



# ICLG

The International Comparative Legal Guide to:

## Copyright 2017

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A practical cross-border insight into copyright law

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# Implications of Brexit for English Copyright Law

Will Smith



Phil Sherrell



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## Introduction

On 23 June 2016, the UK electorate voted in favour of the UK leaving the European Union. The political and economic turbulence in the immediate aftermath of the result was unprecedented. The pound plummeted against the dollar and the euro, the FTSE 100 fell and then quickly recovered, and the Prime Minister, David Cameron, resigned. Constitutional law experts have pointed out that the vote is not binding on the UK Parliament and the UK does not have to trigger Article 50.<sup>1</sup> Meanwhile, litigation has already begun to determine whether the required notice under Article 50 may be given under the executive authority of the Prime Minister, or whether it must follow a vote by Parliament. The distinction is potentially significant as the new Prime Minister, Theresa May, has indicated she would respect the result of the referendum whereas the majority of MPs were in favour of remaining in the EU.

Therefore, at the time of writing, the full consequences of the referendum result and the nature of the UK's future relationship with the EU are difficult to predict with any certainty. This uncertainty applies equally to the future of legislation which has its origins in the EU, including significant elements of copyright law. Precisely what the legal regime will ultimately look like will inevitably depend heavily on the nature of any future political relationship.

This article will review the possible future status of UK copyright law in general terms, before looking at how some specific provisions with their origins in EU law might be affected.

## The Status Quo

Copyright law is arguably the least harmonised of the intellectual property rights recognised in the EU. There have been attempts made by the European Commission to achieve greater harmonisation, most notably the InfoSoc Directive<sup>2</sup> and the IP Enforcement Directive<sup>3</sup> (although this applies to all IP rights), but a number of differences remain. Many of the variations in the scope and application of copyright law have their origins rooted in the differences between the civil and common law legal systems of the Member States.

For example, under French copyright law ("droit d'auteur"), any work is eligible for copyright protection provided that it is original (i.e. it expresses the author's personality) and the author's moral rights in the work are inalienable. In contrast, under the UK common law system, only defined categories of works may be protected<sup>4</sup> (the so-called "closed list" system) and the moral rights of the author of a protected work must be positively asserted<sup>5</sup> and may be waived when a work is assigned (and very often are).

Another key difference between the UK and European systems is the criteria for originality. Under UK law, the originality threshold is low, requiring just that the work was created through the skill, judgment and individual effort of the author (i.e. not copied). There is no subjective requirement for original, artistic or inventive thought. In contrast, the CJEU held in *Infopaq* that under European law a copyright work (to the extent harmonised by the InfoSoc Directive) is only original if it is the author's own "intellectual creation".<sup>6</sup>

When the UK Court of Appeal came to consider originality in the *Meltwater* case it was reluctant to adapt the UK approach and commented on the *Infopaq* decision as follows:

*"Although the court refers to an 'intellectual creation' it does so in the context of para 35 [of the Infopaq judgment] which clearly related such creation to a question of origin not novelty or merit. Accordingly, I do not understand the decision of the European Court of Justice in Infopaq to have qualified the long standing test established by the authorities..."*

Therefore, the findings of the CJEU in *Infopaq* were not sufficiently precise (at least for the UK Court) to effectively harmonise the originality threshold.

The European Commission's efforts towards further harmonisation of copyright law continue under the guise of the Digital Single Market strategy, which aims to create a "*single copyright code and single copyright title*".<sup>8</sup> Along with the proposed Regulations on geo-blocking (discussed below), further copyright reforms are expected before the end of 2016.

## What Does the Future Look Like Post-Brexit?

Of course, if the UK Parliament (or Prime Minister) never invokes Article 50 then the UK will remain a member of the EU notwithstanding the result of the referendum and the *status quo* will be preserved. In any event, the triggering of Article 50 would lead to a two-year window of negotiation regarding the termination of the UK's EU membership and so the *status quo* will endure for at least this period.

After leaving, any EU Directives which have been implemented into UK law will continue to apply (as they are now formally part of UK legislation) unless or until they are specifically repealed. EU Regulations, however, are directly applicable without the need for separate implementation by Member States. Existing and future Regulations, future Directives and future decisions of the CJEU will therefore no longer necessarily apply if the UK has left the EU (although in reality this will depend on what future relationship is negotiated – as discussed below).

Once (if) the UK does leave, there are various possible future trading relationships with the EU, based on the EU's current practices, including at least the following:

1. membership of the European Economic Area ("EEA");
2. membership of the European Free Trade Association ("EFTA");
3. a new, bespoke free trade agreement with the EU; or
4. trade with the EU under World Trade Organisation ("WTO") rules.

If the UK left the EU but remained a member of the EEA (the model adopted by Norway, Liechtenstein and Iceland), it would retain access to the European Single Market (which most commentators agree is a key objective) and remain subject to EU Directives relating to copyright law, including future changes, for example as the Digital Single Market strategy is implemented. The key differences would be that the UK would no longer be involved in the shaping of future European copyright legislation and would no longer (technically) be bound by decisions of the CJEU. The UK Courts would also be in the strange position of being bound to apply EU legislation, but without the option to refer cases to the CJEU for the interpretation of law (this also means that the CJEU would lose the ability to exchange opinions with the well-respected UK judiciary). If the UK does want to maintain the most open access to the European Single Market that it can then an EEA-style relationship would seem to be most likely (if this can be achieved whilst still maintaining the UK's other key objectives from any new deal).

The other possible relationships would be unlikely to require the UK to comply with EU copyright law at all. This could lead to UK and EU copyright laws going their separate ways and it will be interesting to see how much the respective legal systems could drift apart. If anywhere, changes are likely to be seen at the interface between traditional media and new technology. It is in this area that the CJEU has found the application of traditional copyright principles most challenging as we have discussed in previous editions of this guide.

The first priority of the UK Government in this area will be to identify the "*acquis communautaire*" of EU copyright law and which UK copyright laws are derived from or influenced by EU legislation. This will allow the UK to determine which EU-derived laws it needs to ensure are enacted into UK law following an exit from the EU, and which may be considered for amendment.

An example of an area in which the UK may wish to diverge from the EU legal system is in the area of private copying. The InfoSoc Directive permits Member States to introduce an exception to the reproduction right for private copying, provided rights holders receive "fair compensation". In the majority of Members States the exemption has been introduced together with some form of levies system. In the UK, however, a narrow exception was introduced in October 2014 but without a compensation mechanism. The exemption was subsequently quashed by the UK High Court following a judicial review in July 2015 on the basis that the UK Government had failed to provide sufficient evidence that harm to rights holders would be minimal (so that no compensation was required).<sup>9</sup> Whilst stopping short of declaring the UK implementation incompatible with the InfoSoc Directive, this decision does illustrate the differences in approach between the UK Government and many other EU jurisdictions. It is, therefore, likely that, were it no longer bound by the InfoSoc Directive, the UK would wish to introduce a broader, compensation-free, private copying exemption (although this would be hotly contested by the music industry).

## Intermediary Liability – The Hosting, Caching, and Mere Conduit Defences

Whilst it remains a Member State of the EU, the UK will continue to be bound by the E-Commerce Directive.<sup>10</sup> The E-Commerce Directive would also continue to apply to the UK if it left the EU but remained a member of the EEA. The E-Commerce Directive sets out the "hosting", "caching" and "mere conduit" defences, and so is crucial to online intermediaries such as ISPs and platforms. In particular, the hosting defence protects intermediaries from incurring liability for copyright infringement (amongst other things) when infringing content is uploaded to their sites without their knowledge. This limits the extent to which rights holders are required to act as censors of user-published content.

The E-Commerce Directive was first implemented into UK law in 2002 by the E-Commerce Regulations.<sup>11</sup> However, the E-Commerce Regulations are not prospective in nature and so do not apply to legislation passed after the date on which the Regulations themselves were passed. Therefore, in order for intermediaries to be able to benefit from the hosting, caching or mere conduit defences in relation to liability arising under new (post-2002) legislation, the new law must either replicate the provisions of the E-Commerce Directive, or a statutory instrument under the European Communities Act 1972 must be passed to extend the scope of the E-Commerce Regulations to the new offences.

If the UK ultimately leaves the EU (and the EEA), it will no longer be bound by the E-Commerce Directive (subject of course to the terms of departure). The UK would therefore no longer be obliged to continue to apply the mere conduit, caching and hosting defences to new copyright legislation, nor to continue to apply the defences in the same way (as decisions of the CJEU on interpretation of the E-Commerce Directive would no longer be binding on the UK Court).

In these circumstances, it would be open to the UK Government to curtail the application of the defences in new legislation creating civil or criminal liability, or to implement a new intermediary liability regime in general (with presumably a knock-on effect on the existing regime). This in turn could lead to a choice between: (i) the less restrictive legislative regime of the US (where first amendment rights reign supreme and the defence applies regardless of knowledge or notice), which could make the market more competitive for platforms; (ii) the more regulated environment of the EU where intermediaries are coming under increasing pressure (from both rights holders and law enforcement agencies) to be responsible for IP protection (amongst other issues such as child protection); or (iii) a compromise position somewhere in between.

This could give an opportunity for stakeholders on either side of the argument to lobby for a particular "flavour" of liability regime and companies should start thinking now about what their ideal scenario would look like. A particularly contentious issue is likely to be whether the new regime imposes a general monitoring obligation on hosting, caching and conduit intermediaries. Article 15 of the E-Commerce Directive prohibits Member States from imposing such an obligation, but if the UK leaves the EU, this prohibition would fall away unless replicated in national legislation (given that Article 15 is an instruction to Member States rather than a substantive, implemented legal provision). Rights holders may see this as an opportunity to press for something akin to a general monitoring obligation as part of any new regime, whilst intermediaries will argue that to impose such an obligation would be unfair, contrary to fundamental rights of privacy and freedom of speech, and would make the UK market uncompetitive compared to the EU and the US.

Given the historic ties with the EU, and the undoubtedly desire to preserve the access to the single market, it might be expected that the starting point in any re-shaping of the law will be closer to the existing E-Commerce Directive principles. However, the European regime itself is under review. In May 2016, the European Commission issued a communication on the application of the hosting defence to online platforms as part of its Digital Single Market agenda. Whilst no concrete reforms are contemplated at present, the Commission did not rule this out absolutely and the issue is likely to be revisited in the future as the power and influence of platforms continues to grow and rights holders continue to argue that intermediaries should be required to do more to curb online infringement.

A key topic is whether the EU (or the UK, independently) should introduce some form of “notice and stay down” regime (as sought by many rights holders).

## Site Blocking Injunctions

Two other EU directives which are important to rights holders and intermediaries alike, and in particular ISPs, are the IP Enforcement Directive<sup>12</sup> and the InfoSoc Directive.<sup>13</sup> The InfoSoc Directive is the origin of section 97A Copyright, Designs and Patents Act 1988, which entitles rights holders to seek injunctive relief against intermediaries in cases of copyright infringement. A similar provision is also found in the IP Enforcement Directive in respect of all IP rights (as opposed to just copyright). Section 97A has now been relied upon extensively (especially in the UK) by rights holders to seek so-called “site-blocking injunctions”, which require ISPs to block access to specified websites hosting content which infringes copyright.

In the *Cartier* case, the scope of site-blocking injunctions was extended by the UK High Court to apply to websites which host content that infringes trade marks, notwithstanding the absence of an equivalent statutory provision.<sup>14</sup> The High Court’s decision was recently upheld by the Court of Appeal.<sup>15</sup> Key to the Court of Appeal’s reasoning was the intention of the IP Enforcement Directive to provide remedies against intermediaries in respect of all IP rights; this provided the principled basis upon which the inherent jurisdiction of the Court to grant injunctions could be extended.

Unlike the E-Commerce Directive, the IP Enforcement Directive has not been adopted by the EEA Joint Committee and therefore is not binding on countries within the EEA which are not EU Member States. This begs the question: would *Cartier* be decided in the same way if the UK were not bound by the IP Enforcement Directive and, consequently, will site-blocking injunctions still be available against websites that infringe IP rights other than copyright post Brexit?

The comments of Lord Justice Briggs are particularly interesting in this regard.<sup>16</sup> He said:

*“In my view, the courts could and probably would have developed this jurisdiction regardless of the requirement in the two Directives that it be made available as specified.”*

This statement leaves open the possibility that site-blocking injunctions in respect of IP rights other than copyright would still be available absent the IP Enforcement Directive. If this is correct, the logical consequence is that site-blocking injunctions should, in principle, also be available for non-IP rights such as privacy or defamation.

## Content Portability

In December 2015, the European Commission published draft regulations on content portability. The effect of these regulations will be to allow digital content subscriptions to be ported freely throughout the single market by preventing geo-blocking in certain circumstances. Geo-blocking restricts a user’s access to content on the basis of their territorial location and the Commission views this as an obstacle to a true digital single market. The proposed Regulations will permit customers to watch content they can view in their home state throughout the EU. From an EU law perspective, a consumer seeking to use a Netflix subscription or watch the iPlayer whilst abroad will be treated as if they were doing so at home. This is designed to get around the problem that content providers frequently do not have the right to license copyright in content across multiple jurisdictions, so licences are instead negotiated on a country-by-country basis.

As discussed above, EU Regulations are directly applicable, therefore, it is likely that the Regulation on content portability will become law in the UK prior to the UK leaving the EU. Post-Brexit, if the Regulation is no longer effective, a UK service provider will no longer be able to rely on the “localisation” rule to be able to offer content portability, and will therefore have to clear rights for every EU Member State. It would therefore seem likely to be in the interests of both consumers and content providers for any future relationship with the EU to preserve the content localisation provisions.

## SatCab Directive

The Satellite and Cable Directive<sup>17</sup> provides that satellite broadcasts are deemed to be made in the country from which the broadcast is initiated (rather than where the signal is received). This means that broadcasters only need to clear rights (crucially the communication to the public right) with content owners in that country (albeit content owners can still grant permission to broadcast on a country-by-country basis). The Directive also provides for a compulsory system of collective management of cable retransmission rights in order to facilitate cross-border retransmission between Member States (the UK implementation of this provision extends it to apply to all EEA member states, rather than just members of the EU).

If the UK leaves the EU (and the EEA), it will no longer fall within the scope of the Satellite and Cable Directive and other EU Member States may no longer recognise a broadcast originating in the UK as being cleared for all Member States. This could mean that such broadcasters will have to clear communication to the public rights in all states in which their broadcast is available. In contrast, as a result of the UK’s implementation of the Directive, broadcasters from remaining EEA Member States (including those in the EU) will continue to be entitled to clear rights in the country of origin which will continue to enable them to communicate their broadcasts to the public in the UK. This would seem to put the UK market at a significant competitive disadvantage compared to other Member States and may lead broadcasters to reorganise their operations so as to uplink their broadcasts in an EU Member State rather than the UK. There may also be significant knock-on effects for the activities of collecting societies, and contracts which cater for cross-border content transmission will need to be revisited.

## Exhaustion

Under the InfoSoc Directive, the exclusive right to distribute the original or copies of a copyright work in the EU is exhausted when the first sale or transfer of ownership of that work in the EU is made by the copyright owner, or with his consent. This is a form of “regional exhaustion”; where the first sale or transfer of the work occurs outside the EU, the exclusive distribution rights of the copyright holder may still be asserted within the EU. The InfoSoc Directive has been incorporated into the EEA Agreement and, therefore, the effective region is extended also to include Iceland, Liechtenstein and Norway.

Switzerland, however, is not a member of the EEA and applies a system of international exhaustion in relation to copyright works (as does the USA). This means that a rights holder’s exclusive right to distribute a copyright work expires upon the first distribution with his/her consent anywhere in the world.

If the UK leaves the EU (and the EEA) then rights holders in the EU would be able to prevent the re-sale in the EU of works sold in the UK and *vice versa*. If UK rights were not be exhausted by sales in the EU, they could potentially be used to prevent imports into the UK. This would be likely to have a detrimental effect on trade to and from the UK and so is likely to be avoided by the UK as part of its negotiations over access to the free market.

## Conclusion

If the UK does cease to be bound by EU copyright law, the primary concern in the short term will be to ensure that UK-based copyright protected content is not at a competitive disadvantage. This would mean ensuring, at least initially, that key provisions which promote cross-border content portability and common standards, such as the intermediary liability and SatCab regimes, are reproduced in UK law as the EU-derived legislation is unpicked.

In the medium term, making changes to copyright law in order to make the UK more competitive (for example, relaxing certain rules to promote innovation) is unlikely to be a top priority for the UK Government, but the UK will certainly become much freer to promote its own interests in this area. If changes are to be made, however, it would seem logical to seek to closely match the US regime or to continue to retain substantial harmonisation with the EU. Any in-between position risks leaving the UK unattractive and complex for both US and EU rights holders and other copyright stakeholders.

## Endnotes

1. Article 50 of the Treaty of the European Union sets out the legal mechanism by which Member States may withdraw from the European Union.
2. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
3. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.
4. See section 1 Copyright, Designs and Patents Act 1988.
5. See sections 77 and 78 Copyright, Designs and Patents Act 1988.
6. C-5/08 (at paragraph 39).
7. [2011] EWCA Civ 890 (at paragraph 20).
8. [http://europa.eu/rapid/press-release\\_IP-15-6261\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6261_en.htm).
9. *British Academy of Songwriters, Composers and Authors Musicians' Union & Ors, R (on the application of) vs Secretary of State for Business, Innovation and Skills & Anor* [2015] EWHC 2041 (Admin) (17 July 2015).
10. Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).
11. Electronic Commerce (EC Directive) Regulations 2002.
12. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.
13. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
14. *Cartier International and Others vs BSkyB and others* [2014] EWHC 3354 (Ch).
15. *Cartier International and Others vs BSkyB and others* [2016] EWCA Civ 658.
16. Whilst Lord Justice Briggs gave a dissenting judgment he agreed with the majority on this point.
17. Directive 93/83/EEC, which was implemented through the Copyright and Related Rights Regulations 1996, which made amendments to the Copyright, Designs and Patents Act 1988.

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Phil is ranked as a leading individual for Media & Entertainment in the *Chambers UK 2016 Guide*.

# Bird & Bird

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# United Kingdom



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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; and
- the work must meet UK qualification requirements, either through the nationality of its author or through its place of first publication.

#### 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 authors of the screenplay and 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 a logo can also potentially be protected by a trade mark.

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

Yes, but this is in the process of changing. 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). New legislation in 2016 repealed this provision in the UK with effect from 28 July 2016 so that all artistic works, whether or not made by industrial process, now benefit from copyright protection for the life of the author plus 70 years. There is currently a transitional period in place, ending on 28 July 2017, after which date any work created in reliance on 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.

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 authors, composers and music publishers in musical works;
- 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 administers the public performance rights of producers in sound recordings;
  - 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?**

On 10 April 2016, the Collective Management of Copyright (EU Directive) Regulations 2016 came into force. The new Regulations revoked the Copyright (regulation of relevant licensing bodies) Regulations 2014 which had previously been in place, and more completely implement the Collective Rights Management Directive into UK law.

Collecting societies 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 claiming 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
- recent 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 do 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 rights in their performances, as well as in the recordings or broadcasts of their performances.
- 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 not yet addressed how this applies to digital content protected by copyright.

## **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 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. PIPCU is an independent, national enforcement unit designed to protect and enforce existing rights.

## **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; incidental inclusion; educational use; use in libraries, archives and public administration; works permanently situated in public places; public interest; and copying for the visually impaired.

In June and October 2014, further exceptions to copyright infringements were enacted. These cover various topics, including:

- 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; and
- the use of copyright works for the purpose of:
  - parody, caricature or pastiche;
  - quotation; and
  - private copying.

However, in July 2015, the statutory instrument ("S.I.") relating to private copying was quashed by the High Court with prospective effect due to deficiencies in the way in which it was enacted. The UK government is considering whether to replace it with new legislation, but as a result, at present there is 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 the 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.

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**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?**

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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; or 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.

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

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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

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

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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 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 in the course of a business or in such a way as to prejudicially affect the copyright owner;
- causing an infringing public performance of a literary, dramatic or musical work;
- causing an infringing public showing of a sound recording or film; and
- circumventing technological measures or removing or altering electronic rights management information or dealing in devices meant for that purpose.

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

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Infringements carried out with knowledge and intent for a commercial purpose can attract criminal liability; there is no criminal liability where a protected work is copied but not made available for commercial sale or hire.

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.

## 7 Current Developments

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

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See the answer to question 1.6 for changes regarding the protection for copyright works which are made by an industrial process. There is also an intention to bring criminal sanctions for online copyright infringement 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).

It is unclear how the recent UK referendum decision to leave the EU will affect copyright in the UK, in particular, it now seems unlikely that Britain will adopt the Digital Single Market reforms due in September 2016. For a more detailed analysis of the implications on the effects of Britain's decision to leave the EU on UK copyright law, see chapter 1.

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**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.)?**

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The Advocate General has issued his opinion in Playboy's case against GeenStijl.nl in which the website linked to photos on an Australian site, which photos it knew to have been uploaded without Playboy's authorisation. The AG found that hyperlinks merely facilitate the finding of copyright works, but they do not "make available" those works where they are freely accessible on the internet. The CJEU's decision has not yet been handed down, but may revisit the important decision in the *Svensson* case on the communication to the public right.

In addition to the issues regarding the UK's implementation of the EU's changes to the Digital Single Market, it is also unclear what precedential value, if any, CJEU decisions relating to copyright will continue to have in the UK as a result of the UK's decision to leave the EU.

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Rebecca is a senior associate in Bird & Bird's intellectual property department. She was admitted to the New York Bar in 2005, qualified as an Irish solicitor in 2007 and was admitted to the roll of solicitors of England and Wales in October 2012.

Rebecca has represented major ISPs in litigation brought by the recorded music industry relating to peer-2-peer music downloading and the blocking of Pirate Bay websites. Rebecca has also worked extensively with customs authorities in relation to counterfeit goods on behalf of numerous global media, clothing, automotive, and food & drink organisations. As a result of this work, Rebecca was invited to be the Irish liaison between rightsholders and international customs authorities in the initial phase of the World Customs Organisations' innovative Interface Public-Members Tool project. More recently, Rebecca has acted in numerous actions involving copyright infringement relating to broadcasting sports events in pubs around the UK and in relation to infringing activity online.

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Phil has handled several Copyright Tribunal cases in relation to the licensing of music and newspaper content, including representing the media monitoring industry in the well-known Meltwater dispute. He also advises a wide range of clients on other copyright law related issues, including content owners and licensees in the music, publishing, broadcast and advertising industries.

Phil is ranked as a leading individual for Media & Entertainment in the *Chambers UK 2016 Guide*.

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