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Queen's University Oral History, Technology & Ethics

Title: An Introduction to Copyright for Oral Historians

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Date: 13 December 2016

Version: 1.0



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TABLE OF CONTENTS

1. INTRODUCTORY COMMENTS and PRACTICAL ADVICE	1
<i>Address copyright information in your project information; Include a copyright clause in your consent form; Decide on what type of permission you require; Use plain and simple language</i>	
2. PROTECTED BY COPYRIGHT	5
<i>Literary works; Dramatic works; Musical works; Artistic works; Sound Recordings; Films; Broadcasts; Typographical arrangements</i>	
3. PROTECTION CRITERIA	8
<i>Fixation; Originality; Qualification</i>	
4. AUTHORSHIP	11
<i>Works of unknown authorship; Works of joint authorship; Authorship and oral history interviews</i>	
5. COPYRIGHT OWNERSHIP	13
<i>Joint authorship and joint ownership; The implications of joint ownership; Work created by employees; Freelance work; Ownership of work created before 1 August 1989</i>	
6. ECONOMIC RIGHTS AND INFRINGEMENT	15
<i>Primary infringement; Secondary infringement</i>	
7. DURATION OF COPYRIGHT: THE COPYRIGHT TERM	19
<i>Works of unknown authorship; Works created before 1 August 1989; Public Domain calculators</i>	
8. ASSIGNMENTS, LICENSING AND PERMISSIONS	22
<i>Assignments; Licences; Collecting Societies</i>	
9. THE PERMITTED ACTS: COPYRIGHT EXCEPTIONS	24
<i>Fair dealing ... for non-commercial research; for quotation, criticism or review; for education and instruction; and, contracting out of exceptions</i>	
10. ORPHAN WORKS	28
<i>The Orphan Works Directive; The UK Orphan Works Licensing Scheme (OWLS)</i>	
11. USEFUL RESOURCES	31

AN INTRODUCTION TO COPYRIGHT LAW

This document provides you with an introduction to the law of copyright. Specifically, we focus on aspects of copyright that concern and impact the work and interests of oral historians.¹

We begin with some practical guidance and advice on how copyright impacts oral history research, and about why it is important to keep copyright in mind when conducting research interviews (section 1). We introduce a number of concepts that are fundamental to copyright law: the difference between the authorship and ownership of copyright work; what constitutes a work of joint authorship; when permission is needed to make use of someone else's work; the difference between an assignment of copyright and a copyright licence, and so on.

In the sections that follow, we explore these concepts in greater detail providing you with a general overview of the current UK copyright regime. However, this introduction to copyright law is just that: an introduction. It does not provide a comprehensive commentary on the law of copyright in this area; nor should it be understood to provide legal advice. Rather, this document simply presents you with a springboard for beginning to understand and engage with copyright law as it affects your work and practice. There are numerous authoritative textbooks, guides and online sources on copyright that will help you deepen your understanding of the law; we have provided a list of various relevant online sources at the end of this document.

1. INTRODUCTORY COMMENTS and PRACTICAL ADVICE

From a copyright perspective, perhaps the best piece of practical advice to keep in mind when conducting oral history interviews is that active copyright management should be part of your research strategy and implementation from the get-go. Discussing upfront the authorship and copyright ownership of the stories and testimonies that are to be recorded may seem counterintuitive when building trust with an interviewee and helping to put that interviewee at ease. But, as a historian collecting primary reference material it is important that you take responsibility for the legal and ethical implications of gathering that material, including active copyright management. Establishing from the outset who can make use of the material that is being recorded, and for what purpose, will help to avoid problems with permissions and rights clearance further down the line. Indeed, if you are not fully informed about copyright issues in the present this will impact how the past is interpreted in the future.

Naturally, much will depend on why the interviews are being made and how they are to be used. There is no single blueprint that will address the copyright implications of all oral history projects. As such, the advice that follows takes the point of view of a researcher conducting interviews for non-commercial research purposes.

¹ With thanks to Anna Bryson, Lorraine Dennis, Sean O'Connell, Rob Perks and Richard Summerville for their comments, feedback and assistance. The usual conditions apply.

1.1. Address copyright information in your project description

In general, when planning a project, or series of interviews, you should take care to ensure that the interviewee fully understands the nature of your project as well as how you might use the interview and the information it contains as part of your project. It is advisable to include this information in a written project description, provided to the interviewee in advance of the interview.²

As well as providing the interviewee with details about the purpose of the project, and how you will use the material gathered through the interview, your written project description should also address the copyright ownership of the recorded interviews. It should explain that, in giving an interview, the interviewee is creating a new copyright-protected work (a literary work: the interviewee's story or testimony). The work is automatically protected by copyright, and it provides the interviewee with certain rights over the use of the work. For instance: if someone (including you) wanted to make use of your recording of the interviewee's story as part of an online research project they would have to ask the interviewee for their permission.³ For this reason, and to ensure that you can make use of the interview as part of your project, you should incorporate a copyright clause in any consent form that you ask the interviewee to sign.

Before the interview, you should discuss any questions that the interviewee may have about the information provided as well as any concerns that he or she may have. Be sure to set aside sufficient time to explain and discuss these issues with the interviewee before you conduct the interview. It is crucial that you both understand and agree how the interview material may be used and re-used in the future; this is particularly important when conducting research interviews in sensitive areas such as healthcare or conflict histories.

1.2. Include a copyright clause in your consent form⁴

Typically, consent forms will include the following:

- a project description
- a statement that the interviewee understands the project description and agrees to the recording of the interview
- an agreement as to whether the interviewee will have an opportunity to review a draft of the interview, and amend, withdraw, or add to it

² For further commentary, see Anna Bryson, *Oral History: A Training Manual for Beginners* (2013), 23-27, available: www.peaceprocesshistory.org/resources (accessed: 24 November 2016). See also Anna Bryson and Seán McConville, *The Routledge Guide to Interviewing: Oral History, Social Enquiry and Investigation* (London: Routledge, 2014), chapter 2 ('Ethics and legalities'), and chapter 7 ('Shifting focus,' addressing audio-visual interviews). See also the guidance available from the Oral History Society: 'Is Your Oral History Legal and Ethical?', available: <http://www.ohs.org.uk/advice/ethical-and-legal/> (accessed: 07 December 2016).

³ Of course, if the use in question falls within the scope of one of the exceptions to copyright permission would not be required from the copyright owner (the interviewee). See section 9 below for further information.

⁴ This section draws heavily on Bryson, *Oral History*, 24-26.

- be clear about how you can use and store the interview and any other materials
- set out what law governs the consent form (e.g., the laws of Northern Ireland, or the law of England and Wales)
- provide for the form to be signed and dated by the interviewee

In addition, it would be advisable to include a copyright statement/agreement within your consent form. This should provide a clear statement, set out in good faith, about who owns the copyright in the materials created as part of the interview. Ordinarily, this will involve the creation of two discrete copyright works:

- the recording of the interview
- the interview itself (which may be protected as a literary work)

As the person who is responsible for making the sound recording, you will be the author of the sound recording; this also means you will be the first owner of the copyright in the sound recording unless, that is, you are creating the work in the course of your employment or in accordance with a contract that stipulates copyright ownership lies elsewhere (see sections 5.3 and 5.4 for further information on the rights of employees and freelance workers).

Regarding the interview, questions of authorship and ownership will depend on how the interview is planned and conducted, how much interaction there is between interviewer and interviewee, and so on (see sections 4 and 5). There are, in effect, three different possible scenarios to consider here:

- the interviewee is the author of the interview: the work is essentially the creation of the interviewee alone, his or her thoughts, recollections or stories; copyright initially belongs to the interviewee alone
- the interviewee and the interviewer each enjoy the copyright in their own individual contributions to the interview; copyright in the interviewer's contribution belongs to the interviewer; copyright in the interviewee's contribution belongs to the interviewee
- the interviewer and the interviewee have, in effect, created a work of joint authorship, a collaborative work in which their respective contributions cannot be distinguished from each other; in this case, the copyright in the interview will be owned by the interviewer and interviewee jointly; neither can make use of the work without the other's consent

Typically, the authorship and ownership of rights in the interview will fall within either the first or second scenario. We discuss these different scenarios, and their implications, in greater detail in section 4.

Whichever scenario applies however the interviewee will own or co-own the copyright in the interview. As such, you will need their permission to make subsequent use of the interview, and you should document this permission in the consent form signed by the interviewee. The consent form should be completed and signed face-to-face at the end of the interview. This will help you to avoid any problems with the re-use of this research material at a later stage.

1.3. Decide on what type of permission you require

You can secure this permission in one of two ways: either by an assignment of copyright or by a licence (see section 8).

With an assignment, you are asking the interviewee to transfer to you any copyright ownership they have in the material created. From a copyright perspective, this gives you complete control of the work in the future. The interviewee cannot rely on copyright law to prevent you from making use of the work in the future. The consent form can operate as an assignment of copyright: all that is required is that the assignment is made in writing and signed by or on behalf of the interviewee.

While an assignment offers simplicity and certainty regarding future use of the interview material, you may decide against asking the interviewee to assign their rights to you. It may feel disempowering for the interviewee. For example, following an assignment of rights, if the interviewee wanted to make use of the interview in some way they would – in theory – need to ask *your* permission to do so. An assignment may not be appropriate when working collaboratively or building trust with your interviewees. Asking for a licence may be preferable.

With a licence, you are essentially asking the copyright for permission to makes use of a work in a way that, without their permission, would otherwise constitute copyright infringement. As discussed in section 8.2, there are many different types of licence to consider, however, the terms of your licence should address:

- the type of use (e.g., use in print, in film, or online)
- geographic area (e.g., anywhere in the world)
- duration (e.g., for as long as the work remains in copyright)

Within the context of a non-commercial research project, perhaps the most appropriate licence to ask for is a *non-exclusive licence* that grants you permission to make any use of the work for non-commercial research purposes, in print or online, anywhere in the world, and for so long as the work remains in copyright. This means that the copyright in the work remains with the interviewee: they could, if they wanted, grant a licence to someone else to make use of the work in some way (for example, if someone wanted to write a play based on the interview); or they can make use of the work themselves as they wish.

However, it is worth remembering that some funding bodies such as the Heritage Lottery Fund require projects to use a Creative Commons (CC) licence for their work. Creative Commons licences make it easier for others to make use of project materials without having to ask permission from the copyright owners. To ensure you can make the project materials available on a CC basis (and in accordance with the terms of the grant), you should ask the interviewee for an assignment of the copyright in their work.⁵

Both assignments and licences can be very specific in terms of the rights involved, as well as the duration and geographic reach of the permissions granted. When planning your project, think carefully about how you intend to – or might – make

⁵ With thanks to Rob Perks for drawing my attention to this issue.

use of the material produced and ensure this is addressed in the copyright clause of your consent form.

1.4. Use plain and simple language

Whether you decide to ask for an assignment of rights in the interview, or a licence to make use of the interview in certain ways, use plain and simple language to convey the nature of the agreement. You do not need to use the terminology of 'assignment' or 'licence' so long as the intention is clear.

For example, you might ask the interviewee to agree to an assignment as follows:

I, [the interviewee's name], agree to transfer any of my rights in the interview recorded by [the interviewer's name] on [date] to [the interviewer] absolutely and for so long as those rights exist.

Alternatively, you might ask the interviewee to grant you a licence in the following terms:

I, [the interviewee's name], grant permission to [the interviewer's name] to make use of the interview recorded by [the interviewer's name] on [date] for any purpose connected with [the name of the project], including use in print and online. This permission applies worldwide and lasts for so long as my rights in the interview exist.

2. PROTECTED BY COPYRIGHT

Within the UK, the main legislative provision regulating copyright law is the *Copyright, Designs and Patents Act 1988* (the CDPA). The CPDA came into force on 1 August 1989. It 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)), and
- 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',⁶ it is important to appreciate that more than one copyright may subsist in a single cultural product or creation. Consider, 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, in the musical score, and in the film. It is important to be able to separate the different types of copyright involved as each may have a different author and/or owner.

The fact that multiple rights may exist in the same work is particularly important to be aware of for oral historians. For example, if you make a recording of an interviewee telling their story about an event or experience copyright will likely

⁶ For a discussion of the concept of "the work" in Anglo-Australian copyright law, see B. Sherman, "What is a Copyright Work?" (2011) *Theoretical Inquiries in Law* 99-121.

subsist in both their story (as one work) and your recording of that story (as another work). We discuss the implications of this in greater detail below (see sections 4.3. and 5. below). For now, let us consider each category of protected work in turn.

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 1988 Act they are defined to include: 'any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes: (i) a table or compilation (other than a database); (ii) a computer program; (iii) preparatory design material for a computer program; and (iv) a database' (s.3(1)).

Literary works include those things we normally think of as literature (novels, poetry) as well as the ordinary and the banal: listings of stock exchange prices, chronological tables, logarithm tables, and so on. It is important to bear in mind, then, that the term 'literary work' implies no condition of literary merit or style.⁷ When problems have arisen in deciding whether something is a literary work, the courts have tended to rely upon the test set out in *Hollinrake v. Truswell* (1894) 3 Ch 420, in which the Court of Appeal (the CA) suggested that to qualify as a literary work, the creation must provide 'either information or instruction, or pleasure, in the form of literary enjoyment'.⁸

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 stating simply that a dramatic work 'includes a work of dance or mime' (s.3(1)).

2.3. Musical works

Music embodied in print form (that is, sheet music) has been copyright protected since *Bach v. Longman* (1777), a case in which Lord Mansfield held that music was a form of 'writing' that qualified for protection under the provisions of the *Statute of Anne* 1710. Today, a musical work is defined in the CDPA 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)). In practice, what qualifies as 'music' is rarely likely to give rise to any great problem. What is clear however is that lyrics,

⁷ See Lord Evershed in *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 WLR 273, at 281.

⁸ Davey LJ: '[A] literary work is intended to afford either information and instruction, or pleasure, in the form of literary enjoyment. The sleeve chart before us gives no information or instruction. It does not add to the stock of human knowledge or give, and is not designed to give, any instruction by way of description or otherwise; and it certainly is not calculated to afford literary enjoyment or pleasure' (428).

actions, and so on, 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 CDPA defines artistic works to include:

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

Graphic works are further defined by the Act as including: paintings, drawings, diagrams, maps, plans, charts, engravings, etchings, lithographs, woodcuts, or any similar works (s.4(2)) (a non-exclusive definition). 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)).

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. Today, the CDPA defines a sound recording 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, vinyl records, tapes, compact discs, digital audio tapes and any other media used to embody recordings are protected under the Act.

2.6. Films

The CDPA defines a ‘film’ 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 and digital recordings, and so on. In addition, depending on the nature of the work, a film itself can also be considered a dramatic work of which the director and the scriptwriters may be co-authors.

2.7. Broadcasts

The idea of protecting broadcasts within the copyright regime involves accommodating an important difference between broadcasts and other types of copyright-protected works. A broadcast does not involve the creation of a work, *per se*, as is the case with literature, drama and art, but rather 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 in the CDPA 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 definition requiring 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. By referring to ‘visual images, sound, or other information’ the definition will also cover a broad range of content, such as radio and television.

The statutory definition of a broadcast, however, does exclude certain forms of transmission. The requirement that transmissions be for ‘simultaneous reception by members of the public’ excludes a transmission between individuals (telephone calls, faxes, e-mails, and so on) as well as transmissions on private networks (for example, a University intranet). It also excludes transmissions in which the recipient determines the time of receiving the transmission (that is, on-demand services). Moreover, s.6(1A) specifically excludes ‘any Internet transmission’ (albeit subject to three reasonably generous exceptions).⁹

2.8. Typographical arrangements

This category of protection was introduced as part of the *Copyright Act 1956* (s.15): 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. However, this does not prevent someone else publishing the public domain work; it simply prohibits the reproduction of that specific typographical layout and arrangement.

3. PROTECTION CRITERIA

For a work to be copyright-protected, as well as falling within one of the relevant categories of protected subject-matter, 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: (i) fixation: that the work is recorded in material form; (ii) originality: that the work is ‘original’; (iii) qualification: that the work qualifies for protection under UK law.

⁹ The exceptions are as follows: an Internet transmission falls within the definition of a ‘broadcast’ if it is: (i) a transmission taking place simultaneously on the Internet and by other means; (ii) a concurrent transmission of a live event; or, (iii) a transmission of recorded moving images or sounds forming part of a programme service offered by the person responsible for making the transmission, being a service in which programmes are transmitted at scheduled times determined by that person (s.6(1A)).

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 subject-matter should exist in some permanent form before it can be copyright-protected. 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. Indeed, 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)).

Some form of fixation or recording is implicit in the case of sound recordings and films; however, the CDPA does not require that broadcasts be fixed in any material form.

3.2. Originality

Not every literary, dramatic, musical or artistic work will qualify for copyright protection. There is a minimum criterion set out in the CDPA which requires that all literary, dramatic, musical and artistic works be *original* before they will be 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.¹⁰ 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.¹¹

But, in relation to literary, dramatic, musical and artistic works, what does originality mean? How high (or low) is this threshold set? While UK case law on the concept of originality is not always consistent, the courts generally have agreed that so long as the author has expended some labour, skill and judgment in the production of the work, the work should be copyright-protected. This is often referred to as the *sweat of the brow theory*. In effect, within 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 the work attracting copyright protection.

¹⁰ CDPA, s.5A(2), s.5B(4) and s.8(2).

¹¹ CDPA, s.6(6).

3.2.1. Originality and European Copyright Law

Although the standard of originality required in the UK has traditionally been set at a very low threshold, a succession of European directives specifically adopted a higher standard. Both the Software (91/250) and Database Directives (96/9) provided that a computer program or a database would only be protected if the program or database was original in the sense that it was the 'author's own intellectual creation'.¹² Similarly, Article 6 of the Duration Directive (93/98) (the term of protection directive) set out that: '[p]hotographs which are original in the sense that they are the author's own intellectual creation shall be protected'.

Moreover, there is a growing consensus among practitioners and academics that, under the European copyright regime, the concept of 'an author's own intellectual creation' has become the new benchmark for satisfying the originality criterion in relation to all types of authorial works (and not just computer programs, databases and photographs).¹³ Without doubt, this concept of an 'author's own intellectual creation' calls for a different and higher standard than the *sweat of the brow* approach typically adopted by UK courts; it now seems clear that the expenditure of mechanical or routine skill and labour, even if substantive, will not be sufficient to satisfy the European concept of originality.

However, it is important to remember that this new standard will *only* apply to works created *after* the protection of a specific category of work had been harmonised by the EU. So:

- for computer programs, this means: after 1 January 1993 (in accordance with the Software Directive)
- for photographs, this means: after 1 July 1995 (in accordance with the Duration Directive)
- for databases, this means: after 11 March 1996 (in accordance with the Database Directive)
- for all other types of literary, dramatic, musical and artistic works, this means: after 22 December 2002 (in accordance with the Information Society Directive)

In practical terms, when dealing with archive and other historic documents and recordings, the traditional British standard (*sweat of the brow*) will remain the relevant touchstone when trying to determine whether a work is original in a copyright sense.

3.3. Qualification

Before a work will be protected within the UK, the work must qualify for protection. The CDPA (ss.154-56) prescribes certain factors that will give the work

¹² Software Directive A.1(3); Database Directive A.3(1).

¹³ See for example the comments of the ECJ in: *Infopaq International A/S v. Danske Dagblades Forening* (C-5/08); *Bezpečnostni softwarova asociace (BAS) v. Ministerstvo kultury* (2010) C-393/09; *Football Association Premier League Ltd v. QC Leisure and others* and *Karen Murphy v. Media Protection Services Ltd* (Joined Cases) (2011) ECR I-9083 (ECJ, Grand Chamber).

a sufficient connection with the UK which concern: authorship; the country of first publication; 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, then the work will qualify for protection. Similarly, if the work was first published (or transmitted) within the UK then it will qualify for protection.

4. AUTHORSHIP

The concept of the author is central to UK copyright law in that each copyright work must have an author. Similarly, work that is in copyright will always have an owner. But, 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 be passed from one generation to the next, such that the work might have had many different owners before the copyright term expires.

The author of a copyright work is determined by the CDPA. The default position set out within the Act is that the author 'in relation to a work, [is] *the person who creates it*' (s.9(1)).

For situations in which it may be more difficult to determine who the author of a work is, the Act provides some additional guidance. In relation to 'entrepreneurial' works, the CDPA tends to define the author as the person who makes the arrangements for the creation of the work. For example, for sound recordings the author is the producer (s.9(2)(aa)); for a film the authors are the producer and the principal director (s.9(2)(ab)); for a literary, dramatic, musical or artistic work that is computer-generated the author is the person who makes the arrangements necessary for the creation of the work (s.9(3)).

4.1. Works of unknown authorship

Sometimes 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 his or her identity to be revealed). To address this, the CDPA includes the concept of a work with '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 his or her identity by reasonable inquiry (s.9(4)(5)). The CDPA does not, however, define what constitutes a 'reasonable inquiry'.

4.2. 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 the authors can be distinguished from each other (for example, different contributors to an edited collection)

- when the nature of the collaboration means that each respective contribution cannot meaningfully be distinguished from the other

In the first instance, each of the authors 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*.

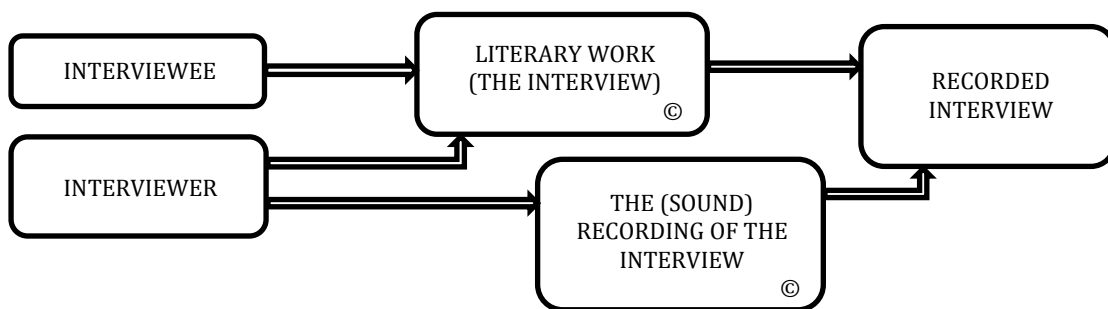
The CDPA defines a work of joint authorship as one ‘produced by a collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors’ (s.10(1)). So, when establishing whether a work is one of joint authorship or not, there are three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

- that each of the authors contributed in some way to the making of the work
- that 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
- that the respective contributions are not distinct or separate from each other

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)).

4.3. Authorship and oral history interviews

The concept of the joint authorship of protected works is important for oral historians. Above, we gave the example of someone making a recording of an interviewee telling their story about an event or experience. In this situation, there will be two different copyright works at play.



If the interviewer is recording the interview, whether as audio or as film, copyright will exist in the recording itself. As noted above, the author of the copyright in the recording will typically be the interviewer: the person who makes the arrangements for the creation of the work.

In addition to the sound or film recording, however, copyright will also likely exist in the work that is being recorded: the interview; the interviewee’s story. The words of the interviewee will almost certainly qualify as a literary work: that is, a work that conveys information or instruction, a work that is original in the sense

that it represents the author's own intellectual creation, and a work that has been fixed (by being recorded).

One issue to consider is whether the interview (rather than the recording of the interview) might be a work of joint authorship: that is, are the interviewer and the interviewee joint authors of the work that has been recorded? As discussed above, this would turn on whether the interviewer has made a meaningful contribution to the creation of the recorded work in terms of shaping the interview beyond a list of pre-determined questions or prompts. If so, the work may well be co-authored by both the interviewer and the interviewee.

However, whether the recorded work is solely authored by the interviewee, or jointly authored by the interviewer and the interviewee, the copyright in the work will be owned – either in full or in part – by the person being interviewed. This has implications for the subsequent use of the work, which we discuss below. Next, however, we consider various aspects of copyright ownership.

5. COPYRIGHT OWNERSHIP

In general, given that copyright in a work subsists from the point of creation, the first owner of the copyright in the work will also be the author of that work (s.11(1)). While ownership of the copyright in a work (that is, of the right to exploit the work) may change hands throughout the period of the copyright term, the authorship of the work will never change.

5.1. 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. Hodgins* [2003] FSR 238, 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] EWHC 3239 (HC) (concerning the 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.¹⁴

¹⁴ Blackburne J 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'. Similarly, see *Bamgboye v. Reed* [2002] EWHC 2922 (QB) in which the court declared the claimant to be entitled to a 33% share of the musical work in question (para.77).

5.2. 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.

Consider, for example, our example of an interviewer and an interviewee jointly authoring the work that has been recorded. And let's assume that at the time the interview was conducted and recorded, there had been no discussion about the copyright in the work and who might own that copyright. In this situation, the interviewer could not simply unilaterally decide to make use of the work in some way – or to grant another person permission to make use of the work – without the consent of the co-owner (that is, the interviewee). Permission to make use of the work must be granted by all co-owners.

5.3. Work created by employees

Although the general rule is that the author of a work will also be the first owner of the copyright in that work, this 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'.

There are three main aspects to consider here: Who is an employee? Was the work made in the course of his employment? Is there an agreement to the contrary effect?

Normally, determining whether someone is an employee (or simply working on a freelance basis or under a contract of service) is straightforward. More interesting questions tend to arise, however, when considering whether the work was made by the employee during the course of his or her employment.

Noah v. Shuba [1991] FSR 14: Dr Noah produced a medical pamphlet, *A Guide to Hygienic Skin Piercing*, 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 some importance to the judge in arriving at this decision was the fact that he 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.

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. For example, *Stevenson Jordan v. MacDonald* (1951) 69 RPC 10 concerned the copyright in a series of public lectures delivered by an employee of a firm of management consultants. While the employer had paid the expenses of the person giving the lecture, Morris LJ considered that as the employee could not have been *ordered* to write and deliver the lectures they did not form part of his contract of employment. As a result, copyright belonged to the employee, and not the employer.

And finally, copyright in works created by an employee, in the course of her employment, will still belong to that employee, and not her employer, where there exists a contractual agreement to this effect. While these agreements are often expressly set out within a contract of employment they can, however, 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. Consider, for example, a University lecturer: although employed by the 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 materials produced for the purpose of teaching or for publication as research likely lies with the lecturer and not her employer.¹⁵

5.4. Freelance work

The situation existing between the employer and an employee will generally only apply where the employee is under a contract of service (that is, when the employer is paying his 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 his own time, equipment, tax etc., then the employer will not automatically own the copyright in the resulting work. 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.

5.5. Ownership of work created before 1 August 1989

In relation to work created before 1 August 1989 (when the CDPA came into force), it is important to be aware that the first owner of the copyright in a work is determined by *the law in force at the time when the work was made or completed* (CDPA, Schedule 1, paragraph 11(1)). For this reason, it is important to be aware of relevant provisions of earlier copyright legislation such as the 1956 and 1911 *Copyright Acts* (the forerunners to the CDPA).

6. ECONOMIC RIGHTS and INFRINGEMENT

Copyright is best understood as a bundle of economic rights that regulate the copying and use of the protected work. In certain circumstances, making use of a

¹⁵ See the decision of *Caird v. Sime* (1887) LR 12 AC 326.

copyright work without the permission of the copyright owner will infringe the copyright in that work. Copyright infringement can be one of two types: primary infringement or secondary infringement.

Primary infringement concerns the unauthorized performance of any of the 'acts restricted by copyright' (CDPA ss.16-21); secondary infringement, by comparison, provides owners with protection against those who, in effect, aid and abet the primary infringer or deal in infringing copies (CDPA ss.22-26). We'll consider each in turn.

6.1. 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. Section 16 of the CDPA provides that the acts restricted by copyright include the right to:

- Copy the work: the reproduction right (further defined in s.17)
- 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)

Performing any of these acts without permission will infringe the copyright in the work, and the owner will be entitled to some form of compensation. Moreover, it will generally not make any difference that the copy takes a different form from the original. For example, converting a two-dimensional image into three dimensions and vice versa; 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.

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

- the public performance right does not extend to artistic works or to typographical arrangement
- the public communication right does not extend to the typographical arrangement of published editions
- the right to make an adaptation of a work only applies to literary, dramatic, or musical works

Table 1 on the following page provides an overview of which economic rights apply to each type of work protected under the CDPA.

6.1.2. Copying part of the work

Copyright protection is not confined to preventing the copying or use of works in their entirety. Simply copying part of the work can also infringe. This principle is set out in s.16(3)(a) of the CDPA which states that infringement can occur in relation to ‘the work as a whole *or any substantial part of it*’ (emphasis added). It is also enshrined in European copyright law. That is, while it is not appropriate to copy a substantial part without permission, it is permissible to make use of protected work so long as you are not copying any more than a substantial part of that work. But where do you draw the line between a substantial and an insubstantial part?

TABLE 1

	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*	-	Y	-
FILM	Y	Y	Y	Y	Y	-
SOUND RECORDING	Y	Y	Y	Y	Y	-
BROADCAST	Y	Y	-	Y	Y	-
TYPOGRAPHIC ARRANGEMENT	Y	Y	-	-	-	-

* Note that the rental and lending right as it applies to artistic works is qualified. That is, it does not apply to ‘a work of architecture in the form of a building or a model for a building, or a work of applied art’ (see s.18A(1)(b)).

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* (1983) Mr Justice Mervyn Davies QC 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*’ (emphasis added).

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). 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 recent years, the courts have become increasingly reluctant to excuse unauthorised copying on the basis that what was copied was an insubstantial part of the work. Previously, liability might only be triggered if the defendant had copied an essential, vital or significant part of the protected work. Now, courts are more inclined to find infringement unless '*no more than an insignificant part of the copyright work is copied*' (quoting Lord Bingham in *Designer Guild Ltd* (2000)).

The decision of the European Court of Justice in *Infopaq International v. DDF* (2009) has consolidated this trend. The 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 European Court of Justice was asked for guidance as to whether this automated copying might constitute copyright infringement.

The ECJ 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 sufficient 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). Ultimately there is no simple test that can be relied upon to draw a clear line between substantial and insubstantial copying.

6.1.3. Strict liability offences

One of the key features of the acts restricted by copyright is that they are based on 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 whatsoever that the person infringing the copyright did not intend to infringe, or was even aware that he was infringing another's copyright. Intention and knowledge on the part of the guilty party are irrelevant. Acts of primary infringement are different from 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 below).

6.2. Secondary Infringement

In addition to these instances of primary infringement (the acts restricted by copyright), the CDPA also provides for various forms of secondary infringement, which are more relevant to individuals or organizations that, in a commercial context, deal with infringing copies or facilitate infringements of the copyright-protected work. For example, while a theatre company staging an unauthorised performance of a dramatic work may be guilty of primary infringement, the theatre venue that enables the performance may be guilty of secondary infringement. Moreover, simply *possessing* copies in the course of a business can be enough to trigger liability if you know or suspect that the copies are infringing someone's copyright (s.23(a)).

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 (s.23)
- providing the means for making an infringing copy (s.24)
- permitting the use of a premises for an infringing performance (s.25)

Unlike situations of primary infringement the *knowledge* of the offending party 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 – actual or constructive knowledge.

7. DURATION OF COPYRIGHT: THE COPYRIGHT TERM

Copyright does not last forever: it is time-limited. The period that copyright lasts is referred to as the 'copyright term'. Not all copyright terms last for the same length of time: duration of protection differs depending on the category of work one is dealing with.

At present, for literary, dramatic, musical, and artistic works, as well as films, the copyright term is the life of the author plus seventy years (s.12(2)).

The duration of copyright in sound recordings expires 50 years from the end of the calendar year in which the recording is made. However, if during that period the recording is *published* copyright expires 70 years from the end of the year in which it was published. Similarly, if during the initial 50 year period the recording is not published but *made available* to the public by being played in public or communicated to the public copyright expires 70 years from the end of the year in which it is first so made available (s.13A(2)).

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)).

The protection for typographical format lasts for 25 years from the end of the year of first publication (s.15).

When the copyright term in any work expires, the work is said to be in the public domain. This means you are free to make use of the work however you like without having to ask permission from anyone, or without having to pay; that is: the work is free to be used by all (in theory at least).

7.1. 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,¹⁶ 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 identities of the relevant measuring persons are 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,¹⁷ then 70 years from the year in which it was so made available.

7.2. Works created before 1 August 1989

Generally, when dealing works created before 1 August 1989 (that is, when the CDPA came into force) the duration of copyright will be governed by the standard rules set out above. However, the CDPA contains various saving and transitional provisions guided by the principle that a change in the copyright legislation should not lead to a reduced term of protection for existing works.¹⁸ So, if a work would have enjoyed a longer period of protection under a previous legislative regime (such as the 1911 or the 1956 Copyright Act) that longer term will apply. For the purposes of this commentary we focus on how these transitional provisions

¹⁶ In this context, making available to the public means (i) in the case of a literary, dramatic or musical work: performance in public or communication to the public; (ii) in the case of an artistic work: exhibition in public, a film including the work being shown in public, or communication to the public (s.12(5)).

¹⁷ In this context, making available to the public means (i) showing in public, or (ii) communicating in public (s.13(6)).

¹⁸ These transitional provisions on copyright duration are set out in Schedule 1 of the CDPA (paragraphs 12, 41 and 44).

impact on two types of work: works posthumously published before 1 August 1989, and certain unpublished works created before 1 August 1989.

7.2.1. Works posthumously published before 1 August 1989

When dealing with literary, dramatic and musical works created before the CDPA came into force, duration of copyright will not always be determined by reference to the death of the author. This is because while s.2(3) of the 1956 Act stipulated that copyright in these works should expire 50 years from the end of the year in which the author died, this general rule was subject to an important proviso concerning posthumous publication of works: that is, if before the death of the author her work had not been published, performed in public, offered for sale as a record, or broadcast, copyright would continue to subsist in the work until 50 years from the end of the calendar year in which the work was first published, performed, offered for sale, or broadcast.¹⁹

So: imagine an author who dies in 1960. Under the standard CDPA terms, the copyright in her work will subsist for 70 years from the end of the calendar year in which she died, that is, until the end of 2030. However, imagine that the author's daughter finds an unpublished manuscript and arranges to have it published in 1985. Under s.2(3) of the 1956 Act the copyright in this work should last for 50 years following publication, that is, until 2035. The transitional provisions set out in paragraph 12(2)(a) of Schedule 1 of the Act ensure that copyright in the work will continue until 2035, rather than 2030.

7.2.2. Unpublished works created before 1 August 1989

The transitional provisions in the CDPA also provide that the duration of copyright in many unpublished literary, dramatic, musical and artistic works, films and sound recordings, continues until 50 years from the end of the calendar year in which the 1988 Act came into force (that is, until 31 December 2039). Moreover, these provisions – collectively referred to as the 2039 rule – apply regardless of when the works in question were created or when their authors died. The 2039 rule affects the following categories of unpublished work:

- anonymous or pseudonymous literary, dramatic, musical or artistic works (other than photographs) (paragraph 12(3)(b))
- literary, dramatic and musical works, engravings and photographs taken on or after 1 June 1957 (paragraph 12(4))
- sound recordings made on or after 1 June 1957, and films which have not been registered under the Cinematograph Films Act 1938 (and subsequent legislation) (paragraph 12(5))

¹⁹ The 1911 *Copyright Act* contained a similar provision regarding posthumous publication. Section 17(1) provided that 'In the case of a literary dramatic or musical work, or an engraving, in which copyright subsists at the date of the death of the author ... but which has not been published, nor, in the case of a dramatic or musical work, been performed in public, nor in the case of a lecture, been delivered in public, before that date, copyright shall subsist till publication, or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter'.

Let's reconsider our author who dies in 1960. Under the standard CDPA terms, the copyright in her work will subsist for 70 years from the end of the calendar year in which she died; that is: until the end of 2030. This time, however, let's assume that the unpublished manuscript discovered by the author's daughter remained unpublished on 1 August 1989. In this case, the 2039 rule applies (in accordance with Sch.1, paragraph 12(4)), and the unpublished work will remain in copyright until 31 December 2039.

7.3. Public Domain Calculators

When a work is out of copyright it is said to be in the public domain. Because of the complexity of the rules concerning duration of copyright both in the UK and the EU, public domain calculators have been developed for EU member states to help determine when a work is no longer in copyright and has passed into the public domain. These public domain calculators have been developed as part of the Europeana Connect initiative and are available as part of the *Out of Copyright*: www.outofcopyright.eu.

Out of Copyright was first launched in 2011, and then re-launched in February 2015 to incorporate recent changes to the law (both at EU and national level) and including added functionality. At the time of writing, the calculator for the UK is not yet available on the new website however the previous calculator is still available at: www.archive.outofcopyright.eu.

8. ASSIGNMENTS, LICENSING AND PERMISSIONS

When making use of someone else's copyright-protected work, one obvious way to avoid liability for copyright 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.

8.1. Assignment

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

The different economic rights in a work do not need to be assigned at the same time to the same person (s.90(2)). That is, 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 of 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, when granting a licence 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.²⁰

There are many different 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.

8.3. Collecting Societies

Authors and/or other copyright owners often authorise a collecting society (often referred to as a Collective Management Organisation: CMO) to manage certain uses of their work. So, for example, the Performing Rights 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.

The collective administration of copyright interests has mushroomed within Britain in the last 30 years. For further information, including a list of collecting societies currently operating within the UK, see [here](#).

²⁰ For example, 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. See *Barrett v. Universal-Island Records Ltd* [2006] EWHC 1009 (Ch) (para. 362).

9. THE PERMITTED ACTS: COPYRIGHT EXCEPTIONS

The copyright regime has never sought to censure or regulate all forms of copying. Copyright protects the work of authors by ensuring they can prevent others from copying their work in certain ways, but at the same time copyright enables many forms of lawful copying without the need for permission from the copyright owner. These *permitted acts* – otherwise referred to as copyright exceptions – represent an attempt to strike a balance between the economic interests of the owner and certain uses that are considered socially, culturally, politically or economically beneficial.

The CDPA provides a number of exceptions to the rule that permission is required before you can make use of a copyright work (ss.28-76). 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.

Before turning to those exceptions that are of relevance for oral historians, we first consider the concept of *fair dealing*.

9.1. Fair Dealing

Some exceptions to copyright permit 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 non-commercial research will not infringe the copyright in that work (s.29(1)).

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 makes use of, 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 in fact to produce a commercially competitive product. In *Hubbard v. Vosper* [1972] 2 QB 84 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, more recent decisions have indicated a number of factors worth bearing in mind that may be of relevance. In *Ashdown v. Telegraph Group* [2002]

RPC 5 Lord Phillips identified three important factors to bear in mind: (i) commercial competition with the claimant; (ii) whether the work in question had previously been published; (iii) the amount and importance of the work taken. In *Fraser-Woodward* [2005] EMLR 22 Mann J considered the following factors to be relevant: (i) the motives of the user; (ii) whether there is fair dealing is a matter of impression; (iii) excessive use can render the use unfair; (iv) the *actual* purpose of the work; (v) the amount of work taken; (vi) that the permissible amount of work reproduced may differ depending on the work in question; (vii) that reproduction should (in essence) conform with the so-called 'three step test' (first set out in the Berne Convention A.9(2)).²¹

Whatever else can be said, it seems clear that the courts will test the question of fairness *objectively*; as Aldous LJ 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]'.²²

9.2. Fair dealing for the purposes of non-commercial research or private study (s.29)

Fair dealing with a work for the purpose 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 purpose of private study does not infringe (s.29(1C)). Both provisions apply only if the copying can be considered fair dealing.

Both provisions are also tethered to non-commercial activity only. Section 29 makes this explicit in relation to research, but not private study. However, s.178 of the CDPA defines private study to preclude 'any study which is directly or indirectly for a commercial purpose'.

Determining what constitutes commercial as opposed to non-commercial activity will not always be easy. This issue was discussed in *The Controller of HMSO v. Green Amps Ltd* [2007] EWHC 2755 (Ch) a case concerning the use of ordinance survey maps. The court endorsed the observation from a leading treatise on copyright that '[p]resumably any research which, at the time it is conducted, is contemplated or intended should be ultimately used for a purpose which has some commercial value will not be within the permitted act'. Put another way, commercial activity need not be concurrent with the research underpinning that activity to preclude reliance on the exception. So, for example, an academic undertaking research for a book that may generate royalties (however small) at some point in the future is almost certainly not engaging in non-commercial research.

The exception for non-commercial research also requires that use of the work is accompanied by a *sufficient acknowledgement*. This is defined in s.178 to mean an

²¹ Article 9(2) of the Berne Convention provides as follows: 'It shall be a matter for the legislation in the countries of the Union to permit the reproduction of [literary and artistic works] in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author'.

²² Reiterated by Peter Gibson LJ in *NLA v. Marks and Spencer* [2001] Ch 257 (CA) (para.44).

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
- in the case of an unpublished work, it is not possible for a person to ascertain the identity of the author by reasonable inquiry

It is important to note here that the acknowledgement required by the legislation concerns the identification of the *author* and not the current copyright owner (although they may of course be the same person).²³ Also, the CDPA makes clear that the requirement for acknowledgement can be dispensed with 'where this would be impossible for reasons of practicality or otherwise' (s.29(1B)).

9.3. Fair dealing for the purposes of quotation, criticism or review (s.30(1))

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 allows the use of quotation more broadly. 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. The CDPA provides as follows:

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 a lot of 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
- the material used is available to the public
- the use of the material is fair
- where practical, the use is accompanied by a sufficient acknowledgement

²³ See: *Express Newspapers plc v. News (UK) Ltd* [1990] FSR 43.

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.

9.4. Exceptions for education and instruction

The CDPA sets out various exceptions permitting the use of copyright works for certain educational purposes (sections 32-36A).

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

9.5. Contracting out of exceptions

Various exceptions set out within the CDPA are protected from contractual override. For example, the exception for research and private study provides:

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))

In short, any contractual terms (such as the terms and conditions on a publicly accessible website) that attempt to prevent you from relying on this exception are rendered null and void; those specific terms are unenforceable. This contract override clause also applies to the exceptions for quotation, criticism and review, as well as the exception permitting illustration for instruction.

10. ORPHAN WORKS

One issue that has attracted considerable attention in recent years is how best to enable the use and re-use of *orphan works*. Essentially, a copyright-protected work is an orphan work if its rights owner cannot be identified or located by someone seeking permission to perform one of the exclusive rights provided for within the CDPA. This can be particularly problematic when trying to make use of historic and other material of scholarly interest held with archive and other heritage collections: if the copyright owner is unknown or cannot be located permission to make use of the work cannot be secured.

Within the UK, there exists a twin-track system for enabling the use of orphan works: an orphan works exception that is based upon the European Orphan Works Directive 2012; and, an orphan works licensing scheme (OWLS) that is specific to the UK. We will consider each in turn.

10.1. The Orphan Works Directive: An exception for orphan works

The Orphan Works Directive mandates that Member States introduce a new exception to copyright to enable certain types of use with certain types of orphan works. In the UK the Directive was implemented by the *Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014* which introduced a new s.44B to the CDPA (Permitted uses of orphan works) along with the accompanying Schedule ZA1. As the Directive has been implemented almost verbatim by the 2014 Regulations, in the commentary that follows we make reference primarily to the provisions of the Directive.

The relevant institutions ('beneficiary organisations') entitled to rely on this new exception are cultural heritage institutions, in particular: publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions as well as public-service broadcasting organisations (A.1(1)). Institutions wishing to benefit from the Directive must register as a beneficiary organisation with the Office for Harmonization in the Internal Market (OHIM), an organisation now referred to as the European Union Intellectual Property Office (EUIPO).²⁴ EUIPO maintains a database of items registered as orphan works (available [here](#)). In the first year of the Directive, only 10 organisations in the UK registered with EUIPO as a beneficiary organisation (and only 61 organisations across the EU).²⁵

The type of material that falls within the scope of the exception includes: books, journals, newspapers, magazines and other writings, as well as phonograms, cinematographic and audiovisual works (A.1(2)). Under the Directive a work will be considered orphan if 'none of the rightholders in [the work] is identified or, even if one or more of them is identified, none is located despite a *diligent search* for the rightholders having been carried out' (A.2(1)) (emphasis added).

²⁴ With the entry into force of Regulation No 2015/2424, on 23 March 2016 OHIM became the European Union Intellectual Property Office (EUIPO). As such, throughout the remainder of the commentary we will make reference to EUIPO.

²⁵ Intellectual Property Office, *Orphan Works: Review of the first twelve months* (2015), 16.

The concept of diligent search is fundamental to the operation of both the Directive and OWLS. The Directive stipulates that a diligent search must be carried out for *each work prior to the use of that work*, and provides a list of sources for each category of work that must be consulted as part of the diligent search process. These sources are set out in the Annex to the Directive. We consider the concept of diligent search in greater detail in Section 7 below.

It is important to note that the diligent search need only be carried out in the Member State where the work was first published or broadcast (A.3).²⁶ This is because the Directive operates a principle of the mutual recognition of orphan works throughout the single market. That is, a work that is considered an orphan work in one Member State is deemed to be an orphan work in all Member States (A.4). This principle of mutual recognition has the benefit of identifying one relevant jurisdiction in which the diligent search is carried out;²⁷ it also removes the need to duplicate the diligent search in another Member State. Records of all diligent searches carried out must be provided to the European Union Intellectual Property Office for inclusion in EUIPO's Orphan Works Database (A.3(5)(6)).

Once a work has been designated orphan, a beneficiary organisation can take advantage of the uses permitted under Article 6(1). That is, they are permitted to use orphan works contained within their respective collections in the following ways:

- copying the work for the purposes of digitisation, indexing, cataloguing, preservation, restoration and making the work available (A.6(1)(b))
- communicating the work to the public, including making it available online (A.6(1)(a))

Article 6(2) makes clear that beneficiary organisations are only permitted to make use of orphan works in order to achieve aims related to their public interest missions, 'in particular the preservation of, the restoration of, and the provision of cultural and educational access to works and phonograms contained in their collection'. However, the Directive does state that relevant organisations may generate revenue in their use of orphan works 'for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public'.

The fact that a work has been designated an orphan does not mean that it will always remain an orphan. Member States must ensure that the owner of a work considered to be orphan can put an end to the work's orphan status (A.5). Within the UK, the legislation states that the rightholder may put an end to the orphan work status of a relevant work by providing evidence of her ownership of the

²⁶ This is subject to an exception concerning cinematographic or audiovisual works when the producer of the work in question has his headquarters or habitual residence in a Member State: in this case, the diligent search must be carried out in the Member State of the producer's headquarters or habitual residence; A.3(3). Moreover, if there is evidence to suggest that relevant information on rightholders is to be found in other countries, then relevant sources of information available in those other countries should also be consulted; A.3(4).

²⁷ Although this is subject to the proviso concerning joint authors from different Member States set out in A.3(3).

rights in question to EUIPO or to the relevant body (the beneficiary organisation) which carried out the relevant diligent search in the first place.²⁸

10.2. The UK Orphan Works Licensing Scheme (OWLS)

At the same time as implementing the orphan works exception under the Directive, the UK government introduced a licensing scheme which is much broader in scope than the Directive. For example:

- while the scheme adopts the same definition of an orphan work as the Directive, it applies to *all types of copyright work* including free-standing artistic works (photographs, drawings, maps, and so on)
- *anyone* can apply for a licence under OWLS, not just libraries, educational establishments, museums and archives²⁹
- OWLS enables both commercial and non-commercial uses of orphan works
- under OWLS the IPO will grant licences for all types of commercial or non-commercial activity, and not just those activities permitted under the Directive (for example, making the work available online)

In short, whereas the Directive enables the use of certain orphan works by certain organisations for certain purposes (across the EU), OWLS enables the use of *all orphan works by anyone for any purpose* (but only within the UK).

As with the Directive, applicants under OWLS must conduct a diligent search in relation to each work for which they are seeking a licence. Crucially, the search undertaken should be properly documented. As part of the licensing process, applicants need to be able to clearly demonstrate that their search was diligent. Indeed, the IPO has produced a diligent search check list that must be completed (for each relevant right holder that cannot be identified or located) and submitted with the licence application.

In addition to the diligent search requirement, OWLS also requires that applicants also pay an application fee and a licence fee to make use of the work. The application fee is paid when the application is submitted, and is determined by the number of works for which a licence is sought (for example, to make an application to licence the use of one orphan work, the fee is £20; for 10 works, the fee is £40; for 20 works, it is £60).

The licence fee is payable once an application has been successful, and the fee will vary depending on the type of orphan work and the proposed use. For example, while licence fees for commercial use are calculated in accordance with current market rates (wherever possible), the licence fee for non-commercial use is significantly lower. Indeed, the IPO have set a licence fee of 10 pence (£0.10) per work for all non-commercial uses.³⁰ Moreover, it is possible to check how much a

²⁸ See CDPA, Sch. ZA1 paragraph 7(2).

²⁹ This is, however, subject to one exception: the 2014 Regulations set out that '[a]n orphan works licence may not be granted to a person authorised to grant licences' (reg.6(4)).

³⁰ Intellectual Property Office, *Orphan Works Licensing Scheme: Overview for Applicants* (October 2014), 2.32, available at:

licence fee will cost *before* making a formal application, which helps with securing appropriate funding and/or changing the scope of the application to ensure affordability. VAT is payable on licence fees, but not on the application fee.

All licences granted under OWLS are non-exclusive (meaning that the orphan work in question remains available for others to license and use) and are only valid for a term *not exceeding seven years*. Thereafter, a new application must be submitted to enable the continued use of the work.

Importantly, the schemes are not mutually exclusive; when digitising or making use of orphan material it is perfectly acceptable to rely on both the Directive and OWLS within the same project, choosing the more appropriate route for each type of work depending on the circumstances. Also, the Intellectual Property Office has produced three sets of guidelines relating to (i) film and sound-related orphan works, (ii) literary orphan works, and (iii) still visual art orphans. These guidelines are primarily intended for those wanting to make an application through OWLS, although they will also be of assistance when conducting a diligent search in accordance with the exception established under the Directive. These guidelines are currently available [here](#).

11. USEFUL RESOURCES

There are numerous websites that offer information and advice on copyright. These resources are produced and managed by public organisations and international institutions, collecting societies, trade and industry bodies; sometimes, they represent the outcome of a publicly-funded research initiative or project. Below is a list of some websites that may be helpful.

British Copyright Council: <http://www.britishcopyright.org/>

British Library Business and IP centre: <http://www.bl.uk/business-and-ip-centre/articles/what-is-copyright>

Building digital capacity for the arts (with BBC):
<http://digitalcapacity.artscouncil.org.uk/>

Centre for Intellectual Property Policy and Management:
<https://microsites.bournemouth.ac.uk/cippm/>

Copyright Hub: <http://www.copyrighthub.co.uk/home>

CopyrightUser.Org: <https://www.copyrightuser.org>

CREATE: <http://www.create.ac.uk/>

European IPR helpdesk: <https://www.iprhelpdesk.eu/>

Europeana Space: <http://www.europeana-space.eu/>

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450649/Orphan_Works_Licensing_Scheme_Overview_for_Applicants.pdf (accessed: 01 March 2016).

Intellectual Property Office:

<https://www.gov.uk/government/organisations/intellectual-property-office>

JISC: <https://www.jisc.ac.uk>

Museum Associations: <http://www.museumsassociation.org/home>

Oral History Society: <http://www.ohs.org.uk/advice/ethical-and-legal/>

SCONUL: <http://www.sconul.ac.uk/>

Society of Authors: <http://www.societyofauthors.org/>