

The **Game is On!**

**UNDERSTANDING
COPYRIGHT:
A HANDBOOK
FOR TEACHERS**



UNDERSTANDING COPYRIGHT: A HANDBOOK for TEACHERS

A free resource from the makers of *The Game is On!*

By Ronan Deazley and Bartolomeo Meletti

Version 1.0

April 2019

Produced with the support of the UK Intellectual Property Office

The teaching materials developed to accompany *The Game is On!* are made available under a CC-BY 4.0 licence (a creative commons licence). This means that you can share, remix, adapt and build on this content for any purpose – including commercial purposes – so long as you give an appropriate credit to the authors of the content. You can find out more about the CC-BY 4.0 licence [here](#).

TABLE OF CONTENTS

INTRODUCTION	1
Using this Handbook with <i>The Game is On!</i>	
But Why Use this Resource?	
Copyright and Creativity	2
Copyright: Where to Find the Law	3
Other Intellectual Property Rights	
This Handbook Provides Guidance (Not Legal Advice)	4
 1. WHAT COPYRIGHT DOESN'T PROTECT	 5
1.1. The difference between a work and the copyright in the work	
1.2. Idea and expression	
1.3. Copyright is not a monopoly right	7
1.4. Public Policy	
 2. WHAT COPYRIGHT PROTECTS	 9
2.1 Literary works	
2.2. Dramatic works	10
2.3. Musical works	11
2.4. Artistic works	12
2.4.1. Works of architecture and architectural drawings	14
2.4.2. Works of artistic craftsmanship	
2.5. Sound recordings	15
2.6. Films	16
2.7. Broadcasts	
2.8. Typographical arrangements	17
 3. PROTECTION CRITERIA: WHEN IS A WORK PROTECTED?	 19
3.1. Fixation	
3.2. Originality	20
3.3. Qualification	21
3.3.1. Qualification and the international copyright regime	22
 4. AUTHORSHIP AND OWNERSHIP OF COPYRIGHT WORKS	 23
4.1. Authorship	
4.2. Works of unknown authorship	24
4.3. Works of joint authorship	
4.4. Authorship and ownership	25
4.5. Joint authorship and joint ownership	

4.6. The implications of joint authorship	26
4.7. Work created by employees	
4.8. Freelance work	28
5. ECONOMIC RIGHTS AND INFRINGEMENT	29
5.1. Copyright Infringement	
5.2. Primary infringement and the acts restricted by copyright	
5.2.1. Copying: the reproduction right	30
5.2.2. Issuing copies to the public: the distribution right	31
5.2.3. Renting or lending to the public	32
5.2.4. Performing, showing or playing the work in public	
5.2.5. Communication to the public: the communication right	
5.2.6. Adaptation	33
5.3. Infringement and causal connection	
5.4. Infringement and the 'substantial part' of a work	34
5.5. Infringement and non-literal copying	36
5.6. The acts restricted by copyright: strict liability offences	
5.7. Authorising another (without permission)	37
5.8. Secondary Infringement	
5.9. Consequences of infringement: legal remedies	38
6. DURATION OF PROTECTION: THE COPYRIGHT TERM	41
6.1. Duration of protection under the CDPA	
6.2. Literary, dramatic, musical and artistic works	
6.2.1. Songs and other co-authored musical compositions	
6.3. Films	42
6.3.1. Films without a designated person	
6.4. Sound recordings	43
6.5. Broadcasts	
6.6. The typographical arrangements of published editions	44
6.7. Works of unknown authorship	
6.8. Computer-generated works	
6.9. Summary table	
7. MORAL RIGHTS	47
7.1. Attribution and Integrity: some common features	
7.2. The Right of Attribution	
7.2.1. When does it apply?	
7.2.2. The need to assert your rights	48
7.2.3. Scope of protection	49

7.2.4. When infringement occurs	49
7.2.5. Works created by employees	50
7.2.6. Exceptions to the right	
7.3. The Moral Right of Integrity	51
7.3.1. When does it apply?	
7.3.2. Scope of protection	
7.3.3. When infringement occurs?	
7.3.4. Work created by employees	52
7.3.5. What is a derogatory treatment of a work?	53
7.3.6. Is the treatment prejudicial to the honour or reputation of the author?	
7.4. Infringement of moral rights, enforcement and damages	54
7.5. Moral rights on death: who inherits?	
8. GETTING PERMISSION TO USE	55
8.1. Assignments	
8.2. Licences	
8.3. Creative Commons and Open Licences	56
8.4. Collecting Societies	
8.5. Collecting Societies and Schools	57
8.6. Copying that is permissible under a licence: An Overview	58
9. LAWFUL USE WITHOUT THE NEED FOR PERMISSION	79
9.1. Ideas, facts, information, theories and themes	
9.2. Insubstantial copying	80
9.3. The permitted acts: limitations and exceptions to copyright	
9.4. Fair dealing	81
9.5. Sufficient acknowledgement	82
9.6. Exceptions for quotation, criticism and review	
9.6.1. Is the work being used for the purpose of criticism and review?	83
9.6.2. Has the work been made available to the public?	85
9.7. Exception for reporting current events	
9.7.1. The public reporting of current events	86
9.8. Exception for parody	
9.9. Exception for preservation	88
9.10. Public recitation or reading	
10. LAWFUL USE WITHOUT PERMISSION: EXCEPTIONS FOR EDUCATION	89
10.1. Copying by individuals	
10.1.1. Research and private study	
10.1.2. Accessible copies for the use of a disabled person	
10.2. Copying for others	90

10.2.1. Copying by librarians: published work	90
10.2.2. Making accessible copies by authorised bodies	91
10.3. Exceptions for education and instruction	
10.3.1. Illustration for Instruction	
10.3.2. Performing, playing or showing a work in the course of activities of a school	92
10.3.3. Lending of copies by schools	
10.4. Exceptions and licensing schemes	
10.5. Copyright exceptions and contract law	94
11. OTHER USEFUL RESOURCES	97

INTRODUCTION

This Copyright Handbook has been produced to accompany the web resource *The Game is On!* (although it can be used independently of that resource). It provides a comprehensive and authoritative introduction to the law of copyright in the UK, but in language that is accessible and user-friendly. The Handbook also features examples, case studies and illustrations to help explain the points of law being discussed.

Copyright is complicated. It can make people feel uncertain and anxious, especially when trying to understand how it affects their professional practice. We hope this resource helps to remove some of that mystery and uncertainty.

We hope the Handbook is useful both for your personal learning and development, and for use in the classroom. If you don't think it is, or you have any suggestions about how the Handbook could be developed, please let us know. We are always keen to improve on the quality and the usefulness of this resource.

You can contact us here: copyrightuserteam@gmail.com.

USING THIS HANDBOOK WITH *THE GAME IS ON!*

This Handbook can be used by anyone – whether a teacher or not – to learn about copyright law in the UK.

However, we presume that most people will use this Handbook in association with *The Game is On!* resource – as a tool for copyright education. With that in mind, we have tried to make clear connections between this Handbook and the **Case Files** that accompany each of the animated episodes of *The Game is On!* series. So, throughout the Handbook we explicitly direct you to Case Files relevant to the topic under discussion. (See, for example, the end of the next section.)

The Case Files are intended for use in the classroom.

This Handbook is intended to ensure that you, as the teacher, have a straightforward but authoritative explanatory text to rely on when planning or delivering lessons about creativity, copying and copyright.

BUT WHY USE *THIS* RESOURCE?

Other copyright education resources exist, so why use this one?

One of the reasons why we began to develop *The Game is On!* series was to address an obvious gap in some of the existing copyright education resources that had already been developed for use in schools.

These other resources are often very imaginative and can be very informative about certain aspects of copyright law. But they tend to focus on what rights exist and when you need permission to make use of someone's work. And yet, the copyright regime

allows for lots of situations in which you can make use of another person's work without the need for permission or paying any kind of fee.

That is, while copyright law tells us there are certain things that we cannot do without permission, the law also expressly tells us there are lots of ways in which we can make use of another person's work, without the need for their permission, whether it is for certain creative, informative, educational or other purposes. In other words, depending on the circumstances, copying without permission is perfectly lawful. Moreover, we believe that copying is a perfectly normal – perhaps necessary – aspect of creativity and the creative process. We discuss this further in the next section.

So, with *The Game is On!* and with this accompanying Handbook, we hope to help teachers to help students understand copyright from a well-rounded perspective.

It's essential to understand and appreciate the importance of copyright for authors and other creators, and it's important to learn to respect the economic and moral rights those authors and other creators enjoy.

At the same time, we believe that students should learn about the opportunities for creative copying that copyright allows, and about the public policy goals that copyright enables, whether that involves reporting the news in a society that values free speech for journalists, whether it is carrying out scientific or other forms of research, or, indeed, whether it concerns improving the quality of the learning experience in the classroom by allowing teachers to make use of other people's work for illustrative purposes.

For a case file about the nature of copyright education, and the approach that some resources take, see **CASE FILE #33: THE (IN)COMPLETE MESSAGE**.

For a case file concerning why we create, and the justification for copyright, see **CASE #10: THE UNCERTAIN MOTIVE**.

COPYING AND CREATIVITY

In the previous section we said that, in our opinion, copying is a perfectly normal – perhaps necessary – aspect of creativity and the creative process.

This was another reason for developing *The Game is On!* We wanted to make an openly available resource that provides an opportunity to explore, discuss and debate key principles and ideas underpinning copyright law, creativity, and the limits of lawfully appropriating and reusing people's work.

But we also wanted to do more than this. Through *The Game is On!* we wanted to **demonstrate** how copyright enables creative possibilities. In adopting **appropriation as a creative technique**, each of our films in the series speak to the positive, expressive power of the copyright regime by embracing and evidencing the creative reuse of public domain and copyright materials.

Across all six films, in just over 20 minutes, we have copied, borrowed from and been influenced by other people's ideas and copyright works around 500 times (or, on average, approximately twice every five seconds). The works we have borrowed from

take many different forms: novels and short stories, paintings, film posters and photographs, melodies and musical scores, television and film, costume and set designs, history, science and academia, real-world copyright litigation, and much more.

We explain the many different ways in which we copied for *The Game is On!* in **CASE FILE #33: THE (IN)COMPLETE MESSAGE**.

In addition, each film is accompanied by a comprehensive set of **ANNOTATIONS**, identifying and explaining all of the source material we have copied from, or been influenced by, in making *The Game is On!* In these annotations, you'll also find a lot of additional information about some of these source materials.

Finally, we have also produced an illustrated essay on Copying, Creativity and Copyright, that explores the relationship between copying and creativity in further depth, while making use of the first episode of *The Game is On!* as an illustrative case study. You can find that essay here: www.create.ac.uk/publications/copying-creativity-and-copyright/

COPYRIGHT: WHERE TO FIND THE LAW

UK copyright law is set out in the **Copyright Designs and Patents Act 1988** (which has been updated on numerous occasions since it was first passed). Throughout this Handbook we will refer to the 1988 Act as **the CDPA**.

At 327 pages long, the **CDPA** cannot be described as an easy or enjoyable read. Some of the provisions, and the language used within the Act, can be quite complicated. In this Handbook we have tried to strip away much of that complexity, and to make key ideas and aspects of the law as accessible and understandable as possible.

That said, at times, you may find it helpful to refer to the Act, or to make copies of specific sections of the Act for use in the classroom (this is perfectly permissible).

You can find the entire Act, here:

<http://www.legislation.gov.uk/ukpga/1988/48/contents>

OTHER INTELLECTUAL PROPERTY RIGHTS

The Game is On! including all of the accompanying materials is primarily concerned with copyright law. But copyright is just one type of intellectual property right. There are many others including, for example, patents, trade marks, trade secrets, and more.

We do not address these other types of rights in this resource apart from **performers rights**, which provide musicians, actors and other live performers with the right to control the making and sale of live performances. Performers rights are similar in nature to copyright.

For case files concerning performers' rights, see **CASE FILE #26 (THE RECORDED PERFORMANCE)**, and **#27 (THE INTERVIEW TAPE)**.

THIS HANDBOOK PROVIDES GUIDANCE (NOT LEGAL ADVICE)

Hopefully, this Handbook has a meaningful role to play in developing your understanding of copyright law and becoming more confident in explaining the basic principles of copyright to others.

But we also want you to feel more confident in making use of copyright materials in your own practice. That is, this Handbook should help you realise that copyright does not (and should not) impede your ordinary everyday practice in the classroom, either because the law allows you to make use of works in certain ways without having to ask for permission, or because your institution already has permission (in the form of a licence) to make copies of certain works for educational and other purposes.

But it is also important to stress that this Handbook does not constitute legal advice. We discuss the law, and legal principles, in general terms only. If you are developing a teaching initiative or other project that is not expressly addressed by the commentary in this Handbook, and you are unsure about the copyright implications, it is probably worth seeking further guidance and advice on your plans.

1. WHAT COPYRIGHT DOESN'T PROTECT

Before getting to grips with the types of work that copyright protects, it is worth first considering what copyright does *not* protect. There are four issues to think about here: (i) the difference between the work and the copyright in the work; (ii) the difference between an idea and the expression of that idea; (iii) that copyright is not a monopoly right; and, (iv) immoral or indecent works.

1.1. THE DIFFERENCE BETWEEN A WORK AND COPYRIGHT IN THE WORK

It is important to realise that owning the copyright in a work does not necessarily mean that you own the work itself (and vice versa). They are two distinct forms of property. Consider for example a work of art: a painting. Copyright regulates the exploitation of the work by controlling the reproduction and re-use of *the image*. But owning *the painting* does not mean you have the right to make copies of the painting; that lies with the owner of the copyright. That is, you might sell the painting since you own it, but you may not sell reproductions of it since you do not own the copyright in it.

1.2. IDEA AND EXPRESSION

Copyright does not protect the idea for a work, only *the expression of that idea*. In *Donoghue v. Allied Newspapers* (1938) Mr Justice Farwell observed that:

[T]here is no copyright in an idea, or in ideas. A person may have a brilliant idea for a story, or for a picture, or for a play, and one which appears to him to be original; but if he communicates that idea to an author or an artist or a playwright, the production which is the result of the communication ... is the copyright of the person who has clothed the idea in form, whether by means of a picture, a play or a book, and the owner of the idea has no rights in that product.

An original novel is protected by copyright. To reproduce the novel in its entirety without permission would clearly infringe the author's copyright. However, consider the following plot:

Boy meets girl and they fall in love; but they come from two very different backgrounds (rival families, if you like); they conceive a plan to marry in secret; the plan goes wrong; the young lovers die tragically.

Is this basic plot – this idea for a novel, or a play, or a musical, or a film – protected by copyright? Almost certainly not. But, while the basic idea for the story may not be protected, the way in which an author *expresses that idea* will be protected (whether by novel, play, song, and so on). Indeed, this basic plot was taken from *Romeo and Juliet*, which has influenced many subsequent works, including Emily Brontë's *Wuthering Heights* and Leonard Bernstein's *West Side Story*; both works make use of ideas from Shakespeare's play rather than copying the play itself.

But, how and where do you draw the line between an idea and the expression of that idea? This is not always easy to do.

Consider, for example, the case of *Temple Island Collections v. New English Teas* (2012), discussed in **CASE FILE #1: THE RED BUS**.

The photograph in Image 1.1 was taken by the claimant, who wanted to create a modern and iconic scene of London to be used on souvenirs. Using Photoshop and taking inspiration from the film *Schindler's List*, Mr Fielder edited the photo to make the red bus stand against a black and white background. He also removed the sky and some people from the picture. In 2010 the defendant, who was aware of the existence of the claimant's picture, took three photos of the Houses of Parliament and one of a red Routemaster bus. These photos were edited together with another iStockphoto image of a red Routemaster bus to create the picture on the right, which was used on souvenir tins for tea (see Image 1.2).



Image 1.1: The claimant's picture

The defendant argued that the claimant could not rely on copyright law to establish a monopoly on black and white images of the Houses of Parliament with a red bus in frame. These elements, he suggested, were 'common elements' in everyday life, and could not be protected by copyright. In effect, he argued that while he may have borrowed the idea of a red bus in front of a black and white depiction of the Houses of Parliament, he had not copied the claimant's work (the expression of that idea).



Image 1.2: The defendant's picture

Mr Justice Birss held in favour of the claimant: the defendant had copied a substantial part of the claimant's picture and so had infringed his copyright.

Many academic commentators considered this decision quite controversial. In many respects, Westminster Bridge, the Houses of Parliament and a Routemaster bus are at the same time iconic and commonplace: they provide a shorthand for communicating that *this is London*. And while the defendant obviously did copy the original work, it is less clear whether he copied anything more than the claimant's idea in creating his own work.

In the end, as Lord Hailsham once commented in *LB (Plastics) v. Swish Products* [1979], '[i]t all depends on what you mean by ideas'.

For other case files that discuss the relationship between (unprotected) ideas and the (protected) expression of those ideas, see **CASE FILE #7 (THE MATCHING WALLPAPER)**, **#16 (THE PANTAGES)**, **#21 (THE SIX DETECTIVES)**.

1.3. COPYRIGHT IS NOT A MONOPOLY RIGHT

Copyright does not provide the copyright owner with a true form of monopoly protection. Copyright prevents others from copying your work (whether they have copied consciously or not), but it does not prevent others from making use of very similar or even identical works they have independently created.

In *Francis Day & Hunter v. Bron* (1963) Lord Justice Upjohn commented that there must be a *causal connection* between the alleged infringer's work and that of the copyright owner. That is, the infringer must *actually copy* the copyright owner's work. He continued that 'if it is an independent work, then, though identical in every way, there is no infringement'.

In truth, the likelihood of two individuals independently creating two identical or near identical works within a commercial context is extremely small. However, imagine two tourists taking photographs of a famous landmark on the same day from a very similar (if not identical) vantage point one after the other. They may well have created identical or near-identical images, each of which would qualify as an independent copyright work.

1.4. PUBLIC POLICY

Historically, as a matter of public policy, the courts have refused to protect works they consider to be immoral, obscene, scandalous, or irreligious.

In *Glynn v. Weston Feature Films* (1916) the defendant made a film, *Pimple's Three Weeks*, which the claimant alleged was based upon her novel, *Three Weeks*. Mr Justice Younger refused to protect the claimant's work, commenting as follows:

Stripped of its trappings [the claimant's work] it is nothing more nor less than a sensual adulterous intrigue ... [I]t is clear that copyright cannot exist in a work of a tendency so grossly immoral as this, a work which, apart from its other objectionable features, advocates free love and justifies adultery where the marriage tie has become merely irksome.

Over 100 years later, Younger J's attitude may seem paternalistic and somewhat prudish. But as recently as February 2000 Lord Justice Aldous in *Hyde Park Residence* (2001) reaffirmed the proposition that any work that was 'immoral, scandalous or contrary to family life' would be refused copyright protection before the courts. In practice, however, the courts today are likely to be much more open-minded than was the case in *Glynn*.

Another illustration of the courts refusing protection on public policy grounds is *Attorney-General v. Observer* (1988). This case concerned *Spycatcher*, a book by Peter Wright, a former member of MI5, published in breach of the Official Secrets Act 1911.

In the House of Lords, Lord Griffiths cited *Glynn v. Weston Feature Films* with approval and continued that Wright would not be entitled to bring an action for copyright infringement before the UK courts because of the ‘disgraceful circumstances’ under which the book had been written.

The *Spycatcher* case is discussed in **CASE FILE #8: THE DREADFUL IMAGES.**

2. WHAT COPYRIGHT PROTECTS

Not every work is protected by copyright. In the UK at present, copyright only protects certain types of work and under certain conditions. Determining whether a work is protected by copyright is always the first step to take in deciding whether and under what circumstances you can make use of that work in your personal or professional life.

The Copyright, Designs and Patents Act 1988 (the CDPA) underpins the copyright regime within the UK. The CPDA first came into force on 1 August 1989. The CDPA sets out a detailed list of eight different types of work protected by copyright (s.1). These are:

- original literary, dramatic, musical and artistic works (s.1(1)(a))
- sound recordings, films and broadcasts (s.1(1)(b))
- the typographical arrangement of published editions (s.1(1)(c))

While all eight types of protected subject matter are referred to in the legislation as ‘works’, it is important to appreciate that more than one copyright may subsist in a single cultural product or creation. For example, a recording of a song: there may be copyright in the lyrics, in the music, in the arrangement, and in the sound recording itself. With a film, there may be copyright in the original story, in the screenplay (as a dramatic work), in the musical score, as well as in the film (as a recording). It is important to be able to identify the different types of copyright that may be involved as each may have a different author and/or owner.

If the work you have created does not fall within one of the eight categories, then it will not be protected by copyright. This is neatly illustrated by a Dutch case that was referred to the Court of Justice of the European Union (the CJEU). The applicants were trying to establish that they should be able to claim copyright in the taste of the spreadable cheese (called Heks’nkaas). The Court rejected their argument. The taste of their cheese was not capable of being protected as a copyright work.



Image 2.1: The claimant’s original spreadable cheese

Next, we consider each of the eight categories of work in turn.

For a case file concerning these categories of copyright-protected work, see **CASE FILE #23: THE EIGHT CATEGORIES**.

2.1. LITERARY WORKS

Literary works were the first type of work to receive statutory protection in the UK under the Statute of Anne 1710. Under the CDPA they are defined to include: ‘any work, other than a dramatic or musical work, which is written, spoken or sung,’ including:

- a table or compilation (other than a database)
- a computer program
- preparatory design material for a computer program, and

- a database (s.3(1))

Literary works include those things we normally think of as literature (novels, short stories, poetry) as well as the ordinary and the banal such as listings of stock exchange prices, a trade catalogue, business letters, a street directory, railway timetables, a 25-letter grid for a newspaper-based bingo game, an instruction manual for a toy, and so on.

For this reason, it is important to bear in mind that the term ‘literary work’ implies no condition of literary merit or style. When the courts have had to decide whether something is a literary work, they have tended to rely on the test set out in *Hollinrake v. Truswell* (1894) in which the Court of Appeal suggested that to qualify as a literary work, the work must provide ‘either information or instruction, or pleasure, in the form of literary enjoyment’.

One of the more significant decisions in recent times concerning the concept of a literary work is *NLA v. Meltwater* (2010) in which Mrs Justice Proudman had to consider whether copyright exists in the headline for a newspaper article as a standalone literary work. Noting that ‘headlines involve considerable skill in devising’, and ‘are specifically designed to entice by informing the reader of the content of the article in an entertaining manner,’ Proudman J concluded that ‘headlines are capable of being literary works, whether independently or as part of the articles to which they relate.’

For case files concerning literary works, see **CASE FILE #13 (THE MULTIPLE RIGHTS), #20 (THE LAWFUL READER), AND #27 (THE INTERVIEW TAPE)**. For a case file concerning the protection of software as a literary work, see **CASE FILE #31: THE ARCADE AND THE APP**. And finally, for a case file concerning the copyright status of an interview, see **CASE FILE #27: THE INTERVIEW TAPE**.

2.2. DRAMATIC WORKS

Dramatic works were first protected as a distinct category of protected subject matter by the Dramatic Literary Property Act 1833. The CDPA provides a limited definition in setting out that a dramatic work ‘includes a work of dance or mime’ (s.3(1)).

In *Norowzian v. Arks Ltd* (1999) the claimant had made a short film, *Joy*, with a single dancer as the protagonist. This case is discussed in **CASE FILE #23: THE EIGHT CATEGORIES**.

The film had no dialogue and made use of an editing technique referred to as ‘jump cutting’. Arks, who were the advertising agents for the Guinness group, approached Norowzian to make an ad campaign entitled *Anticipation*, influenced by *Joy*. Norowzian refused; Arks made their ad campaign anyway (you can watch the advert [here](#)).

Norowzian alleged infringement arguing that his film was a dramatic work. In the High Court the judge held that *Joy* could not be a recording of a dramatic work as the editing technique employed created a visual image that could not be recreated in the real world. That is, a work of dance or mime had to be capable of being performed. In the Court of Appeal, however, it was held that the expression ‘dramatic work’ should be given its

ordinary and natural meaning, which was *a work of action, with or without words or music, which was capable of being performed before an audience*. The court continued that a film could be *both* a recording of a dramatic work but also a dramatic work in that it was a work of action that was capable of being performed before an audience.

So, from *Norowzian*, a ‘dramatic work’ has two components: it must be a ‘work of action,’ and it must be ‘capable of being performed’. And, in relation to the latter, we now know that a film itself might amount to a dramatic work as it is capable of being performed (that is, performed before an audience).

2.3. MUSICAL WORKS

Music embodied in print form (that is, sheet music) has been protected by copyright since *Bach v. Longman* (1777) in which Lord Mansfield held that music was a form of ‘writing’ that qualified for protection under the Statute of Anne 1710.

Today, a musical work is defined as ‘a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music’ (s.3(1)).

The most significant recent decision to consider the concept of ‘music’ under the CDPA is *Sawkins v. Hyperion Records* (2005). This case concerned the efforts of Sawkins in producing what are referred to as ‘performing editions’ of four works by the seventeenth century composer Michel-Richard de Lalande. These efforts included ‘figuring of the bass’, as well as adding ‘ornamentation’ and performance directions. When Hyperion Records made recordings of the performances of the works using Sawkins’ scores, Sawkins alleged copyright infringement. They denied that he had created an original musical work, given that his contributions involved no alteration of the notes or melody. The Court of Appeal held for Sawkins. Lord Justice Mummery observed that the essence of music is the:

[C]ombining of sounds for listening to. Music is not the same as mere noise. The sound of music is intended to produce effects of some kind on the listener’s emotions and intellect. The sounds may be produced by an organised performance on instruments played from a musical score, though that is not essential for the existence of the music or of copyright in it ...

There is no reason for regarding the actual notes of music as the only matter covered by musical copyright, any more than, in the case of a dramatic work, only the words to be spoken by the actors are covered by dramatic copyright. Added stage directions may affect the performance of the play on the stage or the screen and have an impact on the performance seen by the audience. Stage directions are as much part of a dramatic work as plot, character, and dialogue.

For the Court of Appeal, copyright protects more than the actual notes in a piece of music; other elements that contribute *to the sound as performed* such as tempo and performance practice indicators can also be copyright protected.

For further discussion, see **CASE FILE #28: THE MUSICIAN AND THE MACHINE**.

In practice, what qualifies as ‘music’ is rarely likely to give rise to any great problem. What is clear, however, is that lyrics, actions, and so on, that accompany the music, are not protected as part of the musical work but are copyright works in themselves (that is, as literary or dramatic works).

2.4. ARTISTIC WORKS

The first artistic works to be granted copyright protection were engravings (Engravers’ Copyright Act 1735). These were followed by certain works of sculpture (in 1798 and then in 1814), drawings, paintings, and photographs (in 1862) and ‘works of artistic craftsmanship’ (in 1911).

The CDPA defines artistic works to include:

- Graphic works, photographs (excluding a film), sculptures and collages irrespective of artistic quality (s.4(1)(a))
- Works of architecture being a building or a model for a building (s.4(1)(b))
- Works of artistic craftsmanship (s.4(1)(c))

A photograph is defined as ‘a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film’ (s.4(2)). This definition ensures that digital photographs are protected in the same way as photographs captured on more traditional media, such as photographic film.

Moreover, graphic works are further defined by the Act to include: paintings, drawings, diagrams, maps, plans, charts, engravings, etchings, lithographs, woodcuts, or any similar works (s.4(2)) (a non-exhaustive definition).

It is worth noting that the categories of artistic work in s.4(1)(a) – that is, graphic works, photographs, sculptures and collages – are protected by copyright *irrespective of artistic quality*. That is, the courts are not required to make judgements about the aesthetic merit of the work in question; so long as the work falls within a specific category of artistic work, and meets the other relevant protection criteria, the work is protected.

However, at times, the courts have been quite conservative in how they understand and define the concept of an artistic work. Consider, for example, *Creation Records v. Newsgroup Newspapers* (1997). This case concerned the artwork for the 1997 Oasis album *Be Here Now*. Noel Gallagher supervised the placing of various objects (including the band members) around a hotel swimming pool to be photographed for use as the album cover. *The Sun* newspaper arranged for a freelance photographer to go to the hotel and try and take photographs of the shoot. The photoshoot was not a closed set and the freelance photographer was able to take photographs of the band from a similar position to the official photographer. When the newspaper published their ‘unofficial’ photograph (similar but not identical to the artwork used on the album), and offered it for sale as a poster, Creation Records sought an injunction alleging infringement of its copyright (Image 2.2).



News International  CAPTION IN FILE INFO
PLEASE CLEAR ALL RIGHTS WITH
N. I. SYNDICATION, 1 VIRGINIA STREET, LONDON, E98 1XY.
Tel. 020 7782 5400 Fax 020 7782 5353
E-mail syndication@nisyndication.com

Image 2.2: The image taken by the freelance photographer on behalf of *The Sun*

As the freelance photographer had not copied the actual photograph taken by Creation Records but had simply photographed the same scene, Creation Records argued that copyright existed in the scene itself, either as a work of sculpture or collage. Mr Justice Lloyd rejected both arguments.

Works of sculpture, he observed, typically involved chiselling stone, carving wood, modelling clay and casting metal. As no element of the work in question had been carved, or modelled, the judge decided it could not be a work of sculpture.

And as for works of collage, he held that they must involve, as an essential element, the sticking of two or more things together; it was not enough to point to the ‘random, unrelated and unfixed elements’ in the photograph in question. In other words, without glue there could be no collage. As such, the scene did not fall qualify as an artistic work under the CDPA.¹

The very literal approach that Lloyd J took to the definition of these two types of artistic practice (sculpture and collage) has attracted much criticism. It is an approach that is rooted in a very traditional understanding of what it means to create works of art, and how art should be defined. For example, think about *Equivalent VIII* (otherwise known as *The Bricks*) a work by the American minimalist artist Carl Andre. *Equivalent VIII* (1966) is made up of 120 fire bricks arranged in two layers, and side by side, in a rectangular pattern (Image 2.3). According to Lloyd J’s logic, this would not qualify as a work of

¹ In this case, the claimants also argued that the scene might be understood to be a dramatic work. Lloyd J also rejected this argument on the basis the scene that was being photographed lacked story, movement or action. As such it could not constitute a dramatic work.

sculpture under the CDPA in that it did not involve any chiselling, carving, modelling or casting by the artist. And yet, one of the major contributions that Andre made to 20th century art was to move sculpture away from chiselling, carving and modelling and towards positioning and placing raw materials. No doubt TATE, who purchased this work in 1976, considers *Equivalent VIII* to be a work of sculpture.

For case files concerning artistic works, including photographs, see **CASE FILE #1 (THE RED BUS)** and **#30 (THE CREATIVE COPY)**.



Image 2.3: *Equivalent VIII* (1966) by Carl Andre, © Carl Andre/VAGA, New York and DACS, London 2017 (image available [here](#))

2.4.1. WORKS OF ARCHITECTURE AND ARCHITECTURAL DRAWINGS

A work of architecture is defined as ‘a building or a model for a building’, and a building is defined to include ‘any fixed structure, and a part of a building or fixed structure’. The term ‘structure’ is not defined in the legislation. The London Eye or the Nemesis rollercoaster at Alton Towers are good examples of structures that would qualify for copyright protection as a ‘fixed structure’, but so too would more ordinary structures, such as a bridge, an outdoor swimming pool, or a garden that was landscaped to include features such as stone walls, steps and a pond.

It is important to note that while a building or structure is protected by copyright under s.4(1)(b), the architect’s original drawings or plans will also be protected by their own copyright under s.4(1)(a).

For a case file concerning works of architecture, see **CASE FILE #3: BAKER STREET**.

2.4.2. WORKS OF ARTISTIC CRAFTSMANSHIP

As a category of protected subject-matter, works of artistic craftsmanship were first introduced by the Copyright Act 1911. The type of works that will be protected under this heading might include items of hand-made jewellery, clothes and furniture, stained glass windows, wrought-iron gates and book bindings (see, for example, the comments Lord Simon in *George Hensher v. Restawhile Upholstery* (1974)).

Importantly, whereas works within s.4(1)(a) are protected irrespective of artistic quality, works falling in s.4(1)(c) must be *artistic*. Moreover, they must also be works of *craftsmanship*. Let’s consider the latter criteria first.

As might be evident from the examples given, when deciding whether something is a work of craftsmanship the courts have tended to emphasise that creating the work requires ‘special training, skill and knowledge’ or that the work is ‘a durable, useful

handmade object’ (Lord Simon and Lord Reid in *George Hensher*). Knitting and tapestry-making have been considered crafts for this purpose (*Vermeest v. Boncrest* (2001)).

But, when will a work of craftsmanship be considered artistic? Not surprisingly, the courts have not always been clear or consistent on this issue. This is well illustrated by the decision of the House of Lords in *George Hensher*. This case concerned a prototype for a suite of furniture designed and produced by George Hensher Ltd. The prototype was developed for mass-production and sale to the public under various names, such as the ‘Denver’, the ‘Florida’ and the ‘Bronx’ (Image 2.4).

All five Lords decided that the prototype was not artistic, and so did not qualify for protection as a work of artistic craftsmanship. However, they all arrived at that decision for different reasons. For example, when deciding whether a work was artistic, Lord Reid suggested one should ask whether a substantial section of the public admired the work for its appearance. Lord Morris preferred to rely on expert opinion. Lord Kilbrandon emphasised that what mattered was whether the craftsman intended to create something artistic. Lord Simon agreed with Lord Kilbrandon, but also suggested it would be relevant to take into account the opinion of the craftsman’s peers. For Lord Dilhorne, the answer to the question was a matter of intuition.



Image 2.4: The Denver suite: just one of a range of mass-produced suites based on the claimant’s original prototype. Image available as part of the CILIP [Virtual Museum](#) of intellectual property cases.

Unfortunately, subsequent decisions have done little to clarify the law on this problematic issue. What might or might not be considered artistic is always likely to prove somewhat controversial.

2.5. SOUND RECORDINGS

Sound recordings were first afforded protection under the *Copyright Act 1911* in which they were protected *as if they were musical works*. Under the CDPA a sound recording is defined as: ‘(a) a recording of sounds, from which the sounds may be reproduced, or (b) a recording of the whole or part of a literary, dramatic or musical work, from which the sounds reproducing the work or part may be produced, [and] regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced’ (s.5A(1)). As a result, the Act provides protection for vinyl records, tapes, compact discs, digital audio tapes and any other media used to embody recordings, such as a pin roll from a music box or punched tape used in a barrel organ.

For case files concerning sound recordings, see **CASE FILE #28 (THE MUSIC AND THE MACHINE)** and **#29 (THE DOUBLE SCORE)**.

2.6. FILMS

Under the CDPA a ‘film’ is defined as a recording on any medium from which a moving image may be produced by any means (s.5B(1)), a broad definition which encompasses celluloid films, video recordings, disks, and so on. Moreover, following the Court of Appeal’s decision in *Norowzian* (discussed in section 2.2), a film itself might qualify as a dramatic work, of which the director and the scriptwriters may be co-authors.

Films created before 1 June 1957 are protected either as a series of photographs or as a dramatic work. For further details, see *Duration of Copyright*, section 6.

For case files concerning films, see **CASE FILE #13 (THE MULTIPLE RIGHTS)**, **#22 (THE TWO HEADS)**, **#23 (THE EIGHT CATEGORIES)**, and **#29 (THE DOUBLE SCORE)**.

2.7. BROADCASTS

Broadcasts are different from all other categories of copyright-protected work. A broadcast does not involve the creation of a work *per se*, as is the case with literature, drama and art, or when making a sound recording; rather, it involves the provision of a service (an action). Broadcasts are not fixed (although they can be) but are ephemeral acts of communication. That is: to protect a broadcast is to protect *the signal* which is transmitted.

A broadcast is defined as an: ‘electronic transmission of visual images, sounds, or other information which: (a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them; or (b) is transmitted at a time determined solely by the person making the transmission for presentation to members of the public’ (s.6(1)).

The requirement that transmissions should be ‘electronic’ means the protection provided by the legislation covers transmission both by wire and wireless, terrestrial and satellite transmission, as well as analogue and digital broadcasts. And by referring to ‘visual images, sound, or other information’ the definition will also cover a broad range of content, such as radio and television.

Importantly, the CDPA **specifically excludes ‘any Internet transmission’** from the definition of a broadcast. However, this is subject to some exceptions. For example, an internet transmission will fall within the definition of a broadcast if it is taking place simultaneously on the internet and by other means, or if it is a concurrent transmission of a live event (see s.6(1A) for further details).

2.8. TYPOGRAPHICAL ARRANGEMENTS

This category of protection was introduced under the Copyright Act 1956: the typographical arrangement of published editions. A published edition is currently defined as 'a published edition of the whole or any part of one or more literary, dramatic or musical works' (s.8(1)). There is no requirement that the published edition be of a previously unpublished work. That is, a new published edition of a literary work that is no longer in copyright (or, in other words, a work that is in the public domain) is copyright protected.

Note, however, this does not prevent someone else publishing the work itself; it simply prohibits the reproduction of that specific typographical layout and arrangement.

3. PROTECTION CRITERIA: WHEN IS A WORK PROTECTED?

As well as falling within one of the relevant categories of protected subject-matter discussed above, for a work to attract copyright protection it is necessary to establish that it satisfies the various criteria for protection. These requirements sometimes differ depending upon the category of protected subject-matter within which the work falls. In general, however, there are three requirements to bear in mind:

- fixation: that the work is recorded in material form
- originality: that the work is 'original'
- qualification: that the work qualifies for protection under UK law

When a work satisfies the relevant criteria for protection it is *automatically* protected by copyright. That is, unlike other forms of intellectual property (such as a patent or a trade mark) there is no need to register the work for protection: copyright arises at the point of creation.

3.1. FIXATION

It is a general presumption of UK copyright law that a work should exist in some permanent form before it can be copyright-protected. Consider *Merchandising Corp. of America* (1983): in this case the 1980s popstar Adam Ant tried to prevent others from re-producing his 'look' by arguing that his ('Prince Charming') make-up was a copyright work of art (see Image 3.1).

The court held that make-up was not capable of attracting copyright protection as it was transitory in nature, lacking the permanence associated with a work of art. Lawton LJ commented that a painting 'is not an idea: it is an object; and paint without a surface is not a painting'.

Generally, when considering artistic works – such as a photograph – the point of creation and the point of fixation occur in the same moment (although not always). However, this is not necessarily true for literary, dramatic or musical works. For this reason, the CDPA expressly states that copyright will not subsist in a literary, dramatic or musical work 'unless and until it is recorded, in writing or otherwise' (s.3(2)).

In addition, the CDPA states that, in relation to literary, musical, and dramatic works, the fixation requirement will be satisfied even when the recording is carried out by someone other than the creator of the work, and, with or without their permission (s.3(3)).



Image 3.1: Adam Ant, fine and dandy. Author unknown. [Click here for source of the image.](#)

Imagine, for example, that someone secretly records a jazz musician improvising at a gig: the improvised music is fixed by the person making the recording, even though they do not have the musician's (or the venue's) permission to make the recording; that act of fixation is enough to establish that copyright exists in the improvised music.

Some form of fixation or recording is implicit in the case of sound recordings and films. However, there is no requirement that broadcasts be fixed in any specific form.

For a case file concerning the fixation requirement, see **CASE FILE #14: THE MISSING MANUSCRIPT**.

3.2. ORIGINALITY

Not every literary, dramatic, musical or artistic work will qualify for copyright protection. There is a condition set out in the CDPA that requires that all literary, dramatic, musical and artistic works should be *original* before they will be protected by copyright (s.1(1)).

Sound recordings, films and published editions do not need to be original; all the CDPA requires is that they are *not copied* from previous sound recordings, films or published editions (s.5A(2), s.5B(4) and s.8(2)). This is a much easier criterion to satisfy than originality. As for broadcasts, the legislation simply requires that the broadcast should not infringe the copyright in another broadcast (s.6(6)).

But, in relation to literary, dramatic, musical and artistic works, what exactly does originality mean? How high (or low) is this threshold set? Mr Justice Peterson in *University of London Press* (1916) commented as follows:

*The word original does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas ... the Act does not require that the expression must be in an original or novel form, but that the work **must not be copied** from another work – that it should originate from the author.*

While UK case law on the concept of originality is not always consistent, the courts have generally agreed that so long as the author has expended a certain amount of labour, skill and judgment in the production of the work, the work should be protected by copyright. This is often referred to as the *sweat of the brow theory*.

In effect, in the UK, the threshold for protection has traditionally been set at a very low level in that even the expenditure of *non-creative skill and labour* can result in copyright protection.

That said, there are limits to what the law will protect even adopting this minimalist approach. For example, in *The Reject Shop v. Robert Manners* (1995) the issue for the court concerned whether an enlarged photocopy of a drawing was an original artistic work. The court rejected the claim

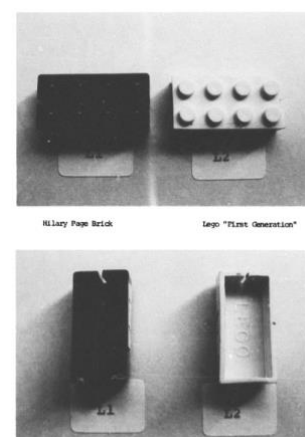


Image 3.2: From the *Interlego* case. Images available at the [Virtual Museum](#) of intellectual property cases.

commenting that the act of photocopying the work was a ‘wholly mechanical’ exercise, and so lacked the requisite originality.

But also, even when the creator of a work has expended considerable labour in the creation of the work, in some cases this has been held not to be enough: that is, it is the *wrong kind of skill and labour*. So, for example, in *Interlego AG v. Tyco Industries Inc* (1989) the issue concerned whether there was copyright in drawings of lego bricks.

After Lego’s patents and design rights in the bricks in question expired in 1975, the company tried to argue that copyright existed in drawings of the bricks which they had produced in 1973. These drawings were based on earlier drawings of bricks, and so the question arose as to whether the 1973 drawings exhibited sufficient originality to warrant new copyright protection (Images 3.2 and 3.3).

The court rejected the claim that the 1973 drawings were original.

Lord Oliver commented as follows: ‘copying *per se*, however much skill or labour may be devoted to the process, cannot make a work original’. He continued: ‘[A] well executed tracing is the result of much labour and skill but remains what it is, a tracing’. In relation to artistic works, he considered, the change in the work must be ‘visually significant’; that was not the case here, and so, the drawings lacked originality.

For a case file concerning the originality requirement, see **CASE FILE #14: THE MISSING MANUSCRIPT**.

3.3. QUALIFICATION

Before a work will be protected within the UK, the work must **qualify for protection**.

The CDPA prescribes certain factors that will give the work an appropriate connection with the UK. These relate to: authorship; the country of first publication; and, the place of transmission (for broadcasts).

Essentially, if the author is a British citizen or was domiciled or resident within the UK at the time when the work was created, the work will qualify for protection. Similarly, if the work was first published (or transmitted) within the UK it will qualify for protection.

For further details, see sections 154-156 of the CDPA.

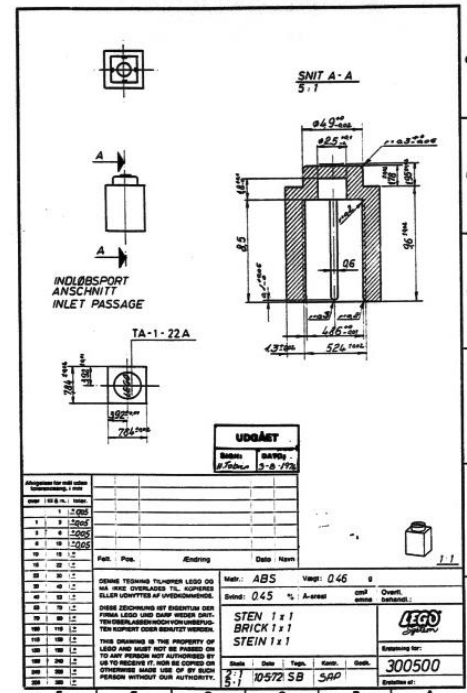


Image 3.3: From the *Interlego* case. Images available at the [Virtual Museum](#) of intellectual property cases.

3.3.1. QUALIFICATION AND THE INTERNATIONAL COPYRIGHT REGIME

The qualification criterion only determines whether a work *first qualifies* for protection under the UK copyright regime.

However, this does not mean that the work of foreign authors is not protected in the UK. Quite the reverse.

The UK is a signatory to an international copyright agreement, the Berne Convention. As a member of the Berne Convention, the UK agrees to give authors from other member states the same protection as it does to author who first qualify for protection within the UK. This guaranteed reciprocity of protection underpins the international copyright system. For example, because the UK guarantees copyright protection to works created by French authors, France guarantees protection to work created by British authors, and so on.

At the time of writing, [176 countries are signatories](#) to the Berne Convention (including the UK). This means that literary and artistic works created in 175 other countries around the world are also protected by copyright in the UK. Similarly, work that first qualifies for protection in the UK is automatically protected in 175 other countries.

[Ask your students to draw an object or an animal. Now, tell them that their work is protected by copyright in 176 countries around the world. That's amazing, isn't it? It's like magic.]

4. AUTHORSHIP AND OWNERSHIP OF COPYRIGHT WORKS

For many, the very *raison d'être* of copyright lies in recognising and rewarding the efforts of authors who create literary, artistic and other types of work by conferring certain economic rights in relation to those works. However, authorship and ownership are two discrete, albeit related, concepts.

The author of a work and the owner of the copyright in that work need not be the same person. While the authorship of a work will never change, the ownership of copyright in that work may initially vest in the author but might change hands many times while the work is in copyright. In this respect, copyright is like any other form of property: while the copyright subsists, it can be bought and sold, or passed from one generation to the next, such that the work might have had many different owners before the copyright term expires. Also, depending on the circumstances, the author of a work may *never* have owned the copyright in the work she created. It is important then to be able to determine who authored a work and whether that person owns the copyright in the work they have created.

4.1. AUTHORSHIP

The author of a copyright work is determined by the Copyright, Designs and Patents Act 1988 (the CDPA). The default position set out in the Act is that the author of a work is 'the person who creates it' (s.9(1)).

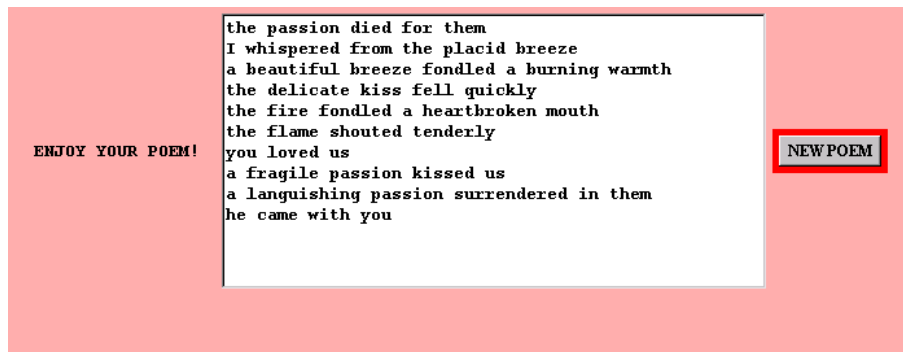


Image 4.1: Computer generated poetry created by A.D.A.M. (Another Dimension of Artistic Manifestations), at the University of Birmingham. See [here](#) for further details.

For literary, dramatic, musical and artistic works, the author is generally easy to identify. But who creates sound recordings, films, broadcasts and the typographical arrangement of published editions? The CDPA provides additional guidance, typically designating the author to be the person who makes the arrangements for the creation of the work. For example, for sound recordings the author is defined as the producer (s.9(2)(aa)); for a film the authors are the producer and the principal director (s.9(2)(ab)); for a broadcast, the author is the person making the broadcast (s.9(2)(b)); for the typographical arrangement of a published edition, the author is the publisher (s.9(2)(d)). In addition, for a literary, dramatic, musical or artistic work which is computer-generated the author

is the person who makes the arrangements necessary for the creation of the work (s.9(3)) (Image 4.1).

For a case file concerning authorship, see **CASE FILE # 13: THE MULTIPLE RIGHTS**.

4.2. WORKS OF UNKNOWN AUTHORSHIP

Occasionally it may not be possible to ascertain who the author of a literary, dramatic, musical, or artistic work is (particularly when the author of the work does not wish her identity to be revealed). To address this, the CDPA includes the concept of a work of 'unknown authorship'. A work is of 'unknown authorship' if the identity of the author is unknown and it is not possible for a person to ascertain her identity by reasonable inquiry (s.9(4)(5)).

Thinks about works of graffiti: are these works of unknown authorship? Would you be able to find out who the identify of the author was by making reasonable inquiries?



Figure 4.2. If you saw this graffiti painted on a wall, would you be able to find out the identity of the author by making reasonable inquiries? [Actually, the image has been made available for use under a Creative Commons licence by [dumbonyc](#).] For more details about Creative Commons licences, see **section 8.3**.

4.3. WORKS OF JOINT AUTHORSHIP

What happens when there is more than one author involved in the creation of a work? There are two different situations to consider here:

- when the contributions of different authors can be distinguished from each other
- when the nature of the collaboration means that each author's respective contribution cannot meaningfully be distinguished from the other

In the first situation, each author will own the copyright in the individual contributions they make. In the second, where the contribution of one author is not distinct from another, there exists a situation of *joint authorship*.

The CDPA defines a work of joint authorship as one ‘produced by a collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors’ (s.10(1)). So, when considering whether a work is a work of joint authorship, ask yourself whether:

- each of the authors contributed in some way to the making of the work
- the work has been produced through a process of collaboration, meaning that, when setting out to create the work, the authors were working to some form of shared plan
- the respective contributions are not distinct or separate from each other

If the answer to each of these questions is yes, the work has been jointly authored.

In Beckingham v. Hodgens (2003) a session musician was hired to play the fiddle at a recording session organised by the band The Bluebells; the band were re-recording their version of the song Young at Heart; he contributed a new fourteen-note introduction to the song; as such, he was deemed to have jointly authored the new version of the work.

Determining that a work is jointly authored is important for various reasons. For example, where there are two or more authors the duration of the copyright term is based on the date of the death of the last of the authors to die (s.12(8)). When joint authors are also joint owners, this has important implications for the use and management of the copyright work.

For a case file concerning joint authorship, see **CASE FILE # 22: THE TWO HEADS**.

4.4. AUTHORSHIP AND OWNERSHIP

In general, given that copyright in a work subsists from the point of creation, the author of the work will also be the *first owner* of the copyright in the work (s.11(1)). While ownership of the copyright in a work may change hands many times while the work is in copyright, the authorship of the work will never change.

Moreover, the author enjoys certain moral rights in relation to the work (such as the right to be identified as the author of the work) regardless of who owns the copyright in the work (see Section XX).

For case files concerning the ownership of copyright, see **CASE FILE #12 (THE HOLLYWOODLAND DEAL)** and **#13 (THE MULTIPLE RIGHTS)**.

4.5. JOINT AUTHORSHIP AND JOINT OWNERSHIP

Joint authors of a work will normally be the joint owners of the copyright in the work.

It is not necessary for joint authors to contribute equally to the creation of the work to enjoy *equal ownership* of the work. Traditionally, joint authorship was *presumed* to result in the authors sharing the rights in the work equally. In *Beckingham v. Hodgens* (2003), for example, the claimant argued he was the co-author of the song *Young at Heart* made famous in the 1980s by the defendant's band *The Bluebells*. The claimant was held to be the author of a fourteen-note introduction (played on the fiddle) to the main song; as a result, the court assumed that the claimant and the defendant were entitled to *equal shares* in the copyright.

However, courts do sometimes determine ownership of copyright in proportion to the contribution made by each of the authors. In *Fisher v. Brooker* (2006) (concerning a dispute over the authorship and ownership of copyright in *A Whiter Shade of Pale*) the court declared that the claimant was entitled to a 40% share of the musical work in question. In this case Mr Justice Blackburne commented as follows: 'I see no reason in principle why Mr Fisher's share in the work should not be something less than an equal undivided share if the circumstances justify that result'.

For a case file concerning joint authorship and joint ownership, see **CASE FILE # 22: THE TWO HEADS**.

4.6. THE IMPLICATIONS OF JOINT OWNERSHIP

One important consequence of joint ownership is that you cannot simply acquire a licence to use a given work from one of the joint owners only. That is, one joint owner cannot grant a licence to use a work that is binding on their co-owners (s.173(2)); you must get permission to use the work from all relevant joint owners. Moreover, if joint owner A grants a licence to a third party to make use of the work, without the consent of the other joint owners (B and C), then A will infringe the copyright of B and C by authorising the use of the work without their permission.

4.7. WORK CREATED BY EMPLOYEES

In general, the author of a work will also be the first owner of the copyright in that work (s.11(1)), however, that is not always the case. The main exception to this rule is set out in s.11(2):

Where a literary, dramatic, musical or artistic work, or a film, is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to agreement to the contrary.

This provision is particularly important when dealing with documents and records within the context of business archives. When determining whether copyright vests in an employer under s.11(2), there are three main things to consider:

- Who is an employee?
- Was the work made in the course of her employment?
- Is there an agreement to the contrary effect?

Normally, determining whether someone is an employee (as opposed to working on a freelance basis or under a contract for services) will be reasonably straightforward. More interesting questions tend to arise when considering whether the work was made by the employee during the course of her employment.

In *Noah v. Shuba* (1991) Dr Norman Noah wrote a medical pamphlet, *A Guide to Hygienic Skin Piercing* (Image 2), while he was working as a consultant in the Communicable Disease Surveillance Centre of the Public Health Laboratory Service (PHLS). Although Dr Noah had discussed the work with his colleagues in work, had used the PHLS library in its preparation, had the manuscript typed up by secretary and had secured the PHLS's agreement to print and publish the Guide at its expense, it was held not to have been written in the course of his employment. Of importance to the judge who arrived at this decision was the fact that Dr Noah had written the draft at home in the evenings and at the weekends, and that he had done so on his own initiative and not at the instigation of or on the direction of his employers.

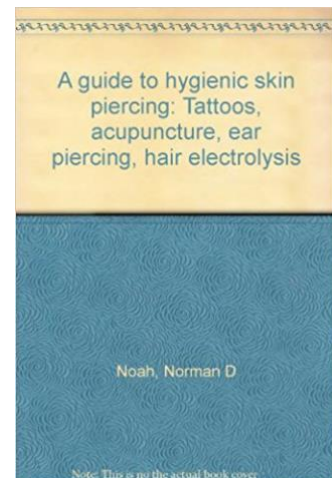


Image 4.2: Noah's *Guide to hygienic skin piercing* (1983)

One important factor which has influenced the decision of the courts on this issue has been whether the making of the work falls within the type of activity that an employer could reasonably expect from or demand of an employee.

This *Noah* case is discussed in **CASE FILE #12: THE HOLLYWOODLAND DEAL.**



Image 4.3: A caricature of John Caird standing in front of the University of Glasgow's main building, from *The Bailie* (1873). Image reproduced as part of [The Glasgow Story](#).

Even if the work in question has been made in the course of the employee's employment, this does not necessarily mean that copyright will vest in her employer. One must always consider the third aspect of s.11(2): what does the contract say about ownership of copyright material if anything? Is there an agreement to the effect that ownership remains with the employee?

Agreements of this kind are often expressly set out within a contract of employment, however, they can also be *implied*. For instance, an employee might be able to establish that it is typical or common practice for employees in her position or industry to retain copyright in the work they produce for their employers. A university lecturer provides a good example, as evidenced by the decision of the House of Lords in *Caird v. Sime* (1887).

John Caird was Professor of Moral Philosophy at the University of Glasgow. Some of his lectures

were transcribed by a student attending his class, and then published as a series of *Aids to the Study of Moral Philosophy*. In the litigation that followed, it was accepted that Caird had the right to prevent the publication of his lectures. As Lord Watson observed, although they were university employees, academics frequently published their lectures and ‘enjoyed, without objection or challenge, the privilege of copyright’ in those lectures.

Arguably, the same logic still holds true today. Although employed by a university to teach and produce research, in the absence of an express provision in the contract of employment to the contrary, the copyright in any material produced for teaching or for publication as research probably lies with the lecturer and not her employer (unless, of course, the contract of employment expressly states otherwise).

4.8. FREELANCE WORK

The exception in s.11(2) will generally only apply where the employee is under a contract of service (that is, when the employer is paying her salary on a PAYE basis). However, when work is carried out on a freelance basis, as a one-off event, or on terms that the individual is responsible for her own time, equipment, tax and so on, then the employer will not automatically own the copyright in the work that has been created.

However, in certain circumstances, the courts may infer that an independent contractor (a freelancer) is working subject to an *implied* obligation to assign the copyright to the person commissioning the work. For example, in *Griggs v. Raben Footwear* (2003) the claimants were the distributors of Dr Marten’s ‘AirWair’ footwear. In 1988, they commissioned an advertising agency to produce a logo. Evans, who did the freelance work for the agency, produced the logo (and was paid on his standard rate of

£15 per hour). In 2002 Evans sought to assign copyright in the logo to *Raben Footwear*. Prescott QC, sitting as Deputy High Court judge, held that while Evans was the author and first owner of the work, nevertheless, an agreement should be implied that copyright was to belong to Griggs. This, he continued, was necessary to give *business efficacy* to the arrangement under which it was clearly contemplated that Griggs would be free to use the logo and prevent others from using the same; this could only be achieved if there was an implied agreement to assign the copyright in the work to the claimants (or give them a perpetual licence, which solution would have been less convenient for the claimants). The decision was upheld on appeal.



Image 4.4: The Dr Martens AirWair logo

5. ECONOMIC RIGHTS AND INFRINGEMENT

The economic rights conferred on copyright owners are defined in the CDPA and are contingent on the type of work under consideration. That is, not all copyright works enjoy the same bundle of rights.

Also, copyright does not prohibit all forms of copying. It only prohibits certain types of copying, in certain ways, and under certain circumstances. So, while copyright protects the economic interests of copyright owners by preventing unlawful copying and use, at the same time it enables and encourages many forms of lawful copying and reuse.

5.1. INFRINGEMENT

In certain circumstances, making use of a copyright work without the permission of the copyright owner will infringe the copyright in that work. Copyright infringement takes one of two forms: **primary infringement** or **secondary infringement**.

Primary infringement concerns the unauthorised performance of any of the ‘acts restricted by copyright’ (CDPA, ss.16-21); secondary infringement provides owners with protection against those who, in effect, aid and abet the primary infringer or who deal in infringing copies (CDPA, ss.22-26).

5.2. PRIMARY INFRINGEMENT AND THE ACTS RESTRICTED BY COPYRIGHT

The ‘acts restricted by copyright’ represent the bundle of economic rights which the copyright owner enjoys in her work for the duration of the copyright term. These acts restricted by copyright are set out in section 16 of the CDPA; they include the right to:

- Copy the work: the reproduction right (further defined in s.17 of the CDPA)
- Issue copies of the work to the public: the distribution right (see s.18)
- Rent or lend the work to the public: the rental right (see s.18A)
- Perform, show, or play the work in public: the public performance right (see s.19)
- Communicate the work to the public: the communication right (see s.20)
- Make an adaptation of the work or do any of the above in relation to an adaptation: the adaptation right (see s.21)

Doing any of these acts without permission will infringe copyright in the work, and the owner will be entitled to some form of relief or compensation (unless, that is, your use falls within one of the exceptions to copyright or is otherwise lawful).

Moreover, it will generally not make any difference that the infringing copy takes a different form to the original. For example, converting a two-dimensional image into three dimensions and vice versa, will still constitute infringement; similarly: turning a story into a ballet; copying a photograph by painting; turning a drawing such as a cartoon into a sketch or a piece of theatre, and so on.

However, not every economic right is granted to every copyright owner. What rights the copyright owner may have will depend on the type of work under consideration. For example:

- performing or showing an artistic work in public is not an offence under s.19 of the CDPA
- the public communication right does not apply to the typographical arrangement of published editions (see s.20 for further details)
- the right to make an adaptation of a work only applies to literary, dramatic, or musical works, but not to artistic works, sound recordings, films or broadcasts (see s.21 for further details)

Table 5.1. provides an overview of which economic rights attach to each of the eight categories of protected work. In the sections that follow, we consider each of the economic rights in turn.

	MAKE COPIES	DISTRIBUTE COPIES	RENT OR LEND	PERFORM IN PUBLIC	COMMUNICATE TO THE PUBLIC	MAKE AN ADAPTATION
LITERARY	Y	Y	Y	Y	Y	Y
DRAMATIC	Y	Y	Y	Y	Y	Y
MUSICAL	Y	Y	Y	Y	Y	Y
ARTISTIC	Y	Y	Y	N	Y	N
FILM	Y	Y	Y	Y	Y	N
SOUND RECORDING	Y	Y	Y	Y	Y	N
BROADCAST	Y	Y	N	Y	Y	N
TYPOGRAPHICAL ARRANGEMENT	Y	Y	N	N	N	N

Table 5.1: Economic rights and types of work

5.2.1. COPYING: THE REPRODUCTION RIGHT (s.17)

Copying includes reproducing a literary, dramatic, musical or artistic work ‘in any material form’ (s.17(2)). This includes manual copying, copying ‘by electronic means,’ as well as making copies that are ‘transient or are incidental to some other use of the work’ (s.17(2)(6)).

In relation to artistic works the CDPA also provides that copying includes ‘the making of a copy in three dimensions of a two-dimensional work and the making of a copy in two-dimensions of a three-dimensional work’ (s.17(3)).

The definition of reproduction in relation to sound recordings and films is narrower than it is in relation to works of literature, drama, music or art. So, for example, with a sound recording it is *only that* recording that is protected. If someone else re-records the same song this will not infringe the copyright in the sound recording (although it may of course infringe the copyright in the music, lyrics, and so on).

There is no explanation within the CDPA of what amounts to the copying of a broadcast, however, it seems clear that making any audio-recording of a radio broadcast, or an audio-visual recording of any images forming part of a television broadcast would involve copying the broadcasts in question (as well as the contents of the broadcasts, be they sound recordings, films, and so on).

In relation to typographical arrangements, the CDPA adopts a narrow definition of copying as ‘making a facsimile copy of the arrangement’ (s.17(5)); this concept seems to be confined to reproduction by way of reprography, photocopies, scanning, and so on (see s.178). So, re-typing a work in a different font would not infringe.

5.2.2. ISSUING COPIES TO THE PUBLIC: THE DISTRIBUTION RIGHT (s.18)

This involves the right to issue copies of the work to the public; that is: to put copies of the work into public circulation (typically, for commercial purposes). The right extends to ‘copies of a work’ including ‘the issue of the original’ (s.18(4)).

Once these copies are in circulation the right no longer applies: it is said to be **exhausted**. This means, in effect, that the copyright owner cannot control the resale or redistribution of *those specific copies*. For example, consider the second-hand book market: the resale of second-hand books does not fall within the scope of (and so does not infringe) the distribution right.

It used to be thought that the distribution right applied only to the distribution of *tangible* copies of a protected work, and that the right would not be exhausted when making digital copies of works available to consumers. However, the European Court of Justice (the CJEU) considered this issue in relation to computer programs in *UsedSoft GmbH v. Oracle* (2012).

Oracle is a company that develops and markets computer programs, selling them directly to their customers as a download from their website. The sales in question took the form of a licence agreement which transferred the program to the customer for an indefinite period. UsedSoft acquired and resold previously purchased software licences from existing Oracle customers, which Oracle claimed was in breach of copyright. The CJEU held that the exhaustion doctrine applies to computer programs made available online in the same way as it does to computer programs made available on a material medium such as a CD-ROM or DVD (although it was significant that the program was transferred to the user for an indefinite period).

Whether the CJEU will formally extend this principle to other types of intangible copyright-protected work (such as music downloads or ebooks) remains to be seen.

5.2.3. RENTING OR LENDING TO THE PUBLIC (s.18A)

Originally the CDPA only provided a limited rental right in relation to sound recordings, films and computer programs. However, following the implementation of the European Rental Rights Directive 1992, copyright in literary, dramatic, musical and artistic works now includes the exclusive right to rent and lend copies of the work to the public. Unlike the distribution right, the rental right is *not exhausted* by the first sale of copies of the work to the public.

5.2.4. PERFORMING, SHOWING, OR PLAYING THE WORK IN PUBLIC (s.19)

The public performance right applies to literary, dramatic and musical works, but not to artistic works or to typographical arrangements of published editions (s.19(1)). The Act also makes clear that ‘playing or showing’ a work in public is an act restricted by copyright in a sound recording, film or broadcast (s.19(3)).

Performance is defined by the Act to include the ‘delivery’ of ‘lectures, addresses, speeches and sermons’ as well as ‘any mode of visual or acoustic presentation, including presentation by means of a sound recording, film, or broadcast the work’ (s.19(2)).

However, where other means of delivery are employed, for example, the playing of copyright protected music on a radio in a restaurant, the person who infringes the public performance right in the music, is not the broadcaster (or the person who supplied the radio apparatus) but the owner of the restaurant (s.19(4)).

Importantly, the public performance right does not prohibit the *exhibition* of works in public. So, it is not an infringement of copyright to put a literary, dramatic, musical or artistic work on public display: for example, as part of an exhibition in a school or a museum or gallery. For further commentary on this issue, see the IPO’s [Copyright Notice](#) concerning the public exhibition of copyright works.

5.2.5. COMMUNICATION TO THE PUBLIC: THE COMMUNICATION RIGHT (s.20)

The communication right was introduced in October 2003 following the implementation of the Information Society Directive 2001 (A.3), and it is distinguished from the performance right by the fact that the public is not present at the place where the communication originates.

Within the UK the communication right is confined to ‘electronic communication’ and is said to include both ‘broadcasting’ and ‘making available’.

While the broadcasting right was first introduced in the *Copyright Act* 1956, the concept of ‘making available’ is of more recent provenance having its roots in the WIPO Copyright Treaty 1996.

Whereas broadcasting is based on the premise of *simultaneous reception*, the concept of ‘making available’ involves individual communications to persons who are members of the public (for example, interactive on-demand transmissions).

The communication right can be assumed to cover most internet transmissions.

5.2.6. ADAPTATION (s.21)

The adaptation right extends to literary, dramatic and musical works, but not to artistic works, sound recordings, films, broadcasts or the typographical arrangements of published editions. The CDPA defines the concept of adaptation differently for literary, dramatic and artistic works. For example, the adaptation of a literary work is defined to include translation, dramatization, and representation in pictorial form (s.21(3)(a)), whereas the adaptation of a musical work is defined to mean the arrangement or transcription of the work (s.21(3)(b)).

While the concept of adaptation is defined quite narrowly within the CDPA, the line between reproduction and adaptation is not always easy to draw. In many cases the same act might be both a reproduction of the work as well as an adaptation of the same. Equally, many acts that do not amount to adaptation may nevertheless fall within the scope of the reproduction right. So, for example, abridging a literary work without permission will not infringe the adaptation right but will almost certainly infringe the reproduction right.

For a case file concerning the adaptation right, see **CASE FILE #17: THE TYPEWRITER**.

5.3. INFRINGEMENT AND CAUSAL CONNECTION

Copyright does not provide the copyright owner with a true form of monopoly protection. That is, copyright prevents others from copying your work, but it does not prevent others from exploiting very similar or even identical works that they have created independently.

In *Francis Day & Hunter v. Bron* (1963) Lord Justice Upjohn commented that there must be a **causal connection** between the alleged infringer’s work and that of the copyright owner. That is, the infringer must have *copied* the copyright owner’s work. He continued that ‘if it is an independent work, then, though identical in every way, there is no infringement’.

However, the court did accept that a person could be guilty of primary infringement where the copying had occurred on a *subconscious* level. For example, Lord Justice Willmer observed that ‘it is not necessary to prove anything in the nature of mens rea [that is, intention or knowledge of wrongdoing]’; he continued: ‘[s]ubconscious copying is a possibility which, if it occurs, may amount to an infringement of copyright’.

In *Mitchell v. BBC* (2011) the claimant had developed a group of characters, five student eco-warriors called the Bounce Bunch, which he intended to be used in an animated children’s television programme (Image 5.1). Drawings of the Bounce Bunch were

accessible on the claimant's website from 2007, and he had also sent a proposal to the BBC that included character designs. In May 2008, the BBC informed the claimant that it was not going to commission the project. Six months later, the BBC produced its own cartoon Kerwhizz involving a group of six characters involved in a futuristic race.

The claimant argued that the striking similarities between the (human) Kerwhizz characters and the Bounce Bunch could only result from copying, whether conscious or unconscious, on the part of the artists working for the BBC. He claimed that the similarities, coupled with the fact that the artists had access to his work, raised a strong case of copyright infringement.

The court found that there were sufficient similarities between the characters to place the onus on the BBC to prove the Kerwhizz characters were created independently and did not arise from copying. Those similarities included, for example, that the characters wore a form of body armour, including helmets and microphones, the similar colour scheme adopted by the artists, the ethic mixture of the characters, and so on. However, the BBC were



Image 5.2: The Kerwhizz characters

able to satisfy the court that their work was an independent creation. For example, development work on Kerwhizz had begun in 2006 before the Bounce Bunch were accessible on the claimant's website. Mr Justice Birss QC also found that other shared features, such as the chunky body armour, were inspired by shared sources such as Japanese anime and manga characters. Moreover, he continued, the Bounce Bunch designs were not particularly memorable and were rather simple and generic. An inference of subconscious copying was not supported. There was no causal connection between the Bounce Bunch and Kerwhizz, and no copyright infringement had occurred.



Image 5.1: The Bounce Bunch

5.4. INFRINGEMENT AND THE 'SUBSTANTIAL PART' OF A WORK

Section 16 of the CDPA sets out the various acts restricted by copyright. But, the legislation also states that references to doing any infringing act only operate in relation 'to the work as a whole or any substantial part of it' (s.16(3)(a)). This means it is permissible to make use of another's copyright work so long as you are not copying any more than an insubstantial part of that work.

Where, however, do you draw the line between a substantial and an insubstantial amount? It is often said that this question of substantiality will depend upon the *quality* of what has been taken rather than the *quantity*. In *Sillitoe v. McGraw-Hill Book Co (UK) Ltd* (1983) the court observed that '[s]ubstantiality is a question of fact and degree determined by reference not only to the amount of work reproduced but also to the importance of the parts reproduced'.

This distinction between *quantitative* and *qualitative* importance is well illustrated by the comments of Mr Justice Arnold in the decision of *England and Wales Cricket Board v. Tixdaq* (2016), which is discussed in **CASE FILE #19: THE FATEFUL EIGHT SECONDS**.

The court was asked to consider whether making an eight-second clip of a film or broadcast of a cricket test match constituted copying of a substantial part of each session of play (over two hours of footage). Arnold J observed:

Quantitatively, 8 seconds is not a large proportion of a broadcast or film lasting two hours or more. Qualitatively, however, it is clear that most of the clips uploaded constituted highlights of the matches: wickets taken, appeals refused, centuries scored and the like. Thus most of clips showed something of interest, and hence value ... Accordingly, in my judgment, each such clip constituted a substantial part of the relevant copyright work(s).

In general, there has been a shift in recent times in relation to what the courts will regard as a substantial part of a copyright work. Previously, someone might be held to have infringed if the part in question was an essential, vital or significant part of the protected work; now, however, courts seem willing to find infringement so long as the part used is not 'insignificant'.

The decision of the European Court of Justice (the CJEU) in *Infopaq International v. DDF* (2009) has consolidated this trend.

The *Infopaq* case concerned a media monitoring business (Infopaq) that scanned newspapers every day to identify and summarise articles of interest to its clients. Their media monitoring process involved the automated copying of eleven-word extracts of text from relevant newspaper articles. The CJEU was asked for guidance about whether this automated copying might constitute copyright infringement.

The CJEU concluded that parts of a copyright work will enjoy copyright protection if 'they contain elements which are the expression of the intellectual creation of the author of the work'.

The court continued that individual sentences *or even parts of sentences* from a literary work, such as a newspaper article, would be protected by copyright 'if that extract contains an element of the work which, as such, expresses the author's own intellectual creation'. In short, the copying of an eleven-word extract from a newspaper article without permission might constitute infringement, depending on the nature of the extract.

So, when considering whether an extract is substantial or not, ask yourself whether the part that is being copied contains a feature or features that express the author's intellectual creation; that is, whether the part that is copied evidences the kind of skill and labour on the part of the author that makes her work original.

As *Infopaq* demonstrates, even a part of a sentence might be enough to constitute a substantial part. On the other hand, the part that is copied may be trite or insignificant within the context of the work, it may be a commonplace phrase, or material that is not itself original to the work (that is, it may have been influenced by or copied from an earlier source).

The *Infopaq* case is discussed in **CASE FILE #9: THE IMPROBABLE THREAT**. For another case file concerning substantial copying, see **CASE FILE #7: THE MATCHING WALLPAPER**.

5.5. INFRINGEMENT AND NON-LITERAL COPYING

Copyright infringement often arises because of the literal copying of a work or a substantial part of the work, for example, copying a photograph found on the internet and making use of it on your own website without alteration. But, the issue of non-literal copying is also important to bear in mind.

In relation to sound recordings, films, broadcasts and typographical arrangements, non-literal copying is not an issue you need to consider: rather, the only question to ask is whether the work or a substantial part of it has been copied.

However, in relation to literary, dramatic, musical and artistic works, the scope of protection provided by copyright extends beyond the specific form in which the work is recorded to include other aspects of the work itself. For example, the protection afforded to a literary work may extend beyond the reproduction of the words on a page to include the copying of the storyline, the plot or the characters that form part of the work. Or consider *King Features v. Kleeman* (1941) in which copyright in comic strip drawings of Popeye the Sailor was held to be infringed by the defendants who were importing and selling Popeye dolls, mechanical toys and brooches without permission. The infringing articles did not copy the drawings directly. Instead, they copied existing Popeye merchandise, manufactured and sold with the claimant's permission, based on the claimant's drawings. Although the defendants had not copied any specific drawing belonging to the claimants, they had nevertheless indirectly copied the essential features of Popeye the comic strip character. Lord Russell listed those features as follows: 'the sailor's cap, the nose, the chin, the mouth, the swollen arms, the baggy trousers, and the enlarged feet'.



Image 5.3: A Popeye doll from the 1940s

In other words, copyright can provide protection that reaches beyond the original author's literal expression to encompass other non-literal elements of the work.

5.6. THE ACTS RESTRICTED BY COPYRIGHT: STRICT LIABILITY OFFENCES

One of the key features of the acts restricted by copyright is that they are based upon the notion of **strict liability**. That is, the state of mind of the person alleged to have committed an offence is irrelevant when determining whether an infringement has taken place. It makes no difference that the person infringing the copyright did not intend to infringe or was even aware that she was infringing another's copyright.

Intention and knowledge on the part of the alleged infringer are irrelevant. Ignorance is no defence.

Acts of primary infringement can be compared with acts of secondary infringement in this regard. In all cases of secondary infringement, liability turns upon the defendant having the requisite 'knowledge' that they were committing an offence (see **section 5.8**).

It is also worth noting that an individual responsible for infringement is always personally liable for that infringement, even if it was carried out during the course of her employment (although the employer will also be jointly liable).

5.7. AUTHORISING ANOTHER (WITHOUT PERMISSION)

Copyright is infringed by any person who performs any of the acts restricted by copyright without the permission of the copyright owner, or by someone who *authorises* another person to do the infringing act (s.16(2)).

In *CBS Songs Ltd v. Amstrad Computer Electronics* (1988) the House of Lords considered what was meant by the concept of authorisation in the context of copyright infringement.

This case concerned whether the electronics company Amstrad was authorising copyright infringement by the manufacture and sale of twin cassette tape recorders which facilitated unauthorised copying of music tapes.

The House of Lords decided that there was no infringement.



Image 5.4: An advert for the original Amstrad twin tape cassette recorder

Lord Templeman, agreeing with the comments of Lord Justice Atkin in *Falcon v. Famous Players Film Co* (1926), suggested that, in the context of copyright infringement, authorisation means 'the grant or purported grant, which may be express or implied, of the right to do the act complained of'. Amstrad were not guilty of authorising any infringement; the machines could be used for legitimate purposes.

Similarly, in *Twentieth Century Fox Film v. Newzbin* (2010) Mr Justice Kitchen commented that to authorise 'means the grant or purported grant of the right to do the act complained of. It does not extend to mere enablement, assistance or even encouragement'.

5.8. SECONDARY INFRINGEMENT

As noted in section 5.1, the CDPA also outlines various forms of secondary infringement, which are more relevant to individuals or organizations that deal with infringing copies or facilitate the infringement of the copyright work.

Sections 22-27 of the CDPA deal with these acts of secondary infringement; they include:

- importing an infringing copy (s.22)
- possessing or dealing with an infringing copy in the course of a business (s.23)
- providing the means for making an infringing copy (s.24)
- permitting the use of a premises for an infringing performance (s.25)

The definition of an ‘infringing copy’ is set out in s.27(2): ‘[a]n article is an infringing copy if its making constituted an infringement of the copyright in the work in question’. Moreover, s.27(4) states that where the question arises whether an article is an infringing copy, if it is shown that (i) the article is a copy of the work, and (ii) that copyright subsists in the work (or has subsisted at any time), then it shall be presumed the article was made at a time when copyright subsisted in the work, until the contrary is proved.

Unlike instances of primary infringement, the *knowledge* of the alleged infringer is *relevant* to the commission of an offence. That is, liability turns upon the defendant ‘knowing or having reason to believe’ that the activities in question are unlawful (what is generally referred to as *actual or constructive knowledge*). So, whereas primary infringement typically turns on strict liability, secondary infringement is fault-based (the infringer knew or had reason to believe that what she was doing was wrong).

5.9. CONSEQUENCES OF INFRINGEMENT: LEGAL REMEDIES

If a claimant successfully establishes before a court that their copyright has been infringed, there are various remedies available to address the infringement. Broadly speaking, they involve either the grant of an injunction, the award of some form of financial settlement, or both.

When a court grants an injunction, it expressly orders the defendant to bring the infringing activity to an end. This might involve, for example, stopping the sale of the work containing the infringing content, or, alternatively, removing the infringing content from their website. Everything will depend on the circumstances and how the claimant’s copyright is being infringed.

For example, when Robbie Williams first released his second solo album, *I’ve Been Expecting You*, in 1998, it included the song *Jesus in a Campervan*. Williams was then sued for copyright infringement by Ludlow Music who owned the rights in the song *I Am the Way* (New York Town) by Loudon Wainwright III. The song by Wainwright III was, itself, a parody of an earlier song by Woody Guthrie, *I Am the Way*.



Image 5.5: The opening bars of *Jesus in a Camper Van*. Note that, following the litigation, both Loudon Wainwright III and Woody Guthrie are now attributed as co-authors of the song.

The judge granted an injunction preventing any future use of the song *Jesus in a Campervan* by Williams (unless appropriate terms could be agreed with the claimants). In addition, he was ordered to pay 25% of the income that he had received from the track to the claimants, which at that time was estimated to be around £190,000.

More recently, in the US, Pharrell Williams and Robin Thicke were ordered to pay **\$7.4M** to Marvin Gaye's family over their unauthorised use of his 1977 hit *Got to Give it Up* in their phenomenally successful 2013 track *Blurred Lines*.

However, not all financial awards are as generous (perhaps, as mind boggling) as this.

For example, in *Walmsley v. Education Limited* (2014) a teacher used some photographs found on the web as part of a post on their school's online blog. When the teacher found the images online without any relevant copyright information they assumed, incorrectly, that the images were free to use. The photographer sued. He was awarded **£500 in damages** for the unauthorised use of his photographs. (For further discussion, see sections 7.2.2 and 7.4).

For a case file concerning the use of injunctions as a legal remedy for copyright infringement, see **CASE FILE #4: THE ANONYMOUS ARTIST**.

6. DURATION OF PROTECTION: THE COPYRIGHT TERM

The **term of protection** for all types of copyright work is **time-limited**. This is just one way in which the copyright regime tempers the economic rights of the copyright owner in the public interest. Once copyright in a work expires, that work enters the **public domain** and (in theory at least) it is free to be used by anyone, without the need for permission.

For a case file concerning the copyright term and the public domain, see **CASE FILE #2: THE MONSTER**.

6.1. WORKS CREATED ON OR AFTER 1 AUGUST 1989: DURATION AND THE CDPA

When considering the current rules on duration of protection under the CDPA, we can draw a distinction between those categories of works for which duration is calculated by reference to an **authorial life** (literary, dramatic, musical and artistic works, and films) and **those which are not** (sound recordings, broadcasts, the typographical arrangement of published editions and certain films).

In addition, it is important to be aware of how duration is calculated for works that are computer-generated and works of unknown authorship. The main rules on calculating duration are set out in sections 12 to 15 of the CDPA.

6.2. LITERARY, DRAMATIC, MUSICAL AND ARTISTIC WORKS

Copyright in literary, dramatic, musical and artistic works expires 70 years from the end of the year in which the author died (s.12(2)). Simple.

If a literary, dramatic, musical or artistic work is jointly authored (see **section 4.3**) the 70-year post mortem term is calculated from the end of the year in which the longest surviving joint author died. For example, the jointly authored works of John Lennon and Paul McCartney will remain in copyright for 70 years after Paul McCartney dies, even though John Lennon died in 1980.

6.2.1. SONGS AND OTHER CO-AUTHORED MUSICAL COMPOSITIONS

It is worth noting a special rule that applies to songs and other similar musical compositions, that was introduced in 2011.

This newly introduced rule states that when the author of a musical work and the author of a literary work collaborate to create works intended ‘to be used together’, the resulting works are treated as a ‘work of co-authorship.’ (The concept of a work of co-authorship is similar to but distinct from the concept of a work of joint authorship.)

This change has had an important impact on how duration is calculated for these types of work.

Previously, the duration of copyright in the music and the lyrics of a song would have been calculated independently of each other: that is, copyright in the music would come to an end 70 years following the death of the composer, whereas copyright in the lyrics would end 70 years after the death of the lyricist.

Now, however, duration of copyright in a song that has been co-authored will last for 70 years from the end of the year in which the longest surviving co-author died.

This change has also resulted in work that was already in the public domain benefitting from a revived copyright. Consider, for example, the songbook of George and Ira Gershwin. George composed music, and Ira was the lyricist. George died in 1937; Ira survived until 1983. Before the implementation of the 2011 Term Directive, in the UK copyright in George's music expired on 31 December 2007. Now, it has been revived. As such, copyright will expire 70 years from the end of the year in which Ira died: that is, on 31 December 2053.

For a case file concerning co-authored songs, see **CASE FILE #28: THE MUSICIAN AND THE MACHINE**.

6.3. FILMS

Under the CDPA copyright duration in film lasts for 70 years after the last to die of four designated persons: the director, the author of the screenplay, the author of the film dialogue (if different), and the composer of any specifically created film score (s.13B(2)).

Note, however, these are only relevant lives for calculating duration of protection. They are not deemed to be the authors of the film. Rather, the CDPA defines the author of a film as 'the producer and the principal director' (s.9(2)(ab)).

If the identity of some of these designated persons is unknown, the relevant measuring life is the last person to die whose identity is known (s.13B(3)).

6.3.1. FILMS WITHOUT A DESIGNATED PERSON

The CDPA also provides for a category of films without any of the persons listed in s.13B(2) (that is, the persons 'connected with the film'). If a film does not have a director, an author (whether of the screenplay or dialogue) or a composer, copyright expires 50 years from the end of the year in which the film was made (s.13B(9)).

For example, imagine that you take some spontaneous footage using your mobile phone. The recording will be a film (in a copyright sense), but not one with a principal director, an author of screenplay or dialogue, or a composer. As such, duration will be calculated according to s.13B(9).

It is also worth noting at this point that a **film without a designated person** is not the same thing as a **film of unknown authorship** (see section 6.7).

To illustrate the difference, consider *Stop That Thief*, a short informational film made for television in 1969 warning people about sneak thieves and advising them on methods

of crime prevention. The film was clearly authored in the sense that it had a director: that is, there are relevant persons connected with the film. However, we just do not know who they are. As such, the film is a work of unknown authorship, rather than a film that falls within the scope of s.13B(9).

Stop That Thief is part of the British Film Institute's extensive film archive. You can watch the film here: www.youtube.com/watch?v=OcvLsje90s8.

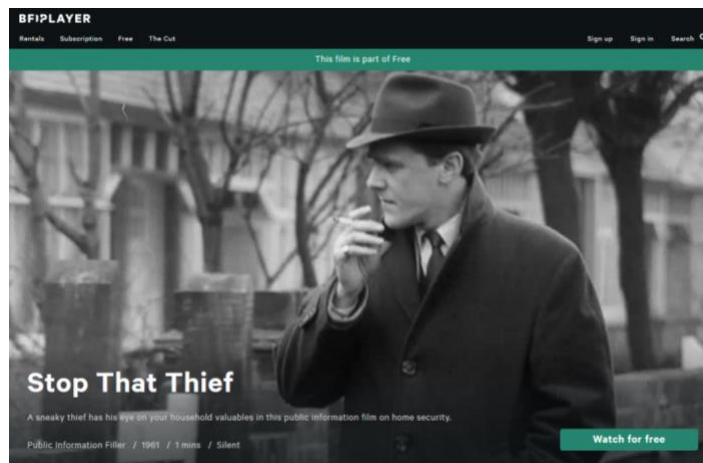


Figure 6.1: *Stop That Thief!*, available to view on the BFI Player

6.4. SOUND RECORDINGS

While the duration of copyright in sound recordings has varied quite a lot in the past, today, copyright in sound recordings expires 50 years from the end of the calendar year in which the recording is made.

However, if during that 50-year period the recording is **published or made available** to the public, copyright expires 70 years from the end of the year in which the recording was published or made available (s.13A(2)).

Imagine, for example, a band records thirteen tracks for an album in late 2010. They don't release the album until 2012, and when they do it only features ten of the thirteen songs. The copyright in the recordings of those ten songs will expire in 2082 (that is, 70 years after the recordings are published or made available to the public).

If the band never release the other three songs, the copyright in those sound recordings will expire 50 years after the recordings were made, that is, in 2060.

6.5. BROADCASTS

The life of the author is not used to calculate the duration of copyright in a broadcast. The period of protection granted to broadcasts continues to be 50 years from the end of the year of transmission (s.14(2)). Copyright in repeat broadcasts expire at the same time as the copyright in the original broadcast (s.14(5)).

6.6. THE TYPOGRAPHICAL ARRANGEMENTS OF PUBLISHED EDITIONS

The life of the author is not used to calculate the duration of copyright in the typographical arrangement of published editions. The protection for typographical format lasts for 25 years from the end of the year of first publication (s.15).

6.7. WORKS OF UNKNOWN AUTHORSHIP

The CDPA provides that a work is of unknown authorship if the identity of the author is unknown or, in the case of joint authorship, if the identity of none of the authors is known (s.9(4)). It continues that ‘an author shall be regarded as unknown if it is not possible for a person to ascertain his identity by reasonable inquiry’ (s.9(5)), although the Act does not define what constitutes a ‘reasonable inquiry’ within this context.

For literary, dramatic, musical and artistic works, if a work is of unknown authorship copyright expires 70 years from the end of the calendar year in which the work was made, or, if during that period the work is made available to the public,² then 70 years from the end of the year in which it was so made available (s.12(3)).

Once this term has expired it cannot be subsequently revived by revealing the identity of the author. However, if the identity of the author is disclosed before the term expired, then the work will be protected for the life of the author plus 70 years (s.12(4)).

Similarly, for films, if the identity of the relevant measuring persons are all unknown, copyright in the film will expire 70 years after the year in which the film was made, or, if during that period the film is made available to the public,³ 70 years from the end of the year in which it was so made available.

6.8. COMPUTER-GENERATED WORKS

When a literary, dramatic, musical or artistic work is computer-generated, the normal rules on duration do not apply. Instead, the work is protected for 50 years from end of the year in which the work was made (s.12(7)).

6.9. SUMMARY TABLE

On the next page, you’ll find a table summarising the rules on duration of copyright discussed above.

² In this context, in the case of a literary, dramatic or musical work making available means performance in public or communication to the public; in the case of an artistic work it means exhibition in public, including the work in a film being shown in public, or communication to the public (s.12(5)).

³ In this context, making available to the public means showing the work in public, or communicating it to the public (s.13(6)).

TYPE OF WORK	DURATION OF PROTECTION	CDPA
Literary, dramatic, musical or artistic work	Life of the author + 70 years from the end of the year in which the author dies	s.12(2)
Co-authored musical works, such as songs	70 years from the end of the year in which the last co-author dies	s.12(8)
Film	70 years from the end of the year of the last of four designated persons to die	s.13B(2)
Film without a designated person	50 years from the end of the year in which the film was made	s.13B(9)
Sound recording	50 years from the end of the year in which the film was made HOWEVER: if, during that 50-year period, the work is published or made available to the public, then 70 years from the end of that year	s.13A(2)
Broadcast	50 years from the end of the year of transmission	s.14(2)
Typographical arrangement of a published work	25 years from the end of the year in which the work is first published	s.15
Computer-generated literary, dramatic, musical and artistic works	50 years from the end of the year in which the work was made	s.12(7)
Works of unknown authorship	70 years from the end of the year in which the work was made HOWEVER: if, during that 70-year period, the work is published or made available to the public, then 70 years from the end of that year	S.12(3)

7. MORAL RIGHTS

In addition to the bundle of economic rights that copyright provides, the Copyright Designs and Patents Act 1988 (the CDPA) also creates moral rights in relation to certain types of work (sections 77-89). There are four types of moral right to be aware of:

- the right to be identified as the author of the work (often referred to as the right of attribution)
- the right to object to the derogatory treatment of a work (often referred to as the right of integrity)
- the right to object to false attribution of the work
- the right to the privacy of privately commissioned photographs or films

Here, we only focus on two of these moral rights: **attribution** and **integrity**. Details about the moral right of attribution are set out in sections 77-79 and 86-89 of the CDPA. Details about the moral right of integrity are set out in sections 80-83 and 86-89 of the CDPA.

For a case file concerning the moral rights of attribution and integrity, see **CASE FILE #11: THE MUTILATED WORK**.

7.1. ATTRIBUTION AND INTEGRITY: SOME COMMON FEATURES

The right of attribution and the right of integrity share some common features.

First, they only apply to certain types of copyright work: literary, dramatic, musical and artistic works, and films. They *do not apply* to sound recordings, broadcasts or the typographical arrangements of published editions.

Second, these moral rights last for as long as copyright exists in the work. That is, typically, both rights will last for the life of the author plus 70 years from the end of the year in which the author died. In the UK, when copyright expires so too do the author's moral rights, although in some continental jurisdictions, such as France, moral rights can last in perpetuity.

Third, while neither right can be assigned to another person (that is, the rights cannot be transferred from the author to someone else) the rights can be *waived* in certain circumstances (CDPA s.87). In effect, this means the author can agree not to assert her rights of attribution and integrity.

7.2. THE RIGHT OF ATTRIBUTION

7.2.1. WHEN DOES IT APPLY?

The right of attribution applies to literary, dramatic, musical and artistic works, as well as films.

But even when dealing with these categories of work there are some exceptions to keep in mind. For example, the right does not apply to:

- computer programs and computer-generated works (s.79(2))
- any work that was made for the purpose of reporting current events (s.79(5))
- any literary, dramatic, musical or artistic work made for the purpose of publication in a newspaper, magazine or similar periodical, or in an encyclopaedia, dictionary, yearbook or other collective work or reference (s.79(6))

So, for example, making use of a newspaper article without attribution details (perhaps you have not been able to identify who wrote the article) will not trigger any liability under this moral right on the basis that the work was both created for reporting current events (s.79(5)) and/or for publication in a newspaper (s.79(6)).

7.2.2. ATTRIBUTION: THE NEED TO ASSERT YOUR RIGHTS

The CDPA states that an author's attribution right cannot be infringed unless the author has **asserted** her right of attribution (s.77(1)). That is, without **asserting** the right the author cannot complain about infringement of that right.

Typically, assertion involves the author creating a signed, written document which states they are asserting their moral right. Alternatively, a provision asserting the attribution right might be written into a contract when the author is contracting with a publisher, producer, and so on. If you look at the front of almost any book published in the UK you will also find a statement to the effect that the author has asserted her moral rights.

In relation to artistic works, assertion might involve providing details about the author on the work itself whenever it is being publicly exhibited (for example, on the work, or on the frame, mount or other thing to which it is attached).

In *Walmsley v. Education Limited* (2014) the claimant was a professional photographer who sued for both breach of copyright and the moral right of attribution when two of his photographs were posted online in a blog written for the teachers and pupils of a school operated by the defendant. The photographs had been taken in 1968 for a book first published by the claimant in 1969.

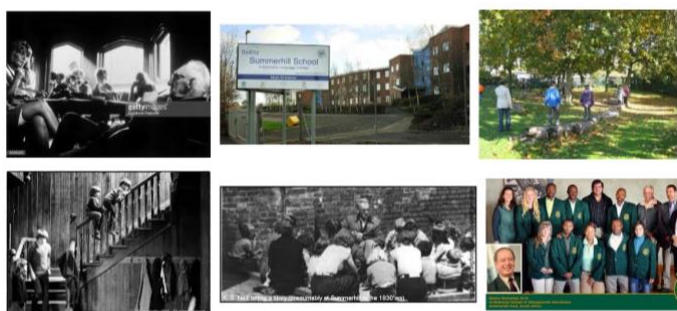


Image 7.1: The results of a google search for 'Summerhill School' showing a photograph clearly watermarked as © John Walmsley.

The teacher responsible for the blog had found the images online (following a Google search) without any copyright information attached and assumed – mistakenly – that they were free to use. Had Mr Walmsley asserted his right to be identified as the author of the photographs? The judge, District Judge Clarke, considered that he had. When his book was first published in 1969 the copyright rubric cleared stated that he owned the

copyright in both the book and the photographs. In addition, a Google search revealed that numerous of the claimant’s photographs – including copies of the photographs in question – contained a clear watermark stating: ‘© John Walmsley 1969 all rights reserved’. In the circumstances, the judge considered that the claimant ‘had clearly asserted his moral rights’.

District Judge Clarke commented that it is not necessary to make an assertion of the right of attribution ‘every single time the copyright is used’. Similarly, for works created

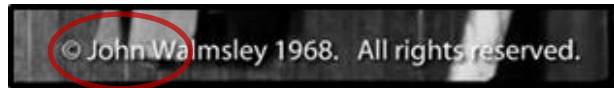


Image 7.2: Detail of the watermark.

before the CDPA came into force, there is no need to find ‘a continuous assertion from creation to the coming into effect of the CDPA’. Rather what is required is evidence of a relevant assertion at some point in time.

7.2.3. ATTRIBUTION: SCOPE OF PROTECTION

If the work qualifies for protection, and the author has asserted their right of attribution, the right applies in relation to the use of the work in its entirety or to any substantial part of the work (s.89(1)). So, even a partial reproduction of the work, if substantial, will require attribution.

7.2.4. ATTRIBUTION: WHEN INFRINGEMENT OCCURS

If the right of attribution exists in relation to a work, and that right has been asserted by the author, what constitutes infringement of the right?

Infringement is only triggered by making use of the work in certain circumstances without properly identifying the author.

Moreover, the types of activity that trigger infringement will vary depending on the type of work you are dealing with. So, whereas doing something with a literary work without attribution might constitute infringement, doing the same thing with a musical work may not.

Table 7.1 provides an overview of when an offence might be committed, although you should refer to the provisions set out in s.77 for further details. (‘Y’ indicates that the moral right of attribution applies to this type of activity for this type of work.)

Essentially, when dealing with literary, dramatic, musical and artistic works, if you commercially publish someone’s work, or make it available to the public – for example, by posting it online – then you should make sure to attribute the author.

However, if you are making use of a work within your classroom, then you don’t need to worry about formally attributing authorship (although, for educational purposes, or as a matter of good practice, you might always want to do so).

	LITERARY	DRAMATIC	MUSICAL	ARTISTIC	FILM
PUBLISH COMMERCIALY	Y	Y	Y	Y	NA
ISSUE COPIES TO THE PUBLIC	NA	NA	NA	NA	Y
ISSUE TO THE PUBLIC IN A FILM OR SOUND RECORDING	Y	Y	Y	Y	NA
EXHIBIT IN PUBLIC	NA	NA	NA	Y	NA
PERFORM IN PUBLIC	Y	Y	NA	NA	NA
SHOW IN PUBLIC	NA	NA	NA	NA	Y
INCLUDE IN A FILM SHOWN IN PUBLIC	NA	NA	Y	Y	NA
COMMUNICATE TO THE PUBLIC	Y	Y	NA	Y	Y
BROADCAST	Y	Y	NA	Y	Y
MAKE AVAILABLE ONLINE	Y	Y	NA	Y	Y

Table 7.1. Infringement of the moral right of attribution

7.2.5. ATTRIBUTION: WORK CREATED BY EMPLOYEES

The CDPA qualifies the application of the right of attribution in relation to work created by employees where copyright originally vested in the employer (that is, work created in the course of employment) (s.79(3)). In this case, if you have the permission of the copyright owner (rather than the author) to make use of the work, then the right of attribution does not apply.

For example, if the author was an employee when she created the work in question the copyright in that work may well have first vested in her employer: in this situation, if you are using the work with the employer's permission, the author cannot complain of any potential breach of her moral rights (whether attribution or integrity).

7.2.6. ATTRIBUTION: EXCEPTIONS TO THE RIGHT

Even if the moral right of attribution exists in relation to a work, and you are making use of the work in a manner that requires attribution (as set out in Table 7.1. above), the

CDPA also provides for some exceptional circumstances in which attribution is not required.

For example, the right does not apply to anything done by or with the authority of the copyright owner where copyright in the work originally vested in the author's or director's employer (as discussed above). In addition, attribution is not required when the use of the work relates to the reporting of current events (as defined by s.30 of the CDPA), or when the work has been incidentally included in an artistic work, sound recording, film or broadcast (as defined by s.31 of the CDPA), neither of which are likely to be of great relevance when digitising heritage material to make it available online.

7.3. THE MORAL RIGHT OF INTEGRITY

The moral right of integrity allows an author to object to the derogatory treatment of their work whenever the treatment would be prejudicial to the honour or reputation of the author.

7.3.1. INTEGRITY: WHEN DOES IT APPLY?

The right of integrity applies to literary, dramatic, musical and artistic works, as well as films. But, even in relation to these categories of work there are a number of exceptions to keep in mind. For example, the right does not apply to:

- computer programs and computer-generated works (s.81(2))
- any work that was made for the purpose of reporting current events (s.81(3))
- literary, dramatic, musical or artistic works made for the purpose of publication in a newspaper, magazine or similar periodical (s.81(4))
- literary, dramatic, musical or artistic works made for publication in an encyclopaedia, dictionary, yearbook or other collective work of reference (s.81(4))

Unlike the moral right of attribution, an author **does not need to assert their claim** to the moral right of integrity: that is, if the work qualifies for protection then the right of integrity applies.

7.3.2. INTEGRITY: SCOPE OF PROTECTION

If the work qualifies for protection, the right applies in relation to the use of the work in its entirety *or to any part of the work* (s.89(2)). So, even subjecting a part of the work – however small or insubstantial – to a treatment that could be regarded as derogatory might infringe.

7.3.3. INTEGRITY: WHEN INFRINGEMENT OCCURS

If the right of integrity applies to a work, what constitutes infringement of the right?

Infringement is only triggered by subjecting the work (or any part of the work) to a derogatory treatment in certain circumstances. Moreover, the types of activity that trigger infringement will vary depending on the type of work you are dealing with. Table 7.2. provides an overview of when an offence might be committed, although you should refer to the provisions set out in s.80 for further details. ('Y' indicates that the moral right of integrity applies to this type of activity for this type of work.)

Essentially, when dealing with literary, dramatic, musical and artistic works, if you commercially publish someone's work, perform it in public, or make it available to the public – for example, by posting it online – then you should be mindful about the right of integrity.

	LITERARY	DRAMATIC	MUSICAL	ARTISTIC	FILM
PUBLISH COMMERCIALY	Y	Y	Y	Y	NA
ISSUE COPIES TO THE PUBLIC	NA	NA	NA	NA	Y
ISSUE TO THE PUBLIC IN A FILM OR SOUND RECORDING	NA	NA	NA	Y	NA
EXHIBIT IN PUBLIC	NA	NA	NA	Y	NA
PERFORM IN PUBLIC	Y	Y	Y	NA	NA
SHOW IN PUBLIC	NA	NA	NA	NA	Y
INCLUDE IN A FILM SHOWN IN PUBLIC	NA	NA	NA	Y	NA
COMMUNICATE TO THE PUBLIC	Y	Y	Y	Y	Y
BROADCAST	Y	Y	Y	Y	Y
MAKE AVAILABLE ONLINE	Y	Y	Y	Y	Y

Table 7.2. Infringement of the moral right of integrity

7.3.4. INTEGRITY: WORK CREATED BY EMPLOYEES

Like the right of attribution, when dealing with work created by an employee, where copyright originally belongs to the employer (that is, work created in the course of employment), the CDPA provides that the right of integrity *does not* apply to anything done in relation to the work by or with the authority of the copyright owner.

However, when dealing with the right of integrity, this qualification is itself subject to two further qualifications:

- where the author or director is identified at the time of the relevant act (that is, at the time of the allegedly derogatory treatment)
- where the author or director has previously been identified in or on published copies of the work

Moreover, the Act also continues that if the right *does* apply, the treatment will *not* constitute an infringement if there is a *sufficient disclaimer* (s.82(2)). A ‘sufficient disclaimer’ is defined as follows: ‘a clear and reasonably prominent indication (a) given at the time of the act, and (b) if the author or director is then identified, appearing along with the identification, that the work has been subjected to treatment to which the author or director has not consented’ (s.178).

7.3.5. INTEGRITY: WHAT IS A DEROGATORY TREATMENT OF A WORK?

The treatment of a work is defined in the legislation as any ‘addition to, deletion from, alteration to or adaptation of the work’, however, this does not include the translation of literary or dramatic works, or arrangement or transcribing a musical work involving no more than a change of key or register (s.80(2)).

The treatment of the work will be derogatory if it amounts to ‘distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director’ (s.80(2)(b)).

There is no simple test that can be applied to determine whether a work has been treated in a derogatory manner, although the courts have indicated that this should be determined objectively. That is, it is not enough that the author thinks the work has been subjected to a derogatory treatment (a subjective perspective); instead, one should ask whether a reasonable person would regard the treatment as derogatory (an objective perspective).

7.3.6. IS THE TREATMENT PREJUDICIAL TO THE HONOUR OR REPUTATION OF THE AUTHOR?

Even if the treatment distorts or mutilates the work, this does not necessarily mean an offence has been committed.

In *Confetti Records v. Warner Music* (2003) it was argued that a distortion or mutilation of a work that was not prejudicial to the honour or reputation of the author might nevertheless infringe an author’s right of integrity. This argument was rejected by the court. Mr Justice Lewison specifically set out that ‘the author can only object to distortion, mutilation or modification of his work *if it is prejudicial to his honour or reputation*’ (emphasis added). That is, simply distorting or altering a work *per se* will not trigger liability unless that distortion is objectively prejudicial to the author’s reputation.

The *Confetti* case is discussed in **CASE FILE #11: THE MUTILATED WORK**.

By way of illustration: in *Tidy v. Trustees of the Natural History Museum* (1996) the cartoonist Bill Tidy granted the Natural History Museum permission to exhibit and reproduce a number of his black-and-white cartoons of dinosaurs. The gallery reproduced the cartoons in a smaller size and added a background colour (or pink or yellow) to the original drawings without the artist's permission (see Image 3). Mr Tidy complained that his right of integrity had been infringed. The court decided that, while the drawings had been altered in a material way, no evidence had been presented as to how the public perceived the Museum's actions, and without appropriate evidence of *actual prejudice* to Mr Tidy's reputation no offence had been committed.

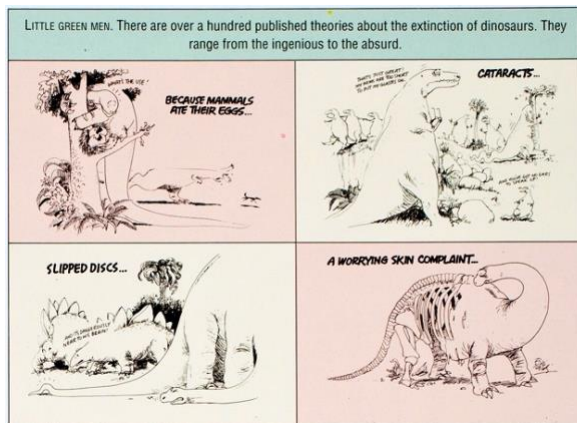


Image 7.3: From *Tidy v. Natural History Museum*. This image is available at the [Virtual Museum of 20th century intellectual property cases](#)

7.4. INFRINGEMENT OF MORAL RIGHTS, ENFORCEMENT AND DAMAGES

Infringement of a moral right is actionable under the CDPA as a breach of a statutory duty (s.103(1)) and will result in an award of damages.

For example, in *Walmsley v. Education Limited* (2014), discussed above, the claimant was awarded £500 plus VAT for breach of his attribution right in relation to two photographs. The claimant had already been awarded the same amount for breach of his copyright in the photographs. That is, the financial penalties imposed by the court for breach of copyright and breach of moral rights were identical.

Moreover, when dealing with a breach of the right of integrity, the court may, if appropriate, grant an injunction to prevent doing anything with the work in question, unless an appropriate disclaimer is made dissociating the author from the derogatory treatment of the work (s.103(2)).

7.5. MORAL RIGHTS ON DEATH: WHO INHERITS?

Section 95 of the CDPA deals with issues concerning the transmission of moral rights on death. The author is free to leave her right of attribution and integrity to whomever she wishes, just like any other form of property. However, if the author makes no provision for her moral rights in her will, they will pass to the person to whom the copyright passes in those works. If, however, no copyright in the work passes under her will (for example, the author may have previously sold the copyright in her work to a publisher or another third party), her moral rights pass to her personal representatives.

8. GETTING PERMISSION TO USE

One obvious way to manage copyright issues, and to avoid liability for infringement, is to ask the copyright owner for permission to make use of the work.

Copyright owners enable the use of their work by a third party either by assigning the copyright in their work to that third party, or, more commonly, by granting a licence to the third party to make use of the work for certain purposes and often in accordance with certain conditions.

For a case file concerning contracts between authors and publishers, see **CASE FILE #15: THE DREAM JOB**.

8.1. ASSIGNMENTS

An assignment of copyright involves a transfer of the ownership of the copyright from one person to another.

Not all the economic rights in a copyright work need to be assigned at the same time to the same person (s.90(2)). Each of the economic rights that attach to the work can be assigned separately if the copyright owner so wishes. For example, an author might assign the right to publish the work to her publisher, while retaining other economic rights (such as performance or adaptation) for herself.

Moreover, an assignment might be partial in nature in that it is limited in duration or by jurisdiction. For example, an author might assign the right to exploit the work in Europe to one publisher, while selling the right to exploit the work in the US to another (although typically a publisher will seek to acquire worldwide rights). Or, an author might assign all the rights in her work to another, but for no more than ten years (although typically a publisher will seek to acquire rights that last for the full duration of the copyright in the work).

But, whether partial or not, to be valid an assignment *must* be in writing and signed by or on behalf of the assignor (that is, the person making the assignment) (s.90(3)).

8.2. LICENCES

A licence is essentially a permission to make use of a work in a way that, without permission, would constitute copyright infringement. In other words, the grant of a licence means the licensee (the person to whom the licence is granted) can make use of the work without infringing the copyright in the work. When granting a licence, the copyright owner retains an interest in the copyright; that is, unlike an assignment, no property interest passes from the copyright owner to the licensee.

A licence will often be contractual in nature, but it does not have to take the form of a binding contract. For example, simply giving someone consent (whether explicitly or tacitly) to reproduce a work can amount in law to a licence, and without the parties entering into a formal contract (*Barrett v. Universal-Island Records Ltd* (2006)).

There are various types of licence, however, one important distinction to be aware of concern *exclusive* and *non-exclusive* licences.

An exclusive licence grants the use of a work *only* to the person who acquires the licence. For example, X grants an exclusive licence to Company Y to publish and sell her novel (for no longer than 20 years, but on a worldwide basis). Because of the exclusive nature of the licence *anyone* who wants to publish the work must seek permission from Company Y; this includes X: for the next 20 years, she has no right to publish or authorise anyone else to publish the work without first seeking permission from Company Y.

A non-exclusive licence enables the copyright owner to license the use of the work to more than one person at the same time, while also retaining the ability to use and exploit the work herself.

As with assignments, licences can be quite bespoke in terms of the rights involved, and the duration and geographic reach of the permissions granted.

For a case file concerning clearing rights by licensing, see **CASE FILE #29: THE DOUBLE SCORE**.

8.3. CREATIVE COMMONS AND OPEN LICENCES

Creative Commons (CC) is a non-profit organisation that enables the sharing and use of copyright-protected content by providing easy-to-use copyright licences for authors and interested organisations. Further information about CC licences can be found on the Creative Commons website.

However, the suite of licences available through Creative Commons represent just one possible approach to open licensing and ensuring open access to creative and informational content. For a short readable introduction to the open access movement, as well as other approaches to open licences, see Peter Suber, *Open Access* (MIT Press, 2012) which is available to download (for free) here: mitpress.mit.edu/books/open-access.

You will also find lots of open, free-to-use content, on Wikimedia Commons, including images, sound recordings and audio files, and videos. Wikimedia Commons aims to make available public domain and freely-licensed educational media content for use and re-use in any context, not just in the classroom. You can find out more here: commons.wikimedia.org/wiki/Commons:Welcome.

8.4. COLLECTING SOCIETIES

Authors and/or other copyright owners often authorise a collecting society (or Collective Management Organisation: CMO) to manage certain uses of their work. So, for example, the Performing Right Society (PRS), first founded in 1914, administers the performance and broadcast of rights in music and song lyrics. The PRS has over 100,000 members, including songwriters, composers and music publishers. Or consider DACS, the Design

and Artists' Copyright Society, established in 1983, which administers the reproduction right for visual artists.

The collective management of copyright interests has mushroomed in Britain in the last 30 years. You can find further information, including a list of collecting societies currently operating within the UK here: www.gov.uk/guidance/licensing-bodies-and-collective-management-organisations.

Essentially, the collective management of rights aims to simplify the process of securing permission so that entire categories of copyright works can be licensed for specific uses by specific institutions or organisations.

For example, this might involve permitting photocopying certain parts or portions of published works by students enrolled at a school or a university. The collecting society grants a blanket licence to the school or university on behalf of its members, collects in the fee, and redistributes it as royalties to its members (after deducting an administrative fee).

8.5. COLLECTING SOCIETIES AND SCHOOLS

The Copyright Licensing Agency offers and administers various licencing schemes relevant to schools. These include the:

- **CLA Schools licence:** this allows you to copy and reuse content from print and digital publications (that is, copying from books, magazines, journals and websites); you can find out more here: www.cla.co.uk/cla-schools-licence
- **Schools Printed Music licence:** this allows you make photocopies and scans of entire works of printed music, and share print music on a school VLE; you can find out more here: www.cla.co.uk/schools-printed-music-licence
- **NLA Media Access Schools licence:** this provides annual blanket permissions to copy and reuse content from print and digital newspaper publications; you can find out more here: www.cla.co.uk/nla-schools-licence

Similarly, the Centre for Education & Finance Management administers various licensing schemes primarily concerned with music and music performance. These include the:

- **PRS for Music licence:** this covers the **non-curricular use and performance of music**, for example, in the form of concerts, music recitals, or other musical performances; you can find out more here: cefm.co.uk/licensing/school/
- **PPL licence:** this covers the **non-curricular use of recorded music** in schools, for example, at a school disco or an end of year party; you can find out more here: cefm.co.uk/licensing/pplschoools/
- **MCPS licence:** this allows your school to produce CDs and DVDs containing up to 120 minutes of music per produce; for example, this might include a DVD recording of musical performances by students to be given away to students and parents , or the production of student films that contain music; however,

this licence does not let you make these recordings available on the internet; you can find out more here: cefm.co.uk/licensing/mcps/

In addition, other collecting societies offer a range of licences that may be relevant to your school. These include the:

- **Educational Recording Agency licence:** this allows educational establishments to create libraries of radio and television broadcasts to be used for educational purposes; this includes making recordings from catch-up services like the BBC iPlayer, as well as other online or on-demand services; you can find out more here: cefm.co.uk/licensing/era_schools/
- **Public Video Screening licence:** this allows schools (as well as other organisations) to show films for entertainment or background purposes on their premises, so long as they do not charge for the screening; it is worth noting that, in England, the Department of Education has acquired a PSV licence for all state-funded schools; find out more here: www.filmbankmedia.com/licences/pvsl/
- **Schools Collective Worship licences:** these allows schools to project or print the words and music of a repertoire of popular hymns and assembly songs during times of collective worship; schools can also make music arrangements of this hymns, and record songs sung during assemblies; you can find out more here: uk.ccli.com/copyright-licences/#school-licences

As noted above, these licensing schemes help to simplify the process of securing permission so that entire categories of copyright works can be licensed for specific uses by schools. They allow you to copy and make use of works in certain specified way, when carrying out the activities of the school. In the next section, we provide a brief overview of the type of activities covered by a number of these licensing schemes.

8.6. COPYING THAT IS PERMISSIBLE UNDER LICENCE: AN OVERVIEW

Most educational uses of copyright works are permitted either through licensing schemes or by copyright exceptions. The combination of licences and exceptions means that teachers and students do not have to worry about seeking permission every time they want to use a copyright work for educational purposes.

Certain exceptions for education – e.g. Recording by educational establishments of broadcasts (s.35 CDPA) – can only be relied upon in the absence of a relevant educational licensing scheme. This means that if a scheme has been set up to license this kind of use of copyright material by educational establishments (in this example, it has: the ERA licence), then the exception does not apply to that particular use.

At the same time, other exceptions such as parody (9.8) or illustration for instruction (10.3.1) cannot be overridden by contract. Therefore, even if the terms and conditions

of a licence specifically prohibit these uses, teachers and students can still rely on the exceptions and make use of the work for those purposes. We discuss this further in section 10.5.

It is important to note that the Department for Education (DfE) buys copyright licences for all state-funded primary and secondary schools in England: www.gov.uk/guidance/copyright-licences-information-for-schools

In the pages that follow, you will find a summary of the key features of the licensing schemes available for educational establishments in the UK. However, for a full understanding of the scope and content of each licensing scheme, it is advisable to refer to the terms and conditions of the licence.

COPYRIGHT LICENSING AGENCY – the CLA EDUCATION LICENCE	
TYPE OF WORK	<p>Literary Works: Books, Magazines, Journals and Websites</p> <p>The licence covers most literary works first published in the UK, as well as material published in various other jurisdictions (including the US). If you are unsure whether the work you want to copy from is covered by this licence, you can check online by using the CLA’s Check Permissions Search Tool (also available as an app).</p>
WHO CAN COPY	Students, Parents of students (under 16), Teaching staff, Other school staff (e.g. admin staff), School governors
HOW MUCH	<p>You can copy up to five per cent of the published work OR one of the following whichever is greater:</p> <ul style="list-style-type: none"> ▪ One chapter of a book ▪ One whole article from a single issue of a magazine or journal ▪ One short story or poem, of no more than 10 pages, from an anthology <p>When dealing with digital material that is not in a conventional format – such as a book or a magazine – follow the guidelines above, so far as you reasonably can.</p>
GENERAL CONDITIONS	<p>You must own a copy of the original work that you are copying from. When copying from a digital work that is not ‘free-to-view’, such as a commercially available e-book, the school must have purchased or secured lawful access to the work in some way.</p> <p>Under this licence, copying cannot become a substitute for purchasing a copy of the original work.</p>
WHAT YOU CAN DO	<p>You can make hard copies from any of these types of work, including from the internet and other ‘free-to-view’ digital materials.</p> <p>For example, you might print out part of an article online, make a photocopy of a couple of pages from a book, or make an acetate copy for use in the classroom.</p>

	You can distribute these hard copies to students and other staff. However, the number of copies you make should not exceed the number that is needed for the learning activity. So, if you have 32 students in your class, you should only make 32 copies for the students (plus one for yourself, other relevant teachers or assistants, and so on).
	You can also make digital copies of these works in two different ways. Either you can scan the material, or you can create a digital copy by retyping extracts from the work onto a computer. If you retype the content, be sure to create a verbatim copy, without altering or amending the text in any way.
	If you make a digital copy, you can make it available to students and staff by emailing it to them, as well as by letting them access it over a secure network . But you cannot make these digital copies openly available online, or otherwise make them openly available to members of the public. They should only be made available on a secure network.
	When students have access to a digital copy on a secure network, they are also allowed to print a single copy of the work. Note, however, if the student is under the age of 16, they can only print out a copy under the guidance of teaching staff as part of formal teaching or some other school activity.

NLA MEDIA ACCESS SCHOOLS LICENCE	
TYPE OF WORK	<p>Literary works: Print and Digital Newspapers</p> <p>The NLA represents over 3500 newspaper titles, over 2000 online titles, and 300 publishers. You can check whether the newspaper you want to copy from is covered by this licence by using the CLA's online Check Permissions Search Tool (also available as an app).</p>
WHO CAN COPY	Students, Parents of students (under 16), Teaching staff, Other school staff (e.g. admin staff), School governors
HOW MUCH	<p>You can copy one article from a single issue of a newspaper, or up to 5% of the material in that issue, whichever is greater.</p> <p>If you are copying an article, this includes the text and any still images accompanying the article. But you cannot copy photographs and images separately from the article to which they relate.</p>
GENERAL CONDITIONS	<p>The school must own the newspaper that is being copied, unless the article is from the NLA's Newspapers for Schools database or the school has paid a copyright fee for the specific material.</p> <p>If it is an NLA Newspaper website the school must have subscribed to the publication, unless it is a free-to-view site. You are free to copy from NLA websites that are free-to-view online (within the limits of the licence).</p>
WHAT YOU CAN DO	You can make hard copies of newspaper articles.
	You can distribute copies to pupils, pupils' parents, staff members and school governors. However, you can only make as many copies as you need for the intended purpose – whether it is a learning activity or some other school-related activity (for example, a governors' meeting) – and no more.
	<p>You can make digital copies of these works, for example, by scanning, retyping, or copy and pasting. If you retype the content, be sure to create a verbatim copy, without altering or amending the text in any way.</p> <p>You can make use of these copies by, for example, projecting them onto a screen in a classroom.</p>

	<p>You can make digital copies available to students and staff by emailing it to them, or by uploading it to a secure network or a VLE. But you cannot make digital copies openly available online, or otherwise make them openly available to members of the public. They should only be made available on a secure network.</p> <p>Staff and students with access to a digital copy on a secure network or VLE are also allowed to print out a single copy of the work. Note, however, if the student is under the age of 16, they can only print out a copy under the guidance of teaching staff as part of formal teaching or some other school activity.</p>
<p>STORAGE AND RE-USE</p>	<p>Copies should be destroyed at the end of the year unless they can be used again, for example, for teaching in the following year.</p>

SCHOOL COLLECTIVE WORSHIP COPYRIGHT LICENCE	
TYPE OF WORK	<p>Literary works: Lyrics</p> <p>This licence concerns the use of words from popular hymns and worship songs, detailed in the Song Reference List as updated by CCLI from time to time.</p>
WHO BENEFITS	Schools taking out the licence.
GENERAL CONDITIONS	The school must not alter the words of any hymn and/or worship song when making copies.
WHAT YOU CAN DO	<p>You can copy the words of hymns and worship songs, but not by way of photocopying (although you can make photocopies of your copy). So, for example, you could write out the words to a hymn and then photocopy your written version for students.</p> <p>You can reproduce these words in bound or unbound books compiled by and for the school.</p> <p>You can project the lyrics of these hymns and songs onto a big screen (and make acetates for that purpose).</p> <p>You can make recordings of students singing the words of these hymns and songs (both audio and audiovisual).</p>
HOW MUCH	When copying the words of hymns and worship songs, the number of copies shall not exceed the number of pupils on the school roll.
ADDITIONAL NOTES	<p>Although this licence only applies to the copying of lyrics from hymns and songs, CCLI (Christian Copyright Licensing International) also offer a SCHOOL COLLECTIVE WORKSHIP MUSIC REPRODUCTION LICENCE which concerns the use of music accompanying these lyrics. For example, it allows you to make musical arrangements of these works for transposing instruments (for example, for a school band) where a published version of the work does not exist. For further details, see: uk.ccli.com/copyright-licences/#school-licences</p>

SCHOOLS PRINTED MUSIC (GENERAL)	
TYPE OF WORK	<p>Musical works: Print Music</p> <p>This licence does not cover hymns and songs used in collective worship, which fall under a different licence (see below). Also, there are certain other printed music publications that are excluded from the licence. For further information about these excluded works, see the CLA website. LINK</p>
WHO CAN COPY	<p>Members of staff and music teachers (whether employed, self-employed, and so on)</p> <p>Note: students are NOT covered by this licence</p>
HOW MUCH	<p>You can copy up ten per cent (by number of items) of the individual pieces of music in a published Anthology or a multi-movement vocal score OR not more than ten percent (by the number of pages) of any Workbook.</p> <p>Note: If there are fewer than ten individual pieces of music in the Anthology or multi-movement vocal score, you can copy one of them only.</p>
GENERAL CONDITIONS	<p>The member of staff, or teacher, or the school must own at least one original source copy of the printed music publication.</p> <p>Copies must only be used for school activities (including individual vocal or instrumental teaching). They cannot be used for private purposes.</p>
WHAT YOU CAN DO	<p>You can make copies on the school premises. The copying can take many forms, for example, by photocopying, by transcribing an extract, by copying onto an acetate, by using music notation computer software, or by scanning and printing</p>
	<p>Having made copies, you can also distribute copies to staff and students. However, the number of copies you make should not exceed the number that is needed for the learning activity.</p>
	<p>If you make a digital copy of the work, you can also make it available to students and staff by letting them access it over a secure network. However, copies made available on the network must be deleted at the end of each academic year.</p>

	<p>You can make a new arrangement of the work. New arrangements can be made for practical purposes, such as a change of instrumentation or key, or to make the work performable.</p>
--	---

	<p>Any arrangement should include an appropriate copyright notice, as well as the name of the arranger; it should not change the character of the work or parody the work in any way.</p>
--	---

PPL LICENCE for SCHOOLS	
TYPE OF WORK	<p>Recorded music: sound recordings (e.g. playing CDs or vinyl, playing the radio or music videos)</p> <p>When playing recorded music, you will generally also need a PRS for Music licence. This is because PPL represent the people who own the rights in the sound recording, but the PRS represent the people who own the rights in the music and lyrics of songs.</p>
WHO BENEFITS	<p>Music can be played on the school premises by groups of students, teachers or anyone else linked to the life of the school, for example, Parent Teachers Associations, or School Governors.</p>
GENERAL CONDITIONS	<p>This licence is only required for non-curricular use of music in schools (see ADDITIONAL NOTES below).</p>
WHAT YOU CAN DO	<p>You can play music for non-curricular activities. This might include, for example, a school disco or an end of year party. Or, it might involve playing music as part of a non-curricular dance class, at a school fete, or playing music on school telephone systems when callers are on hold.</p>
ADDITIONAL NOTES	<p>You do not need a licence to make use of music for curricular activities – this is covered by s.34 of the CDPA.</p> <p>Section 34(2) allow you to play or show sound recordings, films and broadcasts for the purposes of instruction, so long as you are only playing the work to pupils, teachers and anyone else directly connected with the activities of the school (for example, admin staff). So, if you are playing music, or a film or a television programme as part of a lesson you are delivering, that is perfectly lawful under the CDPA.</p>

PRS for MUSIC LICENCE	
TYPE OF WORK	<p>Musical works</p> <p>The PRS repertoire includes millions of songs, but it does not include operas, operettas, musical theatre, music specifically written for a play, revues, pantomimes or performances of ballet.</p>
WHO BENEFITS	Schools taking out the licence.
GENERAL CONDITIONS	<p>This licence is only required for non-curricular use of music in schools (see ADDITIONAL NOTES below).</p> <p>The licence does not allow you to alter lyrics, adapt musical works, or the photocopy sheet music.</p>
WHAT YOU CAN DO	<p>You can play and perform music for non-curricular activities.</p> <p>This might include, for example, a school disco or an end of year party. Or, it might involve playing music as part of a non-curricular dance class, at a school fete, or playing music on school telephone systems when callers are on hold.</p> <p>These events can be run for a profit, so long as the profit goes entirely to the school.</p>
	Because the licence covers the performance of music in public, you do not need a licence for music lessons or music rehearsals.
ADDITIONAL NOTES	<p>You do not need a licence to play or perform music for curricular activities – this is covered by s.34 of the CDPA.</p> <p>Section 34(1) allows the performance of literary, dramatic and musical works for the purpose of instruction, or for any other purpose connected with the activities of the school. However, you can only perform the work to pupils, teachers and anyone else directly connected with the activities of the school. For example, if you want to perform an end of year concert that parents can attend that would require a licence.</p> <p>See Chapter 10 for further details.</p>

MCPS LICENCE	
TYPE OF WORK	<p>Musical works</p> <p>This licence does not include operas, operettas, musical theatre, music specifically written for a play, revues, pantomimes or ballet.</p>
WHO BENEFITS	Schools taking out the licence.
HOW MUCH	You can make a CD or a DVD – or any other similar product – that contains up to 120 minutes of music. However, it cannot contain more than two tracks featuring the same artist.
GENERAL CONDITIONS	<p>The copies that you make must be for private use only. You cannot make the recording available on the internet, broadcast it, or make it available to the public in some way.</p> <p>The licence does not allow you to alter or adapt the works in any way, or to use a work for parody, burlesque or any use that is likely to be detrimental to the author and/or performer of the original work.</p>
WHAT YOU CAN DO	<p>You can make recordings of musical works, for example, on a CD or DVD, and distribute those copies to members of the public.</p> <p>For example, you might want to make a DVD featuring student performances, or student films that contain music. These copies can be sold or given away to students, family, friends, or to raise funds for the school.</p> <p>However, you can only manufacture and distribute up to 1000 copies of any product.</p> <p>The copies that you make must be for private use only. You cannot make the recording available on the internet, broadcast it, or make it available to the public in some way.</p>
ADDITIONAL NOTES	<p>You do not need a licence to copy or play music for curricular activities, for example, for the purpose of instruction or assessment. This is already permitted under s.32 and s.34 of the CDPA (exceptions to copyright). See Chapter 10 for further details.</p>

THE ERA LICENCE	
TYPE OF WORK	TV and radio outputs, including films.
WHO CAN COPY	Staff and students at ERA licensed institutions.
HOW MUCH	Any number of copies of whole programmes can be made and retained.
GENERAL CONDITIONS	<p>You can only access and use ERA licensed content for educational purposes in the UK; you can access the content on or off-site in the UK over a secure network. You can't upload it and make it available via social media platforms such as YouTube or Twitter. Any kind of commercial activity is restricted by the ERA licence, including promotional activity.</p> <p>The licence does not allow to modify or edit the content or reuse it to create a new derivative work. ERA licensed content can't be used in public performances.</p>
WHAT YOU CAN DO	<p>Under the ERA licence, staff and students can show clips or whole programmes from ERA Members' output (including films) for educational purposes. You can use clips from ERA broadcasters' websites and catch up services. You can also access recordings via an approved third party such as BoB, Clickview Exchange or eStream</p> <p>If your institution holds an ERA licence, you can make and retain any number of copies of the licensed works and keep those copies for as long as the licence is held. You can also share programmes or clips on VLEs and embed clips in presentations.</p>
ADDITIONAL NOTES	<p>You do not need a licence to play or show a film or a broadcast for the purposes of instruction, or for any other purpose connected with the activities of the school. This is covered by s.34 of the CDPA.</p> <p>However, you can only play or show films and broadcasts before an audience consisting of pupils, teachers and anyone else directly connected with the activities of the school. See Chapter 10 for further details.</p>

PUBLIC VIDEO SCREENING LICENCE	
TYPE OF WORK	Films
WHO CAN COPY	Various organisations, including schools and student unions.
HOW MUCH	You can screen entire films.
GENERAL CONDITIONS	<p>The film must be screened in the UK and must take place at the licensed premises (indoors only) to the licensed group. There is no limitation on the size of the licensed group. However, licensing fees are proportional to the size of the group. The film must be in DVD or Blue-ray format.</p> <p>You can't modify, edit or make copies of the film. The screening can only be promoted within the licensed premises to the licensed group and only when no commercial activity is being undertaken during, immediately before and/or after the screening. You can't charge an admission fee for the screening.</p>
WHAT YOU CAN DO	You can screen feature films covered by the PVS Licence. These include all films distributed by participating distributors and available to the public in the UK through legitimate retail and rental outlets in DVD or Blu-ray format. A list of participating distributors is available here: https://www.filmbankmedia.com/licences/pvsl/pvsl-participating-studios/
ADDITIONAL NOTES	<p>You do not need a licence to screen entire films for the purposes of instruction, or for any other purpose connected with the activities of the school. This is covered by s.34 of the CDPA.</p> <p>However, under s.34, the screening must be before an audience consisting of pupils, teachers and anyone else directly connected with the activities of the school. See Chapter 10 for further details.</p>

9. LAWFUL USE WITHOUT THE NEED FOR PERMISSION

The law tells us that there are certain things that we cannot do without copyright permission. Getting permission to make use of someone's work in certain ways is an important aspect of respecting copyright, whether you get permission directly from an author or an artist, or your school has secured permission under one of the licensing schemes discussed in section 8.5.

But equally, it is important to appreciate that there are lots of ways in which we can make use of another person's work, without the need for their permission, whether it is for certain creative, informative, educational or other purposes. Much will depend on the context: that is, what you are doing, why, and where.

That is, while copyright **prevents** doing certain things in certain circumstances without permission, at the same time, it **permits** doing certain things in certain circumstances without permission.

In this chapter, we consider three different types of lawful use without permission. You can make use of:

- ideas, facts, or information from someone's work, so long as you don't copy the expression of those ideas, facts or information
- an insubstantial part of the work
- the work in accordance with one of the many statutory defences to copyright infringement (these are otherwise referred to as 'the permitted acts')

Each type of use represents a different way in which the copyright regime limits the control that a copyright owner can exert in relation to her work. That is, they allow and enable the lawful use of other people's work without the need to ask for permission.

For a case file concerning the lawful copying of elements of copyright works, see **CASE FILE #16: THE PANTAGES**. For a case file concerning the use of literary characters from a work of fiction, see **CASE FILE #21: THE SIX DETECTIVES**.

9.1. IDEAS, FACTS, INFORMATION, THEORIES AND THEMES

Although copyright will protect against copying non-literal aspects of literary, dramatic, musical and artistic works, there will always be elements of the work that remain unprotected and so free to use without permission.

Consider, for example, the so-called idea-expression dichotomy discussed in **section 1.2**. Essentially, copyright does not protect ideas, only the way in which an author has expressed her ideas. So, to copy ideas is lawful. But, to copy the way in which an idea has been expressed by another author without permission is not lawful.

Moreover, it is not just ideas that remain in the public domain. In *Baigent v. Random House* (2007) the claimants argued that Dan Brown had copied a substantial part of their non-fiction book, *The Holy Blood and the Holy Grail*, in writing his blockbuster novel *Da Vinci Code*. This case is discussed in **CASE FILE #18: THE PURLOINED LETTERS**.

In *The Holy Blood and the Holy Grail* the claimants argued that the bloodline of Jesus had survived, merging with the Merovingian bloodline around the fifth century.

Both the High Court and the Court of Appeal held that no infringement had occurred. While Brown had made use of *The Holy Blood and the Holy Grail* in writing the *Da Vinci Code*, what he had copied amounted to generalised ideas and propositions at too high a level of abstraction to qualify for protection.

Lord Justice Mummery commented that '[i]t is not, however, sufficient for the alleged infringing work simply to replicate or use items of information, facts, ideas, theories, arguments, themes and so on derived from the original copyright work'. He acknowledged that an author's original expression includes 'not only the language in which the work is composed but also the original selection, arrangement and compilation of the raw research material', but continued:

It does not, however, extend to clothing information, facts, ideas, theories and themes with exclusive property rights, so as to enable the claimants to monopolise historical research or knowledge and prevent the legitimate use of historical and biographical material, theories propounded, general arguments deployed, or general hypotheses suggested (whether they are sound or not) or general themes written about.

So, copyright will protect the content of a literary (dramatic, musical or artistic) work, including an author's specific selection, arrangement and development of ideas, facts, incidents, and so on. However, *it will not protect* those ideas, facts, incidents or other commonplace or abstract aspects of the work. As always, much will depend on the factual circumstances of each individual case.

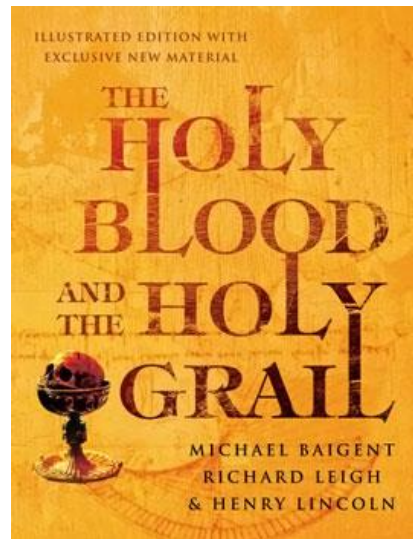


Image 9.1: The claimant's book, *The Holy Blood and the Holy Grail*

9.2. INSUBSTANTIAL COPYING

As we discussed in **section 5.4**, the law allows you to copy insubstantial parts of copyright works without the need for permission. Infringement only occurs if you copy the work in its entirety or a substantial part of it (s.16(3)(a)). However, determining the line between substantial and insubstantial copying is not always straightforward.

9.3. THE PERMITTED ACTS: LIMITATIONS AND EXCEPTIONS TO COPYRIGHT

Every copyright regime throughout the world limits the copyright owner's rights in specific ways by allowing certain things to be done with the work without the need for the owner's permission. These *permitted acts* (otherwise referred to as copyright

exceptions) represent an attempt to strike a balance between the economic rights of the copyright owner and other uses considered to be socially, culturally, politically or economically beneficial.

In the UK, these exceptions are set out in sections 28-76 of the CDPA.

There are general exceptions designed to facilitate the use of work by anyone, for example, for the purposes of research and private study, for criticism and review, or for reporting current events.

Other exceptions are intended to enable the use of copyright material within certain institutional contexts, for example, by educational institutions, by libraries and archives, or to facilitate parliamentary or judicial proceedings.

We consider the specific exceptions relevant to private study, research and education in the next chapter. Before that, however, we consider the concepts of **fair dealing** and **sufficient acknowledgement**, as well as some general exceptions to copyright that are applicable to everyone.

9.4. FAIR DEALING

Some exceptions to copyright allow for the use of *the entire copyright work*; for example, performing a literary, dramatic or musical work before an audience of teachers and pupils at an educational establishment (s.34).

Other types of permitted act introduce the notion of *fair dealing*; for example, fair dealing with a work for the purposes of reporting current events will not infringe the copyright in that work (s.30(2)).

While the concept of *fair dealing* is not defined within the CDPA it will generally be relevant to consider the alleged infringer's purpose in using the work, the proportion of the work she uses, her motive in using the work, and the status of the original copyright work. The courts will not allow a defence of fair dealing if they consider that the real motivation behind the alleged infringer's use of the work is to produce a commercially competitive product. In *Hubbard v. Vosper* (1972) Lord Denning commented as follows:

[F]irst consider the number and extent of the quotations ... Then you must consider the use made of them. If they are used as the basis of comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, they may be unfair. Next you must consider the proportions. To take long extracts and attach short comments may be unfair. But short extracts and long comments may be fair. Other considerations may come to mind also. But when all is said and done it must be a matter of impression.

While it is not possible to provide precise guidelines as to what will or will not be considered fair, some court decisions have indicated various factors worth bearing in mind that may be of relevance. For example, in *Ashdown v. Telegraph Group* (2001) Lord Phillips identified three factors that he considered to be important:

- Does your use of the work commercially compete with the copyright owner's work?
- Has the work already been published by the owner?
- How much of the work (what proportion) have you used, and how important is the part you have used to the work overall?

Whatever else can be said, it seems clear that the courts will assess the question of fairness **objectively**; as Lord Justice Aldous put it in *Hyde Park*: 'the court must judge the fairness [of the use] by the objective standard of whether a fair minded and honest person would have dealt with the copyright work [in that manner].'

For a case file concerning the concept of fairness, see **CASE FILE #25: THE ACCIDENTAL IMAGE**.

9.5. SUFFICIENT ACKNOWLEDGEMENT

In many cases, the exception in question will only apply if there has been an adequate attribution of the work, or a 'sufficient acknowledgement'. 'Sufficient acknowledgement' is defined in s.178 to mean an acknowledgement identifying the work in question by its title or other description and identifying the author, unless:

- in the case of a published work, it is published anonymously, or
- in the case of an unpublished work, it is not possible to ascertain the identity of the author by reasonable inquiry.

It is important to note that the acknowledgement concerns the identification of the **author** of the work only. It **does not apply to the current owner of the copyright** in the work (if that is no longer the author). Nor would it require attribution or acknowledgement of the company the author worked for when the work was created.

9.6. EXCEPTIONS FOR QUOTATION, CRITICISM AND REVIEW (s.30(1))

For a case file concerning the exceptions for quotation, criticism and review, see **CASE FILE #6: THE FAMOUS PIPE**.

Before October 2014, copyright law permitted use of a work for the purposes of criticism and review, but it did not allow quotation for other more general purposes. Now, however, the law also allows quotation for other purposes. So, there are two exceptions to be aware of, one specifically for criticism and review and a more general exception for quotation.

Both exceptions apply to all types of copyright work. It is worth quoting the exceptions in full:

30 Criticism, review, quotation [and news reporting]

(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright

in the work provided that it is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise) and provided that the work has been made available to the public.

(1ZA) Copyright in a work is not infringed by the use of a quotation from the work (whether for criticism or review or otherwise) provided that—

(a) the work has been made available to the public,

(b) the use of the quotation is fair dealing with the work,

(c) the extent of the quotation is no more than is required by the specific purpose for which it is used, and

(d) the quotation is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).

Obviously, there is considerable overlap between the two exceptions. Both are conditional on many of the same criteria; so, you can only rely on each of these exceptions if:

- the purpose genuinely is for quotation, criticism or review (see below, section 9.6.1.)
- the material used is available to the public (see below, section 9.6.2.)
- the use of the material is fair (see above, section 9.4.)
- where practical, the use is accompanied by a sufficient acknowledgement (see above, section 9.5.)

However, as well as the four criteria set out above, the exception for general quotation also depends on satisfying one additional requirement:

- use of the quotation must extend no further than is required to achieve your purpose

The relationship between this criterion and the requirement that your use is fair (see above) is obviously an important one. In theory, while your use might be regarded as fair it might still be more than is required to meet your purpose. Put another way, while the new exception for quotation gives everyone greater freedom to quote the works of others for purposes other than criticism and review, the scope for relying on this new exception is arguably narrower.

What amounts to ‘no more than is required’ is not defined in the legislation. As with determining whether use is fair or unfair, what amounts to a reasonable or proportionate quotation under this criterion is an issue that will be resolved by the courts on a case by case basis.

9.6.1. IS THE WORK BEING USED FOR THE PURPOSE OF CRITICISM AND REVIEW?

When relying on the quotation exception under s.30(1ZA) your reason for quoting from the work is irrelevant. As the provision states, quotation can be for ‘criticism or review

or otherwise’. However, when relying on s.30(1) you must be using the work in question for the purposes of criticism and review of that work or another work or a performance of a work.

It is also important to appreciate that your criticism and review can relate to the ideas underlying the work, or ideas and events connected with the author, rather than just to a work itself or a performance of the work. That is, the courts have looked beyond the literal wording of s.30(1) to identify the general purpose underpinning the exception; instead, they have sought to apply and interpret the exception in the context of that purpose.

For example, in *Time Warner Entertainment v. Channel Four Television* (1994) Channel 4 produced a documentary, *Forbidden Fruit*, about the enduring appeal behind Stanley Kubrick’s *A Clockwork Orange* and his decision to prohibit its broadcast within the UK (at that time). The Channel 4 documentary has been uploaded onto You Tube, in two parts, [here](#) and [here](#).

The programme was just 30 minutes and contained 12 clips from the Kubrick’s film, varying in length but totalling just under 13 minutes of footage (or just under 10% of the film itself). Most of the programme was concerned with Kubrick’s decision to withdraw the film from circulation, rather than critiquing the film or its content. In the Court of Appeal, the use of the footage was held to fall within the meaning of criticism and review for the purposes of s.30(1). It was also deemed to be fair dealing. Lord Justice Henry commented:

[I]t seems to me that the fair dealing defence may apply equally where the criticism is of the decision to withdraw from circulation a film in the public domain, and not just the film itself ... That decision is clearly a suitable matter for public debate and so for public criticism, and it is clearly highly relevant to that criticism to illustrate by excerpts relevant qualities, whether positive or negative, of the film, so the public may form a view of the decision criticised and of what they are missing or rightly being spared ... I am satisfied that the section 30 defence would be available to these defendants.

A similar purposive approach was adopted, again by the Court of Appeal, in *Pro Sieben Media v. Carlton* (1998). In *Pro Sieben* the claimants owned the rights to broadcast a television interview with a woman who was enjoying some celebrity after becoming pregnant with octuplets. The defendant broadcast a current affairs programme that was critical of the phenomenon of ‘chequebook journalism’. The defendant’s programme contained a 30-second clip from the television interview.

In the High Court, Mr Justice Laddie held that the defendant was not criticising the work in question (the claimant’s television interview) and as such the exception did not apply. That is, he adopted a literal interpretation of s.30(1) in a similar manner to Morritt VC in *Ashdown v. Telegraph Group*. However, this was overturned on appeal. In the Court of Appeal, Lord Justice Robert Walker concluded that the defendant’s programme was critical of ‘various works representing the fruits of chequebook journalism,’ of which the interview was just one example. In coming to this decision, he commented as follows:

‘[c]riticism of a work need not be limited to criticism or style. It may also extend to the ideas to be found in a work and its social or moral implications.’ He continued:

“Criticism or review” and “reporting current events” are expressions of wide and indefinite scope. Any attempt to plot their precise boundaries is doomed to fail. They are expressions which should be interpreted liberally.

9.6.2. HAS THE WORK BEEN MADE AVAILABLE TO THE PUBLIC?

When has a work been made available to the public for the purposes of these exceptions? Section 30 provides its own definition of making available. In relation to both criticism and review (s.30(1)) and quotation (s.30(1ZA)) work has been made available to the public ‘if it has been made available by any means’ including:

- the issue of copies to the public
- making the work available by means of an electronic retrieval system
- the rental or lending of copies of the work to the public
- the performance, exhibition, playing or showing of the work in public
- the communication to the public of the work

This is an open-ended and non-exhaustive definition. That is, these are examples only; they may be other ways in which a work has been made available to the public, for the purposes of relying on the exception.

9.7. EXCEPTION FOR REPORTING CURRENT EVENTS (s.30(2))

Section 30(2) of the CDPA states that fair dealing with a work, **other than a photograph**, for the purposes of reporting current events does not infringe copyright in the work, so long as it is accompanied by a sufficient acknowledgement whenever reasonably practical to do so.

Unlike the exceptions for quotation, criticism and review, this exception is not limited to work that has been made available to the public. So, any work, published or unpublished, falls within the scope of this exception. That said, while the published or unpublished status of the work will not be relevant when determining if the use of the work was for the purposes of reporting current events, it may still be relevant when deciding if the use was **fair** (see above, section 9.4).

In *Pro Sieben Media v. Carlton* (1998) Lord Justice Robert Walker commented that the words ‘reporting current events’ are ‘of wide and indefinite scope’ and should be interpreted liberally.

Although the events must be ‘current’ (as a result, newsworthy matters of historical significance do not fall within the exception), the courts have indicated that the exception is not restricted to very recent events. For example, in *Pro Sieben* the claimant tried to argue that the application of the exception should be limited to events that were less than 24 hours old; this argument was rejected by the court. Moreover, it is clear the

work itself need not have been produced recently; rather, it needs only to be used in reporting current events.

9.7.1. THE *PUBLIC* REPORTING OF CURRENT EVENTS

The courts have made clear that to fall within the scope of the exception, the reporting in question must have a *public dimension* (although the literal wording of s.30(2) does not make this a formal requirement). For example, making photocopies of a newspaper article to circulate among all staff in a school would not fall within the exception. The exception is intended to enable informing the public about matters of concern to the public.

For a case file concerning the exception for reporting current events, see **CASE FILE #19: THE FATEFUL EIGHT SECONDS**.

9.8. EXCEPTION FOR PARODY (s.30A)

In October 2014, the UK government introduced a new exception for parody, caricature or pastiche. Section 30A provides simply that: ‘Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work.’

When compared to the other exceptions discussed above, it is worth noting that the **only relevant criterion** here is that your parodic use **must be fair**. The exception does not require sufficient acknowledgement. Nor is the scope of the exception limited to published work, or work that has been made available to the public. The parody exception applies to every copyright work.

IPO guidelines on the new parody exception provide some examples of activity that would fall within the scope of the exception: ‘a comedian may use a few lines from a film or song for a parody sketch; a cartoonist may reference a well-known artwork or illustration for a caricature; an artist may use small fragments from a range of films to compose a larger pastiche artwork’; whereas ‘it would not be considered “fair” to use an entire musical track on a spoof video’. You can find the government’s guide on exceptions to copyright for ‘Caricature, Parody or Pastiche’ here: www.gov.uk/guidance/exceptions-to-copyright.

The meaning of parody was considered by the European Court of Justice (the CJEU) in *Deckmyn and Vrijheidsfonds v. Vandersteen* (2014) which concerned a modified version of a comic book cover that satirised the mayor of Ghent: the mayor was portrayed distributing government funds to a multi-ethnic public (Image 9.2).

Johan Deckmyn, a member of the right-wing Flemish nationalist party, created the satirical work. The copyright owners of the comic sued for copyright infringement. Deckmyn claimed that his work was a parody, and as such was protected under the relevant exception in Belgian copyright law.

The CJEU held that the essential characteristics of a parody are, first, to evoke an existing work while being noticeably different from it, and second, to constitute an expression

of humour or mockery. If these two criteria are satisfied, then the work in question is a parody. (Of course, the creation of the parody still might not be considered fair.)

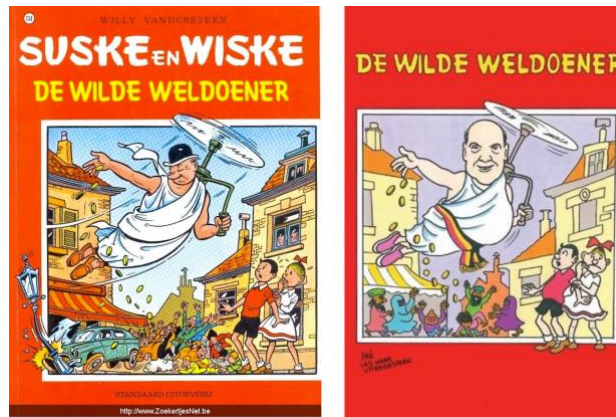


Image 9.2: The original comic book cover (left) and Deckmyn's parody (right)

One significant aspect of the decision in Deckmyn concerned whether the exception applies to different types of parody. For example, some would argue that the exception for parody should only apply when the work that is being used is also the target of the parody itself. Images 9.3 and 9.4 provide a good example of so-called 'target parody'. Here, the image of Leslie Nielson is clearly intended to lampoon the *Vanity Fair* cover of Demi Moore photographed by Annie Liebovitz. The parody borrows from the original work to make fun of the original work.

Deckmyn, however, was engaging in so-called 'weapon parody'. The original work was not the subject of the parody. Instead, Deckmyn was using the work as a weapon, to mock the Mayor of Ghent. The court concluded that the exception applies to both target and weapon parody. That is, a work can be used under the exception by a parodist to mock or lampoon someone or something else.

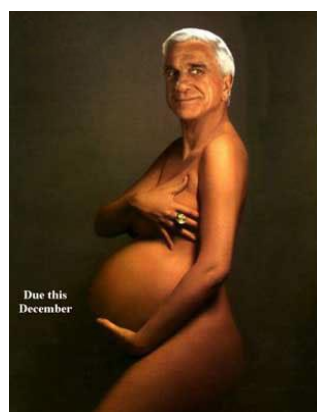


Image 9.3: Promotional poster for the film *Naked Gun*



Image 9.4: The original Liebovitz photograph

For a case file concerning the exception for parody, see **CASE FILE #5: THE TERRIBLE SHARK.**

9.9. EXCEPTION FOR PRESERVATION

Making copies of works is often necessary to preserve the work for the future, and especially when dealing with digital works created in formats, or stored on media, that are in danger of becoming obsolete. There is an exception in copyright law that allows archivists to make copies of any type of work for preservation purposes.

For a case file concerning the exception for preservation, see **CASE FILE #24: THE RETRIEVED IMAGE**.

9.10. PUBLIC RECITATION OR READING (s.59)

Section 59(1) of the CDPA states that the reading or recitation in public by one person of a reasonable extract from a published literary or dramatic work does not infringe any copyright in the work provided it is accompanied by a sufficient acknowledgement. But, note that this provision only applies to *published* works.

Section 59(2) further states that making a sound recording of the reading, or communicating it to the public, does not infringe copyright in the work, so long as the reading or recitation of the work is not the principal focus of the recording or communication. That is, the recording or communication should consist mainly of other material (for example, original material or material for which permission has been granted), and not material falling within the scope of the exception.

10. LAWFUL USE WITHOUT PERMISSION: EXCEPTIONS FOR EDUCATION

Certain copyright exceptions apply specifically to the education sector. We group these exceptions under three headings: copying by individuals, for educational purposes; copying for others, for educational purposes; specific exceptions for teachers, teaching and schools.

10.1. COPYING BY INDIVIDUALS

10.1.1. RESEARCH AND PRIVATE STUDY (s.29)

Fair dealing with a work for the purposes of non-commercial research does not infringe copyright in the work, provided it is accompanied by a sufficient acknowledgement (s.29(1)); fair dealing with a work for the purposes of private study does not infringe (s.29(1C)).

Both exceptions apply only if the copying can be considered ‘fair dealing’. As discussed in **section 9.4**, courts will often consider a range of factors when determining whether the use of someone’s work was fair or not.

Moreover, although it will have little relevance for staff or students in a school environment, it is worth noting that both exceptions apply only to non-commercial activity. Section 29 makes this explicit in relation to research, but not private study. However, s.178 defines private study to preclude ‘any study which is directly or indirectly for a commercial purpose’.

10.1.2. ACCESSIBLE COPIES FOR THE USE OF A DISABLED PERSON (S.31A)

The CDPA allows a disabled person to make an accessible copy of the whole or part of a work, so long as that person has ‘lawful possession or lawful use’ of the work (s.31A(1)), and so long as the copy is made for their personal use. Moreover, the accessible copy can be made either by the disabled person or by another person acting on their behalf.

The exception applies to all types of work, whether published or unpublished, but it does not apply if accessible copies of the work are already commercially available on reasonable terms (for example, if a Braille edition of a book is available for purchase at a reasonable price) (s.31A(2)).

A disabled person is defined as a person who has a physical or mental impairment which presents them from enjoying a copyright work to the same degree as a person who does not have that impairment (s.31F(2)).

An accessible copy is defined as a version of the work that enables the fuller enjoyment of the work by disabled persons (s.31F(3)). So, for example, this might involve adding sub-titles to films or broadcasts for the deaf or hard of hearing, or making large-print copies of books, newspapers and other copyright content for the visually-impaired. Importantly, copies can also be made on behalf of the disabled person (s.31A(2)(a)).

Section 31A requires that the disabled person have ‘lawful possession or lawful use’ of the work to be copied, but it does not define the concept of ‘lawful use’.

The UK Intellectual Property Office provides [guidance](#) on s.31A as follows: ‘You are only able to make an accessible-format copy of a work if you have lawful possession of or *lawful access* to the material in question (for example, if you bought a copy of a book, film, etc)’ (emphasis added).

As you will see in the next section, the CDPA also allows certain designated institutions – including schools and other educational institutions – to make and supply accessible copies for the personal use of a disabled person (s.31B).

10.2. COPYING FOR OTHERS

10.2.1. COPYING BY LIBRARIANS: PUBLISHED WORK (s.42A)

If your school has a library, it will also have a librarian – that is, the person who is responsible for the library (whether they have been specifically trained to work in a library or not). The CDPA includes an exception that allows librarians to make copies of published works for students, and other persons.

There is another exception that relates copying unpublished work for others (s.43), but here we focus only on the exception that concerns published work (s.42A).

A librarian (of a library not conducted for profit) – or a person acting on their behalf – can make and supply a single copy of one article in any one issue of a periodical (s.42A(1)(a)), or a **reasonable proportion** of any other published work (s.42A(1)(b)), provided certain conditions are met.

The relevant conditions are that:

- the copy is supplied in response to a request from a person who has provided the librarian with certain specific information set out in a declaration in writing (s.42A(2)(a)), and
- the librarian is not aware that the information provided is false (s.42A(2)(b))

The specific information to be included in the declaration in writing is as follows:

- the name of the person who requires the copy and the material which that person requires
- a statement that the person has not previously been supplied with a copy of that material by the library
- a statement that the person requires the copyright for private study or non-commercial research, that they will only use it for those purposes and will not supply the copy to any other person
- a statement that, to the best of the person’s knowledge, no other person with whom the person works or studies has made, or intends to make, at or about the same time as the person’s request, a request for substantially the same material for substantially the same purpose (s.42A(3))

This may seem overly complicated. But, typically, libraries use pre-printed forms setting out these declarations, while leaving space to add details about the user and the work to be added, along with the date and a signature.

10.2.2. MAKING ACCESSIBLE COPIES BY AUTHORISED BODIES (S.31B)

In section 10.1.2. we described how a disabled person, or someone acting on their behalf, is permitted to make an accessible copy of a copyright work under certain conditions. In addition, the CDPA expressly provides that educational establishments or other bodies not conducted for profit (including libraries) are permitted to make and supply accessible copies of work for the personal use of disabled persons (s.31B(1)).

An educational establishment conducted for profit can also rely on the exception, but any copies made must only be used for educational purposes (s.31B(6)).

The exception applies to all types of copyright work although it does not apply if accessible copies of the work are already commercially available on reasonable terms (s.31B(2)).

Finally, it is worth noting that this exception only applies to published work.

10.3. EXCEPTIONS FOR EDUCATION AND INSTRUCTION

The CDPA provides various exceptions that permit the use of **all types of work** for certain educational purposes (sections 32-36A).

10.3.1. ILLUSTRATION FOR INSTRUCTION

Perhaps the most important exception for education permits the use of any work for the sole purpose of illustration for instruction, which includes setting examination questions (s.32). The exception only applies, however, when the purpose of the use is non-commercial, when it is accompanied by a sufficient acknowledgement (wherever practical), and when the use is fair.

Importantly, this exception applies to all types of teaching and instruction, not just teaching that takes place within a traditional educational institution or environment.

Also, the exception draws no distinction between analogue and digital copying in this context. That is, posting material on an interactive whiteboard, or within a virtual learning environment, is permitted under the exception.

So, for example, it is OK for a teacher to copy material onto a blackboard or an interactive whiteboard under this exception. For instance, a teacher might show students a copy of a poem by Carol Ann Duffy, Benjamin Zephaniah, or Kate Tempest, on an interactive whiteboard. But what the teacher cannot do under this exception is to make photocopies of a work for the students in their class (that type of copying would be covered by the CLA Schools licence which is discussed in section 8.5).

10.3.2. PERFORMING, PLAYING OR SHOWING A WORK IN THE COURSE OF THE ACTIVITIES OF AN EDUCATIONAL ESTABLISHMENT

This exception allows performing, showing and playing works as part of the school's curriculum. The exception applies slightly differently for literary, dramatic and musical works on the one hand, and for sound recordings, films and broadcasts on the other.

We deal with each category in turn.

First: The exception allows the performance of a literary, dramatic or musical work before an audience consisting of teachers and pupils – and other persons directly connected with the activities of the school – in two situations: for the purposes of instruction; and, in the course of other activities of the establishment.

It is important to note that 'other persons directly connected with the activities of the' school does not include parents. That is, if a school play is performed for parents or other members of the public the exception does not apply. (However, if some parents are present because they carried out a special role in relation to the performance, for example, by assisting backstage, they would seem to fall within the exception.)

Second: The exception allows playing or showing a sound recording, film or broadcast before such an audience for the purposes of instruction. So, the scope of the exception is more limited.

The exception only applies to the use of work for curricular purposes.

But this also illustrates how licensing regimes can help to supplement the exceptions provided in the CDPA. For example, the PRS for Music licence and the PPL Licence for Schools were both developed specifically to address the non-curricular use of music within the school environment (see sections 8.5 and 8.6. for further details).

10.3.3. LENDING OF COPIES BY EDUCATIONAL ESTABLISHMENTS

The CDPA provides that copyright in a work is not infringed by the lending of copies of the work by an educational establishment (s.36A). For example, when a school lends books to pupils for homework, study or other purposes, this exception ensures that the school does not infringe copyright.

10.4. EXCEPTIONS AND LICENSING SCHEMES

As we noted in section 8.6. most educational uses of copyright works are permitted either by copyright exceptions or through licensing schemes. The combination of licences and exceptions means that teachers and students do not have to worry about seeking permission every time they want to use a copyright work for educational purposes.

Certain exceptions for education – e.g. Recording by educational establishments of broadcasts (s.35 CDPA) – can only be relied upon in the absence of a relevant educational licensing scheme. This means that if a scheme has been set up to license

this kind of use of copyright material by educational establishments (in this example, it has: the ERA licence), then the exception does not apply to that particular use.

Also, some licensing schemes cover activity that may already be permitted by an exception. For example, the CLA Education licence allows students to make copies of material from books, journals and websites under certain conditions. But, arguably, a student might lawfully copy the same material under the exception for research and private study (s.29). So, why would you need or invest in a licence to enable student copying if an exception may already apply?

The main reason is that the licence provides peace of mind.

Relying on an exception necessarily involves make some judgment calls about whether your copying meets the relevant criteria set out in the exception. For example, copying for research and private study must qualify as fair dealing, but what is fair will depend on the context (as we discuss in section 9.4). Generally, there will always be some level of uncertainty, however small, about what may or may not be fair in any given situation. This is not to say that exceptions can not or should not be relied upon. They should. Rather, it simply acknowledges the fact that because of the flexible, open-ended nature of concepts like fairness or reasonableness, answers to questions like – is this fair – tend to come in shades of grey, rather than black and white.

And this is where a licence, such as the CLA Education licence, can provide peace of mind. First, it sets out clear guidelines about what can or cannot be copied under the licence. For example, one complete chapter of a book, or a short story or a poem (of no more than ten pages in length) from an anthology. When students copy within these guidelines, they know with certainty that their copying is lawful, and they don't need to ask themselves whether their copying is fair.

Related to this is that the CMO will underwrite any reasonable legal costs that may arise from a complaint about copyright infringement. That is, if someone complains that you are infringing their copying by letting students in your school copy a chapter from their book, the licence provides you with legal cover. So long as you are copying within the terms of the licence, the CMO will provide you with an indemnity.

For example, the current CLE Education licence currently states as follows:

11.1. *In this clause “Qualifying Claim” shall mean any complaint made in writing that the Licensee [that is: you] acting in pursuance of this Licence has infringed copyright and/or database right in Licensed Material or in the typographical arrangement of the published edition in which Licensed Material is contained.*

11.2 *In the case of any Qualifying Claim CLA will indemnify the Licensee in respect of all reasonable legal costs, expenses and damages awarded against or incurred by the Licensee including any ex-gratia payments made with the prior written consent of CLA, provided the Licensee has complied with the terms of this Licence and has given CLA notice of any Qualifying Claim within ten (10) working days or, in the case of a Claim Form, within five (5) working days of the same having been received by the Licensee.*

Finally, it is worth concluding this section by reiterating the complementarity of exceptions and licensing schemes. To take the above example: if a student copies more than one chapter from a book for their own private study, this obviously falls outside the scope of the CLA Education licence. If the copyright owner complained, you could not rely on the licence to provide you with legal cover. However, the student's actions might still fall within the scope of the exception. That is, their copying might still be deemed to be fair. For example, the book in question might be made up of hundreds of very short chapters, perhaps a chapter for every day of the year. In this scenario, copying two chapters might well be deemed to be fair, and so lawful under the exception. As always, much will depend on the context of the situation.

10.5. COPYRIGHT EXCEPTIONS AND CONTRACT LAW

When the CDPA was last revised in 2014, the government introduced a contract override provision into many – but not all – of the exceptions to copyright. For example, the exception for non-commercial research and private study states:

To the extent that a term of any contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable (s.29(4B))

Effectively, this means that, whenever someone tries to rely on a term of a contract to prevent someone else making a copy of work for the purposes of the relevant exception, the contract term is rendered null and void. These exceptions cannot be bargained away. Any attempt to restrict them by contract will fail.

For example, the exception allowing illustration for the purposes of instruction cannot be overridden by contract. So, even if the terms and conditions of online platforms such as Netflix and YouTube claim to prohibit the use of their content for educational purposes in the UK, these specific terms and conditions are rendered void. Clips from the videos available on these services can still be shown under the exception.

The rule that certain exceptions cannot be overridden by contract terms and conditions also applies to the licences granted to schools by CMOs (see sections 8.4 to 8.6).

For example, the Schools Printed Music licence (the SPML) allows you to make arrangements of musical works, but states that these arrangements 'must not parody the Musical Work' (clause 4.8.2 of the SPML's current Standard Terms). However, the exception for parody – like the exception for illustration for instruction – is protected against contract override. So, to the extent that the SPML licence attempts to prohibit making parodies, that clause fails. Parodies of musical works can still be made under the exception.

The exceptions that include a contract override provision are as follows:

- non-commercial research and private study (s.29(4B))
- text and data analysis for non-commercial research (s.29A(5))

- quotation (s.30(4))
- caricature, parody or pastiche (s.30A(2))
- enabling access and use for disabled persons (s.31F(8))
- illustration for instruction (s.32(3))
- copying by librarians (ss.41(5), 42(7), 42A(6))
- recording of a broadcast for archival purposes (s.75(2))

11. OTHER USEFUL RESOURCES

Copyright and Schools – www.copyrightandschools.org

Online resource providing information on licensing schemes available for schools and other educational establishments.

Copyright Cortex – www.copyrightcortex.org

Online resource dedicated to copyright and digital cultural heritage, including an open access text introducing basic copyright concepts and principles.

Copyright, Designs and Patents Act 1988 – www.legislation.gov.uk/ukpga/1988/48/contents

Online version of the UK copyright act.

Copyright User – www.copyrightuser.org

Online resource intended to make UK copyright law accessible to creators, media professionals, entrepreneurs, teachers and students, cultural heritage practitioners, and members of the public.

Learning on Screen: Copyright FAQs – www.learningonscreen.ac.uk/copyright-guidance

Most Frequently Asked Questions about copyright in education identified by Learning on Screen.

UK Intellectual Property Office – www.gov.uk/government/organisations/intellectual-property-office

The official government body responsible for intellectual property rights in the UK and is an executive agency of the Department for Business, Energy and Industrial Strategy.

The Game is On!

a web series produced by



WORTH
KNOWING

for



with the support of



Arts & Humanities
Research Council



CREATE



University
of Glasgow



QUEEN'S
UNIVERSITY
BELFAST



Intellectual
Property
Office