



Intellectual Property Law (6th edn)

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## p. 323 11. Exploitation and Use of Copyright

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### Abstract

This chapter examines the ways in which copyright can be exploited or transferred, with emphasis on the two most important forms of exploitation: assignment and licensing. It also discusses the transfer of copyright in the case of mortgages, bankruptcy, or death, as well as situations in which compulsory licences and voluntary licences are used to exploit copyright. In addition, the chapter considers testamentary dispositions, techniques for exploiting works that rely on the use of technological protection measures, and the role of collecting societies in copyright exploitation.

**Keywords:** copyright, assignment, licensing, compulsory licences, voluntary licences, exclusive licences, testamentary dispositions, technological protection measures, collecting societies, CMOs

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## 1 Introduction

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As we saw in Chapter 6, copyright law confers on the first owner of copyright certain exclusive rights over the exploitation of the work. These rights are capable of being exploited in a number of ways. Most obviously, the rights enable copyright owners to control the sale of both the original work and copies of the work. By selling copies of the work at an appropriate price, copyright owners can ensure that they reap a reward sufficient to cover the costs of producing the work. This form of exploitation is most important where the market for the work is limited and the owner can easily be linked to a purchaser, such as with sales of limited editions of engravings or prints by artists.

If copyright law were to give the author only the right to exploit the work, its economic usefulness would be limited. While there has been a rise in self-publishing,<sup>1</sup> and a reduction in the cost of selling works (particularly online), it remains the case that relatively few authors have the financial ability, economic acumen, or the willingness to print and sell their own works. Consequently, the law treats copyright as a form of personal property that can be exploited in a number of ways, most importantly by assignment or licence.<sup>2</sup> This enables copyright to be transferred to those who can exploit it more profitably. Where this occurs, the terms of the transfer agreement will determine how the profits are to be distributed. As we will see, such transfers are often arranged in advance of the creation of a work, for example where an author enters into a publishing contract prior to writing a book. Moreover, since some works can be exploited in a variety of ways, there may be many assignments, licences, and sub-licences. With new forms of exploitation, the web of transactions is becoming ever more complex.

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One of the characteristics of the intangible property protected by copyright is that it has the potential to be used by a range of different people at the same time. For example, a sound recording can be played in numerous public places (such as pubs, shops, and clubs) simultaneously. As works are increasingly exploited in this manner, the role of licensing in exploitation becomes ever more important. In some situations, the copyright owner will be able to license the use of the work by the customer directly (e.g. where sale of software on a DVD includes a licence to make the immaterial copies necessary to run the program). In other cases, owner–user relations are mediated by an agency or collective management systems.

In this chapter, we look at the ways in which copyright can be exploited or transferred. After exploring the most important forms of exploitation—namely, assignment and licensing<sup>3</sup>—we consider the transfer of copyright in the case of mortgages, bankruptcy, or death. In turn, we examine situations in which the rights may be exploited by way of compulsory licence. We also consider briefly techniques for exploiting works that rely on the use of technological protection measures, techniques that are important in the digital environment. (These are examined in detail in Chapter 13.) Finally, we look to the important role that collecting societies play in copyright exploitation.

Before doing so, it is important to note that assignment, licence, or other transaction in relation to copyright is effective only if the purported assignor was able to enter the transaction. Consequently, it is important to ensure that the person entering the transaction is the owner or is appropriately authorized by the owner.<sup>4</sup> In this respect, it should be noted that where there are joint proprietors, all of them must consent to any

transaction.<sup>5</sup> Particular difficulties may arise in relation to transactions made by minors who are creators. These are inviolable only if made for the benefit of the minor. If not so made, on reaching majority the minor can have such a transaction set aside.<sup>6</sup>

## 2 Assignment

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An assignment is a transfer of ownership of the copyright. As a result of an assignment, assignees stand in the shoes of the assignor and are entitled to deal with the copyright as they please. Although an assignment may be for payment of a royalty (as well as for a fixed sum), the nature of the assignment means that if the assignee transfers the copyright to a third party, the transferee takes free of the personal agreement to pay royalties.<sup>7</sup>

p. 325 ↵ It is not necessary that all of the copyright be assigned.<sup>8</sup> In contrast with other types of property, where the tendency is to simplify transfers by limiting the ways in which the rights can be divided up, copyright law takes a liberal view of what may be assigned. In particular, copyright allows partial assignments by reference to 'times, territories and classes of conduct'.<sup>9</sup> For example, an agreement to write a book might include an exclusive grant of all rights. In turn, the publisher might parcel out the exploitation of the work by way of hardback, paperback, newspaper serialization, audiotape, reprography, electronic distribution, dramatization, and translation, as well as by being filmed.<sup>10</sup>

In order for an assignment to be valid, it must be in writing and signed by or on behalf of the assignor. It has been held that sufficient writing might be provided by an invoice or receipt.<sup>11</sup> The assignment should identify the work concerned with sufficient clarity that it can be ascertained, although the courts have admitted oral ('parol') evidence to assist in the process of identification.<sup>12</sup> No special form of words is required, so a transfer of 'all of the partnership assets' will include a transfer of any copyright owned by the partnership.<sup>13</sup>

Assignment of copyright is a distinct legal transaction and is not effected by mere sale or transfer of the thing itself.<sup>14</sup> Thus if a person sells an original painting or manuscript, this (of itself) transfers only the personal property right in the chattel; the copyright remains with its owner.<sup>15</sup> If a vendor wishes to transfer the copyright as well as the personal property in the chattel, this should be done explicitly.

Where an assignment is made orally, this will be ineffective *at law*. However, the general equitable rule that treats a failed attempt at a legal assignment as an oral contract to assign the interest will usually apply to attempted assignments of copyright. So long as there is valuable consideration, an oral contract of this nature will be specifically enforceable.<sup>16</sup> Where this occurs, a prospective assignee will be treated as the immediate equitable owner.<sup>17</sup> While such an equitable owner may commence an action against an infringer and secure interim relief, the legal owner needs to be joined as a party before final relief can be secured.<sup>18</sup>

A prospective copyright owner (usually an author) can also make assignments of future copyright—that is, they can assign the copyright in works not in existence at the time of the agreement.<sup>19</sup> This will be useful, for example, where a painting is commissioned, or where a music publishing agreement is entered into before a songwriter creates the songs.

p. 326 There is no form of registration for assignments.<sup>20</sup> Priority is determined by reference to rules as to ‘first in time’ and bona fide purchase. In the case of legal assignments, the ↵ first transfer in time has priority over claims deriving from subsequent purported transfers of the same rights. Assignments effective in equity will be defeated only at the hands of a later bona fide purchaser for value without notice of the earlier assignment (‘equity’s darling’).

### 2.1 Presumed Transfers

Although transfer of ownership of copyright (or its component rights) is usually governed by contract, an important exception exists in relation to film production agreements. Where a contract concerning film production is concluded between an author and a film producer, the author is presumed to have transferred their *rental* right to the film producer.<sup>21</sup> The presumption operates only in relation to authors of literary, dramatic, musical, and artistic works, and therefore does not apply to the director of a film. Moreover, the presumption does not apply to the author of a screenplay, dialogue, or music specifically created for and used in a film.<sup>22</sup> The presumption is important in relation to the incorporation of existing works in films, for example where the author of a novel agrees to their work being made into a film, or a musical composer agrees to their work being used in a soundtrack. The presumption can be rebutted by an agreement to the contrary, which it seems can be express or implied.

## 3 Voluntary Licences

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The powers conferred on the copyright owner are most commonly employed by the copyright owner giving licences to particular individuals permitting them to carry out specified activities. At a basic level, a licence is merely a permission to do an act that would otherwise be prohibited without the consent of the proprietor of the copyright.<sup>23</sup> A licence enables the licensee to use the work without infringing. So long as the use falls within the terms of the licence,<sup>24</sup> it gives the licensee an immunity from action by the copyright owner.

In contrast with an assignment (where the assignor relinquishes all interest in the copyright), the licensor retains an interest in the copyright. Indeed, no proprietary interest is passed under a licence,<sup>25</sup> although in most circumstances a licence is binding on successors in title of the original grantor of the licence.<sup>26</sup> While the essential nature of a licence is that it is a mere permission, copyright law has developed a sophisticated repertoire of ways in which a work might be licensed.

p. 327 ↵ Licences may take many forms, from a one-off permission through to an exclusive licence. Licences may be limited geographically, temporally, and in relation to specific modes of exploitation of the copyright work. A licence, even if non-exclusive, may (if the parties so choose) grant the licensee a right of action against infringers where the infringing act was directly connected to the prior licensed act of the licensee.<sup>27</sup> For the most part, the terms of a voluntary licence are up to the parties to choose. As such, terms will vary with the needs, capacities, and wishes of the parties.

### 3.1 Exclusive Licences

Of the different forms of licence, perhaps the most significant is the ‘exclusive licence’. An exclusive licence is an agreement according to which a copyright owner permits the licensee to use the copyright work.<sup>28</sup> At the same time, the copyright owner also promises that they will not grant any other licences and will not exploit the work themselves. The legal consequence of this is that the licence confers a right in respect of the copyright work to the exclusion of all others including the licensor.<sup>29</sup> In some ways, it is the intangible property’s equivalent of a ‘lease’.<sup>30</sup>

While a bare licensee acquires the right not to be sued in relation to the acts set out in the licence, an exclusive licence confers on the licensee a procedural status that is equivalent to that of the proprietor.<sup>31</sup> One significant aspect of this status is that exclusive licensees can sue infringers without having to persuade the proprietor to take action on their behalf.<sup>32</sup> Section 101(1) of the Copyright, Designs and Patents Act 1988 (CDPA 1988) declares that an exclusive licensee has the same rights and remedies in respect of matters occurring after the grant of the licence as they would have if the licence had been an assignment.<sup>33</sup> An exclusive licensee is given the same rights as a copyright owner and therefore has the right to bring proceedings in respect of any infringement of the copyright after the date of the licence agreement. Indeed, an action can be brought by both the copyright owner and an exclusive licensee: special provisions dealing with this situation are set out in section 102. Exclusive licences of legal interests in copyright have to be in writing and signed by or on behalf of the assignor<sup>34</sup> if the licensee wishes to take advantage of their statutory entitlement to sue for infringement.<sup>35</sup> This is in contrast to a non-exclusive licence, which may be made orally or in writing, and might be contractual or gratuitous, express or implied.<sup>36</sup>

p. 328 ↵ In practice, the grant of an exclusive licence can often be seen as equivalent to an assignment.<sup>37</sup> Consequently, publishers are often happy to be granted exclusive licences, rather than full assignments, by authors.<sup>38</sup> However, there are legal differences between an assignment and an exclusive licence. The first difference arises from the fact that an assignee becomes the copyright owner, whereas an exclusive licensee does not. One of the consequences of this is that the remedies available to the exclusive licensee are limited to those that arise in an action for breach of contract against the copyright owner.<sup>39</sup> The second difference is that the rights given to licensees are less certain and can be defeated at the hands of a bona fide purchaser for valuable consideration and without notice (actual or constructive) of the licence.<sup>40</sup> Third, an exclusive licensee may not always be able to grant a sub-licence or transfer the benefit of their licence to a third party.<sup>41</sup> Fourth, the rights of an exclusive licensee may be limited by implied terms.<sup>42</sup> Finally, a copyright owner who wishes to permit another to exploit a work can retain better protection by giving an exclusive licence.<sup>43</sup>

In some situations, it may be difficult to determine whether a copyright owner has assigned their copyright or merely granted an exclusive licence.<sup>44</sup> Whether a person is an exclusive licensee or an assignee is a matter of construction of the agreement according to the ordinary rules of contractual construction. The question to be answered is whether there is evidence from which an intention to assign can be inferred. The way in which the parties describe the arrangement will be influential, but not conclusive. Use of terms such as ‘grant’, ‘sole’, and ‘exclusive rights’, and provisions on ‘retransfer’ if the copyright is not exploited, might indicate an assignment.<sup>45</sup> However, these descriptions may be ignored if the tenor of the agreement suggests that, in substance, there is an exclusive licence.<sup>46</sup> Occasionally, the courts have treated provisions concerning

'royalties' as suggesting that the arrangement is an exclusive licence rather than an assignment.<sup>47</sup> But in all cases the court should beware of linguistic formalism and infer the intention from all of the circumstances of the case.<sup>48</sup>

### 3.2 Creative Commons, Free Software, and Viral Licences

While it had been extremely common for an author to grant an exclusive licence to an exploiter, such as a publishing company, since the end of the twentieth century there has been a rise in popularity of 'open access' modes of distributing works—that is, the use of standardized licences allowing for particular reuses of works by any member of the public.<sup>49</sup>

p. 329 ↵ The first popular version of such a licence was the so-called 'General Public License' (GPL) developed for use in relation to computer programs.<sup>50</sup> Given the manner in which computer programs build on existing programs, it was immediately evident to a few of those involved that the need to obtain copyright permissions could become a significant impediment to software development. Richard Stallman of the Free Software Foundation conceived that one way in which to avoid this would be to grant permission in advance allowing anyone to use and modify material, but to make it a condition of use that subsequent developers make their software available on the same terms.<sup>51</sup> The GPL therefore has been said to be 'viral' in nature, in that those who take advantage of the licences must subject their own work to the same conditions.<sup>52</sup> Developers are able to obtain remuneration by selling individual pieces of software, rather than by extracting licence fees based on copyright. The GPL has proved to be an amazing success,<sup>53</sup> although doubts exist over the enforceability of 'viral' clauses.<sup>54</sup>

Following in the wake of the GPL, the 'Creative Commons' movement (see Fig. 11.1, for the logo designed in 2001 by Ryan Junell) has attempted to develop similar standard open licences for other types of work.<sup>55</sup> In so doing, the Creative Commons movement has been forced to take account of different national legal systems.



**Fig. 11.1** Logo of the Creative Commons movement

Source: Creative Commons, <http://creativecommons.org> <<http://creativecommons.org>>

In contrast with the GPL, Creative Commons offers copyright owners a menu of licences: some allow reuse of p. 330 a work only in unmodified form (CC BY-ND); some allow reuse only with attribution (CC BY); some allow reuse only for non-commercial purposes (CC BY-NC); and some attempt to impose a ‘share-alike’ condition on users (CC BY-SA). As a result, a copyright owner has considerable flexibility and the take-up of such licences has been very widespread.<sup>56</sup> Nevertheless, it should be observed that the most commonly adopted licence is the ‘attribution, non-commercial, no derivative works’ licence (CC BY-NC-ND), which confers only the freedom to duplicate, distribute, play, or perform the work in an unmodified state, for non-commercial purposes and with attribution of authorship.<sup>57</sup>

While both the GPL and the Creative Commons licences have become very widely used (by 2015, there had been a billion works licensed using CC), these initiatives have not escaped criticism, even from those who share similar ideological goals or who desire similar practical results. Professor Elkin-Koren, for example, has emphasized the dangerous effect of ‘open licensing’ as constituting informational goods as property and creators as owners.<sup>58</sup> In fact, because Creative Commons licences depend on the prior existence of property rights, there are those who advocate the expansion of such rights, for example the extension of legal protection to non-original databases, so that such products can effectively come within the terms of Creative Commons share-alike licensing schemes. More practically, Professor Dusollier has called attention to a number of potential limitations to the effectiveness of viral contracts,<sup>59</sup> in order to remind those in the open-access movement and beyond of the remaining importance of public law. It has also been suggested that in many cases the licences are bare licences (rather than contractual licences) and so certain types of term would be unenforceable (such as indemnities) and the licences could be revoked at will leaving users to rely on estoppel.<sup>60</sup>

Others, more sympathetic to traditional avenues of copyright exploitation, have emphasized the dangers of ill-considered adoption of these licences by aspiring authors. While it may seem attractive for a young or naive author to adopt an easy-to-use Creative Commons licence at a time when many others seem to be so doing, it is by no means obvious that such a move is always in their best interests. Rather, only those with a clear idea as to how they will be able to turn a profit if their works become popular should discard the mechanism that has traditionally secured rewards to successful writers or composers. From this perspective, Creative Commons licences are primarily useful tools for those who do not need remuneration *from copyright* (or at all).

The popularity of Creative Commons licences amongst British academics has been affected by what are, in p. 331 effect, compulsory publication standards, imposed by Research Councils UK (RCUK). The 2013 RCUK policy requires that outputs of Council-funded research be published under CC-BY licences, which expressly permit the making of derivatives and commercial use.<sup>61</sup> The RCUK Open Access policy was reviewed in 2014 by Professor Sir Robert Burgess,<sup>62</sup> including the use of CC-BY licences.<sup>63</sup> It was found that while those in science, technology, engineering, and mathematics (STEM) subjects were largely content with using Creative Commons licences, many in other disciplines, in particular those in the Arts, Humanities, and Social Sciences (which includes law) remained unhappy for practical reasons. One objection, common among art historians, whose articles often contain illustrative images, is that the policy requires open licensing of their articles in a mutilated form whenever the images are subject to rights of third parties. Another objection was that work could be used commercially or in ways, or for things, in respect of which the academic did not approve. More recently, Science Europe published Plan S, which attempts to accelerate open-access publication of scientific

publications starting from the basic principle that ‘... scientific publications on the results from research funded by public grants provided by national and European research councils and funding bodies, must be published in compliant Open Access Journals or on compliant Open Access Platforms’. There have been various difficulties identified arising from this principle which have been explored by numerous bodies,<sup>64</sup> but there is a clear direction of travel towards publicly funded research being open access.

### 3.3 Implied Licences

In certain circumstances, the court may see fit to imply a licence to use a copyright work.<sup>65</sup> However, for the most part, the courts have been reluctant to imply licences from the circumstances.<sup>66</sup> They have indicated that they will normally imply terms into a contract only in two situations: terms may be implied ‘by law’ where they are ‘inherent in the nature of the contract’; and terms may be implied to fill gaps left in an agreement where it is necessary to provide ‘business efficacy’.<sup>67</sup>

In relation to terms implied by law, the court is primarily concerned with whether the contract falls into a particular class. However, that is not to say that the express terms are not important. This is because they may indicate that the parties did not intend the normal incidents of a particular class of contract to apply. The classes subject to such implied terms are not closed and change with the necessities of the times. An Australian case has indicated that one such class of contracts concerns ‘persons who prepared written material with the intention it should be used in a particular manner’.<sup>68</sup> The specific terms to be implied in this class then depend upon the ‘particular purpose’. For example, where an architect provides a client with plans, the court might determine the purpose (and the extent of any licence) from the fee, when viewed in light of the standard professional fee scales operating.<sup>69</sup>

Where courts are implying terms for particular cases, they look at the existing express terms and the surrounding context. It has been said that, for a term to be implied, it must be reasonable and equitable, necessary to give business efficacy to the contract, obvious that it ‘goes without saying’, capable of clear expression, and must not contradict any express term of the contract.<sup>70</sup> In *Ray v. Classic FM*,<sup>71</sup> Lightman J found that an expert in music who had been engaged by a radio station to catalogue its musical recordings had copyright in the catalogues produced. While the terms of his consultancy were silent as to copyright, the Court held that the expert had granted an implied licence to the radio station to do certain things with the catalogues. The scope of the licence was limited to use of the material for the purpose of broadcasting in the United Kingdom. This meant that the claimant’s copyright was infringed where copies were made for the purpose of exploiting the database abroad.<sup>72</sup>

In less formal circumstances (particularly those involving consumers), the courts have tended to react flexibly in deciding the nature and extent of any licence. For example, it seems that sale of an article to a consumer usually carries with it a licence to repair that article,<sup>73</sup> and that sale of a knitting pattern might carry with it an implied licence to the effect that a person can make the pattern for domestic, but not commercial, purposes.<sup>74</sup> Where the licence is claimed by a competitor who could have entered formal contractual arrangements, but neglected to do so, the courts have been reluctant to imply a licence.<sup>75</sup>

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## 4 Mortgages

Like other forms of property, copyrights may be mortgaged—that is, assigned as security for a debt.<sup>76</sup> This can be a useful technique that enables copyright owners to raise funds. It has proved to be particularly common where a work is extremely expensive to create, as in the film industry.<sup>77</sup> In this context, a mortgage is achieved by way of an assignment of the copyright by the copyright owner to the mortgagee (lender). This is subject to a condition that the copyright will be reassigned to the mortgagor when the debt is repaid (or, as the law describes this, on ‘redemption’). In addition, it is important that the assignment reserves for the mortgagor a right to continue selling copies of the work. This is probably best achieved by reservation of an exclusive licence.<sup>78</sup> Alternatively, copyright can be used as security by way of a charge. While, in these circumstances, there is no assignment, the chargee does gain certain rights over the copyright as security.<sup>79</sup> In the case of both forms of security, the transaction must be in writing and signed by the parties in order to be valid. A mortgage or charge by a company of its copyright must also be registered within 21 days of its creation with the Registrar of Companies,<sup>80</sup> if it is not to be void against the liquidator or a creditor of the company.<sup>81</sup> A legal mortgagee has the powers of a proprietor and is therefore able to sue infringers,<sup>82</sup> even though, as a matter of practice, the borrower is in a better position to police infringements.

‘Securitization’ is the name given to a further way of raising money from copyright. Typically, securitization involves selling tranches of (that is, defined periods of entitlement over) the rights to royalties accruing from bundles of copyrights, a well-known example being in relation to David Bowie’s recordings. The reasons for creating these financial arrangements stem from the desire to exchange future possible income for immediate capital, which will facilitate reinvestment of that capital in new projects.<sup>83</sup>

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## 5 Testamentary Dispositions

Because copyright is personal property, it is capable of passing on the death of the proprietor either by will or according to the rules applicable in cases of intestacy. In the case of the death of one co-proprietor, because they hold copyright as tenants in common (rather than as joint tenants), the share of the deceased co-owner passes along with the rest of their estate.<sup>84</sup> A presumption exists that where a work is unpublished and a bequest is made of a document or other material thing containing the work, the bequest is to be construed as including the copyright in the work, insofar as the testator was the owner of the copyright immediately before their death.<sup>85</sup>

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## 6 Bankruptcy

On bankruptcy, copyright passes via the Official Receiver to the trustee in bankruptcy by operation of law.<sup>86</sup> Where a court appoints a receiver to sell assets, both the appointment and subsequent sales by the receiver will involve transfers ‘by operation of law’ and therefore need not comply with the formal requirements.<sup>87</sup> Where copyright has been assigned in return for a royalty and the assignor subsequently becomes insolvent, that right also vests in the bankrupt’s trustee in bankruptcy.<sup>88</sup>

## **7 Compulsory Licences**

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In general, if copyright owners choose not to allow others to exploit their rights, then that is their prerogative.<sup>89</sup> However, in certain exceptional circumstances, the law will intervene to force the copyright owner to license the work and require the ‘licensee’ to pay a fee. The basis for such action varies, as do the conditions on which the law permits the copyright owner’s wishes to be overridden. Provisions of this nature are called ‘compulsory licences’. In jurisprudential terms, the grant of a compulsory licence converts a property rule into a liability rule.<sup>90</sup> Compulsory licences can arise either as a result of various provisions in the CDPA 1988 or through the actions of the competition authorities. We discuss these in turn.

### **7.1 Compulsory Licences in The United Kingdom**

Compulsory licences are made available under British law in only a small number of specifically defined circumstances. One reason why so few non-voluntary licences exist in the United Kingdom is because the international standards to which the United Kingdom has committed itself are generally incompatible with compulsory licensing. Although two provisions of the Berne Convention explicitly permit the national legislature to grant such licences,<sup>91</sup> the United Kingdom no longer takes advantage of these provisions. As regards rights in phonograms, the Rome Convention intimates that compulsory licences may be imposed only as regards the broadcasting or communication to the public of phonograms.<sup>92</sup>

Another reason for the limited circumstances in which compulsory licences are available is that they are generally seen as unsatisfactory when compared with full property rights. This is because, in contrast to exclusive property rights, the existence and terms of compulsory licences require some administrative procedure, which is costly and time-consuming when compared to negotiations in the free market. Critics of the compulsory licence also complain that the value of a licence can only ever be determined accurately by negotiations in the marketplace. It is also argued that compulsory licences unfairly deprive the copyright holder of the most significant element of their rights—namely, the right to bargain.

p. 335 ↵ There are no common characteristics that explain the circumstances in which compulsory licences are granted.<sup>93</sup> In some cases, they are granted in response to past practices of ‘abuse’, usually where that abuse either prevented the production of a product for which there was a clear demand, or where the evidence showed that the copyright holder had imposed unjustifiable restrictive conditions. This is true of the compulsory licence relating to the publication of television schedules,<sup>94</sup> which was introduced to end the practice by television companies of licensing only the publication of daily listings, so that they could reserve for their own subsidiaries the market for weekly guides.<sup>95</sup> After a Monopolies and Mergers Commission (MMC) report,<sup>96</sup> the Broadcasting Act 1990 introduced provisions entitling publishers, once certain conditions are satisfied, to reproduce that information.<sup>97</sup> On other occasions, compulsory licences are granted where changes in market conditions unduly strengthen the copyright owner’s interest. This sort of consideration explains why compulsory licences were introduced in relation to where copyright had lapsed but was revived by the Duration Regulations.<sup>98</sup> There are also rights to use a work, similar to a compulsory licence, where a work qualifies for protection after a third party had started using the work.<sup>99</sup>

## **7.2 Compulsory Licences Ordered by the Competition Authorities**

Compulsory licences may also be made available by the Competition and Markets Authority (CMA) if a copyright owner is found to have violated the Chapter II prohibition in the Competition Act 1998 which regulates the ‘abuse’ of a ‘dominant position’.<sup>100</sup> *RTÉ and Independent Television Publications v. Commission* (known as the ‘Magill’ case)<sup>101</sup> involved a battle between an Irish broadcaster (RTÉ), which produced copyright-protected television listings, but only licensed them on a daily basis (in order to reserve to itself the market for weekly guides to its own programmes), and a person wishing to publish a comprehensive weekly guide. The competition regulator held this refusal to license the copyright to be an abuse of the dominant position of the broadcaster and ordered it to license the listings.<sup>102</sup> The Court of Justice affirmed the legality of the action by the regulator. The substantive basis of this power to intervene—which it should be noted is limited to exceptional circumstances—is discussed in Chapter 12.<sup>103</sup> As Microsoft discovered, failure to comply with a regulator’s decision that it should grant a licence can result in a very substantial fine.<sup>104</sup>

## **p. 336 8 Technological Protection Measures**

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As already mentioned, copyright works have traditionally been exploited by the manufacture and sale of duplicated copies (where the processes of manufacturing and distribution have been controlled by the copyright owner). In light of the emergence of digital communication technologies and digital reproduction, many copyright owners are concerned that continued use of such a traditional model of exploitation will expose them to undue levels of infringement. More specifically, there is a concern that if digital versions of works are made available, it will result in widespread unauthorized copying, particularly by individual users in private. Since these digital copies will be perfect, this is seen as a much greater threat than that previously posed by photocopiers, for example. Relying on copyright against widespread copying by individuals is problematic. Copyright holders have consequently sought techniques outside copyright to protect their interests, in particular through the use of so-called ‘technological measures of protection’—that is, they have sought to make available works only when they have additional protection systems through technologies that prohibit access, encrypt, or control copying. A familiar example of such a technology is the encryption of satellite broadcast signals and the provision to authorized service subscribers of cards that enable the use of decoding technology. Another example is the ‘content scrambling system’ used to protect DVDs and to ensure they can be used only on authorized players with content scrambling system (CSS) descrambling software.

Technological measures are regarded as critically important for the so-called ‘information society’, because the feared duplication of works is thought to be likely to take place in private and thus be impossible to police. Technological measures provide an opportunity to police private uses, by forcing users to enter contractual arrangements before they can use or copy works. If users do not contact the copyright owner, they do not get a set of keys to open the technological locks. However, the potential for technological measures is much more than operating only to solve the problem of the digital shift in replication from public to private arenas; it also poses the possibility of radical transformation among the ways in which works are delivered. For example, technological measures might mean that a person could buy a digital newspaper for a single read with the advantage that the proprietor would not need to set the price on the basis that other readers will look at the

newspaper (and so will not buy their own copy). The potential of technological measures is to enable consumers to get works delivered in the form that they want, with costs to the user tailored more closely to the use of the work.

The use of technological measures to support copyright, however, is not a complete answer to the problems of digital distribution and replication. This is because for every lock, there is some enthusiast willing to pick it. Those wishing to rely on technological measures have therefore sought government support for the use of such measures through the passage of laws prohibiting circumvention of the measures.<sup>105</sup> They argue that, by providing protection now, copyright owners will be given appropriate incentives to develop such systems. If such legal protection is not provided, that investment is vulnerable to being undermined by the rapid spread of circumventing technology. So there has been felt to be a need to act immediately. The problem with formulating legal principles to prevent circumvention, however, is that it is the locking systems currently being used that are crude. Strong protection of crude systems carries two problems: it may give users of p. 337 technological protection too much control (or control of public domain ↴ dimensions of content); and it provides developers with little reason to make the systems more sophisticated.

The CDPA 1988, as amended, contains a formidable array of civil and criminal provisions dealing with situations in which a person facilitates access to works that the person concerned is not entitled to use or receive. Some of these relate to the circumvention of effective technological measures applied to copyright works other than computer programs and are designed to have implemented Article 6 of the Information Society Directive.<sup>106</sup> Others, somewhat less prescriptive in scope, apply only to computer programs (and implemented Article 7(1)(c) of the Software Directive). The third category, in sections 297–9, relates to reception of transmissions (and implemented the Conditional Access Directive).<sup>107</sup> We consider these provisions in Chapter 13. Whether these provisions will give copyright owners the confidence to exploit works, particularly in electronic form, by utilizing technological protection remains to be seen.

## 9 Non-Fungible Tokens

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Blockchain technology<sup>108</sup> enables the creation of information records which are difficult to modify. In simple terms, a blockchain is a series of records (blocks) which are linked together and encrypted. Each block contains information about the previous block in the chain and so a block cannot be removed or altered without changing every subsequent block. Each new block added to the chain includes data from the previous block (for authentication), a timestamp (when the transaction occurred), and the information stored in the block itself.<sup>109</sup> Initially, the information included in each block was recording transactions in cryptocurrency, but more recently, instead of recording transactions in currency, it has been used to record other sorts of transactions, including in non-fungible tokens<sup>110</sup> or NFTs.

The security of the blockchain comes from the fact that each chain of data is held in many different locations on the Internet (by way of peer-to-peer sharing) thereby providing a decentralized and self-rectifying method of authentication. If one version of the blockchain differs from those held elsewhere it will be ‘corrected’ so that it matches all the other versions of blockchain.<sup>111</sup> In general, therefore, it is not possible for an individual to create fake transactions. Furthermore, because the blockchain is ‘public’ anybody can view all

the data it holds.<sup>112</sup> This provides greater transparency. It is also a technology which can come with high costs in terms of the energy consumed by computers carrying out the computations needed for each new blockchain transaction.<sup>113</sup>

p. 338 ↵ Initially, there was interest in how blockchain might change the exploitation of music. First, it has been suggested that a blockchain could be used to identify the owner of the work, payment rights, and royalty and other information; essentially providing a different form of rights management information.<sup>114</sup> Yet there has been a long-standing problem in the music industry with the accuracy and consistency of databases and records that will not be fixed by blockchain alone. Secondly, there have been suggestions that blockchain could be used to create a subscription-based service for music whereby an artist sells tokens through smart contracts<sup>115</sup> and without the involvement of music publishers.<sup>116</sup> But once more this model does not stop the copying of the music files and their dissemination without payment, it simply transfers the risk.

More recently, the use of NFTs has been suggested as a way to aid creators to receive remuneration in relation to their work.<sup>117</sup> Certainly, there have been some widely publicized sales of NFTs, including the auction of Beeple's *Everydays: the First 5,000 Days* for an astonishing US\$69 million.<sup>118</sup> However, it is important to realize that the NFT does not in itself create ownership in any copyright work (or any tangible artwork),<sup>119</sup> but even so it might create scarcity not in the work itself but in each an 'item of attention' on the work (i.e., each unique encounter with a work).<sup>120</sup> Put another way, anyone can create ('mint') an NFT which does not grant any right in the physical object (artwork) or in the intangible thing (such as copyright) and this may be done whether or not the minter owns the original object or the copyright. Even when a tangible item is owned, the minting of its NFT does not require the transfer of any share of ownership or granting of rights. For instance, Julian Lennon, the son of the famous musician John Lennon, has auctioned NFTs in his Beatles memorabilia without actually giving the purchaser of the NFT the rights in anything other than the NFT. Yet an NFT can be an artefact in its own right—and it has the value people attach to it through the relational and historic significance of the transaction.<sup>121</sup> So when somebody buys an NFT they are purchasing the contact with Julian Lennon, and a unique association with an item of memorabilia. And when that NFT is sold on to somebody new, any earlier relationship persists as it is permanently recorded on the blockchain.

If, for the moment, NFTs offer a mechanism for some creators to make money from their output, it should be understood that this has nothing to do with copyright.

## p. 339 10 Collecting Societies

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One of the central problems facing copyright owners who wish to exploit their works is how to monitor or police infringements. Where the main form of copyright was the book and the main mode of exploitation the sale of printed copies, this policing (typically undertaken by a publisher) was ad hoc and depended on monitoring activities in the marketplace. However, as copyright expanded to encompass a wider array of subject matter and (particularly ephemeral) uses, the problems of policing copyright have changed. One of the main mechanisms developed by copyright owners to monitor infringement has been collective systems of management and enforcement of rights, in particular, the 'collecting society'.<sup>122</sup>

Collective administration is a system whereby certain rights are administered for the benefit of authors and/or copyright owners. The organizations that administer the rights are empowered to authorize various specified uses of their members' works, normally by way of a licence. The essential characteristic of these arrangements is that they are able to negotiate and act without individual consultation. In most cases, the copyright owner assigns their rights to the society. Where this occurs, the rights are pooled so as to create a repertoire of works at the disposal of potential users.

The main collecting societies in the United Kingdom are as follows:<sup>123</sup>

- (i) PRS for Music is a combination of two earlier collecting societies. First, the Performing Right Society (PRS) which was formed in 1914 and administered, as assignee, the performing and broadcasting rights in music and song lyrics. Secondly, the Mechanical-Copyright Protection Society (MCPS) which was formed in 1924 and administers, as agent, the 'mechanical rights' in music and song lyrics—that is, the right to make a sound recording (part of the reproduction right). The gross licensing revenue of PRS for Music was £810.8 million in 2019.<sup>124</sup>
- (ii) Phonographic Performance Limited (PPL), formed in 1934, administers, as assignee, the performing and broadcasting rights in sound recordings, and from 2007 (when it merged with Performing Artists Media Rights Association, or PAMRA, and the Association of United Recording Artists, or AURA) has also represented performers. Video Performance Limited (VPL), a sister company of PPL, administers, as agent, the performing and broadcasting rights in videos. While technically separate from PPL, it has the same management and has combined accounts. In 2019, PPL (and VPL) collected £271 million in copyright fees.<sup>125</sup>
- (iii) The Publishers Licensing Society (PLS), established in 1981, operates on behalf of the Publishers Association, the Association of Learned and Professional Society Publishers, and the Professional Publishers Association, in relation to the collective licensing of photocopying and digitization. It collected £40.7 million in copyright fees in 2019.<sup>126</sup>
- (iv) The Authors' Licensing and Collecting Society (ALCS), formed in 1977, represents writers and distributes the fees collected by the CLA for writers from photocopying, scanning, and so forth. In 2019, its licensing income was £36.7 million.<sup>127</sup>
- (v) The Copyright Licensing Agency (CLA), formed in 1982, is owned by the PLS and ALCS, and collects on their behalf from various user constituencies involved in photocopying and scanning. It also operates as an agent for DACS. It enters blanket licences with educational authorities and universities. It collected £86.8 million in 2019.<sup>128</sup>
- (vi) NLA Media Access (formerly known as the Newspaper Licensing Agency) was established in 1996 by eight national newspapers to offer collective licences for news-clipping services. It now operates on behalf of 1,400 newspapers, offering a range of licences, and in 2019 it collected £46.9 million.<sup>129</sup>
- (vii) The Design and Artists' Copyright Society (DACS), formed in 1983, administers, as agent, the reproduction rights for painters, printmakers, sculptors, and photographers, as well as the resale royalty right. In 2019, it collected £23.8 million.<sup>130</sup>
- (viii) The Artists Collecting Society (ACS), formed in 2006, administers the resale royalty right (in competition with DACS). In 2019 it collected £1.9 million from resale royalty rights.<sup>131</sup>

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- (ix) The British Equity Collecting Society (BECS) was established in 1998 by the actors' union, Equity, primarily to collect and distribute monies payable to audiovisual performers, in particular remuneration payable in other EU countries when audiovisual works are copied in private or retransmitted. In 2019, it collected £6.5 million.<sup>132</sup>
- (x) Directors UK, launched in 2008, represents film and television directors for purposes similar to those of BECS. In 2019, Directors UK collected £17.2 million.<sup>133</sup>
- (xi) Eos (the Broadcasting Rights Agency), launched in 2012, represents musicians and publishers in Wales (its members withdrew from PRS to join Eos). In 2019, it collected £250,181.<sup>134</sup>
- (xii) Picsel, launched in 2016, has been set up to collect monies from reprographic and secondary digital copying. Its income largely comes from the CLA and overall it collected a little over £840,000 in 2019.<sup>135</sup>
- (xiii) The Educational Recording Agency (ERA) licenses educational establishments to record broadcasts, distributing revenue to broadcasters and collecting societies (such as ALCS, DACS, MCPS, PPL, and PRS).<sup>136</sup> In 2019, it collected £2.1 million.

### 10.1 Organization

Because collecting societies are private organizations that have emerged in response to particular commercial environments, there is no great uniformity to their organizational structures. Nevertheless, it is worth considering the different dimensions of some of the existing societies.

p. 341 **10.1.1 Membership terms**

In terms of copyright owner–collecting society relations, the relevant relationship will be determined in the membership agreement and the rules of the society. To ensure that each collecting society is capable of licensing the relevant right on behalf of the copyright owner, the owner has to assign the right to the society or appoint the society as its agent. The scope of any such assignment or agency will depend on the proposed function of the society. For example, a copyright owner joining the PRS is required to assign the 'small rights' relating to non-dramatic performances; the 'grand rights' relating to dramatic performances, which are not included, are administered by individual agreements. The rules of a society might also make provision for a member to assign rights in relation to works not in existence at the time of joining. A society may have different categories of membership (e.g. author members and publisher members). As a member, a copyright owner will have power to vote at meetings and thus to influence the way in which the society operates. A collecting society will distribute any licensing revenues that it collects in accordance with the rules of the society. Often, this will involve some kind of sampling mechanism that enables the society to estimate the amount to which each member is proportionally entitled. Usually, a society will first deduct its administration expenses. In some jurisdictions, a portion of the revenue is used for 'cultural purposes' (e.g. to fund indigenous music culture in the country making the deduction), and for pension and welfare payments. Provisions exist within the rules of a society specifying the circumstances in which a person may leave the society, which will usually require a substantial period of notice.

### 10.1.2 Licensing arrangements

The collecting societies enter into negotiations with copyright users, either as associations of users or on an individual basis. Negotiations with associations of users will often result in the establishment of tariffs. Sometimes, a society–user agreement will cover more than just a licence fee. Some associations of users will involve themselves in ensuring that licence fees are paid by their members, or help in other ways with the administration, in return for a reduced tariff. Although the terms of licences will vary, it is common for collecting societies to grant a ‘blanket’ licence entitling users to use any work in the repertoire of the licensing body without restriction.

## 10.2 Assessment

At a practical level, collecting societies are a convenient way of resolving some of the difficulties faced by copyright owners and users in reaching appropriate arrangements.<sup>137</sup> Collecting societies are useful insofar as they provide users with a focal point to locate and transact with copyright owners. Collecting societies reduce the ‘transaction costs’ that would otherwise exist in ascertaining and negotiating individual licences with individual copyright owners. This is particularly important where a user wishes to utilize a large number of copyright works, so that transacting on an individual basis would be time-consuming and costly.<sup>138</sup> Moreover, where the society grants a user a blanket licence, this offers users a degree of flexibility.

p. 342 For example, where a blanket licence is granted to a nightclub or a radio station, it means that it does not need to determine in advance the works that it is going to play.

For the copyright owner, collective administration relieves an otherwise impossible burden of policing and enforcing rights.<sup>139</sup> It also provides copyright owners with a bargaining power that they would not possess as individuals. Moreover, the possibility of collective administration has enabled owners to argue for the extension of rights in relation to subject matter that might not otherwise have been protected on the basis that it was unenforceable.

Probably the most interesting thing about collecting societies is the way in which their emergence represents a significant shift in the character of copyright. As Thomas Streeter has observed, with collective administration, copyright loses much of its character as a property right exploited through distribution of copies bought and sold in the marketplace.<sup>140</sup> Instead, copyright becomes more like the legal underpinning of an institutional bureaucracy that attempts to simulate a market through statistical mechanisms. Each copyright loses its individuality and the ‘property form’ is replaced by a liability form. In effect, collecting societies turn an author’s property right into a right to receive welfare payments and a user’s licence fee into a tax upon their activities.

## 10.3 International Dimensions

Although collecting societies tend to operate at the national level, they form part of a global network of collecting agencies. For example, while performing rights are administered in the United Kingdom by the PRS, there are equivalent societies in the United States (Broadcast Music, Inc., or BMI; the American Society of Composers, Authors and Publishers, or ASCAP); Australia (the Australasian Performing Right Association,

APRA); Germany (*Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte*, or GEMA); France (*Société des Auteurs, Compositeurs et Editeurs de musique*, or SACEM); Belgium (*Société d'Auteurs Belge—Belgische Auteurs Maatschappij*, or SABAM), and so on. Typically, there will be ‘reciprocal representation contracts’ between national copyright management societies.<sup>141</sup> Under these arrangements, which date back as far as 1936, one national society (A) undertakes, on a reciprocal basis, to manage the rights attached to the repertoire of a foreign society (B) within its sphere of operation, normally its national territory. Society A collects royalties on behalf of foreign society B, pursues infringers, takes any necessary proceedings in respect of infringement, and transfers sums collected to B. Effectively, these agreements can mean that a particular national society controls within the territory the entire world repertory of works.<sup>142</sup>

As markets for particular uses have become increasingly transnational, attempts have been made to develop EU-wide licences (so that users do not have to get permission on a territory-by-territory basis). For such EU-wide licensing to be possible, the collecting societies must agree that they can grant licences permitting uses outside their territories—so, for example, that GEMA can authorize webcasting in Belgium or SABAM can do the same for Germany. This sets the collecting societies up in competition with one another, which from one perspective could make them operate more efficiently. However, if collecting societies compete amongst themselves for users by reducing authors’ (and copyright owners’) remuneration, one might wonder whether the overall effect is in the public interest. One attempt to avoid this kind of competition was proposed by the music performing rights societies in an agreement that would have permitted all collecting societies to authorize Europe-wide licensing of public performance right, but would have required users to seek permission from their local society.<sup>143</sup> The European Commission doubted whether this was compatible with competition law and has encouraged collecting societies to compete with one another.<sup>144</sup> Eventually, the European Union adopted the Collective Rights Management Directive,<sup>145</sup> which was implemented in the United Kingdom by the Collective Management of Copyright (EU Directive) Regulations 2016.<sup>146</sup> The Regulations, which were not amended when the United Kingdom left the EU, provide that collecting societies which provide multi-territorial licensing of music may also be required to administer the repertoire of another collecting society that requests that it do so (and which is not offering such licences itself).<sup>147</sup> It also provides various rules on the proper conduct of collecting societies, such as acting in the best interest of right holder members,<sup>148</sup> regulating management fees and other deductions,<sup>149</sup> and ensuring there is a complaints procedure.<sup>150</sup>

### 10.4 Extended Collective Licences

Perhaps most analogous to compulsory licences,<sup>151</sup> section 116B of the CDPA 1988 allows for licensing bodies to be authorized to grant copyright licences in respect of works in which copyright is neither owned by the body nor by any of the persons on behalf of whom it acts.<sup>152</sup> The idea is that bodies that operate collective licensing schemes will be permitted or enabled to grant blanket licences relating to the complete array of works and rights that they purport to represent, and that users can feel secure that, having obtained a licence from such a society, they will not be liable to individuals who are not members. Precedents for such ‘extended collective licensing’ exist from the Scandinavian countries<sup>153</sup> and were approved of by the Hargreaves Review.<sup>154</sup>

p. 344 ↵ The proposal is given effect by the Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014.<sup>155</sup> Essentially, this enables the Secretary of State to authorize an existing licensing body to operate extended collective licensing for the same types of works and rights as it is already administering.<sup>156</sup> The body must license works of the type which are proposed to be subject to the Extended Collective Licensing Scheme, its representation in relation to those types of works must be significant, and there must be adequate opt-out arrangements.<sup>157</sup> The application to set up the scheme needs to specify, amongst other things, the opt-out arrangements, the distribution policy, the licences being offered, and publicity arrangements.<sup>158</sup> The authorization lasts for five years,<sup>159</sup> but can be modified, renewed, or revoked.<sup>160</sup> Licences granted under the scheme are stated to have effect as if granted by the owner of the work or right.<sup>161</sup> Fees collected on behalf of non-members are, after nine months, to be put into separate accounts,<sup>162</sup> and if unclaimed after a specified period, transferred to the Secretary of State who may transfer them to fund social, cultural, and educational activities for the benefit of non-member right holders.<sup>163</sup>

The CLA made the first application under the scheme. The IPO issued a consultation in December 2017, but the application was withdrawn in April 2018. The legality of the scheme is now doubted in light of the decision of the Court of Justice in *Soulier v. Ministre de la Culture*, Case C-301/15,<sup>164</sup> which held that a French scheme concerning out-of-commerce books<sup>165</sup> was contrary to the Information Society Directive. The scheme allowed for the digitization of books by third parties where they were no longer being exploited by publishers. It involved registering a book on a database and after a six-month period (during which time objections could be made) it was possible to get a licence to use the out-of-commerce work from the relevant collecting society. Accordingly, the UK scheme would face the same difficulties and any licence set up might well be unlawful.<sup>166</sup>

## 11 Digital Copyright Exchanges

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For virtually a century, collecting societies proved to be an effective way of linking copyright holders with potential copyright uses. However, in the digital environment, even these organizational forms seem to have proved inadequate. Digitization has provided opportunities for individuals to become significant exploiters of copyright material held by others, whether by creating web pages or otherwise. Collecting societies have been seen to be ill-equipped to offer solutions to users who want to use a range of different types of work, of varying levels of obscurity, in low-value activities. One need only look at the 'IPKat' website, the leading UK blog on intellectual property, to see that a key feature of a blog is the inclusion of illustrative material designed to entertain alongside serious work of substantive commentary.

p. 345 ↵ The question of establishing some sort of copyright clearing house was mooted in the Carter Report entitled *Digital Britain*.<sup>167</sup> Following the Hargreaves Review, the matter was taken forward in the Hooper Report. The first interim report, published in spring 2012, diagnosed the problems that needed attention to improve the 'efficiency and effectiveness' of copyright licensing;<sup>168</sup> the final report, dated July 2012, proposed a 'copyright hub'.<sup>169</sup> A not-for-profit company was set up and, in 2013, a website was established. The idea of the hub was to provide a portal (the website) which offers information on how to get permission to use particular content via connected websites. The original idea was that there would be a one-stop shop and the licensing would be through the portal itself to provide 'easy to use, transparent, low transaction cost

copyright licensing'.<sup>170</sup> This has, to date, not proved possible due to the incompatibility of collecting society databases—in part because of different cataloguing and naming practices—and so the project has largely come to an end.

The Hooper Report also recommended action favouring the further development of international standard identifiers (already underway in forums such as the Linked Content Coalition and the Virtual International Authority File), backed up with severe sanctions for stripping metadata.<sup>171</sup>

## Notes

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<sup>1</sup> See e.g. D. Hesmondhalgh, R. Osborne, H. Sun, and K. Barr, *Music Creators' Earnings in the Digital Era* (IPO, Sept. 2021), 15, [11] (reporting that just over half (52 per cent) of musicians usually release their own recordings while 18 per cent go through record companies and 23 per cent report a mix of the two); Digital, Culture, Media and Sport Committee, *Economics of Music Streaming*, Second Report of Session 2021–22, (HC 50), [105] (on huge numbers of so-called 'self-releasing artists'). For comparable shifts in book publishing, see T. Laquintano, *Mass Authorship and the Rise of Self-Publishing* (2016); M. Hviid, S. Izquierdo-Sánchez, and S. Jacques, 'From Publishers to Self-Publishing: Disruptive Effects in the Book Industry' (2019) 26(3) *Intl J of the Economics of Business* 355.

<sup>2</sup> CDPA 1988, ss 1 and 90(1).

<sup>3</sup> UK IPO, *Copyright Works: Seeking the Lost* (2014), 1 ('The UK's copyright system is founded on the principle of licensing').

<sup>4</sup> *Beloff v. Pressdram* [1973] RPC 765. Where one author purports to act 'on behalf of' co-authors, it seems those co-authors who have given authorization must be identified (most obviously, by name): *Potter v. Duffield* (1874) LR 18 Eq 4, 7; *Lovesey v. Palmer* [1916] 2 Ch 233, 240 (land law cases); *Bowstead and Reynolds on Agency* (2018), [8–004]. Such authorization can be oral: *Heptulla v. Orient Longman* [1989] FSR 598, 610 (Delhi Court); *McLaughlin v. Duffil* [2008] EWCA Civ 1627, [2010] Ch 1 (another land law case).

<sup>5</sup> CDPA, s. 173; also see *Powell v. Head* (1879) 12 Ch D 686.

<sup>6</sup> *Chaplin v. Frewin (Publishers)* [1966] Ch 71.

<sup>7</sup> *Barker v. Stickney* [1919] 1 KB 121 (royalty clause not enforceable against subsequent assignees, but only on the basis of contract against the initial assignee). See J. Adams, 'Barker v. Stickney Revisited' [1998] IPQ 113; J. Adams, 'The Passing of the Burden of Royalty Payments' [2007] IPQ 403; Copinger (18th edn), [5–80] ff.

<sup>8</sup> CDPA 1988, s. 90(2).

<sup>9</sup> *Kervan Trading v. Aktas* (1987) 8 IPR 583, 587.

<sup>10</sup> See further Copinger, [26.02]–[26.18]. For consideration of the limits of such parcelling, see Copinger, [5.89] ff.

<sup>11</sup> *Savoury v. World of Golf* [1914] 2 Ch 566.

<sup>12</sup> *Ibid.; Batjac Productions v. Simitar Entertainment* [1996] FSR 139, 146–7.

<sup>13</sup> *Murray v. King* [1986] FSR 116, 124, 128, 130, 134–5 (FCA).

<sup>14</sup> Cf. CDPA 1988, ss 93 and 56.

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<sup>15</sup> *Pope v. Curl* (1741) 2 Atk 341, 26 ER 608; *Cooper v. Stephens* [1895] 1 Ch 567.

<sup>16</sup> *Western Front v. Vestron* [1987] FSR 66, 78. See also *Lakeview Computers v. Steadman* (CA, 26 Nov. 1999, unreported), 8 (Mummery LJ) (conduct of setting up company for the exploitation of software led irresistibly to inference of agreement to assign copyright therein); *Chadwick v. Lypiatt Studio* [2018] EWHC 1986 (Ch), [44] (Spearman QC) (citing *Lakeview*, and finding that the conduct of the acclaimed sculptor Lynn Chadwick in setting up the defendant company to exploit his work led to an inference that he intended to assign copyright to it).

<sup>17</sup> *Wilson v. Weiss* (1995) 31 IPR 423; *Ironside v. HMAG* [1988] RPC 197.

<sup>18</sup> *Batjac Productions v. Simitar Entertainment* [1996] FSR 139, 146–7.

<sup>19</sup> CDPA 1988, s. 91(1) (reversing *PRS v. London Theatre of Varieties* [1924] AC 1).

<sup>20</sup> In some countries, there are official mechanisms to record assignments for evidential purposes: see Canadian Copyright Act, s. 57. See S. van Gompel and S. Massalina, *WIPO Survey on Voluntary Copyright Registration Systems*, WIPO/CRR/GE/2/21/REPORT <[https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=556094](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=556094)> (2021), 14–15, (identifying 46 countries with ‘recordation’ systems).

<sup>21</sup> CDPA 1988, s. 93A, implementing Rel. Rights Dir., Art. 2(6); member states are also allowed to have presumptions for transfers of other rights, provided they are not irrebuttable: see *Luksan v. van der Let*, Case C-277/10, EU:C:2012:65. The Beijing Treaty on Audiovisual Performances, Art. 12 also makes permissive provision in relation to transfers. At the time of writing, the United Kingdom is not a party but it is obliged to become a party under the UK-EU Trade and Cooperation Agreement, art. 222(2)(a).

<sup>22</sup> CDPA 1988, s. 93A(3).

<sup>23</sup> *British Actors Film Co. v. Glover* [1918] 1 KB 299; *Canon Kabushiki Kaisha v. Green Cartridge Co.* [1997] AC 728, 735.

<sup>24</sup> Where a licensee breaches the agreement, the question arises whether there is an action merely for breach of contract or for infringement of copyright: if the act is outside the scope of the licence, it is an infringement; if the breach relates to a condition precedent for the licence, the action will also infringe (*Miller v. Cecil* [1937] 2 All ER 464); moreover, if the breach is sufficiently serious to amount to a repudiation of the contract, this may be accepted by the copyright owner and an action will lie for infringement of copyright as regards subsequent acts.

<sup>25</sup> *CBS v. Charmdale* [1980] FSR 289, 295.

<sup>26</sup> CDPA 1988, s. 90(4).

<sup>27</sup> CDPA 1988, s. 101A; the purpose of this provision was to enable subscription broadcasters to bring proceedings where their programmes were copied.

<sup>28</sup> It is possible for an agreement to start (or cease) being an exclusive licence when particular circumstances arise (so the assessment of its status is not once and for all): *Oxford Nanopore Technologies Ltd v. Pacific Biosciences of California, Inc* [2017] EWHC 3190 (Pat), [2018] FSR (19) 586, [30].

<sup>29</sup> Cf. *Sega Enterprises v. Galaxy Electronics* (1998) 39 IPR 577.

<sup>30</sup> D. Vaver, ‘The Exclusive Licence in Copyright’ (1995) 9 IPJ 163, 165. However, an exclusive licence has been described as a statutory status rather than a proprietary right: Copinger, [5.236].

<sup>31</sup> Copinger, [5.248].

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<sup>32</sup> The copyright owner is made party to the proceedings, if necessary by joining as a defendant. But note that a mere licensee may be able to bring an action under CDPA 1988, s. 101A, if the infringing act was directly connected to a previous licensed act of the licensee, the licence is in writing signed by the copyright owners, and it expressly grants the right of action.

<sup>33</sup> However, the exclusive licensee cannot sue the copyright owner for infringement of copyright (although if the terms of the contract are breached, the copyright owner will be liable for breach of contract): *CBS v. Charmdale* [1980] *FSR* 289, 297; and *Rapid Steel v. Blankstone* (1907) 24 *RPC* 529, 541.

<sup>34</sup> CDPA 1988, s. 90(3).

<sup>35</sup> CDPA 1988, s. 101.

<sup>36</sup> *Godfrey v. Lees* [1995] *EMLR* 307.

<sup>37</sup> *R. Grigg v. Evans* [2003] *EWHC* 2914 (Ch), [58]; *Chaplin v. Frewin* [1966] *Ch* 71, 93.

<sup>38</sup> The Publishers' Association Code of Practice on Author Contracts (1982, updated 1997 and 2010), [2] states that, in some fields of publishing such as trade publishing, an exclusive licence should be sufficient, but in other areas, it may be appropriate for the copyright to be vested in the publisher, to make it easier for the publisher to protect the work as a whole.

<sup>39</sup> *CBS v. Charmdale* [1980] *FSR* 289, 297.

<sup>40</sup> CDPA 1988, s. 90(4).

<sup>41</sup> Publishing contracts are generally non-assignable.

<sup>42</sup> E.g. in *Frisby v. BBC* [1967] *Ch* 932 (in the case of a licence, the courts will more readily imply a term limiting the right of the licensee to alter the work).

<sup>43</sup> *Barker v. Stickney* [1919] 1 *KB* 121.

<sup>44</sup> *Western Front v. Vestron* [1987] *FSR* 66, 75. The Supreme Court of Canada has called the distinction between an assignment and an exclusive licence 'important and meaningful': *Euro-Excellence Inc v. Kraft Canada Inc* (2007) *SCC* 37, [85].

<sup>45</sup> *Jonathan Cape v. Consolidated Press* [1954] 3 *All ER* 253; *Messager v. BBC* [1929] *AC* 151; *British Actors Film Co. v. Glover* [1918] 1 *KB* 299, 308.

<sup>46</sup> *Messager v. BBC* [1929] *AC* 151.

<sup>47</sup> *Western Front v. Vestron* [1987] *FSR* 66, 75–6.

<sup>48</sup> *Ibid.*, 76.

<sup>49</sup> S. Dusollier, 'Sharing Access to Intellectual Property through Private Ordering' (2007) 82 *Chi-Kent L Rev* 1391.

<sup>50</sup> See <http://www.gnu.org> <<http://www.gnu.org>>. There are three versions of the GPL, the last from 2007. See M. O'Sullivan, 'The Pluralistic, Evolutionary, Quasi-Legal Role of the GNU General Public License in Free/Libre/Open Source Software' [2004] *EIPR* 340; T. Rychlicki, 'GPLv3: New Software Licence and New Axiology of Intellectual Property Law' [2008] *EIPR* 232.

<sup>51</sup> GPL (v.1) states that:

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[Y]ou may modify your copy or copies of the Program or any portion of it, and copy and distribute such modifications ... provided that you ... cause the whole of any work that you distribute or publish, that in whole or in part contains the Program or any part thereof, either with or without modifications, to be licensed at no charge to all third parties under the terms of this General Public License.

<sup>52</sup> The characterization of such contracts as viral is attributed to M. J. Radin, ‘Humans, Computers, and Binding Commitment’ (2000) 75 *Indiana LJ* 1125. The term ‘copyleft’ is also frequently used to describe this feature of the GPL and other licences. Non-viral licences, such as Apache or MIT licences, are in contrast called ‘permissive licences’.

<sup>53</sup> Although the GPL is a very popular licence, the most commonly used open source licences are now the (non-viral) Apache 2.0 and MIT licences: <https://www.whitesourcesoftware.com/resources/blog/open-source-licenses-trends-and-predictions/>.

<sup>54</sup> A. Guadamuz Gonzalez, ‘Viral Contracts or Unenforceable Document: Contractual Validity of Copyleft Licences’ [2004] *EIPR* 331; cf. G. Westkamp, ‘The Limits of Open Source’ [2008] *IPQ* 14.

<sup>55</sup> See <http://creativecommons.org>. See S. Dusollier, ‘The Master’s Tools v. the Master’s House: Creative Commons v. Copyright’ (2005) 29 *Colum JL & Arts* 271; M. Fox, T. Ciro, and N. Duncan, ‘Creative Commons: An Alternative, Web-Based, Copyright System’ (2005) *Ent L Rev* 111.

<sup>56</sup> A purely practical difficulty with the system is that many things (such as blogs or social media) are purportedly licensed under Creative Commons licences where the content provider is not the original creator or copyright owners. This can present problems as a person cannot subject another person to particular licence terms. So, e.g., re-posts or extracts from other materials on a blog may not be the blogger’s to license.

<sup>57</sup> A. Chander and M. Sunder, ‘The Romance of the Public Domain’ (2004) 92 *Cal L Rev* 1331, 1361–2.

<sup>58</sup> N. Elkin-Koren, ‘What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons’ (2005) 74 *Fordham L Rev* 375, 398. The dependence of open access licensing on copyright was earlier emphasized by Dusollier—S. Dusollier, ‘Open Source and Copyleft: Authorship Reconsidered’ (2003) 26 *Colum JL & Arts* 281, 286–7—but she also argues that Creative Commons may bring about a shift in the notion of the author from the romantic author-as-owner who controls the meaning of a text, to the post-modern author as the ‘founder of a discursivity’: S. Dusollier, ‘The Master’s Tools v. the Master’s House: Creative Commons v. Copyright’ (2005) 29 *Colum JL & Arts* 271, 285–6.

<sup>59</sup> Dusollier emphasizes three limits: the definition as to when the viral effect occurs, the validity of the licence itself, and the compatibility of different licences. On the potential problems posed by revocation, see L. P. Loren, ‘Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright’ (2007) 14 *Geo Mason L Rev* 271.

<sup>60</sup> See P. Johnson, ‘“Dedicating” Copyright to the Public Domain’ (2008) 71 *MLR* 587.

<sup>61</sup> See RCUK, *Policy on Open Access and Supporting Guidance* (2013), 7–8, available online at <http://www.rcuk.ac.uk/documents/documents/rcukopenaccesspolicy-pdf/>.

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<sup>62</sup> RCUK, *Review of the Implementation of the RCUK Policy on Open Access* (Mar. 2015), available at <http://www.rcuk.ac.uk/documents/documents/openaccessreport-pdf/>.

<sup>63</sup> Ibid., 18–20.

<sup>64</sup> See e.g. British Academy, *Science Europe's Plan S: Making it Work for Researchers* (Nov. 2018).

<sup>65</sup> For an extended treatment, proposing a methodology for implying such licences, see P. Mysoor, *Implied Licences in Copyright Law* (2021) (arguing, in particular, that there are three types of implied licence, namely, consent-based, custom-based, and policy-based). See also S. Karapapa, *Defences to Copyright Infringement: Creativity, Innovation and Freedom on the Internet* (2020), ch. 5.

<sup>66</sup> It is unclear how far the legal rules applicable to licensing which had been assumed to be a matter of national law had been harmonized: Info. Soc Dir., Art. 4, for example, specifically refers to ‘consent’ in defining exhaustion, but in other respects the other harmonized rights are simply couched as rights to ‘authorize’ acts. In *Marc Soulier, Sara Doke v. Premier Ministre, Ministre de la Culture et de la Communication*, Case C-301/15, EU:C:2016:878, [37], the CJEU held that consent included implied consent, but that ‘the circumstances in which implicit consent can be admitted must be strictly defined’ and concluded that even implied consent must be ‘informed’, in the sense that the author knows of the intended use of the work or subject matter.

<sup>67</sup> *Philips Electronique v. BSB* [1995] EMLR 472, 481; *Cescinsky v. Routledge* [1916] 2 KB 325, 319.

<sup>68</sup> As to implying terms in contracts more generally, see *BP Refinery (Westernport) Pty Ltd v. President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR 20 confirmed and approved in *Marks and Spencer plc v. BNP Paribas Securities Services Trust Company (Jersey)* [2015] UKSC 72, [2016] AC 742, [18], [21].

<sup>69</sup> *Acohs v. RA Bashford Consulting* (1997) 37 IPR 542 (FCA), [5.2].

<sup>70</sup> *Blair v. Osborne & Tompkins* [1971] 2 QB 78; *Stovin-Bradford v. Volpoint Properties* [1971] 1 Ch 1007. Note that *Ray v. Classic FM* [1998] FSR 622 treats these cases as ones in which the terms are implied to give business efficacy to the agreement.

<sup>71</sup> *Marks & Spencer PLC v. BNP Paribas Securities Services Trust Co. (Jersey) Limited* [2015] UKSC 72, [2015] 3 WLR 1843 and *Europa Plus SCA SIF & Ors v. Anthracite Investments (Ireland) Plc* [2016] EWHC 437 (Comm), [33].

<sup>72</sup> [1998] FSR 622.

<sup>73</sup> *Grisbrook v. MGN Ltd* [2010] EWCA Civ 1399 (interpreting a freelance photographer’s oral licence as limited to publication in a newspaper, rather than to global delivery of them via back issues hosted on website); *Celebrity Pictures Ltd v. B. Hannah Ltd* [2012] EWPCC 32 (implied licence to use photographs in magazine).

<sup>74</sup> *Solar Thomson v. Barton* [1977] RPC 537, 560–1; *Canon Kabushiki Kaisha v. Green Cartridge Co.* [1997] AC 728, 735; cf. *Sony Entertainment Inc v. Owen* [2002] EWHC 45 (Ch), [2002] EMLR (34) 742, [19] (Jacob J holding that, because a licence is territorial, a licensee must prove that a Japanese licence to use a computer game extended to the United Kingdom).

<sup>75</sup> *Patricia Roberts v. Candiwear* [1980] FSR 352. It may be that the making of a garment from written instructions is not an infringement in the first place: *Lambretta Clothing v. Teddy Smith* [2003] EWHC 1204 (Ch), [2003] RPC (41) 728, [78]–[79]; also see *Abraham Moon & Sons v. Thornber* [2012] EWPCC 37, [2013] FSR (17) 312, [99]. See Chapter 6, section 2.1, p. 159.

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<sup>75</sup> *Banier v. News Group* [1997] FSR 812; cf. *Express Newspapers v. News (UK)* [1990] FSR 359 (tit-for-tat defence).

<sup>76</sup> See *Santley v. White* [1899] 2 Ch 474.

<sup>77</sup> M. Henry, ‘Mortgages and Charges over Films in the UK’ [1992] *Ent L Rev* 115.

<sup>78</sup> On the importance and delicacy of the terms of the licence, see M. Antingham, ‘Safe as Houses? Using Copyright Works as Security for Debt Finance’ (1998) 78 *Copyright World* 31, 32.

<sup>79</sup> Copinger, [5–233], seems to suggest that such a charge is equitable. While there is no definitional provision equivalent to PA 1977, s. 130, there seems no reason why it should not be legal.

<sup>80</sup> Companies Act 2006, s. 859A.

<sup>81</sup> Companies Act 2006, s. 859H.

<sup>82</sup> See Copinger, [5–232].

<sup>83</sup> See A. Wilkinson, ‘Securitization in the Music Industry’ (1998) 86 *Copyright World* 26.

<sup>84</sup> *Lauri v. Renad* [1892] 3 Ch 402, 412–13.

<sup>85</sup> CDPA 1988, s. 93 and Sch. 1, para. 30; cf. *Re Dickens* [1935] 1 Ch 267.

<sup>86</sup> Copinger, [5.160].

<sup>87</sup> *Murray v. King* [1986] FSR 116 (FCA), 124, 130, 137.

<sup>88</sup> *PRS v. Rowland* [1997] 3 All ER 336.

<sup>89</sup> *Oscar Bronner v. Mediaprint*, Case C-7/97 [1998] ECR I-7791, [AG-56].

<sup>90</sup> See further R. Merges, ‘Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations’ (1996) 84 *Cal L Rev* 1293.

<sup>91</sup> Berne, Arts 11bis(2) (aka the ‘jukebox licence’), Art. 13 (aka the ‘mechanical licence’). Berne, Art. 17, is not intended to permit any general system of compulsory licences, but to cover such things as the maintenance of public order and morality.

<sup>92</sup> Rome, Art. 12. Note also Rome, Art. 15(2).

<sup>93</sup> For a full review, see Copinger, ch. 28.

<sup>94</sup> Broadcasting Act 1990, ss 175, 176, and Sch. 17.

<sup>95</sup> *ITP v. Time Out* [1984] FSR 64.

<sup>96</sup> MMC, *The British Broadcasting Commission and Independent Television Publications: A Report on the Policies and Practices of the BBC and ITP of Limiting the Publication of Advance Programme Information* (1995 Cmnd 9614). The Monopolies and Mergers Commission was a predecessor of the Competition and Markets Authority.

<sup>97</sup> *News Group Newspapers v. ITP* [1993] RPC 173. Note also, CDPA 1988, ss 135A–G, introduced by the Broadcasting Act 1990 following MMC, *Collective Licensing: A Report on Certain Practices in the Collective Licensing of Public Performances and Broadcasting Rights in Sound Recordings* (1988 Cm. 530) and applied in *The Association of Independent Radio Companies v. Phonographic Performance* [1994] RPC 143.

<sup>98</sup> Duration of Copyright and Rights in Performances Regulations 1995 (SI 1995/3297), reg. 24 (the regulation has now been revoked as the all revived copyright has now lapsed).

<sup>99</sup> Copyright and Performances (Application to Other Countries) Order 2016 (SI 2016/1219), art. 13.

<sup>100</sup> I. Govaere, *The Use and Abuse of Intellectual Property Rights* (1996), 135–50.

<sup>101</sup> [1995] *ECR I*–743 (C-241/91).

<sup>102</sup> *Magill TV Guide/ITP, BBC and RTÉ*, Case IV/31.851 [1989] *OJ L* 78/43.

<sup>103</sup> Note also *IMS Health v. Commission*, Case T-184/01 R [2005] *ECR II*-817, in which the Commission had also ordered a compulsory licence, but the (then) CFI overturned the interim measure.

<sup>104</sup> A fine of €899 million: European Commission, ‘Antitrust: Commission Imposes €899 Million Penalty on Microsoft for Non-compliance with March 2004 Decision’ (27 Feb. 2008) Press Release IP/08/318.

<sup>105</sup> S. Dusollier, ‘Technological Measures and Exceptions in the European Directive of 2001: An Empty Promise’ (2003) 34 *IIC* 62.

<sup>106</sup> See Chapter 13, section 4.1, pp. 390–7.

<sup>107</sup> Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access [1998] *OJ L* 320/54 (29 Nov. 1998).

<sup>108</sup> It is sometimes called Distributed Ledger Technology for reasons which will become apparent.

<sup>109</sup> The transactions can also be anonymous, which presents different issues, for instance in relation to money laundering.

<sup>110</sup> Something is fungible when it can be replaced with another identical item and so it is perfectly substitutable. Accordingly, a non-fungible token is simply one that cannot be replaced by anything else.

<sup>111</sup> The provides for the possibility of what is called ‘51 per cent’ hacks (which have occurred) whereby over half the blockchain records are modified by hackers and so the remaining blockchains correct themselves to the hacked version.

<sup>112</sup> It is possible to have private blockchains, but these work in the same way with fewer people having access to the information.

<sup>113</sup> The energy consumed varies between the type of blockchain. Bitcoin (the worst offender) is estimated to use 707 kWh of energy per transaction whereas others use much less: see Adan, *Blockchain Protocols and their Energy Footprint* (29 Sept. 2021) <https://adan.eu/en/article/blockchain-protocol-energy-footprint>.

<sup>114</sup> See B. Rosenblatt, ‘The Future of Blockchain Technology in the Music Industry’ (2019) 35 *Ent & Sports Law* 12, 16.

<sup>115</sup> A smart contract simply is a computer program stored on a blockchain that executes if conditions are met (such as payment or agreement). The use of blockchain means there is a date-stamped record of the transaction and there is no need for any intermediary or similar.

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<sup>116</sup> See e.g. A. Taghdiri, ‘How Blockchain Technology Can Revolutionize the Music Industry’ (2019) 10 *Harv J of Sports and Ent Law* 173; T. Evans, ‘Blockchain and the Disintermediation of Music’, in S. O’Connor (ed.), *The Oxford Handbook of Music Law and Policy* (2020). There have also been disputes between publishers and artists regarding how NFTs are dealt with under existing publishing contracts: N. Eziefula, P. Horton, and A. Wilson, ‘Newly Minted: NFTs in the Entertainment Industries’ [2022] *EIPR* 33, 35.

<sup>117</sup> See e.g. Eziefula et al., *ibid.*, 33.

<sup>118</sup> Discussed in detail in K. Low, ‘The Emperor’s New Art: Cryptomania, Art & Property’ (2021) available at SSRN: <https://ssrn.com/abstract=3978241> <<https://ssrn.com/abstract=3978241>>.

<sup>119</sup> K. Low, *ibid.* (discussing the nature of the transaction when a person buys an ‘NFT’ and concluding that ownership of an NFT is ‘legally meaningless’). However, it had been suggested that the minting of the NFT might itself be an artistic work: P. Aksoy and Z. Under, ‘NFTs and Copyright: Challenges and Opportunities’ (2021) 16 *JIPPL* 1115, 1121–2.

<sup>120</sup> J. Gibson, ‘The Thousand-and-Second Tale of NFTs, as Foretold by Edgar Allan Poe’ (2021) 11 *QMJP* 249, 251.

<sup>121</sup> *Ibid.*

<sup>122</sup> For commentary, see Copinger, ch. 27; also see generally D. Gervais (ed.), *Collective Management of Copyright and Related Rights* (2nd edn, 2010).

<sup>123</sup> The financial income comes from each society’s annual transparency report for 2019. These reports are available on the societies’ webpages. The figures have not been used for 2020 or 2021 due to the economic disruption caused by Covid-19.

<sup>124</sup> See <http://www.prssformusic.com> <<http://www.prssformusic.com>>; on the history of the PRS, see T. Ehrlich, *Harmonious Alliance: A History of the Performing Right Society* (1989).

<sup>125</sup> See <http://www.ppluk.com> <<http://www.ppluk.com>>.

<sup>126</sup> See <http://www.pls.org.uk> <<http://www.pls.org.uk>>.

<sup>127</sup> See <http://www.alcs.co.uk> <<http://www.alcs.co.uk>>.

<sup>128</sup> See <http://www.cla.co.uk> <<http://www.cla.co.uk>>.

<sup>129</sup> See <http://www.nlamediaaccess.com> <<http://www.nlamediaaccess.com>>.

<sup>130</sup> See <http://www.dacs.org.uk> <<http://www.dacs.org.uk>>.

<sup>131</sup> See <http://artistscollectingsociety.org> <<http://artistscollectingsociety.org>>.

<sup>132</sup> See <http://www.-becs.org.uk> <<http://www.-becs.org.uk>>.

<sup>133</sup> See <http://www.directors.uk.com> <<http://www.directors.uk.com>>.

<sup>134</sup> See <http://www.eos.cymru> <<http://www.eos.cymru>> (note most of the website is in Welsh).

<sup>135</sup> See <http://www.picsel.org.uk> <<http://www.picsel.org.uk>>.

<sup>136</sup> See <http://www.era.org> <<http://www.era.org>>. See further Chapter 9, section 13.4, p. 284.

<sup>137</sup> G. Davies, ‘The Public Interest in Collective Administration of Rights’ (1989) *Copyright* 81.

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<sup>138</sup> J. Fujitani, ‘Controlling the Market Power of Performing Rights Societies: An Administrative Substitute for Antitrust Regulation’ (1984) 72 *Cal L Rev* 103, 106 (breaking down the transaction costs in identifying and locating the copyright owner, obtaining the information necessary to negotiate a price, and transaction time costs).

<sup>139</sup> For an economic assessment of transaction costs see N. Gallini, ‘Competition Policy, Patent Pools and Copyright Collectives’ (2011) 8 *RERC/3*.

<sup>140</sup> T. Streeter, ‘Broadcast Copyright and the Bureaucratization of Property’ (1992) 10 *Cardozo AELJ* 567, 570, 576.

<sup>141</sup> The operation of CISAC and the role of such contracts, in described in *CISAC v. European Commission*, Case T-442/08, EU:T:2013:188.

<sup>142</sup> In the present state of affairs, the Court of Justice has held that legislation which provides that a collecting society is the only source of licences does not breach Art. 56 TFEU: *Ochranný svaz autorský pro práva k dílům hudebním, o.s. (OSA) v. Léčebné lázně Mariánské Lázně a. s.*, Case C-351/12, EU:C:2014:110, [67]–[79].

<sup>143</sup> The so-called ‘Santiago agreement’ is described in *CISAC v. European Commission*, Case T-442/08 EU:T:2013:188, [28], [109] ff, [170] ff.

<sup>144</sup> European Commission, *Commission Staff Working Document: Impact Assessment Reforming Cross-Border Collective Management of Copyright and Related Rights for Legitimate Online Music Services* (11 Oct. 2005), SEC (2005) 1254, 9; European Commission, *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee: The Management of Copyright and Related Rights in the Internal Market* (16 Apr. 2004) COM(2004) 261 final, 6–9.

<sup>145</sup> 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 [2014] OJ L 84/72 (the ‘Collective Rights Management Directive’, or CRM Directive); cf. European Commission, *Monitoring of the 2005 Music Online Recommendation* (7 Feb. 2008).

<sup>146</sup> SI 2016/221 (‘CMC Regs’).

<sup>147</sup> CMC Regs, Pt 3.

<sup>148</sup> CMC Regs, reg. 3.

<sup>149</sup> CMC Regs, regs 11 and 14.

<sup>150</sup> CMC Regs, Pt 4.

<sup>151</sup> A critical difference is that copyright holders can opt out of such a regime: Hargreaves Review, 38, [4.51]; UK IPO, *Extending the Benefits of Collective Licensing* (2013), 15, [3.61].

<sup>152</sup> UK IPO, *Extending the Benefits of Collective Licensing* (2013).

<sup>153</sup> A. Strowel, ‘The European Extended Collective Licensing Model’ (2011) 34 *Colum JL & Arts* 665; also see T. Riis and J. Schovsbo, ‘Extended Collective Licenses and the Nordic Experience—It’s a Hybrid but is it a Volvo or a Lemon?’ (2010) 33 *Colum JL & Arts* 471.

<sup>154</sup> Hargreaves Review, 37–8, [4.48]–[4.51].

<sup>155</sup> SI 2014/2588 (hereafter ‘ECL Regs’).

<sup>156</sup> ECL Regs, reg. 4.

<sup>157</sup> ECL Regs, reg. 4(4).

<sup>158</sup> ECL Regs, reg. 5.

<sup>159</sup> ECL Regs, reg. 4(6).

<sup>160</sup> ECL Regs, reg. 9 (renewal), reg. 12 (modification), reg. 14 (revocation).

<sup>161</sup> One might wonder whether this is compatible with the CJEU's view that the author must be able to give informed consent: *Soulier*, Case C-301/15, EU:C:2016:878, [34]–[40], discussed in section 3.3, p. 331, n. 65.

<sup>162</sup> ECL Regs, reg. 18(3).

<sup>163</sup> ECL Regs, reg. 19.

<sup>164</sup> EU:C:2016:878.

<sup>165</sup> For an explanation of the scheme see A. Bensamoun, 'The French Out-of-Commerce Books Law in the Light of the European Orphan Works Directive' (2014) 4 *QMJP* 213.

<sup>166</sup> Now that the United Kingdom has left the EU, it would be possible to introduce such a scheme by way of a new enactment, but the 2014 Regulations remain subject to rules of EU supremacy: European Union (Withdrawal) Act 2018, s. 5.

<sup>167</sup> BERR/DCMS, *Digital Britain: The Interim Report* (2009 Cm. 7548); BIS/DCMS, *Digital Britain: Final Report* (2009 Cm. 7650).

<sup>168</sup> UK IPO, *Rights and Wrongs* (Mar. 2012); as to the economics of the proposal, see R. Towse, 'Economics of Copyright Collecting Societies and Digital Rights: Is There a Case for a Centralised Digital Copyright Exchange' (2012) 9 *RERCI* 3.

<sup>169</sup> R. Hooper and R. Lynch, *Copyright Works: Streamlining Copyright Licensing for the Digital Age—An Independent Report* (July 2012).

<sup>170</sup> Ibid., 2, [9] and [97].

<sup>171</sup> Ibid., [12] (organizations should sign up to a code of practice refusing to use images to which there is no metadata attached).

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