Meakin v BBC* [2010] EWHC 2065, para 30.

¹⁴⁹ *Banner v Endemol* [2017] EWHC 2600 at paras 43–44.

¹⁵⁰ 1956 Act, s 48(1).

¹⁵¹ CDPA 1988, s 1(1)(b).

¹⁵² [2000] FSR 363 (CA); see para 3.19. See further A Barron, ‘The legal property of film’ (2004) 67 MLR 177; I Stamatoudi, ‘Joy for the claimant: can a film also be protected as a dramatic work?’ [2000] IPQ 117; R Arnold, ‘Joy: a reply’ [2001] IPQ 10.

¹⁵³ Note, however, that the only relevant author for duration of copyright in a dramatic work is the dramatist, whereas for a film it is not only the screenplay writer and dialogue author but also the principal director and the composer of any special music, and the duration of the copyright is determined by the death of the last of these to die. A film may thus enjoy copyright for longer as such than it does as a dramatic work. See para 3.124.

¹⁵⁴ See generally, S Frith and L Marshall, *Music and Copyright* (2nd edn, 2004); A Rahmatian, ‘Music and creativity as perceived by copyright law’ [2005] IPQ 267.

¹⁵⁵ CDPA 1988, s 3(1).

¹⁵⁶ See *Sawkins v Hyperion Records Ltd* [2005] RPC 32 (CA).

¹⁵⁷ See Cheng Lim Saw, ‘Protecting the sound of silence in 4’33”—a timely revisit of basic principles in copyright law’ [2005] EIPR 467.

¹⁵⁸ See generally P Kearns, *The Legal Concept of Art* (1998); D McClean and K Schubert (eds), *Dear Images: Art, Culture and Copyright* (2002); S Stokes, *Art and Copyright* (2021); A Barron, ‘Copyright law and the claims of art’ [2002] IPQ 369; D Booton, ‘Framing pictures: defining art in UK copyright law’ [2003] IPQ 38; W Landes and R Posner, *Economic Structure of Intellectual Property Law* (2004), Ch 9 (‘The legal protection of postmodern art’).

¹⁵⁹ CDPA 1988, s 4(1). See generally, J McCutcheon and F McGaughey (eds), *Research Handbook on Art and Law* (2020).

¹⁶⁰ CDPA 1988, s 4(2).

¹⁶¹ *Navitaire Inc v EasyJet Airline Co Ltd* [2006] RPC 3 (Pumfrey J).

¹⁶² *Nova Productions Ltd v Mazooma Games Ltd* [2007] RPC 25 (CA).

¹⁶³ For more about Adam Ant, see <https://musicbrainz.org/artist/e188a520-9cb7-4f73-a3d7-2f70c6538e92> <<https://musicbrainz.org/artist/e188a520-9cb7-4f73-a3d7-2f70c6538e92>>.

¹⁶⁴ T Rychlicki, 'Legal questions about illegal art' (2008) 3 JIPLP 393 at 396. See also M Iljadica, *Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture* (2016), Ch 4.

¹⁶⁵ See, eg, *Robert Allan & Partners v Scottish Ideal Homes* 1972 SLT (Sh Ct) 32.

¹⁶⁶ See, eg, *Howard Clark v David Allan & Co Ltd* 1987 SLT 271.

¹⁶⁷ See, eg, *British Leyland v Armstrong Patents* [1986] AC 577.

¹⁶⁸ *King Features Syndicate Inc v OM Kleeman Ltd* [1941] AC 417 (Popeye the Sailor man).

¹⁶⁹ *KARO STEP Trade Mark* [1977] RPC 255.

¹⁷⁰ *Solar Thomson Engineering v Barton* [1977] RPC 537. For the drawing see 540.

¹⁷¹ See para 4.26.

¹⁷² See generally, Y Gendreau, *Copyright and Photographs: An International Survey* (1999); C Mihalos, *The Law of Photography and Digital Images* (2004); K Garnett, 'Copyright in photographs' [2000] EIPR 229; R Deazley, 'Photographing paintings in the public domain: a response to Garnett' [2001] EIPR 229; S Stokes, 'Photographing paintings in the public domain: a response to Garnett' [2001] EIPR 354; and R Arnold, 'Copyright in photographs: a case for reform' [2005] EIPR 303.

¹⁷³ *Antiquesportfolio.com plc v Rodney Fitch & Co Ltd* [2001] FSR 345.

¹⁷⁴ CDPA 1988, s 4(2).

¹⁷⁵ See also *Plix Products v Winstone* [1985] 1 NZLR 376.

¹⁷⁶ For more on the Frisbee, see <http://en.wikipedia.org/wiki/Frisbee> <<http://en.wikipedia.org/wiki/Frisbee>>.

¹⁷⁷ See further S Clark, 'Lucasfilm Ltd and Others v Ainsworth and Another: the force of copyright protection for three-dimensional designs as sculptures or works of artistic craftsmanship' [2009] EIPR 384; A Hobson, 'Imperial stormtroopers, art works, and copyright defences' (2009) 4 JIPLP 16; J Pila, 'The "Star Wars" copyright claim: an ambivalent view of the Empire' (2012) 128 LQR 15.

¹⁷⁸ *Metix v Maughan* [1997] FSR 718.

¹⁷⁹ *J & S Davis (Holdings) Ltd v Wright Health Group* [1988] RPC 403.

¹⁸⁰ *Breville Europe v Thorn EMI* [1995] FSR 77.

¹⁸¹ [1985] RPC 127.

¹⁸² For an example, see *Martin v Polyplas* [1969] NZLR 1046.

¹⁸³ 1956 Act, s 48(1).

¹⁸⁴ *James Arnold & Co v Miafern Ltd* [1980] RPC 397 esp at 403–04: rubber stereos for printing designs on ties held to be engravings.

¹⁸⁵ [1985] RPC 127.

¹⁸⁶ CDPA 1988, s 4(2).

¹⁸⁷ CDPA 1988, s 172(2).

¹⁸⁸ For design rights, see Part III (see Chapters 8 and 9).

¹⁸⁹ (1990) 95 ALR 275.

¹⁹⁰ *ibid* at 285. See also *Talk of the Town v Hagstrom* (1991) 19 IPR 649 at 655.

¹⁹¹ *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444.

¹⁹² CDPA 1988, s 4(1)(a).

¹⁹³ *Kenrick v Lawrence* (1890) 25 QBD 99.

¹⁹⁴ *Miller and Lang Ltd v Macniven & Cameron Ltd* (1908) 16 SLT 56.

¹⁹⁵ *Duriron Co Inc v Hugh Jennings & Co Ltd* [1984] FSR 1; *British Leyland v Armstrong Patents* [1986] RPC 279 per Oliver LJ at 289–96; *Interlego AG v Tyco Industries Inc* [1989] AC 217 per Lord Oliver at 264–65.

¹⁹⁶ See further A Adrian, ‘Architecture and copyright: a quick survey of the law’ (2008) 3 JIPLP 524.

¹⁹⁷ CDPA 1988, s 4(1)(b).

¹⁹⁸ CDPA 1988, s 4(2).

¹⁹⁹ *Hensher v Restawile* [1976] AC 64 per Lord Reid at 78.

²⁰⁰ *Vincent v Universal Housing Co* [1928–35] MCC 275.

²⁰¹ *Meikle v Maufe* [1941] 3 All ER 144.

²⁰² *Blake v Warren* [1928–35] MCC 268.

²⁰³ For the English and Scots law of fixtures, see *Halsbury’s Laws of England*, and *Laws of Scotland: Stair Memorial Encyclopaedia*.

²⁰⁴ See also M Rushton, ‘An economic approach to copyright in works of artistic craftsmanship’ [2001] IPQ 255.

²⁰⁵ [1976] AC 64.

²⁰⁶ Three slightly fuzzy black-and-white photographs of the plaintiff’s suites are available in [1975] RPC 31 at 33–34.

²⁰⁷ *Burke v Spicers Dress Design* [1936] Ch 400 per Clauson J at 407–08; *Cuisenaire v Reed* [1963] VR 719 per Pape J at 730; *Cuisenaire v South West Imports* [1968] 1 Ex CR 493 per Niel J at 574.

²⁰⁸ Lord Simon’s approach was preferred by the Federal Court of Australia in *Coogi Australia v Hysport International* (1999) 157 ALR 247 and by the High Court of Australia in *Burge v Swarbrick* [2007] FSR 27.

²⁰⁹ *Merlet v Mothercare* [1986] RPC 115; *J & S Davis (Holdings) Ltd v Wright Health Group* [1988] RPC 403.

²¹⁰ [1994] 3 NZLR 216.

²¹¹ There was no appeal on this point: [2009] EWCA Civ 1328 (CA); and nor was it argued before the Supreme Court: [2012] 1 AC 208 (SC).

²¹² See generally P Kamina, *Film Copyright in the EU* (2002); I Stamatoudi, *Copyright in Multimedia Products: A Comparative Analysis* (2002).

²¹³ CPDA 1988, s 5B(1).

²¹⁴ CPDA 1988, s 5B(2), (5).

²¹⁵ See *Sega Enterprises Ltd v Galaxy Electronics Pty Ltd* (1997) 145 ALR 21 (Fed Ct of Australia); *Golden China TV Game Centre v Nintendo Co Ltd* 1997 (1) SA 405 (A); *Nova Productions Ltd v Mazooma Games Ltd* [2007] RPC 25 (CA). The computer program incorporated in the game will also have its own copyright as a literary work.

²¹⁶ cf *WGN Continental Broadcasting Co v United Video Inc* 693 F 2d 622 (7th Cir, 1982), where teletext accompanying a TV programme but broadcast from a different channel was held to be an audiovisual work.

²¹⁷ See *Norowzian v Arks Ltd (No 2)* [2000] FSR 363; and see para 3.58.

²¹⁸ CDPA 1988, s 4(2).

²¹⁹ CDPA 1988, s 17(4).

²²⁰ CDPA 1988, s 5A(1).

²²¹ CDPA 1988, s 5A(1).

²²² CDPA 1988, s 5A(2).

²²³ See further at para 4.21.

²²⁴ CDPA 1988, s 6(1).

²²⁵ CDPA 1988, s 6(2); and see s 6(1)(b) and 6(4).

²²⁶ CDPA 1988, s 6(1).

²²⁷ So, the decision in *Shetland Times v Wills* [1997] FSR 604 that a website was a cable programme service could not now be reached. None of the exceptions to the general rule would have applied either.

²²⁸ CDPA 1988, s 6(1A); see also *ITV v TVCatchup* [2015] EWCA Civ 2014 at para 69.

²²⁹ See CDPA 1988, s 14(2), (5) (note duration of copyright in a repeat cannot exceed that of the original transmission).

²³⁰ CDPA 1988, s 6(6).

²³¹ CDPA 1988, ss 1(1)(c) and 8(1).

²³² See further discussion of this point by Lord Hoffmann in *Newspaper Licensing Agency Ltd v Marks and Spencer plc* [2003] 1 AC 551 at paras 11 and 16.

²³³ CDPA 1988, s 8(2).

²³⁴ CDPA 1988, s 9(1).

²³⁵ CDPA 1988, s 104(2).

²³⁶ The classic analyses are: M Foucault, 'Qu'est ce qu'un auteur?' (1969) 64 *Bulletin de la Société française de Philosophie* 73 (translated as 'What is an author?' in JV Harris (ed), *Textual Strategies: Perspectives in Post-Structuralist Criticism* (1979)); R Barthes, 'The death of the author' in *Image Music Text* (1977); and J Derrida, 'Limited Inc a b c' in *Limited Inc* (1988). The literature in English is immense: see, eg, L Zemer, *The Idea of Authorship in Copyright* (2007). See too JC Ginsburg, 'The concept of authorship in comparative copyright law' (2003) 52 *De Paul LR* 1063; J Pila, 'An intentional view of the copyright work' (2008) 71 *MLR* 535; J Phillips, 'Authorship, ownership, wikiship: copyright in the twenty-first century' (2008) 3 *JIPLP* 788; WR Cornish, 'Conserving culture and copyright: a partial history' (2009) 13 *Edinburgh Law Review* 8; HL MacQueen, 'The legal definition of authorship and the scrolls' in JJ Collins and TH Lim (eds), *Oxford Handbook of the Dead Sea Scrolls* (2010).

²³⁷ CDPA 1988, s 10(1).

²³⁸ CDPA 1988, s 104(2), (3).

²³⁹ *Nicholas Martin v Julia Kogan* [2021] EWHC 24 (Ch), para 319 citing the Court of Appeal.

²⁴⁰ *Levy v Rutley* (1871) LR 6 CP 523; *Cala Homes (South) v Alfred McAlpine Homes East* [1995] FSR 818 at 834–35.

²⁴¹ *Julia Kogan v Nicholas Martin* [2019] EWCA Civ 1645 at para 33. The person who improves or amends another’s work—as, eg, the editor of a new and updated edition of a legal textbook originally composed by someone else—would most likely have a separate copyright in their contribution to the result rather than a joint one, provided such contribution was original. See, eg, *Sawkins v Hyperion Records* [2005] RPC 32 (CA).

²⁴² *Beckingham v Hodgins* [2003] EMLR 18.

²⁴³ *Julia Kogan v Nicholas Martin* [2019] EWCA Civ 1645 at para 35.

²⁴⁴ *ibid*, paras 36–41, where the Court of Appeal indicates a preference for the approach in *Cala Homes (South) v Alfred McAlpine Homes East* [1995] FSR 818.

²⁴⁵ *Beckingham v Hodgins* [2002] EMLR 45 (Ch D).

²⁴⁶ *Julia Kogan v Nicholas Martin* [2019] EWCA Civ 1645 at para 47.

²⁴⁷ *Tate v Thomas* [1921] 1 Ch 503; also *Wiseman v Weidenfeld & Nicolson* [1985] FSR 525.

²⁴⁸ *Brighton v Jones* [2005] FSR 288.

²⁴⁹ *Kenrick & Co v Lawrence & Co* (1890) 25 QBD 99.

²⁵⁰ *Donoghue v Allied Newspapers* [1938] Ch 106; also *Evans v Hulton & Co* (1924) 131 LT 534.

²⁵¹ On appeal the decision was affirmed on other grounds: [2004] RPC 44 (CA).

²⁵² In addition to the cases cited in the following text, see *Beckingham v Hodgins* [2003] EMLR 18 (music of the Bluebells’ ‘Young at heart’ a work of joint authorship); *Fisher v Brooker* [2007] FSR 12 (music of Procol Harum’s ‘A Whiter Shade of Pale’ also a work of joint authorship); *aff’d* on this point [2008] FSR 26 (CA). The issue of joint authorship was not discussed when the case reached the House of Lords; *Fisher v Brooker* [2009] FSR 25 (HL). See on this latter case in the Court of Appeal, N Elsberg, ‘Skip the light fandango, turning cartwheels “cross the court”’ (2008) 3 JIPLP 626. For a recent application of the concept to a musical work, see *Minder Music v Sharples* [2015] EWHC 1454 (IPEC). See generally on authorship in musical works, R Arnold, ‘Reflections on “The Triumph of Music”: copyrights and performers’ rights in music’ [2010] IPQ 153.

²⁵³ CDPA 1988, ss 10(3) and 11(1).

²⁵⁴ CDPA 1988, s 12(8); and see para 3.120.

²⁵⁵ See *Lauri v Renad* (1892) 3 Ch 402; *Slater v Wimmer* [2012] EWPCC 7 (PCC) at para 89. The point is not entirely free from doubt and it still might be open, at least to a Scottish court, to hold that this was a case of joint property, in which case all the rights would ultimately accrete in the estate of the last-surviving author. Possibly, however, this would be unfair. On joint and common property, see generally *Halsbury’s Laws of England; Laws of Scotland: Stair Memorial Encyclopaedia*.

²⁵⁶ *Powell v Head* (1879) 12 Ch D 686; *Mail Newspapers v Express Newspapers* [1987] FSR 90.

²⁵⁷ CDPA 1988, s 173(2).

²⁵⁸ *Waterlow Publishers v Rose*, *The Times*, 8 December 1989 (CA).

²⁵⁹ Note that CDPA 1988, s 178 unhelpfully defines ‘collective work’ to include works of joint authorship as well as a work in which there are distinct contributions, eg the category of work discussed in this paragraph.

²⁶⁰ CDPA 1988, s 10A added by Copyright and Duration of Rights in Performances Regulations 2013/1782. See also *Redwood Music Ltd v Feldman & Co Ltd* [1979] RPC 385 esp at 400–03 (a decision on the 1911 Act).

²⁶¹ *A & C Black Ltd v Claude Stacey Ltd* [1929] 1 Ch 177.

²⁶² CDPA 1988, s 9(2)(ab). Note that this provision resulted from implementation of EU directives and the ECJ, in Case C-277/10 *Martin Luksan v Petrus van der Let* (9 February 2012), confirmed that under EU law, member states must allocate initial rights in films to the principal director and cannot exclusively grant them to the producer, although they have the option of laying down a rebuttable presumption of transfer of rights in favour of the producer.

²⁶³ CDPA 1988, s 10(1A). For a discussion of the terms ‘producer’ and ‘principal director’, see *Slater v Wimmer* [2012] EWPC 7 (PCC). On joint authorship, see paras 3.89–3.93.

²⁶⁴ CDPA 1988, ss 9(2)(aa) and 11(1). For a discussion of the term ‘producer’ in this context, see *Henry Hadaway Organisation Ltd v Pickwick Group Ltd* [2015] EWHC 3407 (IPEC).

²⁶⁵ CDPA 1988, ss 9(2)(b) and 11(1).

²⁶⁶ For all this see CDPA 1988, s 6(3).

²⁶⁷ CDPA 1988, ss 9(2)(d) and 11(1).

²⁶⁸ CDPA 1988, ss 10(2) and 6(3).

²⁶⁹ *Express Newspapers v Liverpool Daily Post and Echo* [1985] FSR 306.

²⁷⁰ CDPA 1988, s 178.

²⁷¹ CDPA 1988, s 9(3).

²⁷² *Nova Productions Ltd v Mazooma Games Ltd* [2006] RPC 14 (Kitchin J).

²⁷³ See M Perry and T Margoni, ‘From music tracks to Google maps: who owns computer-generated works?’ (2010) 26 CLSR 621; J Dickenson et al, ‘Creative machines: ownership of copyright in content created by artificial intelligence applications’ [2017] EIPR 457.

²⁷⁴ www.gov.uk/government/consultations/artificial-intelligence-and-ip-copyright-and-patents/artificial-intelligence-and-intellectual-property-copyright-and-patents <<http://www.gov.uk/government/consultations/artificial-intelligence-and-ip-copyright-and-patents/artificial-intelligence-and-intellectual-property-copyright-and-patents>>

²⁷⁵ CDPA 1988, s 9(4).

²⁷⁶ CDPA 1988, s 9(5).

²⁷⁷ CDPA 1988, s 12(2). Otherwise, the term is determined under s 12(3).

²⁷⁸ CDPA 1988, s 104(4). For an example, see *Waterlow Publishers v Rose*, *The Times*, 8 December 1989 (CA). Note here the author’s moral right to be identified as such (paras 6.8–6.11), and a person’s right not to have a work falsely attributed to him (para 6.17).

²⁷⁹ CDPA 1988, s 57(1).

²⁸⁰ CDPA 1988, s 11(2). The 1988 Act also removed any claim by an employee-journalist to copyright in his work. See 1956 Act, s 4(2), which was not replaced in CDPA 1988.

²⁸¹ For the meaning of employment, see *Halsbury's Laws of England; Laws of Scotland: Stair Memorial Encyclopaedia*.

²⁸² See *Chadwick v Lypiatt Studio Ltd* [2018] EWHC 1986 (Ch), where the court applied general principles on whether a contract is one of employment, including those set out in *Chitty on Contracts*. See generally D Cabrelli, *Employment Law in Context* (2020).

²⁸³ For the difference between these two types of contracts, see *Beloff v Pressdram Ltd* [1973] FSR 33 at 36–43; *Stephenson Jordan and Harrison v Macdonald and Evans* (1952) 69 RPC 10 at 22.

²⁸⁴ CDPA 1988, s 11(2).

²⁸⁵ See further on universities and copyright ownership, J Pila, 'Who owns the intellectual property rights in academic work?' [2010] EIPR 609; A Monotti with S Ricketson, *Universities and Intellectual Property: Ownership and Exploitation* (2003); C McSherry, *Who Owns Academic Work? Battling for Control of Intellectual Property* (2001); and D Bok, *Universities in the Marketplace: The Commercialisation of Higher Education* (2003), Chs 4, 5, 8, 9.

²⁸⁶ CDPA 1988, s 11(2).

²⁸⁷ CDPA 1988, s 104(2). For an example where the presumption was not displaced by the employer, see *Mei Fields Designs Ltd v Saffron Cards and Gifts Ltd* [2018] EWHC 1332 (IPEC). For an example where it was, see *Penhallurick v MD5 Ltd* [2021] EWHC 293.

²⁸⁸ Note that whether a relationship is one of employment or commission depends on the *true relationship* between the parties, and not simply the label chosen to describe the relationship. *Sprint Electric Ltd v Buyer's Dream Ltd* [2018] EWHC 1924 (Ch).

²⁸⁹ Under the 1956 Act, s 4(3), the commissioner was the first owner of copyright in respect of a limited class of artistic works. See CDPA 1988, Sch 1, para 11 for transitional provisions. For an example of the copyright in a commissioned work vesting in the author, see *Oilfield Publications Ltd v MacLachlan* 1989 GWD 26–1128.

²⁹⁰ CDPA 1988, s 90(3).

²⁹¹ [2005] FSR 31 (CA) at para 13.

²⁹² Set out by Lightman J in *Robin Ray v Classic FM plc* [1998] FSR 622.

²⁹³ See further the website of the Information Management section of the National Archives, which administers Crown copyright at www.nationalarchives.gov.uk/information-management/re-using-public-sector-information/copyright-and-re-use/crown-copyright <<http://www.nationalarchives.gov.uk/information-management/re-using-public-sector-information/copyright-and-re-use/crown-copyright>>.

²⁹⁴ CDPA 1988, s 163(1).

²⁹⁵ [1988] 3 All ER 545 per Scott J at 567, per Dillon LJ at 621 (CA), and per Lords Keith and Griffiths at 645 and 654 (HL). The argument is dependent on notions of equitable ownership which it would be impossible to apply in the Scottish context.

²⁹⁶ CDPA 1988, s 164(1); Scotland Act 1998, s 92(3). For the Bill stage, see para 3.114.

²⁹⁷ *Prince Albert v Strange* (1848) 2 De G & Sm 652 (64 ER 293); aff'd (1849) 1 Mac & G 25 (41 ER 1171); *HRH The Prince of Wales v Associated Newspapers Ltd (No 3)* [2006] EWHC 522 (Ch) (Blackburne J).

²⁹⁸ For a valuable discussion of the development and contemporary significance of Crown copyright, see S Saxby, 'Crown copyright regulation in the UK—is the debate still alive?' (2005) 13(3) IJL & IT 299.

²⁹⁹ See generally the website of the Information Management service of the National Archives at www.nationalarchives.gov.uk <<http://www.nationalarchives.gov.uk>> and N Cox, 'Copyright in statutes, regulations and judicial decisions in common law jurisdictions: public ownership or commercial enterprise?' (2006) 27(3) Statute Law Review 185.

³⁰⁰ CDPA 1988, s 165(1).

³⁰¹ CDPA 1988, s 166(1).

³⁰² CDPA 1988, s 166(2).

³⁰³ CDPA 1988, s 166(3).

³⁰⁴ CDPA 1988, s 166(4).

³⁰⁵ CDPA 1988, s 166(5). For the Crown copyright in an Act, see para 3.113.

³⁰⁶ CDPA 1988, ss 166A, 166B, 166C, and 166D.

³⁰⁷ Directive 93/98/EEC of 29 October 1993 harmonising the term of protection for copyright and certain related rights implemented by the Duration of Copyright and Rights in Performances Regulations 1995 (SI 1995/3297). The Directive was replaced by a consolidated version, European Parliament and Council Directive 2006/116/EC, which was amended by Directive 2011/77/EU. The UK position parallels the rest of the EU, because of these directives but outside the EU, different copyright terms may apply in other jurisdictions.

³⁰⁸ Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019, regs 4–8.

³⁰⁹ See, eg, CDPA 1988, s 12(6).

³¹⁰ On economic justifications for the copyright terms, see W Landes and R Posner, *Economic Structure of Intellectual Property Law* (2004), Ch 8. See also the still thought-provoking K Puri, 'The term of copyright protection: is it too long in the wake of new technologies?' [1990] EIPR 12.

³¹¹ CDPA 1988, s 12(1), (2).

³¹² CDPA 1988, Sch 1, para 12.

³¹³ CDPA 1988, s 301 and Sch 6.

³¹⁴ CDPA 1988, s 12(7).

³¹⁵ CDPA 1988, s 12(3).

³¹⁶ CDPA 1988, s 12(4).

³¹⁷ CDPA 1988, s 12(5)(a).

³¹⁸ CDPA 1988, s 12(5)(b).

³¹⁹ CDPA 1988, s 12(5) proviso.

³²⁰ CDPA 1988, s 12(8)(a)(i).

³²¹ CDPA 1988, s 12(8)(a)(ii).

³²² CDPA 1988, s12(8).

³²³ CDPA 1988, s 163(3).

³²⁴ CDPA 1988, s 175(2).

³²⁵ CDPA 1988, s 164(2).

³²⁶ CDPA 1988, s 165(3).

³²⁷ CDPA 1988, s 166(5).

³²⁸ CDPA 1988, ss 166A(2), 166B(2), 166C(2), and 166D(2).

³²⁹ CDPA 1988, s 166(5) proviso.

³³⁰ CDPA 1988, s 13B(2)–(4).

³³¹ CDPA 1988, s 13B(6) proviso.

³³² CDPA 1988, s 13B(9).

³³³ CDPA 1988, s 13A(2) as amended by Copyright and Duration of Rights in Performances Regulations 2013/1782, reg 8.

³³⁴ CDPA 1988, s 13A(2) proviso.

³³⁵ The proposal is accessible at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0464:FIN:EN:PDF> <<http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0464:FIN:EN:PDF>>.

³³⁶ Centre for Intellectual Property Policy and Management, Centre for Intellectual Property and Information Law, Institute for Information Law and Max Planck Institute for Intellectual Property, Competition and Tax Law, ‘The Proposed Directive for a Copyright Term Extension—A Backward-Looking Package’, Letter to the Commission (27 October 2008).

³³⁷ See *Gower’s Review of Intellectual Property* (2006), at paras 4.20–4.47 therein and the government’s reply to the Committee in Media Culture and Sport Report (Cmnd 718).

³³⁸ Speech by Andy Burnham at Creator’s Conference, 11 December 2008 (http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/reference_library/minister_Speeches/5685.aspx <http://webarchive.nationalarchives.gov.uk/%2b/http://www.culture.gov.uk/reference_library/minister_Speeches/5685.aspx>).

³³⁹ Directive 2011/77/EU.

³⁴⁰ Copyright and Duration of Rights in Performances Regulations 2013/1782.

³⁴¹ CDPA 1988, s 14(2).

³⁴² CDPA 1988, s 14(5). See para 3.84 for copyright in repeats.

³⁴³ CDPA 1988, s 15.

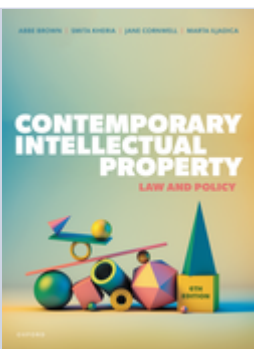
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Contemporary Intellectual Property: Law and Policy (6th edn)

Abbe Brown, Smita Kheria, Jane Cornwell, and Marta Iljadica

p. 33 2. Copyright 1: history, rationale, and policy context

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Abstract

This chapter considers the evolution of modern copyright law against the background of its historical development in the UK and the international and European legal frameworks within which UK copyright law has been set since the nineteenth century. It examines the rationale and justifications for copyright and identifies the general policy context within which law and policy has developed in the UK and the EU. It also highlights the rapid development of new technologies which has brought copyright reform to the forefront in recent times, the difficulties which this new environment presents for the copyright framework, and how the framework has developed to meet such challenges.

Keywords: copyright law, copyright protection, digital environment, EU law, copyright reform, rationales, historical context

Introduction

Scope and overview of chapter

2.1 This chapter considers the evolution of modern copyright law against a background of its historical development in the UK and the international and European frameworks within which UK copyright law has been set since the nineteenth century. It examines the rationale and justifications for copyright, and also identifies and examines the general policy context within which law and policy has developed in the UK and the EU. What holds many of these developments and initiatives together is the development of digital, mobile, and interactive technology as the means of delivering ideas, information, and entertainment to their users. As such, the chapter outlines the technological developments which have brought copyright reform to the forefront in recent times and looks at difficulties which this new environment presents for copyright, the rules of which were mostly created in a world where material came to users in the form of single copies or performances put on the market by intermediaries of one kind or another, such as publishers, broadcasters,

and film and sound recording producers. This survey of the policy context in general will assist in understanding how specific aspects of the copyright framework have developed and the challenges posed in adapting the framework.

2.2 Learning objectives

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

- the development of copyright, and its rationale;
- the policy and reform context for copyright law;
- the significance of the digital environment, and other related concerns for copyright law.

2.3 The rest of the chapter looks like this:

- Early history (2.4–2.7)
- International developments (2.8–2.13)
- European developments (2.14–2.15)
- ↩ Copyright framework in the UK—European and international influences (2.16–2.23)
- Rationale of copyright (2.24–2.28)
- Policy context (2.29–2.44).

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Early history

2.4 In most European countries the origins of copyright law lie in the efforts of government to regulate and control the output of printers once the technology of printing had been invented and become established in the fifteenth and sixteenth centuries. Whereas before printing, a writing, once created, could only be physically multiplied by the highly laborious and error-prone process of manual copying out, printing made it possible to have as many exact copies of a work as there were persons who wanted and could afford to buy them. This meant much more rapid and widespread circulation of ideas and information. While the state and church thought this was to be encouraged in many aspects (eg dissemination of material such as Bibles and government information), it also meant that undesirable content—dissent and criticism of government and established religion, for example—could circulate too quickly for their comfort. So, all over Europe, government established controls over printing, by requiring printers to have official licences to be in business and produce books. These licences typically gave the printer the exclusive right to print particular works for a fixed period of years, enabling him to prevent others from doing so during that period. Although the official licences could only grant rights to print in the territory of the state that had granted them, and therefore could not prevent printing of the same works in other territories, they did usually prohibit the import of such foreign printings into the territory where the licence had been granted. In England, the printers (then termed

‘stationers’) formed a collective organisation, known as the Stationers’ Company, which in the sixteenth century was given the power to require the entry in its register of all lawfully printed books. Further, only members of the Company could enter books in the register. As a result, the Company achieved a dominant position over publishing in seventeenth-century England. But there was no equivalent in contemporary Scotland or Ireland.³ However, in 1694 the English Parliament deprived the Stationers’ Company of its powers of control, creating uncertainty about regulation of the printing industry at a critical juncture in British history.⁴

Question

How was the printing of books regulated in England before 1707?⁵

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2.5 In 1707 the Parliaments of England and Scotland were united in a single body as the result of the Anglo-Scottish Union finally agreed that year, after much debate. The new Parliament was enjoined to respect the separate identities of the English and Scottish legal systems, but was enabled to change the laws of both countries as part of an overall project that today might be described as the creation of a single market in the UK. An important early piece of legislation to this end was the Copyright Act of 1709,⁶ which created a single regime for application in both England and Scotland. The Act marks an important shift of emphasis in the law, because it gave the ‘sole right and liberty of printing books’, not to printers, but to the authors of the books. This is the first formal legal recognition that a reason for conferring exclusive or property rights in this area was the work of its creator or originator. It may reflect the theories of contemporary philosophers such as John Locke, who held that rights of property flowed first from the labour of the person who created the thing to be owned. But the 1709 Act also enabled the author to transfer his rights to ‘assigns’, who would typically be the printer, without whom the author would be unable to disseminate and profit from his creation. Further, a precondition of the right was registration of the work at Stationers’ Hall; something of a disadvantage for Scottish and Irish printers, since the Hall was in London. The right lasted for 14 years from first publication and if at the end of that time the author was still alive, it was renewed for another 14 years.⁷

Question

When was the first copyright statute passed? What changes did it make to the previous regime described in para 2.4?

2.6 The next critical stage in the early history of British copyright came from the 1730s on, as the first copyrights created under the 1709 Act began to expire. Did those who had held statutory rights to prevent unauthorised copies also have an underlying right at common law which now revived to enable them to continue to control printing and publication of their work? There was intense controversy and much

litigation in both England and Scotland on this question.⁸ Matters were not resolved until the great cases of *Hinton v Donaldson*⁹ in Scotland in 1773 and *Donaldson v Beckett*¹⁰ in England in 1774. In these decisions, the Court of Session and the House of Lords respectively held that there was no copyright at common law in works which had been published and enjoyed copyright under the 1709 Act. While the common law of both England and Scotland went on to develop with regard to *unpublished* works (only the author or his licensee could authorise publication), the development of copyright would henceforth be principally through statute. The common law copyright in unpublished work remained significant until the beginning of the twentieth century, however, because unlike the statutory copyrights, it had no specific time limit, and lasted until lawful publication (ie it could go on forever if publication never occurred).

Question

What was the effect of the decisions in *Donaldson v Beckett* and *Hinton v Donaldson*?

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2.7 The primary development of copyright after *Donaldson v Beckett* was by statute. Engravings had been given copyright by statutes in 1734 and 1766, and further Acts for this subject matter were passed in 1777 and 1836;¹¹ sculptures joined books as copyright subject matter in 1798;¹² and paintings, drawings, and photographs (the last a form of art recently made possible by technological development) were added by the Fine Arts Copyright Act 1862. Plays were protected against unauthorised public performance as well as printing by the Dramatic Copyright Act 1833, and public lectures were given limited protection by the Lectures Copyright Act 1835. The length of the copyright term began to increase, moved by ideas that, if the basis of copyright was the recognition and encouragement of authorship, its duration should be extended for the benefit of family and descendants who might otherwise suffer for their relative's art.¹³ In 1814 the term for books became the longer of 28 years or the author's lifetime, while in 1842 there was a further extension, inspired by the lawyer-playwright Thomas Talfourd, to the longer of 42 years or the author's lifetime plus seven years. These extensions of copyright did not have an easy passage through Parliament: for example, the debates on the 1842 Act include TB Macaulay's famous criticism that copyright was 'a tax on readers for the purpose of giving a bounty to authors'.¹⁴ In general, however, it was accepted that if authorship in literature, drama, music, and art was to be rewarded, then the protection of copyright was essential.¹⁵

Key points on the early history

- Modern copyright begins in the eighteenth century, mainly for printed books.
- It is decided that copyright is primarily a statutory right, which endures only for the period laid down by the statute.
- Unpublished works have a common law copyright which lasts for as long as the work is unpublished.

- In the nineteenth century, copyright is extended to works of art and drama, and the period of protection gets longer.

International developments

Berne Convention 1886

2.8 The major problem which domestic legislation alone could not solve was unauthorised activity outside the UK. Copyright remained, like the old licensing systems from which it sprang, entirely limited to the territory in which it was granted, leaving authors and publishers unprotected beyond their home shores. As international markets for creative output began to take off in the course of the nineteenth century, so states began to enter into negotiations for the mutual recognition and enforcement of foreigners' copyrights. This culminated in 1886 in the multinational arrangement known as the *Berne Convention*, although the treaty also underwent important revisions at Paris in 1896, Berlin in 1908, Rome in 1928, Brussels in 1948, Stockholm in 1967, and Paris in 1971.¹⁶ The Convention relates to literary and artistic works, amongst which are included films, and requires its member states to provide protection for every production in the literary, scientific, and artistic domain.

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Question

When did the Berne Convention come into being, and how often has it been revised? What is the policy objective of the Convention?

The other main features of the Berne Convention which have emerged from the international activity of the last 130 years are:

- The principle of *national treatment*: each member state of the Convention would give citizens of other member states the same rights of copyright that it gave to its own citizens (Arts 3–5).
- *Minimum standards for national copyright legislation*—each member state agreed to certain basic rules which their national laws must contain, although it could, if it wished, increase the amount of protection given to right holders. One of these minimum rules was that copyright should arise with the creation of a work and not depend upon any formality such as a system of public registration (Art 5(2)). This entailed the end of the British system of registration at

Stationers' Hall when the UK finally implemented the Berne Convention in the Copyright Act 1911. Another important Berne rule, also implemented in the 1911 Act, was that the term of copyright was to be a minimum of the author's lifetime plus 50 years.

- *A focus on the author* as the key figure in copyright law: apart from the prohibition of registration requirements and the extension of the copyright term, the Berne Convention emphasised in other ways the centrality of authorship in copyright. Its purpose was 'the protection of the rights of authors in their literary and artistic works' (Art 1), not the protection of publishers and other actors in the process of disseminating works to their public. In the 1928 revision the concept of moral rights was introduced (Art 6bis), giving authors the right to be identified as such and to object to derogatory treatment of their works. These rights, unlike those which have become known as the economic rights to prevent reproduction, public performance, and, in due course, broadcasting, could not be transferred to others.
- The possibility of *exceptions to copyright*, enabling the reproduction of literary and artistic works without the right holder's prior permission. The precise nature of these exceptions was for national legislation: the guiding principle stated that such exceptions were permitted 'in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author' (Art 9). Free use of works was expressly permitted in the cases of quotation from lawfully published works, illustration for teaching purposes, and news reporting (Art 10).

2.9 The importance of the Berne Convention cannot be overstated. It remains the basis for international copyright relations and domestic copyright law. Originally a mainly European instrument, it now extends to most of the world, including since 1989 the United States. Under the Trade-Related Aspects of Intellectual Property Rights Agreement of 1994 (TRIPS; see para 2.10), states wishing to participate in international trade must join and comply with the Berne Convention. In 1961, a Berne-like treaty, the Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention 1961), was created to provide the international basis for the protection of performers, phonograph producers, and broadcasters.

Question

What are the differences in subject matter of the Berne and Rome Conventions?

Further international developments

2.10 There were important developments in the international protection of copyright in the 1990s. The TRIPS Agreement 1994 contains a number of provisions on copyright, compliance with which is required of states wishing to be members of the World Trade Organization (WTO). They have to:

- sign up to the Berne Convention, apart from its provisions on moral rights (Art 9(1));
- protect computer programs and databases (Art 10);
- provide for rental rights in at least computer programs and films (Art 11);
- where the duration of copyright is calculated other than by reference to the life of a natural person, give a minimum term of 50 years calculated from, as the case may be, the date of authorised publication or of the work being made (Art 12).

Further, TRIPS makes explicit what had previously been an underlying principle of copyright law, namely, that it protects expression rather than ideas.¹⁷ The agreement also states that member states must ‘confine’ limitations or exceptions to copyright to ‘certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder’.¹⁸ The verb ‘confine’, not found in this context in the Berne Convention, is significant, hinting as it does at a hostile attitude towards copyright exceptions and limitations. Finally, there is provision for the protection of performers, producers of sound recordings, and broadcasting organisations.¹⁹

Question

What does TRIPS add to the Berne and Rome Conventions?

2.11 In 1996 two further treaties supplementing the Berne Convention were agreed at the World Intellectual Property Organization (WIPO). The WIPO Copyright Treaty (WCT) followed TRIPS in:

- providing that copyright protected only the form in which a work was expressed and not its underlying ideas (Art 2);
- requiring copyright protection for computer programs and databases (Arts 4 and 5);
- recognising rental right in relation to computer programs and films, and extending it to sound recordings (Art 7);
- adopting the language of ‘confining’ copyright exceptions and limitations (Art 10 WCT).

2.12 But where TRIPS was driven by concerns about international trade, the WCT was primarily concerned to respond to the problems created by the rise of the internet, and hence it added rights to deal with distribution and public communication of works and to support the use of technological measures in the protection from

unauthorised use of works recorded digitally.²⁰ The other treaty concluded in 1996, WIPO Performances and Phonograms Treaty (WPPT), was for the further protection of performers and producers of sound recordings, significantly supplementing the provisions of the Rome Convention 1961 (see para 2.9) in this regard.

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Question

What did WCT 1996 add to previous international agreements on copyright? What was its main policy goal?

2.13 There have been two further international developments of note. In June 2013, the WIPO-administered Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty) was adopted. It entered into force in September 2016. Aimed at improving access to copyright-protected materials for those with visual disabilities, it introduces limitations and exceptions to copyright to facilitate reproduction, distribution, and making available of works in accessible formats. In June 2012, WIPO adopted the Beijing Treaty on Audiovisual Performances, which entered into force in April 2020. It updates the rights for performers in audio visual performances for the digital era.

Exercise

Look at the Marrakesh Treaty and find out more about the negotiations up to the adoption of the treaty. Was the main policy goal of the treaty easy to achieve? Were any compromises made?

European developments

2.14 In the 1980s the EU²¹ began to become more interested in copyright as an element in the creation of a single market. In 1991 there began a programme of directives on copyright, designed to harmonise the national laws of the member states in certain key areas (computer programs²² and databases²³) and to reduce the potential for differences to cause unjustified obstacles to the free movement of goods and services (rental rights,²⁴ satellite broadcasting,²⁵ copyright duration,²⁶ resale rights in works of art²⁷).²⁸ The international activity in the 1990s had further significant effects upon harmonisation of copyright law in the EU.²⁹ In particular, the WCT led to the introduction in 1997 of the first draft of what eventually became, after much debate and controversy, the Information Society (InfoSoc) Directive 2001.³⁰ This collection of significant directives focused on approximating laws in specific areas of copyright and led to piecemeal partial harmonisation of copyright in the EU. The Commission's piecemeal harmonisation has continued thereafter, in the form of more specific initiatives such as directives on the term of copyright in sound recordings, collective rights management and multi-territorial licensing of rights in musical works for online uses, and

certain permitted uses of orphan works.³¹ In addition to implementation of these EU directives, references for preliminary rulings on the interpretation of these directives on copyright have also been regularly made by member states to the ECJ.

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↩ 2.15 At the same time as ECJ's attempts to harmonise aspects of the copyright framework on the EU legislation noted above, the European Commission has continued with its harmonisation programme in recent years through further initiatives. For instance, in 2017, the EU adopted a directive and a regulation for the implementation of the Marrakesh treaty in the EU.³² As part of its Digital Single Market (DSM) Strategy for Europe, the EU's attempt to modernise 'copyright rules in the light of the digital revolution and changed consumer behaviour',³³ took the form of the Copyright Directive 2019.³⁴ This includes notable reforms in the area of copyright exceptions and limitations, provisions for fair remuneration in the copyright contracts of authors and performers, use of out-of-commerce works by cultural heritage institutions, a new right for press publications concerning online uses (press publishers' right), and an obligation on online content-sharing service providers in relation to certain uses of copyright-protected content (value gap). The legislative process for the Directive proved to be particularly controversial in relation to its provisions on the value gap and press publishers' right.³⁵ The Commission continues its efforts to examine the copyright and related rights framework in the EU in light of latest technological developments, including digital services,³⁶ copyright related data management, blockchain, and artificial intelligence (AI),³⁷ as well as in the context of the plans for a single EU market for data.³⁸

Question

What topics have been dealt with in the EU's copyright directives?

Key points on modern developments

- Copyright internationalised from the late nineteenth century onwards and then acquired a strong European dimension. While copyright has been, and remains a national right, the EU harmonised a number of key aspects of copyright (notably several exclusive rights, duration of copyright, and, exceptions and limitations to copyright) and a substantial part of UK copyright law has been framed in light of, such EU law. As such, an appreciation of the European developments (*at least* until the UK's withdrawal from the EU) as well as the international background is therefore vital to fully understand the present law in the UK.
- Copyright extended further, to photographs, films, sound recordings, broadcasts, and computer technology (software and databases).

- There is a division apparent in most legal systems between the copyright treatment of ‘author works’ (covered by the Berne Convention) and ‘neighbouring’ or ‘media works’ (covered by the Rome Convention)—see further para 3.44.

Copyright framework in the UK—European and international influences

Copyright Acts 1911–1988

2.16 As already noted, the UK implemented the Berne Convention in the Copyright Act 1911, which came into force on 1 July 1912. The Act swept away all the particular copyrights which had grown up over the nineteenth century (see para 2.7), and replaced them with a much more general approach. It also abolished the common law copyright in unpublished works, replacing that with a statutory scheme for such material. The Act also responded to technological development by conferring a copyright on a new subject matter not mentioned in Berne, namely sound recordings. Yet more new technology underlay the 1911 Act’s replacement with the Copyright Act 1956, which came into force on 1 June 1957, and extended protection to films and broadcasts, and also to the typographical arrangements of published editions of works. Between them the two statutes brought under the umbrella of copyright works which, apart from films, were seen in Continental European systems as belonging to a distinct category of their own. They were not author works, but rather technological media works, by which entrepreneurs brought such works to new audiences in a different form. While they deserved copyright-like protection, the substance of the protection did not need to be as great as with author works. The Continental European systems thus developed systems for the protection of what were termed ‘neighbouring rights’ quite distinct from those for author works. The approach was reinforced by the Rome Convention’s provision on neighbouring rights. But in the UK the 1956 Act followed the distinction between author and media works only in a modified form: one part of the Act gave copyright to literary, dramatic, musical, and artistic works, while a second part gave a somewhat modified form of what was still called copyright to sound recordings, films, broadcasts, and published editions.

CDPA 1988

2.17 The current legislative framework for copyright and related rights in the UK is the Copyright, Designs and Patents Act 1988 (CDPA 1988), which came into force on 1 August 1989. It sets out, in Part I, the subject matter, ownership, and duration of copyright protection, the bundle of economic rights given to copyright owners which allows them to use and exploit copyright-protected works and also prevent infringement, and the acts which are permitted in relation to use of copyright-protected works. It also sets out moral rights provided to authors. CDPA 1988 was also a response to technological development. Again, new ways of creating and disseminating works—for example, computer programs or software, and cable and satellite broadcasting—were recognised. But even more important in giving rise to the replacement of the 1956 Act were expansions in the ways by which copies might be made of works, notably photocopying, re-recording sound recordings on audio cassettes, and videoing broadcasts. Advances in copying technology meant that

not only could individuals make copies for their personal or business use, but so too could so-called ‘pirates’, that is, persons who made copies in great quantities for commercial resale at prices significantly lower than those of the copyright owner. The Act continued to apply the concept of copyright generally to both author and media works, but it also moved towards the Continental European model by recognising moral rights for authors in literary, dramatic, musical, and artistic works and films.

Question

List and date the three UK copyright statutes of the twentieth century, and give the dates when each of the Acts came into force.

p. 42 ↩ 2.18 The implementation in the UK of WCT and WPPT and several EU directives (para 2.14) led to significant amendment of CDPA 1988, generally by way of amending regulations. In addition to the implementation of EU directives, references to the ECJ for preliminary rulings on the interpretation of these directives have also played an important role in interpreting CDPA 1988 in conformity with EU law (see further para 1.52). In fact, recent judgments of the ECJ on copyright matters have attempted to indirectly, and arguably in depth, harmonise some fundamental copyright concepts, which were previously believed to have remained unharmonised by the piecemeal framework of copyright directives (see paras 3.16, 3.23, 3.32–3.37, 5.42) and as such received criticism for having ‘deepened the harmonisation of copyright well beyond that which had been agreed politically’.³⁹ However, the full impact of such judgments in some areas of UK copyright law remains enigmatic.

2.19 There have been notable domestic copyright reform initiatives in the UK in the twenty-first century. Copyright featured prominently among the issues addressed by two major UK independent reviews of intellectual property (IP). The remit of the *Gowers Review of Intellectual Property* published in 2006⁴⁰ included, in particular, whether the ‘infringement framework reflects the digital environment’; whether ‘fair use’ (sic) provisions for citizens are reasonable; and what the term of protection for sound recordings should be. This followed the Labour Party manifesto commitment with which it entered and won the 2005 general election: ‘Copyright in a digital age: We will modernise copyright and other forms of protection of intellectual property rights so that they are appropriate for the digital age.’

2.20 The *Hargreaves Review of Intellectual Property and Growth* was published in 2011, commissioned by the Conservative Party-led government.⁴¹ Prime Minister David Cameron, when launching the review, stated: ‘I can announce today that we are reviewing our IP laws, to see if we can make them fit for the internet age ... [the review will] focus on how the IP system can be improved to help the new business models arising from the digital age.’⁴² The Hargreaves Review made significant recommendations for reform in the area of copyright exceptions (it rejected a US-style ‘fair use’ defence but considered exemptions for format-shifting, parody, non-commercial research, library archiving) and copyright licensing (enabling licensing of orphan works).⁴³ It also recommended the introduction of a ‘Digital Copyright Exchange’, which would provide a common platform for cross-sectoral licensing transactions and provide a marketplace where such licences can be bought and sold.

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2.21 More recently, the UK's withdrawal from the EU has also had an impact on domestic copyright law. Most EU-derived domestic legislation in relation to copyright, and related ECJ case law delivered prior to the withdrawal (end of the transition period), continues to be applicable in domestic law, as 'retained EU law'.⁴⁴ Much of this EU-derived law builds on and implements minimum standards of protection provided in relevant international treaties to which both the UK and other EEA member states are party.⁴⁵ As such, Brexit hasn't led to any major changes to CDPA 1988 or other statutory instruments, because reciprocal protection remains in place under the UK's continued membership of the main international treaties on copyright. However, there have been a range of specific changes inter alia on qualification rules, territorial scope, EU specific rights which go beyond the provisions of international treaties, and specific cross-border copyright mechanisms unique to the EU.⁴⁶ Some of the key changes will be flagged up in subsequent chapters. Going forward, there will be regulatory divergence between UK and EU copyright law because the UK will not be part of new EU reform initiatives, for example the UK is neither required to, nor does it intend to, implement the Copyright Directive 2019.

2.22 While ECJ case law has played an important role in harmonising some of the key concepts within copyright, divergence may result in the future, if and when the relevant UK courts (para 1.62) choose to depart from it. A recent Court of Appeal decision provides an early consideration of the position of both retained and post-Brexit ECJ case law. The case of *TuneIn Inc v Warner Music*⁴⁷ concerned the public communication right (para 4.59), a harmonised right heavily developed and influenced by preliminary references to the ECJ. The defendant contended that the court should exercise its power to depart from retained ECJ jurisprudence on the right. However, it was held that in the circumstances of the case, it would be undesirable for the court to depart from retained EU law on the subject.⁴⁸ Arnold LJ also found an ECJ decision on the subject given after the withdrawal from the EU, and consequently not part of retained EU law and not binding on the UK courts, to be still highly persuasive.⁴⁹ Whether UK courts will continue to follow retained EU law on previously harmonised aspects of copyright and remain closely aligned with the ECJ's approach, or whether they will choose to adopt a different path that is less aligned with the interpretation under retained or post-Brexit ECJ jurisprudence, remains to be seen.

2.23 Finally, in the past few decades, any scope for purely domestic reform initiatives in the area of copyright has been quite limited. There had been an understanding that any significant reform would stem from the EU or even more widely based international institutions (although reform at this level is even slower), and any major solutions are likely to be Europe-wide rather than in a merely UK context. Post-Brexit, the UK can pursue domestic changes, albeit while complying with relevant international frameworks. In this regard, recent UK based policy discussions of copyright related challenges in specific areas, such as music streaming, and AI, as well as other possibilities for domestic reform, will be highlighted in subsequent chapters.

Rationale of copyright

2.24 Copyright first developed in the early modern period as a response to the growth of the printing technology that facilitated the rapid multiplication and distribution of copies of written works. As shown by the history described in the early part of this chapter, change in the law has continued to be driven by technological advance in the means by which works can be presented to the public at large, and protection has been extended and adapted to cover photography, cinematography, sound recording, broadcasting, cable

transmissions, computer programs, and, most recently, the internet. The practical benefit of developing protections within the copyright mould is the applicability of the international regime under the Berne Convention and other treaties which ensure potentially worldwide protection for right holders.

p. 44 2.25 Despite the harmonising effects of the Berne Convention and other more recent international instruments, two distinct major conceptualisations of the functions of copyright can still be identified in the world's legal systems.⁵⁰ The Anglo–American or common law tradition emphasises the *economic role of copyright*. Protection of copyright subject matter against unauthorised acts of exploitation enables right holders either to go to market themselves with a product based on the material, or to grant others, by outright transfer or, more typically, by licence, the right to do so for whatever seems an appropriate price. In the absence of copyright, which would enable free-riding by would-be users, it is unlikely that producers of the material would earn any return for their work, and without that incentive production would dry up or slacken significantly. Copyright is thus essentially a response to market failure, a means by which socially beneficial activities can be made financially worthwhile for those engaging in them. It rests ultimately upon the general or public interest in having works containing ideas, information, instruction, and entertainment made available, and in rewarding those—publishers as well as the creators of the works—who perform this function in society in accordance with the public demand for their efforts.⁵¹ In contrast, the Continental European or civil law tradition sees copyright as springing from the *personality rights of the individual creator* of the subject matter. This perception is reflected in the name ‘author-law’ given to the topic by the various Continental systems—*droit d’auteur*, *urheberrecht*, and so on. Protection is given out of respect for the individual’s creative act of production, and extends beyond the merely economic to the so-called ‘moral rights’: the right to be identified as the creator of a work, the right to have the integrity of a work preserved, and others. Copyright is thus rooted in protection of the individual personality and interests of the author as expressed in his work. Companies and organisations as such cannot be creators.

2.26 The distinction between the two conceptualisations is sometimes summarised by saying that the Anglo–American tradition is centred on the entrepreneur, the Continental one on the author. It is reflected in various rules. For example:

- where the Anglo–American tradition gives copyright protection to media works such as sound recordings and broadcasts, the Continental tradition uses a separate group of ‘neighbouring rights’ for these non-author works;
- where the Anglo–American tradition vests first ownership of copyright in the employer of an author making a work in the course of employment, the Continental tradition gives it to the author;
- where the Anglo–American tradition operates a relatively low threshold of ‘originality’ for works to enjoy copyright, based mainly upon the author’s effort in not copying previous work, the Continental tradition tends to require a higher level of creativity before works will be protected.

Question

Explain with illustrative examples the differences between the Anglo–American and Continental European conceptions of what copyright is for.

2.27 A further significant aspect of the distinctness of the two traditions is their stances in relation to the *copyright limitations and exceptions* allowed under the Berne Convention (see para 2.8); that is, those activities in which members of the public may engage with regard to copyright works without any authorisation from the right holders concerned. The Anglo–American tradition has traditionally allowed ‘fair dealing’ or ‘fair use’ for free in areas where it is thought that the public interest in the dissemination of information and ideas outweighs the interest of the right holder in earning reward from the exploitation of the work and the public interest in encouraging the author’s activities. In contrast, although the Continental traditions typically permit private copying, the author still receives remuneration by way of levies imposed upon the sale of the equipment that enables the copying to take place. There is generally a less expansive approach to exceptions and limitations based upon wider interests than those of the author and the publisher.

p. 45 **2.28** The significance of such distinctions should not be overemphasised. Continental copyright laws are also a basis for market operations with regard to ideas, information, and entertainment, while, as we shall see (paras 3.86–3.114), the author plays a fundamental role in Anglo–American copyright laws, where moral rights are now also available (paras 6.4–6.21). Membership of the Berne Convention has embraced countries from both traditions for most of its history and since 1989 has included the United States. The convergence promoted by the Convention’s minimum standards has been further advanced by TRIPS and the WIPO Treaties of 1996, as well as the copyright directives of the EU. Nonetheless the deep-seated differences in basic concepts have an effect upon international discussions, the outcomes of which occasionally reflect a somewhat uneasy compromise between the competing schools of thought.

Key points on rationales

- Copyright has an economic function, enabling the production of information, ideas, and entertainment to be rewarding for their authors and publishers.
- Copyright also has a non-economic function, related in some legal systems to the idea of recognising creativity as an aspect of individual personality.
- Copyright rewards individuals for their contributions; but this is offset by recognition of the interests—if not the rights—of the wider public in the free dissemination of material in certain circumstances.
- Different legal systems give different emphases to these functions, making it sometimes difficult to achieve European or global harmonisation.

Policy context

2.29 Then Director General of WIPO, Francis Gurry, noted in 2011 that copyright laws and rights holder business models should more appropriately suit the digital age.⁵²

I am firmly of the view that a passive and reactive approach to copyright and the digital revolution entails the major risk that policy outcomes will be determined by a Darwinian process of the survival of the fittest business model. The fittest business model may turn out to be the one that achieves or respects the right social balances in cultural policy. It may also, however, turn out not to respect those balances. The balances should not, in other words, be left to the chances of technological possibility and business evolution. They should, rather, be established through a conscious policy response.

Then President of the European Union, Jean-Claude Juncker, noted in 2016, the same day as the European Commission set out its proposals on the modernisation of copyright for the digital single market:⁵³

I want journalists, publishers and authors to be paid fairly for their work, whether it is made in studios or living rooms, whether it is disseminated offline or online, whether it is published via a copying machine or commercially hyperlinked on the web.

The chair of the UK Parliament's Digital, Culture, Media and Sport Committee, Julian Knight MP, at the launch of the Committee's report on the 'Economics of Music Streaming Inquiry' in 2021, noted:⁵⁴

While streaming has brought significant profits to the recorded music industry, the talent behind it —performers, songwriters and composers—are losing out. Only a complete reset of streaming that enshrines in law their rights to a fair share of the earnings will do.

p. 46 ↵ The approach taken in this short section is to consider the general background of recent technological development (the 'digital environment') as the policy context within which the initiatives at international, European, and domestic level described above have developed. The importance of doing this is to understand why reform of copyright has been, and continues to be, such an important question in light of rapid development of new technologies; and to understand how such challenges in relation to reform are ultimately related to the purpose(s) of copyright. This also enables one to come to grips with the policy and law reform issues with which copyright law has to deal, recognising the sometimes sharply opposed views that exist on these matters. At the best of times, law reform is a slow process. This and the subsequent chapters show how difficult it is in relation to copyright.

New technologies

2.30 A huge range of areas of activity are affected by copyright: government, entertainment, education, creativity, technology, and international development, to name but a few. Much of the current debate on copyright, which has brought copyright reform to the fore in the UK and Europe, has arisen in the context of the ever-expanding scope and possibilities of using digital, wireless, and mobile technologies for the creation, dissemination, and reproduction of ideas, information, and entertainment. The context for policy thinking in the areas traditionally covered by copyright has been transformed by the ability to make material available so that it is potentially always accessible to users at times and places chosen by them; especially when it has gone along with expanding possibilities of, and demand for, interactivity between suppliers and users who, starting on the basis of what already exists, may themselves become creators, developers, and suppliers of further material. It is also clear that increasing amounts of material from both the digital and pre-digital era is becoming available electronically: not only sound recordings, films, and broadcasts, but also works of art and literature of all kinds and all periods. The idea of the digital environment as a cultural jukebox, always on and available for use, shifts the traditional relationships between users and consumers, on the one hand, and creators and repositories such as libraries, archives, museums and galleries, and publishers and broadcasters, on the other. Further, because the digital environment does not know jurisdictional and national frontiers, the law's approach has to be an international one, moving beyond the traditional international approach of setting minimum standards of copyright protection (which does not entail the law and rights being the same everywhere), and according to foreigners whatever protection the national law affords its own nationals (see para 2.8).

Exercise

Can you give some specific examples of copyright policy issues arising from attempts to create, disseminate, and reproduce ideas, information, and entertainment in the digital environment?

2.31 Debate is sparked, however, by varying visions of what the role of new technologies should be; for example what the internet and, following it, the 'information superhighway' through wireless and mobile communication systems should be about, or more recently what AI systems and their deployment should be about. For *government and commercial interests*, it is primarily a means of *economic development and innovation*. For instance, the DSM strategy (see para 2.15), aimed at adapting the EU's single market to changes in the internet and digital technologies, is made up of three 'pillars' or policy areas: 'better access for consumers and businesses to digital goods and services across the EU; creating the right conditions and a level playing field for digital networks and innovative services to flourish; and maximising the growth potential of the digital economy'.⁵⁵ UK's national AI strategy notes the government's ambition for the country to be a 'science superpower' and in this regard to ensure that IP not only incentivises such innovation in the area of AI but gives the UK a competitive edge.⁵⁶

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2.32 Digital and mobile technologies have changed the information, marketing, and selling processes for reaching an ever-widening number of citizens, consumers, and buyers. All kinds of producers can in effect set up electronic shops and information resources. Some simply sell goods and services that are already available (but usually more expensively) through traditional outlets. Good examples are Amazon (the online store) offering books, music, and films and easyJet, offering airline services; and each contracting with customers principally by way of electronic communication across the web. eBay, the online auction site, is a slightly different example of the same thing, electronically putting sellers in contact with potential buyers of whatever they have to sell. But digital technology also creates the possibility of new types of purely electronic products and services that can be traded primarily through communication systems. Computer programs and games were the most familiar type of digital product before the internet took off; these could now be made available on the internet for downloading directly to computers and mobile devices from the relevant website. Familiar also by the end of the 1980s were the digital CD-ROMs, which were largely replacing analogue cassettes and the still-surviving vinyl record as the primary means of disseminating recorded musical performances. The internet opened up the possibility, soon realised by Napster and others, of the global jukebox from which music enthusiasts could at any time download to a local computer, a mobile telephone, or other device (eg an iPod) whatever took their fancy at the time. From music it was but a short step to films, aided by the arrival of broadband. Broadcasting has also moved into the digital era via ‘podcasting’, ‘webcasting’, and ‘streaming’, so that viewers and listeners can increasingly choose where and when to watch and hear programmes, and interrupt, pause, and replay them to suit their own rather than the broadcaster’s convenience (eg on-demand services like Netflix and Spotify). Digitisation also enabled the rapid development of the multimedia product, combining writing, sounds, and images still and moving. Finally, the most obviously new kind of service made both necessary and possible in the digital environment was the search engine provided by such organisations as Google and Yahoo!, through which users of the internet could find their way most speedily to the material they wanted.

2.33 The key point in all this for copyright is that, by contrast with the analogue world in which, although copying was easy, the copy was invariably less good than the original, the digital work will always copy perfectly. The downloader gets as good a version as the master copy on the original site—and gets it increasingly easily and quickly as the technology moves on. Nor does the user necessarily have to have, keep, or find space for the products involved: access by way of streaming, webcasting, and cloud-based computing may soon replace acquisition of anything other than the devices which provide the means of access. The internet and subsequent developments in mobile communications systems thus provide a tremendous new way to reach consumers of information and entertainment products in the comfort of their own homes and social patterns. But the difficulty also facing those minded to exploit these opportunities is precisely the ease and speed of digital reproduction and transmission. How can consumers be made to pay for the material they download or receive in this way? How can pirates, those making copies and providing access for their own commercial gain without the authority of the originator, be stopped from exploiting the technology and thereby undercutting the latter’s market? Piracy—the unlicensed mass reproduction of copyright material such as sound recordings, films, and computer games for free or for resale at prices far undercutting those of the copyright owner—has continued to be a serious issue for the affected industries, as it was also for most of the second half of the twentieth century.

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2.34 A further question is raised, however, from the perspective of those who see the new technology as raising other exciting possibilities of ever greater and wider access to, and expression and circulation of, ideas and information. In this perspective, the ease and speed of digital communication and reproduction is an opportunity rather than a problem; a real step forward in allowing the realisation of both individual and societal goals. This is the perspective which lies behind the idea of ‘open source’, in which material is made freely available to others—‘free’ here meaning, as it has famously been put, ‘free’ as in ‘free expression’ rather than as in ‘free beer’. By their very nature, information and ideas want to be free in the same sense as a prisoner or a caged wild animal might want. As economists point out, information and ideas are ‘public goods’, meaning that their availability is not diminished no matter how many people have enjoyed or employed them. Insofar as copyright is a barrier to the free flow of information and ideas, it is misused. Some go as far as to say that copyright is always such a barrier; the purpose of others, such as Creative Commons, however, is to recognise the value possessed by copyright, provided that it is not used simply to obstruct otherwise beneficial further activity and creativity. There are also widespread perceptions of copyright as complex, inaccessible, productive of difficulty and uncertainty in relation to otherwise lawful activities, and sometimes absurd.

2.35 File-sharing (paras 4.74–4.79) provides a good example for argument about the different perspectives. The music industry viewed the transfer of music recordings from user to user without charge as the main reason, apart from piracy, behind a significant decline in the sale of music CDs since 2000 (the year in which the Napster operation first took off). The industry argued that without profit its investment in new talent will necessarily decline, with the end result being less opportunity for, and so overall less, new recorded music. Those supporting a more ‘open’ approach argued that the music industry failed to move quickly enough to meet the potential of the internet as a means of distributing music, and that users of the unlicensed file-sharing services actually did continue to buy CDs, turning to the services only for hard-to-obtain or actually unavailable material. The industry had only itself to blame for its financial woes, having been exposed by others more innovative and better attuned to the ways in which consumers wished to acquire and use their music in the digital environment, and who made that pay in different ways (eg by selling advertising space on their services). More recently, the industry has embraced legal offerings of content through streaming services such as Netflix, Spotify, and Apple Music, and seen profits rise, but continues to see piracy, as well as content-sharing platforms such as YouTube as the problem, while musicians now see the lack of income from such services as the key problem.

2.36 In the pre-digital world, an author and a person wishing to use the author’s work would have very little opportunity or incentive to meet and negotiate the terms and conditions of the latter’s use; hence, the need for copyright law to set down some general social bargain, as it were, and also for intermediaries such as publishers to enable works to find their markets and audiences. But in the digital environment it is potentially much easier for author and audience to find each other directly, and for them to use technology to conclude their own bespoke bargain about terms and conditions of use of the author’s work. The use of DRM (digital rights management)—*technical protection measures* (TPMs) and *rights management information systems* (RMIs)—built into CDs, databases, websites, and games consoles, can prevent access to and use of a work unless and until such contractual conditions as the producer imposes are met by the would-be user. Such technologies are intensely controversial, and usually seen by critics hostile to current legal developments in the field as the manifestation of the worst of current copyright rules, since the law protects

them against circumvention by third parties even though their use can enable not only the prevention of activities falling within the exceptions to copyright, but, indeed, the protection of works no longer or never in copyright. The position of the right owner thus appears to be considerably strengthened at the expense of the user, since money can be made even from a work without copyright, as long as it is technologically protectable. Right owners can also use DRM to enable consumers to make further uses of their products (eg making additional copies to store on additional devices), particularly if different consumers might be prepared to pay variable prices for different packages of permissions made available through DRM.

p. 49 2.37 Contracts between the author/producer and the exploiter of copyright works also assume importance in the digital world. While such contracts promote economic efficiency in relation to exploitation of protected works, they may also require policing against the potential for abuse and lack of fairness. Although there are some provisions in copyright legislation that regulate copyright contracts, and the common law on restraint of trade and undue influence have also been deployed in such contracts, an important issue is whether anything more is required to balance the position of authors and exploiters in copyright contracts. Should copyright contracts be more closely vetted for general unconscionability or should compulsory equitable remuneration provisions, such as already exist in relation to performers' rights (see paras 7.41–7.42) be extended to all copyright contracts? It may be noted that, while users of copyright products can often be at least analogised with consumers, authors are often persons whose work is being consumed by their publishers; in a sense, therefore, their claim to protection from market forces is more like that of the employee in labour law than the consumer. Further, however, and like the employee who is a member of a trade union or professional association, the author has some possibility of self-protection through collective action by way of copyright management societies, trade unions, professional organisations, and pressure groups. In the digital environment, it becomes particularly important to separately understand the interests of authors from the exploiters, in relation to reform initiatives and their impact.

2.38 Contracts, such as the forms provided by Creative Commons, can also help facilitate dissemination of and access to protected works as an author can indicate in advance, as it were, those uses of the work by others which, although within the scope of copyright protection, are nonetheless permitted; further, the author can require those using this permission to apply those terms and conditions to further downstream sub-users. So, in this context contracts and technology can operate in support of widespread use and later creativity with existing works. However, there are limits to what can be achieved through this means of promoting access to protected works, and reform initiatives such as those for orphan works, or for out of commerce works, remain of much significance in the digital environment.

2.39 An obvious tricky point is that it is copyright, for the most part, which, at least initially, creates the subject matter around which contracting parties can subsequently bargain. In the absence of copyright at the point of creation, there might be no room for bargaining at all. In particular, the individual author/creator without access to the means of sophisticated technological protection, dissemination, and online payment methods (and such persons will continue to exist for a long time, even in the digital environment) would be at a serious disadvantage without copyright in dealing with the entrepreneur who will convert the work into a marketable product. One could, of course, try to create some sort of 'fair contract' or 'minimum terms'

regime for such authors, but that instrument would either assume the existence of copyright, or alternatively the ‘minimum contract’ that would have to be created in the absence of copyright might end up looking remarkably similar to copyright!

2.40 Further, the economic interests protected by copyright are not limited to those of the author/creator of the work and the entrepreneur who first takes it to market. Since the economic rights protected by copyright are freely transferable to third parties, the person who at any given moment owns the copyright and reaps the economic returns it gives may well be someone who had no hand in the original production of the work or the product flowing from it. How far such investors in works may deserve the same level of protection as the originators of the work is a nice question: after all, they are risk-takers to a greater extent than those from whom they bought the rights, and they have helped to ensure that the author/creator/first producer does, indeed, earn reward from their work.

2.41 Finally, the recent focus on the development of AI raises the question of whether copyright should protect creative works generated by AI, or works where AI has been used as part of the creative process. It also raises the issue of whether the legal framework should be adapted to facilitate AI systems to use, and be trained by, copyright protected material, without permission of or payment to right holders. Such questions require a consideration of how far should the economic function of copyright extend to, and ultimately whose economic interests should copyright protection prioritise, and whose labour and creativity the framework should reward and recognise.

p. 50 Purpose of copyright in the digital environment

2.42 A fundamental question in thinking about these challenges arising from technological developments is the purpose, or purposes, of copyright. Only with clear ideas of what we are trying to achieve will clear, coherent, and principled law emerge. We have already discussed at some length many of copyright’s underlying ideas:

- The *economic role* (para 2.25)—incentivising and rewarding, in accordance with market demand, those involved in the creation and publication of certain kinds of work. Economic interests therefore include not only creators, but also entrepreneurs who convert what is created into products for the marketplace. Copyright is a response to market failure; without it, the *expression* of ideas and information, creativity, and innovation would be available to all, without reward for those who invested in the creation and dissemination of the works thereby produced, either personally or financially. With copyright, the way is open for the reward of creative individuals and those who convert their creative work into products that the public will buy or otherwise spend money on.
- Protection of the *creative individual’s personality rights* (para 2.25), most evident in the moral rights, and their recognition of inalienable, non-economic interests that 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 recognition of copyright is also apparent in the copyright terms, much longer than a strict economic analysis would suggest is necessary for the fulfilment of the economic goal. There may also be a link between moral rights and the fundamental human rights that underlie many personality rights in general. Human rights to dignity and respect

seem particularly apt to support the right to be identified in connection with one's work and to have that work treated appropriately by others. Copyright can also protect the individual's interest in *privacy*. There is no obligation to publish or make available one's work, and copyright serves to protect that position should that be the author's wish.

- The *rights of users, or the public domain* (para 5.4). By placing various limitations upon what it protects on the producer side, copyright also protects, directly or indirectly, non-producer interests. Thus:
 - freedom of expression and information are protected by the limitation of copyright to forms of expression, as distinct from the ideas and information which are expressed;
 - works which fall below the threshold requirement of 'originality' do not have copyright, even if in other respects they come within one of the categories of protected work (eg being written, they are literary);
 - works which do not fit into the expressed categories of the law do not receive copyright protection;
 - copyright exceptions, for example fair dealing for a number of specified purposes, reflect a recognition that certain non-producer interests outweigh producer ones in at least some circumstances; or at any rate the impracticability of certain kinds of copyright enforcement; and
 - the *product* embodying the protected work can generally be dealt with freely by the first and subsequent purchasers apart from integrity/commercial rental/lending/public communication rights.

We might also take note of a further dimension:

- The *cultural purposes* of copyright: this dimension is apparent in the nature of what copyright protects—literary, dramatic, musical, and artistic works, films, sound recordings, and broadcasts—and also in the length of time for which it gives that protection.

2.43 The digital environment puts these purposes into sharp conflict with each other. Should the economic interests of the author and entrepreneur, and also the interests of society, require the strengthening of economic rights and their enforcement, because protected material is easier to copy and the business models on which the creative sectors have been built are under threat over the last two decades? Or should the rights of users, as well as economic and cultural interests of the society, require the weakening of economic rights to allow for wider access to protected works? What is the role of powerful and disruptive technological companies in this debate? It is worth keeping these contestations in mind in understanding specific aspects of the copyright and related rights framework in Chapters 3–7.

2.44 It is not suggested here that current UK law does anything other than reflect a mixture of the various purposes set out above, which attempts to provide a *balance* between the different interests involved. Nor is it suggested that the present balance is satisfactory, or that it was at any time in the past. The interests inevitably come into conflict, especially those related to economic and personality interests in works, on the one hand, and those reflecting the public domain dimension, on the other. All that law-makers can do is be sensitive to all the interests involved, make choices between options from time to time, and be prepared to act should it become apparent that a solution, old or new, is not working as it should, or has become inappropriate in changing circumstances.

Further reading

Books

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2. Copyright 1: history, rationale, and policy context

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C Geiger et al, 'The resolution of the European Parliament of July 9, 2015: paving the way (finally) for a copyright reform in the European Union?' [2015] EIPR 683

A Rahmatian, 'The Hargreaves Review on copyright licensing and exceptions: a missed moment of opportunity' [2011] Ent LR 219

E Rosati, 'The Hargreaves report and copyright licensing: can national initiatives work per se?' [2011] EIPR 67

Notes

³ On the pre-history of copyright in Scotland, see AJ Mann, 'Scottish copyright before the Statute of 1710' [2000] JR 11; also the same author's *The Scottish Book Trade 1500–1720* (2000), Ch 4 and App 1; and 'Some property is theft: copyright law and illegal activity in early modern Scotland' in R Myers, M Harris, and G Mandelbrote (eds), *Against the Law: Crime, Sharp Practice and the Control of Print* (2004).

⁴ See in general M Rose, *Authors and Owners* (1993); J Greene, *The Trouble with Ownership: Literary Property and Authorial Liability in England, 1660–1730* (2005).

⁵ See 'Primary Sources on Copyright (1450–1900)' at www.copyrighthistory.org <<http://www.copyrighthistory.org>>, a digital collection of primary sources from the UK and beyond and related commentary.

⁶ Often known to copyright lawyers as 'the Statute or Act of Anne', after Queen Anne, who reigned 1702–1714. The Act entered into force in 1710 and is sometimes given that date rather than 1709.

⁷ See further R Deazley, *On the Origin of the Right to Copy—Charting the Movement of Copyright Law in Eighteenth Century Britain (1695–1775)* (2004); JC Ginsburg, "'Un chose publique?" The author's domain and the public domain in early British, French and US copyright law' (2006) 16 CLJ 636.

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⁹ 1773 Mor 8307. Full text of the judicial opinions in the case can be found in J Boswell, *The Decisions of the Court of Session upon the Question of Literary Property in the Cause of John Hinton of London, Bookseller, against Alexander Donaldson and John Wood, Booksellers in Edinburgh, and James Meurose, Bookseller in Kilmarnock* (1774). See further MacQueen, 'Intellectual property and the common law', note 8, 33–38.

¹⁰ (1774) 2 Bro PC 129. See further R Deazley, *Rethinking Copyright: History, Theory, Language* (2006).

¹¹ Engraving Copyright Acts 1734, 1766, 1777, and 1836.

¹² Sculpture Copyright Act 1798; replaced by the Sculpture Copyright Act 1814.

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¹³ Particularly significant writers in this regard were William Wordsworth and Sir Walter Scott.

¹⁴ See for a very full account of the genesis of the 1842 Act, C Seville, *Literary Copyright Reform in Early Victorian England* (1999).

¹⁵ On the nineteenth-century ‘crystallisation’ of copyright in the UK, see B Sherman and L Bently, *The Making of Modern Intellectual Property* (1999), 111–28, 137–40.

¹⁶ See in general S Ricketson and J Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2006); C Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (2006).

¹⁷ TRIPS, Art 9(2).

¹⁸ TRIPS, Art 13.

¹⁹ TRIPS, Art 14.

²⁰ WCT, Arts 6, 8, 11, and 12.

²¹ At the time called the European Community.

²² Directive 91/250/EEC on the legal protection of computer programs, repealed and replaced by Directive 2009/24/EC.

²³ Directive 96/9/EC on the legal protection of databases.

²⁴ Directive 92/100/EEC on rental right and lending right, repealed and replaced by Directive 2006/115/EEC.

²⁵ Directive 93/83/EEC on satellite broadcasting and cable retransmission.

²⁶ Directive 93/98/EEC harmonising the term of protection, repealed and replaced by Directive 2006/116/EC, amended by Directive 2011/77/EU (Term Directive 2011).

²⁷ Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art.

²⁸ For all EU directives and regulations in the area of copyright, see European Commission, ‘The EU copyright legislation’ at <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation> <<https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation>>.

²⁹ WCT and WPPT were signed by the EU in December 1996 and ratified in December 2009.

³⁰ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

³¹ Term Directive 2011; Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works; Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

³² Directive (EU) 2017/1564 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled; Regulation (EU) 2017/1563 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled.

³³ COM(2015) 192 final.

³⁴ Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market. At the same time, it also adopted Directive (EU) 2019/789 on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes.

³⁵ At the time of writing, the Commission is urging remaining members states to transpose the Directive. <https://digital-strategy.ec.europa.eu/en/news/copyright-commission-urges-member-states-fully-transpose-eu-copyright-rules-national-law>. <https://digital-strategy.ec.europa.eu/en/news/copyright-commission-urges-member-states-fully-transpose-eu-copyright-rules-national-law>.

³⁶ https://www.europarl.europa.eu/doceo/document/A-9-2021-0356_EN.html https://www.europarl.europa.eu/doceo/document/A-9-2021-0356_EN.html

³⁷ <https://digital-strategy.ec.europa.eu/en/news/commission-publishes-two-studies-map-challenges-and-opportunities-cultural-and-creative-sectors> <https://digital-strategy.ec.europa.eu/en/news/commission-publishes-two-studies-map-challenges-and-opportunities-cultural-and-creative-sectors>

³⁸ https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-data-strategy_en https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-data-strategy_en

³⁹ L Bently, 'The return of industrial copyright?' [2012] EIPR 654 at 671; see also S Vousden, 'Infopaq and the Europeanisation of copyright law' [2010] WIPO J 197 and E Rosati, 'Towards an EU-wide copyright? (Judicial) pride and (legislative) prejudice' [2013] IPQ 47.

⁴⁰ *Gowers Review of Intellectual Property* (HM Treasury 2006).

⁴¹ I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (IPO 2011).

⁴² <https://www.gov.uk/government/news/independent-review-launched-to-ensure-ip-system-promotes-growth> <https://www.gov.uk/government/news/independent-review-launched-to-ensure-ip-system-promotes-growth>

⁴³ A number of the recommended changes were implemented in 2014 and are discussed in Chapter 5.

⁴⁴ European Union (Withdrawal) Act 2018, ss 2 and 6.

⁴⁵ Under such treaties, member countries provide copyright protection for works originating in or made by nationals of other countries under the 'national treatment' rule (see para 2.8).

⁴⁶ See Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019.

⁴⁷ [2021] EWCA Civ 441.

⁴⁸ [2021] EWCA Civ 441 at paras 73–89, 182–184, and 196–202.

⁴⁹ [2021] EWCA Civ 441 at para 91.

⁵⁰ For a comparative overview, see G Davies, *Copyright and the Public Interest* (2nd edn, 2003), especially Chs 5–7. See also B Sherman and A Strowel (eds), *Of Authors and Origins: Essays on Copyright Law* (1994).

⁵¹ The economics of copyright are explored in, eg, W Landes and R Posner, *The Economic Structure of Intellectual Property Law* (2003), Chs 2–6, 8–10; R Towse (ed), *Copyright and the Cultural Industries* (2002); MA Einhorn, *Media, Technology and Copyright: Integrating Law and Economics* (2004). Many classic earlier studies are reprinted in R Towse and R Holzhauser (eds), *The Economics of Intellectual Property* (2002), vol 1 (Introduction and Copyright).

⁵² See his comments at the February 2011 Blue Sky Conference in Queensland Australia at www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html *<http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html>*.

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⁵⁴ <https://committees.parliament.uk/work/646/economics-of-music-streaming/news/156593/mps-call-for-a-complete-reset-of-music-streaming-to-fairly-reward-performers-and-creators/> *<https://committees.parliament.uk/work/646/economics-of-music-streaming/news/156593/mps-call-for-a-complete-reset-of-music-streaming-to-fairly-reward-performers-and-creators/>*

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⁵⁶ <https://www.gov.uk/government/publications/national-ai-strategy> *<https://www.gov.uk/government/publications/national-ai-strategy>*

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