

International Comparative Legal Guides



Copyright 2020

A practical cross-border insight into copyright law

Sixth Edition

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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 On the presumption that copyright can arise in literary, artistic and musical works, are there any other works in which copyright can subsist and are there any works which are excluded from copyright protection?

Copyright can also subsist in the following works: dramatic (e.g. plays, dance); typographical arrangements of published editions (e.g. magazines, periodicals); sound recordings (which may be recordings of other copyright works, e.g. musical and literary); films; and broadcasts.

Computer programs are protected as literary works. However, copyright protects the expression of an idea, not the idea itself; therefore, certain forms may not carry copyright protection, e.g. the functionality, programming language and interfaces (such as data file formats) of computer programs are not protected by copyright to the extent that they are not contained in the software's source code (which is the written expression in which copyright can subsist).

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

No, copyright subsists automatically.

1.4 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.

1.5 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.

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

No. Until recently 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 only be 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 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 (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.

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 and it is currently engaged in an initiative designed at gathering information relating to counterfeit websites, by encouraging the buyers of such goods to report purchases to their bank.

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: recent experience has shown that typical costs are of the order of £75,000–£200,000 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 finally approved in April 2019, with Member States having two years in which to implement its provisions. The Directive remains the subject of intense public debate, especially with regard to the new press publishers' right set out in Article 15 and changes to the liability regime governing online service providers covered in Article 17. Despite the Directive's approval, it appears unlikely that the date by which it will need to be implemented will occur before the UK leaves the European Union. If the Directive does not need to be implemented prior to Brexit, it may be for UK legislature to determine what elements, if any, of the Copyright Directive will be transposed into English law.

Blocking injunction case law in England has seen further development recently. In *Matchroom Boxing v BT and Others* [2018] EWHC 2443 (Cb), Arnold J demonstrated the flexible approach that the courts are willing to take in granting blocking injunctions. Unlike earlier blocking injunctions for sporting events which have been granted for matches with fixed timings scheduled months in advance, the injunction in this case related to irregular events over a two-year period, with monitoring taking place in a seven-day period around the event. This increases the utility of such injunctions to rightsholders, particularly in the field of broadcasting.

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.)?

European case law continues to evolve in this regard, most recently with the CJEU decision in *Renckhoff* C-161/17 in which the CJEU found that the publication on a website without the authorisation of the copyright holder of a work, which was previously communicated on another website with the holder's consent, should be treated as making such a work available to a new public, and thereby an unauthorised communication of that work to the public. It will be interesting to see whether the CJEU's current line of reasoning (which continues to favour copyright owners) will be followed by the English courts after the UK leaves the EU.

With relevance to exceptions to copyright infringement, the CJEU in *Spiegel Online* C-516/17 recently found that a link to an independently downloadable file could amount to a quotation for the purposes of the exception to copyright infringement provided for in Article 5(3)(d) of the InfoSoc Copyright Directive.



Phil Sherrell heads Bird & Bird's international Media, Entertainment and Sport sector, a 130-strong team of sector-focused lawyers spread across our offices and practice areas. His day job is as a litigator, handling complex intellectual property and media law disputes, often with a digital aspect.

Cases of particular note include:

- *Mattel v Zynga* (obtaining a Court of Appeal victory for Mattel in relation to the iconic Scrabble brand);
- *Warner Music & Sony Music v TuneIn* (UK test case on liability for linking to copyright-protected content);
- *Metropolitan International v Google* (one of the leading cases on search engine liability for defamatory content); and
- *Meltwater v the Newspaper Licensing Agency* (the Copyright Tribunal dispute which set the model for the licensing of online news content).

Phil also sits on the Copyright and Technology Working Group of the British Copyright Council and regularly appears in the media on copyright and other media law issues.

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Abbas advises both rightsholders and online platforms on the full spectrum of 'soft' intellectual property rights, with a focus on copyright (including related rights, e.g. moral rights and performers' rights). Abbas has particular experience advising clients in the music industry in relation to licensing issues relating to the use of content by digital streaming platforms and also on commercial deals, negotiating licences and rights clearances.

Abbas's recent experience includes:

- acting for an online platform in the current UK test case on liability for linking to copyright-protected content, which was brought by two of the biggest record labels in the world;
- advising a music collecting society in relation to potential copyright tribunal and copyright infringement proceedings against a number of digital content platforms; and
- spending nine months seconded to the Perform Group, advising their on-demand sports streaming platform (DAZN) and data analytics platform (Opta) on copyright protection/anti-piracy measures.

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Public Procurement
Real Estate
Sanctions
Securitisation
Shipping Law
Telecoms, Media & Internet Laws
Trade Marks
Vertical Agreements and Dominant Firms