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The small print for BIG IDEAS

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COPYRIGHT EXPLAINED

What is covered by copyright?

As with all fields of intellectual property, copyright is concerned with protecting the work of the human intellect. The rules governing copyright protection in the UK are set out in the Copyright, Designs and Patents Act 1988 (the “CDPA”). The primary purpose of copyright law is to reward authors for the creation of original works where the author has expended independent effort to create the work.

Copyright protects the following categories of “works”:

- original literary, dramatic, musical artistic works;
- sound recordings, films and broadcasts; and
- typographical arrangements of published work.

Copyright is used to protect (among other things) writings, music and works of the fine arts, such as paintings and sculptures. Programming language¹ and newspaper headlines² have also amounted to a copyright work, despite not being specified in the CDPA as they otherwise meet the requirements for copyright protection.

In a relatively recent extension of the scope of copyright protection, a computer program and preparatory design material for a computer program³ have been included within the notion of a literary work. Also, a database can attract copyright if the selection or arrangement of its contents

¹ [2013] EWHC 69 (Ch).

² [2010] EWHC 3099 (Ch).

³ Directive 2009/24/EC on 25 May 2009.

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was original (i.e. the result of the author's own intellectual creation)⁴.

Computer software, including open source software, is also protected by copyright and is governed by its software licence. Although open source licences tend to provide broad use rights, care should be taken to ensure that there are no restrictions, since disclosure requirements may exist under the terms of the licence. In contrast, freeware software is not covered by copyright as its owner has relinquished their rights to it.

What are the requirements to obtain protection?

Copyright protects “works”, being the *expression of thoughts and ideas*, rather than the thoughts or ideas themselves. For example, it is the actual writing in the book which is protected, not the plot. Similarly the idea for a computer game is not protected but the way it is expressed (icons, graphics, instructions, underlying software) is.

If a user copies a “substantial part” of the work, they may be committing copyright infringement. “Substantial part” refers to the qualitative features of the work copied (i.e. the quality, importance or significance of the extract), not the proportion of the work copied. Unauthorised copying of a relatively small but important extract from a book or play may be sufficient for copyright infringement to occur.

In order to attract copyright protection, the work itself (as a whole) must be “**original**”. In the UK this means that (at the least) the author of the work must have applied his or her “*skill, labour and judgement*” in the creation of the work.

Recent developments in European case law have introduced a higher threshold of creativity for authors, requiring that the work must also include a degree of the “*author's own intellectual creation*”. Authors are required to “*express [their] creative ability in an original manner by making free and creative choices, [which]...[stamp their] personal touch*”⁵ on a work. The mere intellectual effort and skill of creating the works are insufficient; authors must demonstrate that personal choices have been made with a clear methodology. Originality will arise from the choice, sequence and combination of the various components of the work by which the author expresses their

⁴ Directive 96/9/EC on 11 March 1996, section 3A(2) of the CDPA.

⁵ Case C-604/10.

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creativity⁶.

Another requirement in the UK is “**fixation**” which means a work must be written down or recorded. This is easy for some works, such as literary works, as they are by nature written down. This is harder for other types of works that are not fixed in the normal way. In order to receive protection, the work must be recorded or embodied even if that is done by a third person with or without the owner’s authorisation. For example, a work of choreography would only be protected once the movements were written down in dance notation or recorded on videotape.

Who is the owner of the copyright?

The author (and original owner) in relation to a work is presumed to be the person who creates it.

The following people are presumed to be the author of the work:

- In the case of a literary, dramatic, musical or artistic work, the named person;
- In the case of a sound recording, the producer;
- In the case of a film, the producer and the principal director;
- In the case of the typographical arrangement of a published edition, the publisher; and
- In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author is the person who made all the arrangements required for the creation of the work.

If a work is produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author(s), then the work is one of “**joint authorship**”. A film shall be treated as a work of joint authorship, unless the producer and the principal director are the same person. A broadcast is a work of joint authorship when more than one person has taken part in making the broadcast. In order to copy the work without infringing copyright, , the consent of all copyright holders must be obtained.

A “**work of co-authorship**” means a work comprised of separate elements with different authors. For instance, a song can be produced by the collaboration of the author of a musical work and the author of a literary work where the two works are created in order to be used together. Unlike with joint authorship, the individual contributions of the authors can be distinguished.. Even if one of the

⁷ CDPA also applies to citizens and individuals domiciled or resident in, and bodies incorporated in countries which are party to the Berne Convention, Rome Convention or World Intellectual Property Organisation Performances and Phonograms Treaty (WPPT), or World Trade Organisation (WTO) members, and to certain other countries.

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co-authors has contributed a greater amount of work, an equal ownership will be provided to each co-author.

If the identity of the author (or joint authors) is **unknown** and the name of the publisher appears on the work, the publisher is presumed to be the owner of the copyright until there is evidence to the contrary.

Employees / commissioning work

If a work is created by an employee **in the course of his employment**, the employer is the first owner of any copyright in the work. It is possible for contracts of employment to contain express assignment clauses to ensure or alter this.

Where a copyright work is made by a partner, the legal title to the work will be owned by the partner, since the partner is not an employee. However, if the partner made the work **in the ordinary course of the partnership business**, and for the purpose of the partnership, the work will be regarded as an asset of the partnership, unless the partnership agreement provides otherwise.

When a work has been **commissioned** from the author by another person or organisation, the ownership of the copyright vests in the author. However, depending on the circumstances of the commission, copyright could be assigned by the author to the commissioner. It is important to remember that just because a person commissions a work (and possibly pays for it) this does not mean they are the owner without an express assignment of the copyright work from the author.

What is the minimum duration of copyright protection?

The duration of protection depends on the nature of the work:

- Life of the author plus 70 years – for literary, artistic, dramatic and musical works;
- 70 years from death of last to die of principal director, author or composer - for films;
- 50 years from the date made – for sound recordings;
- 50 years from end of year work is made – for computer generated works;
- 50 years from end of year made - for broadcasts; and
- 25 years from end of year of publication - for typographical editions.

What are the qualifications for copyright protection?

Copyright is an automatic right and arises whenever the author embodies the work in some physical

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form and in an original way. Under the CDPA, a work may only qualify for copyright protection in the UK if:

- At the time the work was made (if unpublished) or first published, the author was a qualifying person under the CDPA; or
- The work was first published in, or in the case of a broadcast, the broadcast was made in, a qualifying country.

A work qualifies for copyright protection, if its author is a: British citizen; British dependent territories citizen; British National (Overseas); British subject; British protected person; individual resident or domiciled in the UK, or in another European Economic Area member state (the “EEA”), or in another country to which the qualification clause extends; or a body incorporated under the law of a part of the UK, or in another EEA state or in another country to which the qualification clause extends.⁷

A work can qualify for copyright protection if its first publication took place in the UK, or in another EEA state (or in another country to which the qualification clause extends).

What are the rights protected by copyright?

The owner of copyright may use the work as he wishes, and has the sole authority to permit or prevent certain activities, subject to the legally recognised rights and interests of others.

There are two types of rights under copyright: **economic rights**, which allow the owner of rights to derive financial reward from the use of his works by others; and **moral rights**, which allow the author to take certain actions to preserve the personal link between himself and the work (i.e. recognition).

Economic Rights:

1. Right of reproduction means reproducing a literary, dramatic, musical or artistic work in any material form such as the printing of books, photocopying and scanning or digitising printed text or images into a digital file/posting them on the Web. It also includes storing the work in electronic means such as on computer memories, copying the source code or object code, copying onto servers or in the cloud, copying a computer software program or document, and uploading movies

⁷ CDPA also applies to citizens and individuals domiciled or resident in, and bodies incorporated in countries which are party to the Berne Convention, Rome Convention or World Intellectual Property Organisation Performances and Phonograms Treaty (WPPT), or World Trade Organisation (WTO) members, and to certain other countries.

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or music to a website.

2. Right of issuing copies to the public covers the first issue to the public of copies of a work, and the act of putting the work into circulation in the UK where that work has not been previously put into circulation in the EEA by, or with the consent of, the copyright owner. This does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation.

3. Right of rental or lending of work to the public means renting or lending copies of the work to the public. For instance, renting or lending of software, sound recordings, or a disk carrying a copy of a computer game.

4. Right of public performance refers to performing a literary, dramatic or musical work, or showing/playing a sound recording, film or broadcast in public (for example, performing a play in a theatre, playing sound recordings or showing films in public).

5. Right of communication to the public includes electronic transmission in relation to a work by means of a broadcast⁸ and making copyright works available to the public so that they could access them from a place and at a time individually chosen by them.

6. Making an adaptation only applies to literary, dramatic, musical works, and computer program/databases. For literary works the adaptation right includes turning a novel into a film, or translating a work into another language. Adaptation in relation to computer program/database involves converting a computer program into a different language or code (for example, translating the object code of a program into source code). For a musical work, the adaptation right includes making a new arrangement of the work or making a transcription of the work for new instruments or voices.

Moral Rights:

1. Right to be identified as author or director includes the right to have your name mentioned, for instance when the work is reproduced (e.g. in a film credit).

2. The right to object to derogatory treatment of the work refers to the ability to oppose any addition to, deletion from, or alteration or adaption of the work which amounts to a distortion or

⁸ "Broadcasting" covers all electronic transmission of content for simultaneous reception by members of the public or transmissions at a specific time determined by the owner of transmission for presentation to the public.

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mutilation of the work or is otherwise prejudicial to the author.

3. False attribution right covers the right not to be identified as the author of someone else's work.

4. Privacy right occurs where a person has a photograph or film commissioned for private use and this work meets the requirements for granting copyright protection. Accordingly, such photographs/films may not be issued to the public, shown in public, or communicated to the public without the permission of that person.

Whilst moral rights are personal rights, they do need to be addressed in any commercial deal. They can be waived but not assigned.

What is copyright infringement?

The CDPA lists acts of "primary" and "secondary" copyright infringement.

If a person does any of the following activities in the UK in relation to the whole or a substantial part of a copyright work, without the copyright owner's consent or a licence from the owner, they will be committing **primary copyright infringement**.

- Copying a copyright work.
- Issuing copies of the copyright work to the public.
- Renting or lending the work to the public.
- Performing, showing or playing a copyright work in public.
- Communicating the work to the public.
- Making an adaptation of a copyright work or doing any of the acts listed above in relation to an adaptation.

It is also an act of infringement to authorise another to do any of the restricted acts set out above without the consent of or a licence from the copyright owner. Acts of primary infringement are "strict liability" torts, meaning that no knowledge or intention is required to be shown on the part of the defendant to establish liability.

Secondary infringing acts are carried out without the consent of or a licence from the copyright owner. Relevant infringing acts are importing, possessing or dealing with an infringing copy, providing means for making copies, permitting the use of premises and supplying apparatus for an infringing performance. For acts of secondary infringement, the defendant is required to have had



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certain specified knowledge, or reasonable grounds for having such knowledge of the infringement. Although the CDPA doesn't state that acts of secondary infringement must be carried out in the UK, it has been suggested that they should be.

The CDPA permits various acts to be carried out in relation to copyright works notwithstanding the subsistence of copyright. Although copyright owners have exclusive rights to reproduce their works, the CDPA permits "**fair dealing**" with certain types of copyright work in certain circumstances (for non-commercial research, private study, criticism, review or reporting of current events, quotation or parody, caricature, pastiche).

What are the remedies for copyright infringement?

An infringement of copyright is actionable by the copyright owner. As with any other property right, the courts can (among other remedies): (a) stop that person making further infringing use of the material by granting an injunction, such as search orders, freezing orders and interim injunctions; (b) award the copyright owner damages or an account of profits which compensate for loss resulting from the infringement; (c) make the infringing party deliver up the goods to the copyright owner; and/or (d) destroy the infringing items. In addition, the court can order seizure or forfeiture of infringing copies in certain circumstances. Deliberate infringement of copyright on a commercial scale may be a criminal offence.

In some cases, where it can be proved that an infringing party persisted in knowingly infringing copyright, the court has a **discretion to award additional damages** for infringement of the copyright, having regard to all the circumstances, and in particular to (a) the flagrancy of the infringement in which there is an intentional action for infringement, and (b) any benefit accruing to the infringer.

However, if the defendant did not know, and had no reason to believe that a particular work was protected by copyright, the claimant is not entitled to damages against "**innocent infringers**", but other remedies can still be granted.

In the UK, litigation is expensive and can take a long time, which is why the parties to a copyright dispute should try to resolve their issues between themselves without resorting to the court system if possible.

If this is not possible, the parties may choose to go to court, or to try to settle their dispute via a means of "alternative dispute resolution" ("**ADR**"). One way of resolving an intellectual property

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dispute via ADR is mediation, where a mediator will not make a decision on the dispute, but will help both parties reach an amicable solution. The UK Intellectual Property Office offers a mediation service to parties involved in an IP related dispute. The other way of resolving a dispute through ADR is arbitration. Solicitors can advise on which procedure may be more appropriate for the dispute and parties if/when the situation arises.

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