

# International **Comparative** Legal Guides



## Copyright **2021**

A practical cross-border insight into copyright law

### Seventh Edition

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## Expert Chapter

- 1** **Expanding the Boundaries of Copyright Law**  
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## Q&A Chapters

- 7** **Australia**  
Solubility: Jeff Bergmann & Louise Brunero

- 15** **Brazil**  
SiqueiraCastro Advogados: Eduardo Ribeiro Augusto

- 19** **Canada**  
Marks & Clerk Law LLP: Catherine Lovrics & Lesley Gallivan

- 27** **China**  
Hylands Law Firm: Erica Liu (Liu Yuping) & Andrew Liu (Liu Yungui)

- 34** **France**  
Armengaud Guerlain: Catherine Mateu

- 40** **Germany**  
BOEHMERT & BOEHMERT: Silke Freund & Dr. Sebastian Engels

- 48** **India**  
LexOrbis: Aprajita Nigam & Dheeraj Kapoor

- 57** **Japan**  
Nagashima Ohno & Tsunematsu: Kenji Tosaki

- 62** **Malaysia**  
Shin Associates: Jessie Tan Shin Ee & Joel Prashant

- 72** **Mexico**  
OLIVARES: Luis C. Schmidt, Guillermo Treviño & Manuel Santin

- 78** **Norway**  
Advokatfirmaet GjessingReimers AS:  
Øystein Flagstad

- 84** **Philippines**  
SyCip Salazar Hernandez & Gatmaitan:  
Vida M. Panganiban-Alindogan & Anna Loraine M. Mendoza

- 92** **Russia**  
Semenov&Pevzner: Roman Lukyanov,  
Ksenia Sysoeva & Irina Ostapchuk

- 99** **Switzerland**  
Wenger Plattner: Melanie Müller & Yannick Hostettler

- 105** **Turkey**  
Ofo Ventura Intellectual Property & Litigation:  
Ozlem Futman & Yasemin Aktas

- 112** **United Kingdom**  
Bird & Bird LLP: Rebecca O’Kelly-Gillard & Phil Sherrell

- 119** **USA**  
Fross Zelnick Lehrman & Zissu, P.C.: David Donahue & Jason D. Jones

- 126** **Zimbabwe**  
Wintertons Legal Practitioners: Cordellia Nyasha Midzi

# United Kingdom

Bird & Bird LLP



Rebecca O'Kelly-Gillard



Phil Sherrell

## 1 Copyright Subsistence

### 1.1 What are the requirements for copyright to subsist in a work?

For copyright to subsist:

- literary, dramatic, musical and artistic works must comply with the criterion of originality, i.e. the work must originate from its author and must not be copied from another work. This does not mean that the work must be the expression of original or inventive thought; the originality required relates to the expression of the thought and is not a subjective test regarding the 'artistic' originality or novelty. The standard of originality is low and depends on the author having created the work through his own skill, judgment and individual effort, and not having copied from other works;
- the work must be fixed, i.e. recorded in writing or in some other material form;
- the work must meet UK qualification requirements, either through the nationality of its author or through its place of first publication; and
- the relevant term of copyright must not have expired.

### 1.2 Does your jurisdiction operate an open or closed list of works that can qualify for copyright protection?

The Copyright, Designs and Patents Act 1988 sets out a closed list of works that qualify for copyright protection. However, recent CJEU case law, in particular in the *Cofemel* and *Brompton Bicycles* decisions, suggests that a closed list may be incompatible with the requirements of the InfoSoc Directive (Dir 2001/29).

### 1.3 In what works can copyright subsist?

Copyright can subsist in: original literary, dramatic, musical or artistic works; sound recordings, films or broadcasts; and typographical arrangements of published works.

### 1.4 Are there any works which are excluded from copyright protection?

Works which do not include the requisite level of originality as set out in question 1.1 are excluded from copyright protection.

### 1.5 Is there a system for registration of copyright and, if so, what is the effect of registration?

No, copyright subsists automatically.

### 1.6 What is the duration of copyright protection? Does this vary depending on the type of work?

In general, the terms of protection in the UK are as follows:

- Copyright in a literary, dramatic, musical or artistic work lasts for the life of the author plus 70 years from the end of the calendar year in which the author dies.
- Copyright in computer-generated literary, dramatic, musical or artistic works lasts 50 years from the end of the calendar year in which the work was made.
- Copyright in a film expires 70 years after the end of the calendar year in which the death occurs of the last to survive of the principal director, the author of the screenplay or dialogue, and the composer of any music specifically created for the film.
- Copyright in a sound recording expires 50 years from the end of the calendar year in which the recording is made; or if, during that period, the recording is published, 70 years from the end of the calendar year in which it was first published; or if, during that period, the recording is not published but is played or communicated in public, 70 years from the end of the calendar year in which it was first so made available.
- Copyright in a broadcast expires 50 years from the end of the calendar year in which the broadcast was made.
- Copyright in the typographical arrangement of a published edition expires at the end of the period of 25 years from the end of the calendar year in which the edition was first published.

### 1.7 Is there any overlap between copyright and other intellectual property rights such as design rights and database rights?

Some works are also covered by other intellectual property rights in addition to copyright: e.g. 3-D and other designs can be protected by design rights; a database may be protected by the *sui generis* database right (this is intended to protect and reward investment in the creation and arrangement of databases, and protects rightsholders from the extraction and/or re-utilisation of the contents of the database). A logo protected by copyright may also be protected as a trade mark.

### 1.8 Are there any restrictions on the protection for copyright works which are made by an industrial process?

No. Historically in the UK, where articles embodying a copyright work were made with the copyright owner's consent by means of an industrial process, and had been marketed, the work could be copied without infringing copyright in the work 25 years after those articles were first marketed. A work is regarded as made by an industrial process if it is one of more than 50 articles made as copies of a work (this can include miniature replicas of a work). In 2016, legislation repealed this provision in the UK with effect from 28 July 2016 so that all artistic works, whether or not made by an industrial process, benefit from copyright protection for the life of the author plus 70 years. Following the end of the transitional period on 28 January 2017, any work created in reliance of the old section, and which does not fall within an exception to copyright law, must be destroyed or authorised by the rightsholder.

## 2 Ownership

### 2.1 Who is the first owner of copyright in each of the works protected (other than where questions 2.2 or 2.3 apply)?

The author, i.e. the person who creates the work, is usually the first owner of copyright in that work. The presumption is that the author will be:

- the person who creates a work for literary, dramatic, musical or artistic works;
- the producer of a sound recording;
- the producer and the principal director of a film;
- the publisher of a published edition;
- the person making a broadcast or effecting a retransmission of a broadcast;
- the publisher of a typographical arrangement; and
- the person making the arrangements necessary for the creation of the work for computer-generated works (including certain works created by artificial intelligence systems).

However, this may be amended by agreement. For example, it is possible for someone who would ordinarily be deemed to be the copyright owner to assign the benefit of future copyright, even prior to that work having been created.

### 2.2 Where a work is commissioned, how is ownership of the copyright determined between the author and the commissioner?

Copyright will belong to the author of the work (i.e. the person commissioned), unless there is an agreement to the contrary assigning the copyright and which is signed by the commissioned party, e.g. in a services contract. However, where a work has been commissioned and there is no express assignment of the copyright to the commissioner or licence to the commissioner to use the work, the courts have often been willing to imply a contractual term that copyright should be licensed to the commissioner for the use that was envisaged when the work was commissioned. Occasionally, the court will even assign the copyright to the commissioner. The extent of any implied licence will depend on the facts of any given case, but generally the licence will be limited to that necessary to meet the needs of the commissioner.

### 2.3 Where a work is created by an employee, how is ownership of the copyright determined between the employee and the employer?

If a work is produced as part of an employee's employment, the first owner will automatically be the company that employs the individual who created the work, unless the employee and employer agree otherwise in writing. No further formalities are required and the employee has no rights to subsequent compensation.

### 2.4 Is there a concept of joint ownership and, if so, what rules apply to dealings with a jointly owned work?

Yes. A work will be of joint authorship if it 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 or authors. If the contribution is distinct, then separate copyrights will subsist in each author's respective parts of the work.

A joint author will have individual rights that they can assign independently of the other author or authors. However, a joint owner cannot grant a licence which is binding on the other co-owners, nor can a joint owner grant an exclusive licence.

## 3 Exploitation

### 3.1 Are there any formalities which apply to the transfer/assignment of ownership?

Copyright is transmissible by assignment, by testamentary disposition or by operation of law, as personal or movable property.

The only formal requirements for an assignment of copyright are that it is in writing and signed by or on behalf of the assignor. The terms of the assignment (and how they are expressed) are entirely at the discretion of the contracting parties.

An assignment or other transfer of copyright may be partial, that is, limited so as to apply to one or more, but not all, of the acts the copyright owner has the exclusive right to do; and can be in relation to part or the whole of the period for which the copyright is to subsist.

### 3.2 Are there any formalities required for a copyright licence?

Unlike an assignment, a licence of copyright need not be in writing nor comply with particular formalities and may, therefore, be oral or implied. However, in order to obtain the statutory rights of an exclusive licensee, e.g. the right to sue third party infringers, an exclusive licence must be recorded in writing and signed by or on behalf of the licensor. If an exclusive licence is not in writing, the licensee will only have a contractual right to use the copyright, not to enforce it.

### 3.3 Are there any laws which limit the licence terms parties may agree to (other than as addressed in questions 3.4 to 3.6)?

Please see the answers to questions 2.4 and 4.2.

### 3.4 Which types of copyright work have collective licensing bodies (please name the relevant bodies)?

There are numerous collecting societies in existence in the UK, including:

- the Performing Rights Society (PRS), which administers the public performance rights (including in relation to broadcasts, streaming services, and non-theatrical performances) of songwriters, composers and music publishers in musical compositions and lyrics;
- the Mechanical-Copyright Protection Society (MCPS), which administers the reproduction rights (e.g. in relation to CDs, digital downloads and musical toys) of songwriters, composers and music publishers (PRS and MCPS operate jointly as PRS for Music);
- Phonographic Performance Ltd (PPL), which licenses recorded music when it is played in public or broadcast on the radio or TV in the UK and then distributes the fees to the performers and recording rightsholders it represents;
- PPL PRS (a joint venture between PPL and PRS for Music), which offers a single joint music licence, on behalf of them both, for playing and performing music in public;
- ICE (a joint venture between PRS for Music, Swedish collecting society STIM and German collecting society GEMA), which is an integrated multi-territory music copyright licensing and processing hub;
- NLA Media Access (formerly the Newspaper Licensing Agency), which administers the reproduction rights of newspaper and some magazine publishers in articles;
- the Copyright Licensing Agency (CLA), which administers the reproduction rights of authors and publishers in literary and artistic works;
- the Authors' Licensing and Collecting Society (ALCS), which administers various rights of authors in literary and dramatic works; and
- the Design and Artists Copyright Society (DACS) and the Artists' Collecting Society (ACS), which administer rights in artistic works (including resale rights).

### 3.5 Where there are collective licensing bodies, how are they regulated?

Collecting societies are regulated by the Collective Management of Copyright (EU Directive) Regulations 2016. They are also subject to the supervision of the Copyright Tribunal in relation to licensing terms.

### 3.6 On what grounds can licence terms offered by a collective licensing body be challenged?

A reference in respect of the terms of a *proposed* licensing scheme may be made to the Copyright Tribunal by an organisation claiming to be representative of persons who claim that they require licences under the proposed scheme. A licensee may also refer to the Copyright Tribunal the terms on which a licensing body proposes to grant a licence to it. A reference to the Copyright Tribunal in respect of the terms of an *existing* licence scheme may be brought by a person claiming that he requires a licence under it, or an organisation claiming to be representative of such persons.

The primary grounds of challenge which the Copyright Tribunal can consider are that the terms are unreasonable or discriminate unfairly between licensees.

In addition, a person can make an application to the Copyright Tribunal where an operator of a scheme has unreasonably refused to grant a licence under that scheme.

In addition to copyright claims, the Collective Management of Copyright (EU Directive) Regulations 2016 require copyright licensing bodies to make available alternative dispute resolution procedures in relation to any breach of the Regulations, except in relation to tariffs.

## 4 Owners' Rights

### 4.1 What acts involving a copyright work are capable of being restricted by the rights holder?

Copyright holders have the exclusive right to do or authorise the following:

- copying the work;
- issuing copies of the work to the public;
- renting or lending the work to the public;
- performing, showing or playing the work in public;
- communicating the work to the public; and
- adapting the work.

The copyright owner can restrict these acts in relation to the whole or any substantial part of the work.

The courts have shown that they are willing to find intermediary service providers (ISPs) liable for primary copyright infringement where they have infringed the exclusive right of copyright owners to authorise any of the above acts, most notably where ISPs have authorised the copying of works or making them available to the public.

The courts have also shown a willingness to use common law principles to protect the rights of copyright owners. For example:

- parties have been found to infringe copyright where they act in a common design with each other to induce others to do any of the above infringing acts; and
- case law has also found that where website operators or service providers provide the key means by which copyright can be infringed, and they know or intend for their service to be used for that purpose, they can be held to be joint tortfeasors with those who actually perform the infringing act.

### 4.2 Are there any ancillary rights related to copyright, such as moral rights, and, if so, what do they protect, and can they be waived or assigned?

There are a number of ancillary rights associated with the creation of copyright works, the most common of which are:

- Moral rights: the author or director of a copyright work usually has moral rights in relation to the work. These are the rights to: i) be identified as the work's author or director; ii) object to derogatory treatment of the work; iii) privacy in respect of certain photographs and films; and iv) not have the work's authorship wrongly attributed. These rights may be waived by the author or director but not assigned. The first three rights have the same duration as copyright, but the right to object to false attribution lasts for the author's or director's lifetime plus 20 years.
- Performers' rights: performers have various property and non-property rights in relation to the exploitation of their performances, in addition to a right to equitable remuneration in certain cases.

- Publication right: the publication right grants rights equivalent to copyright to a person who publishes for the first time a literary, dramatic, musical or artistic work, or a film in which copyright has expired.

#### 4.3 Are there circumstances in which a copyright owner is unable to restrain subsequent dealings in works which have been put on the market with his consent?

The doctrine of exhaustion of rights provides that once copies of a copyright work are issued to the public in one EEA Member State with the owner's consent, the owner cannot object to their circulation anywhere else within the EEA. The courts have held that the principle does not apply to subsequent/back-up copies of digital works. In those cases, it appears that the copyright owner's rights would only be exhausted in relation to the original digital version placed on the market. It has yet to be determined how the principle of exhaustion will apply in the UK after the UK leaves the EU.

## 5 Copyright Enforcement

#### 5.1 Are there any statutory enforcement agencies and, if so, are they used by rights holders as an alternative to civil actions?

HMRC is the UK customs authority responsible for national policy governing IP rights enforcement at the UK external border. In certain circumstances, HMRC (and Border Force, the law enforcement command within the Home Office responsible for carrying out the frontier interventions that implement this policy) are empowered to detain goods that may infringe intellectual property rights such as copyright. There are two regimes in existence, one governed by European Regulations and the other by purely domestic legislation. The two regimes, which are mutually exclusive, are as follows:

- Regulation (EU) No 608/2013 (in force in the UK since 1 January 2014), which regulates pirated goods infringing copyright; and
- Section 111 of CDPA 1988, which permits the owner of copyright in certain types of works to lodge a notice with HMRC stating their ownership of copyright in a work and requesting infringing copies to be treated as prohibited goods.

Trading Standards officers in the UK are also under a statutory duty to enforce copyright and have the powers, among others, to make test purchases of infringing goods, to enter premises and to inspect and seize goods and documents which infringe.

The City of London Police and the UK Intellectual Property Office have also set up the Police Intellectual Property Crime Unit (PIPCU) to tackle serious and organised intellectual property crime (counterfeit and piracy) affecting physical and digital goods (with the exception of pharmaceutical goods). PIPCU's focus is on offences committed online.

#### 5.2 Other than the copyright owner, can anyone else bring a claim for infringement of the copyright in a work?

Yes, an exclusive licensee has the same rights and remedies in respect of matters that occur after the exclusive licence was granted, as if the licence had been an assignment. This statutory position can be modified by contract.

A non-exclusive licensee can also bring a claim for infringement, although only in limited circumstances; specifically, if the infringement is directly connected to an act which the licensee had been licensed to carry out under the licence, and the licence is in writing, signed by the copyright owner, and expressly grants the non-exclusive licensee a right of action.

#### 5.3 Can an action be brought against 'secondary' infringers as well as primary infringers and, if so, on what basis can someone be liable for secondary infringement?

Yes, a person will be liable for secondary infringement of copyright if they do or authorise any of the following:

- import an infringing copy;
- possess or deal with an infringing copy;
- provide means for making infringing copies;
- permit the use of premises for an infringing performance; and
- provide apparatus for an infringing performance.

To be liable for secondary acts of infringement, the secondary infringer must have some actual or imputed knowledge of the primary infringement of the copyright work.

#### 5.4 Are there any general or specific exceptions which can be relied upon as a defence to a claim of infringement?

A number of provisions of the CDPA permit various activities which would otherwise be infringements of copyright in literary, dramatic or musical works.

The most common exceptions relate to:

- temporary copies technically required to enable a lawful use;
- fair dealing, including the use of copyright works for the purpose of:
  - news reporting;
  - parody, caricature or pastiche; and
  - quotation;
- incidental inclusion;
- educational use;
- use in libraries;
- archives and public administration;
- works permanently situated in public places;
- the making of digital copies by various institutions;
- text and data mining;
- making copies accessible to disabled people;
- further exceptions for the purpose of research or private study;
- public interest; and
- copying for the visually impaired.

There is currently no private copying exception under UK law.

#### 5.5 Are interim or permanent injunctions available?

Yes, both interim and permanent injunctions are available, as are "site-blocking injunctions" (orders against ISPs to prevent access to websites held to infringe copyright).

### 5.6 On what basis are damages or an account of profits calculated?

Damages are calculated so as to put the claimant in the position it would have been in if the infringing act had not occurred. This is often based on what would have been a reasonable licence fee had the copyright owner entered into an arm's length licence with the party found to infringe copyright. An account of profits is calculated so as to make the defendant forfeit to the copyright owner the profits made as a result of the infringing act. A successful claimant must elect one of the two remedies.

In the event that the infringement has been particularly flagrant, the copyright owner will be able to claim punitive damages in addition to the basic amount.

### 5.7 What are the typical costs of infringement proceedings and how long do they take?

The traditional forum for IP litigation at first instance in the UK is the High Court. Costs can vary from £250,000–£1 million+ per side (depending on the complexity of the claims at issue) to take an action to trial, and the winner can usually expect to recover about two thirds of its actual costs from the loser. The typical time for a case to be heard at the High Court is about 12–15 months, and with an appeal within a further 12–18 months.

Infringement proceedings can also be brought in the Intellectual Property and Enterprise Court (IPEC) in which court procedures are simplified to make the cost of actions significantly lower: typical costs are of the order of £75,000–£350,000 per side, although costs recovery by the winner is limited to a maximum of £50,000. The typical time for a case to be heard is 8–12 months in the IPEC.

### 5.8 Is there a right of appeal from a first instance judgment and, if so, what are the grounds on which an appeal may be brought?

Yes, the appeal court will allow an appeal where the decision of the lower court was one of the below:

- Wrong, which is presumed to mean: an error of law; an error of fact; or an error in the exercise of the court's discretion.
- Unjust, because of a serious procedural or other irregularity in the proceedings in the lower court.

### 5.9 What is the period in which an action must be commenced?

The limitation period for bringing a copyright infringement claim in the UK is six years from the date when the cause of action arose.

## 6 Criminal Offences

### 6.1 Are there any criminal offences relating to copyright infringement?

There are various criminal offences in respect of copyright infringement, including:

- making an infringing article for sale or hire;

- importing an infringing article into the UK other than for private and domestic use;
- possessing an infringing article in the course of business with a view to committing any act infringing copyright;
- selling, letting for hire, offering/exposing for sale or hire, exhibiting in public, or distributing an infringing article in the course of business;
- distributing an infringing article not in the course of business but to such an extent as to prejudice the copyright owner; for example, a large number of infringing copies are given away for free, therefore affecting the copyright owner's revenue;
- making/possessing an article specifically designed for making copies of a copyright work;
- communicating a work to the public intending to make a gain for themselves or another person, or knowing or having reason to believe that communicating the work to the public will cause loss to the owner of the copyright, or will expose the owner of the copyright to a risk of loss;
- causing a copyright work to be performed, played or shown in public (otherwise than by reception of a communication to the public) so as to infringe copyright; and
- circumventing technological measures, removing or altering electronic rights management information, or dealing in devices meant for that purpose.

### 6.2 What is the threshold for criminal liability and what are the potential sanctions?

Criminal liability usually requires knowledge or reasonable belief about the infringing nature of the works and/or activity, in addition to a commercial purpose.

Criminal remedies apply in parallel with civil remedies, and offences carry varying levels of possible punishment including fines and/or imprisonment with, in certain cases, a maximum term of imprisonment of 10 years. Criminal sanctions for online copyright infringement have recently been brought in line with those for physical infringement (i.e. to increase the sanction from a maximum two-year imprisonment to a maximum of 10 years' imprisonment).

## 7 Current Developments

### 7.1 Have there been, or are there anticipated, any significant legislative changes or case law developments?

The European Copyright Directive was approved in April 2019, with Member States having two years in which to implement its provisions. However, in February 2020 the UK Government stated that it would not be implementing the Directive. As a result, there is likely to be a divergence between UK and EU law post July 2021 (the deadline for implementation of the Directive by Member States).

In addition, the recent CJEU decisions in *Cofemel* and *Brompton Bicycles* decisions raise the question as to whether the UK's closed list of copyright works is compatible with EU law. This issue is addressed in more detail in the Expert Chapter at the start of this guide.

**7.2 Are there any particularly noteworthy issues around the application and enforcement of copyright in relation to digital content (for example, when a work is deemed to be made available to the public online, hyperlinking, etc.)?**

The High Court decision of *Warner Music and Sony Music v TuneIn* [2019] EWHC 2923 (Ch) held that services which are neither conventional search engines nor conventional websites, but are specialist search engines which link to third party content, may be liable for making that third party content available to the public where the content is re-targeted to users who were not taken into account by the copyright owner, even if the first act of communication was licensed. This case is under appeal, but if the first instance decision is upheld, it could have far reaching consequences for any service that provides specialist search functions.

**7.3 Have there been any decisions or changes of law regarding the role of copyright in relation to artificial intelligence systems, including the use of copyright in those systems and/or any work generated by those systems?**

There have not been any legislative or case law developments in this area to date in the UK.





**Rebecca O'Kelly-Gillard** is a partner in Bird & Bird's Intellectual Property Group in London and her particular focus is helping clients solve trade mark and copyright issues that have a digital or online focus.

A major part of Rebecca's practice is working with companies to set up their global brand enforcement projects: using technology to streamline processes for clients and make their anti-counterfeit programmes as cost effective as possible. Her digital focus relates to all IP issues arising online, including highly complex issues regarding copyright infringement, hyperlinking and the communication of works to the public. Rebecca works with a range of service platforms, content owners and content creators helping them navigate their business against a changing legislative backdrop, enabling them to maximise their digital and data assets for commercial success.

**Bird & Bird LLP**  
12 New Fetter Lane  
London, EC4A 1JP  
United Kingdom

Tel: +44 20 7415 6000  
Email: [rebecca.okelly@twobirds.com](mailto:rebecca.okelly@twobirds.com)  
URL: [www.twobirds.com](http://www.twobirds.com)



**Phil Sherrell** heads Bird & Bird's international Media, Entertainment & Sport sector and focuses on litigating disputes relating to the media industry, content and brands.

Phil's team offers the full range of contentious IP and media law advice, handling complex trade mark and copyright infringement litigation, disputes relating to the dissemination of information (confidential, private, defamatory, etc.), as well as complaints to UK media regulators including the ASA, IPSO and Ofcom.

Phil sits on the Copyright and Technology Working Group of the British Copyright Council and is the editor of *ICLG – Copyright*. He appears regularly in the media discussing all aspects of media and IP law and led the team which created Bird & Bird's own content platform, MediaWrites.

**Bird & Bird LLP**  
12 New Fetter Lane  
London, EC4A 1JP  
United Kingdom

Tel: +44 20 7415 6000  
Email: [phil.sherrell@twobirds.com](mailto:phil.sherrell@twobirds.com)  
URL: [www.twobirds.com](http://www.twobirds.com)

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