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MEDIA LAW

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PROPERTY RIGHTS AND FREEDOM OF EXPRESSION

COPYRIGHT, DESIGN RIGHT, MORAL RIGHTS AND PERFORMERS' RIGHTS

(a) Copyright

The civil law

Copyright confers the right to control the exploitation of certain sorts of material. It defines what can and cannot be done to the material without the copyright owner's consent. Under English law, copyright is generally viewed as an economic right because it confers the right to control the exploitation of something of value – such as a work of art or a piece of music. Copyright also acts as an incentive to creativity. By conferring the right to control the exploitation of the work, copyright goes some way to ensuring that the creator of the work is rewarded for his creativity. As the flip side to this economic function, copyright has important repercussions for freedom of expression. The owner of copyright in a newsworthy document or piece of film footage may be able to exercise its copyright to prevent the use of the material by the media – either at all or on terms requiring payment of a fee. Rival media entities often seek to enforce the copyright in their material against their rivals.¹

UK copyright law is largely contained in an Act of Parliament, the Copyright, Designs and Patents Act 1988 (CDPA) as amended.² The CDPA came into force on 1 August 1989.

What is copyright?

Copyright is a property right which protects the skill and labour which goes into the creation of a work from unauthorised appropriation. Copyright exists in certain types of material (classified by the CDPA into nine types of 'work'). Ownership of copyright in a work enables the copyright owner to restrain or license a number of activities specified in the Act in relation to that work.

The law rests on two basic principles. The first is that unauthorised appropriation of the product of an author's skill and labour is wrong and

1 By way of example, see *BBC v British Satellite Broadcasting Ltd* [1991] 3 WLR 174.

2 Amended by the Duration of Copyright and Rights in Performances Regulations 1995, the Copyright and Related Rights Regulations 1996 and the Copyright and Rights in Databases Regulations 1997.

ought to be restrained. The second principle is that works which have been generated by the exercise of skill and labour should be capable of exploitation for commercial reward without undue hindrance, the rationale being that creativity should be encouraged by allowing creative works to be profitably exploited. In recent times it is this second principle which has become paramount. In the media industries many copyrights are owned and exploited by large businesses rather than by the individuals who created the works. The emphasis is on ever greater protection for copyright owners, ensuring that copyright owners can keep lucrative markets for themselves or demand large fees in return for permission to use their material. But at what price for freedom of expression and freedom of innovation?³

International protection

Copyright is a national right. A work qualifies for copyright protection in the UK if the creator of the work (known, for copyright purposes, as the 'author') is a 'qualifying person' as defined in s 154 of the CDPA. The definition includes an individual domiciled or resident in the UK. As an alternative to the individual residence criterion, copyright will subsist under the laws of the UK if the work was first published in the UK.⁴

If the owner of UK copyright wishes to enforce his UK copyright outside the UK, he must confirm that it has the right to do so under the laws of the country in which he wants to enforce. This will involve looking at relevant international treaties, principally the Berne Convention 1886 for the Protection of Literary and Artistic Works and the Universal Copyright Convention 1952 (UCC), which respectively lay down minimum standards for the national copyright law of the Contracting States. Under the provisions of these treaties, Contracting States are obliged to give the foreign copyright owner the same protection as is afforded to their own nationals. The UK has ratified both the Berne Convention and the UCC.

3 At the time of writing, this emphasis can be seen in relation to the record industry's lobbying for greater protection for digital works. This is considered towards the end of this chapter.

4 CDPA 1988, Chapter 9, ss 153–162.

Copyright works

Under the CDPA, copyright subsists in works of the following types.

*Original literary works*⁵

These are defined as any work, other than a dramatic or musical work, which is written, spoken or sung. It does not matter whether the work has been published. The term encompasses more than just works of prose. The words 'literary work' covers 'work which is expressed in print or writing, irrespective of the question whether the quality or style is high'.⁶ Literary works can take the form of computer programs, tables, compilations or databases.⁷ Copyright has been successfully claimed in material as diverse as examination papers,⁸ football coupons⁹ and a label containing instructions placed on the side of a barrel of herbicide.¹⁰ The Court of Appeal has laid down a threshold which a literary work must meet before it can qualify for copyright protection.¹¹ The work must convey information, provide instruction or give pleasure (in the form of literary enjoyment). Single words, titles and commonplace slogans and phrases are unlikely to satisfy any of these criteria.¹²

Original scripts, screenplays and lyrics are literary works in their own right as well as being part of a play, film or song.

The meaning of 'original' is considered below.

*Original dramatic works*¹³

These are defined in the CDPA as including a work of dance and mime. This is not a comprehensive definition.¹⁴ The Court of Appeal has held that the term 'dramatic work' should bear its natural and ordinary meaning, namely a work of action, with or without words or music, which is capable of being performed before an audience.¹⁵ A film may, therefore, be a dramatic work,

5 CDPA 1988, s 3(1).

6 *University of London Press v University Tutorial Press* [1916] 2 Ch 601.

7 Defined by the CDPA as a collection of independent works, data or other materials which are arranged in a systematic or methodical way and are individually accessible by electronic or other means. Databases are considered further below.

8 *University of London Press v University Tutorial Press* [1916] 2 Ch 601.

9 *Ladbroke (Football) v William Hill (Football)* [1964] 1 All ER 465.

10 *Elanco v Mandops* [1979] FSR 46.

11 *Exxon v Exxon Insurance Consultants International Ltd* [1982] Ch 119; [1981] 3 All ER 241.

12 See below, p 227 for more detail.

13 CDPA 1988, s 3(1).

14 *Norowzian v Arks (No 2)* [2000] EMLR 1.

15 *Ibid.*

provided that it meets the originality requirements. The requisite performance in public could, according to the Court of Appeal, take the form of showing the film. We shall see below that 'film' is also one of the types of work which is recognised in the CDPA. Films may therefore enjoy dual protection as original dramatic works and as films.

A static scene is not capable of being a dramatic work, even if it is artfully arranged.¹⁶ It cannot be said to be 'a work of action'.

The Court of Appeal's definition of 'dramatic work' seems to be wider than the court could ever have intended. It appears to omit a vital component, namely an element of plot or creativity. In the wake of the Court of Appeal decision, some practitioners have sought to argue that recorded sporting sequences, such as goal scoring sequences in a football match, could be dramatic works in the sense that they are works of action which can be shown in public.¹⁷ If this view is correct, any other type of moving sequence which has been filmed is also capable of being a dramatic work. This could have important repercussions for news footage and sports footage.

However, it is likely that the practitioners in question are being a little optimistic about the scope of dramatic work. Dramatic works must be original to qualify for copyright protection. The meaning of originality is considered in more detail below, but it should be noted at this stage that, although the test for originality is not high, it might not be satisfied where action occurs spontaneously without premeditation. Further guidance about limitations on the meaning of 'dramatic work' can be found in the Privy Council decision in *Green v Broadcasting Corp'n of New Zealand*,¹⁸ where it was held that a dramatic work must have 'sufficient unity' to be capable of performance. An isolated goal scoring sequence is unlikely to have the required unity.¹⁹

Clearly, the Court of Appeal formulation of what is meant by dramatic work is generating its own peculiar problems. It must be hoped that the definition is applied in a commonsense way in accordance with general copyright principles or that the court takes the opportunity to clarify the definition further.

A dramatic work is distinct from any script on which it is based. An original script, as we have seen, enjoys protection in its own right as a literary work.

16 *Creation Records v News Group Newspapers* [1997] EMLR 444.

17 Eg, 'They think it's all over – it isn't yet' (2000) *The Times*, 8 February.

18 *Green v Broadcasting Corp'n of New Zealand* [1989] 2 All ER 1056.

19 Note also that, in relation to performers' rights, the definition of performance in CDPA 1988, s 180(2) would not extend to sporting 'performances' or other types of spontaneous performances. Although performers' rights are not dependent on the existence of copyright, it would make sense to bring the meaning of dramatic work in line with the meaning of performance.

Original musical works

These are defined as original music of all kinds (exclusive of any words or action intended to be sung, spoken or performed with the music). The lyrics to a song will be a *literary* work. The tune will be a separate *musical* work. The music does not have to be an elaborate composition. Advertising jingles can be copyright works. Channel 4 has asserted copyright protection for its signature 'fanfare', even though it consists of only a handful of notes.²⁰

The term 'musical work' includes new arrangements of existing music. Separate and distinct copyrights might co-exist in the music (musical work), and the arrangement of the music (a second and separate musical work).

The meaning of 'original' is considered below.

*Original artistic works*²¹

These are defined to mean a graphic work, photograph, sculpture or collage,²² *all irrespective of artistic quality*. It also includes a work of architecture (being a building or a model for a building) and works of artistic craftsmanship.

The term 'graphic work'²³ includes paintings, drawings, diagrams, maps, charts, plans, sculptures (including casts or models made for a work of sculpture) and engravings. There are *dicta* in the case of *Creation Records v News Group Newspapers*²⁴ which suggest that an artistic work cannot be something which is intrinsically ephemeral, such as a posed scene for a photograph. Whilst the photograph recording the posed scene would be an artistic work, the scene itself would not be. ('Photograph' is defined as 'a recording of light or other radiation on any medium or from which an image may by any means be produced and which is not part of a film'.)²⁵ The result of this seems to be that it would not be an infringement of copyright in a photograph to take a separate photograph of the same scene or to recreate the scene on a different occasion.

The meaning of 'original' is considered below.

Sound recordings

These are defined as a recording of sounds, from which the sounds may be reproduced,²⁶ or a recording of the whole or any part of a literary, dramatic or

20 (1985) *The Times*, 13 June.

21 CDPA 1988, s 4.

22 A collage involves sticking two or more things together – *Creation Records v News Group Newspapers* [1997] EMLR 444.

23 CDPA 1988, s 4(2).

24 *Creation Records v News Group Newspapers* [1997] EMLR 444.

25 CDPA 1988, s 4(2).

26 *Ibid*, s 5A.

musical work from which sounds reproducing the work or part may be produced. A sound recording is not restricted to the recording of music.

The sounds which are the subject of the recording may be literary works or musical works in their own right. A sound recording of a song can therefore involve a number of separate types of copyright: copyright, for example in the lyrics (literary work), in the tune (musical work) and in the sound recording of the song. The sound recording is a derivative right in the sense that it is derived from the original works which form the subject of the recording. Copyright does not subsist in a sound recording which is, or to the extent that it is, a copy taken from a previous sound recording.²⁷ It follows that copyright will subsist in a master sound recording – but not in any copies produced from the master tape – even where the subsequent recordings have been authorised by the copyright owner.

Films

Films are defined as a recording on any medium from which a moving image may by any means be reproduced.²⁸ This will include feature films, newsreels, home and music videos, television programmes and filmed advertisements. Since 1 December 1996, the sound track accompanying a film is treated as being part of the film.²⁹ Copyright does not subsist in a film which is, or to the extent that it is, a copy taken from a previous film.³⁰ As with sound recordings, copyright exists in the master tape of the film, but not in copies produced from the master. Infringement requires copying of the physical recording embodied on the film, for example, by video recording the film.³¹ It is not, therefore, an infringement of copyright in a film to recreate the subject matter of the film or the filmmaker's overall technique or distinctive editing features.³²

Broadcasts

Broadcast is defined³³ as a 'transmission by wireless telegraphy of visual images, sounds or other information (for example, Teletext) which is capable of being lawfully received by members of the public or is transmitted for presentation to members of the public'. It includes analogue, terrestrial and

27 CDPA 1988, s 5A(2).

28 *Ibid*, s 5B.

29 *Ibid*, s 5B(2).

30 *Ibid*, s 5B(4).

31 *Norowzian v Arks (No 1)* [1998] FSR 394.

32 *Norowzian v Arks (No 2)* [2000] EMLR 1.

33 CDPA 1988, s 6.

satellite broadcasts by television or radio. Broadcasts are protected independently of the material which is the subject of the broadcast. Therefore, if the BBC broadcasts a feature film, copyright subsists in the broadcast *and* in the film itself. Copyright does not subsist in a broadcast which infringes, or to the extent that it infringes, the copyright in another broadcast or in a cable programme.

Special rules apply to determine the place of origin of transnational satellite broadcasts.³⁴ Where the satellite uplink is located in a State in a European Economic Area (EEA) State, that State is treated as the place where the broadcast is made and the person operating the uplink station is treated as the person making the broadcast. Where the uplink station is not in an EEA State, but a person established in an EEA State has commissioned the broadcast, that person is treated as the person making the broadcast and the place where he has his principal establishment in the EEA is treated as the place from which the broadcast was made.³⁵

Cable programmes

These are defined³⁶ as items included in a cable programme service. A cable programme service is a service consisting: (a) wholly or mainly in sending visual images, sounds or other information; (b) by means of a telecommunication system, otherwise than by wireless telegraphy; (c) for reception at two or more places or for presentation to members of the public. There are a number of exceptions to the definition of cable programmes,³⁷ most notably where a service or part of a service has as an essential feature the provision for interactivity. Cable telephone networks fall within this exemption, and are not therefore protected as cable programmes. Communications by e-mail are also likely to be excluded on the interactivity grounds, although e-mail could probably be protected by reference to other types of work, for example, literary works (provided that they are original). As with broadcasts, the subject matter of the item transmitted will have its own copyright existing separately from the copyright in the cable programme.

*Published editions*³⁸

Copyright exists in the typographical arrangement of a published edition of the whole or any part of one or more literary, dramatic or musical works. This right exists separately from the material which is the subject matter of the edition. It is a special and narrow type of copyright which protects the image

34 CDPA 1988, s 6A.

35 *Ibid.*

36 *Ibid.*, s 7.

37 *Ibid.*, s 7(2).

38 *Ibid.*, s 8.

on the page. Its purpose is to protect the publisher's investment in the typesetting work. Copyright does not subsist in the typographical arrangement of a published edition if, or to the extent that, it reproduces the typographical arrangement of a previous edition. Publication is defined as the issue of copies to the public,³⁹ which is likely to include making the edition available electronically, for example, over the internet.

New technologies

The development of new technologies is currently outstripping the development of copyright laws. As a result it can be difficult to accommodate new product developments into the existing categories of work.

What types of copyright work are websites?

In *Shetland Times v Wills*,⁴⁰ the *Shetland News* reproduced headlines created by its rival publication, *Shetland Times*, and created links on the *Shetland News* home page to the pages of the *Shetland Times*. *Shetland Times* sued *Shetland News* for copyright infringement for the unauthorised reproduction of its headlines and obtained an interim injunction to restrain the further operation of the website link. Lord Hamilton held (on an interim application) that the *Shetland Times* website was a cable programme service. The judge acknowledged that he had little technical information available to him on the application and that the application was made at a preliminary stage of the litigation before pleadings had closed and without the benefit of hearing all of the evidence. The decision has been criticised on the ground that it did not deal adequately with the possibility of interactivity between the website and readers. Readers will recall from the definition of cable programme service set out above that there is an exemption where the service in question involves interactivity as an essential feature. Lord Hamilton found that those possibilities for interactivity which were available to readers (on the facts, a note inviting readers to send in comments or suggestions by email) were not essential to the website as a whole. Alternatively, he found that the interactive parts of the website were easily severable from the rest of the website.

Multimedia works

There is no particular category of multimedia work in copyright law. If a defendant reproduces a particular multimedia work, the claimant would have to bring proceedings in relation to the underlying works out of which the final

39 Copyright and Related Rights Regulations 1996, reg 16.

40 *Shetland Times v Wills* [1997] FSR 604.

product has been produced, for example, the musical work, any sound recordings used in such works, artistic works, etc. This situation does not really reflect the fact that the composite multimedia work may be greater than its constituent parts. It might be possible for the multimedia work as a whole to be protected as a film or a dramatic work but this would depend on the multimedia work in question and the position is far from certain.

A lacuna in copyright law?

The division of the classes of copyright work into the nine types of work is strict. If a feature does not fall within any one of the categories, copyright will not subsist in that feature. This can lead to injustice for works of originality which cannot be categorised as one of the recognised types of work. An illustration of such injustice was illustrated by the decision of *Norowzian v Arks*.⁴¹

The claimant was a director of advertising films. In 1992, he directed a short film called *Joy*. The striking feature of the visual impact of the film was the result of the claimant's filming and editing techniques. One of these was the practice of 'jump cutting'. The result of this editing technique was that apparent sudden changes of the actor's position were shown, which could not have been performed as successive movements in reality.

The defendants were Guinness and their advertising agency. The case concerned an advertisement for Guinness, which the claimant alleged was an infringement of his copyright in *Joy*. A similar jump cutting technique was used as in the defendants' film. It was common ground that the advertising agency had instructed the director of the Guinness commercial to produce a commercial with an atmosphere which was broadly similar to that portrayed in *Joy*.

The claimant's claim

The claimant claimed infringement of copyright in the following works:

- copyright in the film 'Joy';
- copyright in the dramatic work .

*Copyright in the film (Norowzian (No 1))*⁴²

Norowzian (No 1) concerned an application to strike out the claim in relation to the film. The application was successful. The court held that infringement of copyright in a film requires copying of the physical recording embodied on

⁴¹ *Norowzian v Arks (No 2)* [2000] EMLR 1.

⁴² *Norowzian v Arks (No 1)* [1998] FSR 394.

the film for example, by video recording the film. It is not an infringement in the film to simply reproduce the subject matter of the film as the defendant had done.

*Copyright in the dramatic work (Norowzian (No 2))*⁴³

At first instance the court held that the film was not a dramatic work. This finding was subsequently reversed on appeal (see above). The Court of Appeal held that the *film* was a dramatic work, being a work of action capable of being performed in public. But the subject matter of the two films was different. Copyright did not exist in the filmmaker's style or technique taken in isolation. The categories of work set out in the CDPA do not protect the techniques embodied in the works. Accordingly, there was no infringement on the facts of *Norowzian*. Nourse LJ observed that 'the highest it can be put in favour of the claimant is that there is a striking similarity between the filming and editing styles and techniques used by the respective directors of the two films'.

The judge at first instance (Rattee J) had recognised that 'there is no doubt that the little film [*Joy*] is a striking example of a talented film director's art'. The claimant's counsel argued that this result was a serious *lacuna* in the protection of works of originality. Copyright law offered no protection for the originality of the film as a manifestation of the filmmaker's art. Rattee J appeared to have some sympathy with this view but indicated that his hands were tied. The Court of Appeal agreed. Buxton LJ indicated that 'the general features said to mark out *Joy*, such as its rhythm, pace and movements; the use of jump cutting and other techniques; and its theme, explained to us of that of a young man releasing his tension by performing a rather bizarre collection of dance movements in a rather surreal setting; could none of them be the subject of copyright'.

Originality

In order for copyright to subsist in a literary, dramatic, musical or artistic work the work must be original. Originality has been interpreted widely by the courts. The threshold is not high. It is not dependent on talent or inventiveness. Nor does it mean that a work has to be ground breaking or unique. The courts generally shy away from any assessment of creative originality.

43 *Norowzian v Arks (No 2)* [2000] EMLR 1.

'Original' simply means that the work must have originated from the author; it must not have been copied from something else.⁴⁴ The creation of the work must therefore have involved the creator in the exercise of at least a small degree of skill, judgment and labour.

A reworking of an earlier work may still be original provided that the reworked version has involved skill and labour.⁴⁵

A special originality requirement for databases

A database (which the CDPA recognises as a type of literary work for copyright purposes) is original under copyright law if the database constitutes the creator's own intellectual creation by reason of the selection or arrangement of the database contents.⁴⁶ This is a more demanding requirement than the test for originality for other types of literary works, artistic works, dramatic works and musical works.

Fixation

Copyright will not subsist in a literary, dramatic or musical work unless the work is recorded in writing or otherwise.⁴⁷ In copyright law, recording is often referred to as 'fixation'. It is immaterial whether the work is recorded by or with the permission of the author.⁴⁸

Example

Where a speech is made *ad lib*, for example, without written notes or text, copyright will not exist in the speech as a literary work unless and until it is recorded, for example, by the taking of written notes of the speech or by the making of a sound recording. It does not matter whether the recording was made with the speaker's consent or not. Similarly, an original musical composition must be recorded either by musical notation or by a sound recording.

44 *Ladbroke v William Hill* [1964] 1 All ER 465; and *University of London Press v University Tutorial Press* [1916] 2 Ch 601.

45 *Christoffer v Poseidon Films* (1999) unreported. The claimant wrote a script of the Cyclops story from *The Odyssey*. The script was an original work even though the story was the same as that in *The Odyssey*. The script contained many variations of detail, for example, the narrative script had been turned into a script suitable for filming: '... this manifestly involves original work.'

46 CDPA 1988, s 3A(2).

47 *Ibid*, s 3(2).

48 *Ibid*, s 3(3).

In the *Norowzian* litigation, the dance portrayed in the claimant's film was held to have been recorded by filming.⁴⁹

Copyright in ideas

It is often said that copyright does not exist in an *idea*, but only in the form in which the idea is expressed. This is one of the reasons why the law insists on fixation in relation to literary, dramatic and musical works. It is the fixed form which is protected rather than the underlying idea. But taken at face value, the ideas/expression maxim is too glib. It requires qualification. A more accurate reflection of the law is the statement that *copyright will only subsist where the work in question is in a sufficiently developed form*. If the work is too nebulous or imprecise, it will not enjoy copyright protection.

It is useful to keep in mind the fact that one of the objectives of copyright law is to protect the skill and labour of the author of the work from appropriation. A general idea or an undeveloped concept is unlikely to have involved sufficient skill, judgment or labour. Ideas which develop the general concept are more likely to be protected. Anyone can use the basic idea or the underlying concept, but if they copy the detail, they may infringe copyright. By copying the detail, they are likely to be appropriating the skill, judgment and labour which went into the creation. Pritchard J explained this point in eloquent terms in the New Zealand case of *Plix Products v Frank M Winstone*.⁵⁰ He said:

There are in fact two kinds of 'ideas' involved in the making of any work which is susceptible of being the subject of copyright. In the first place, there is the general idea or basic concept of the work. The idea is formed (or implanted) in the mind of the author ... While this 'idea' remains as a thought in the author's mind it is, of course, not copyright.

Then there is the second phase – a second kind of 'idea'. The author of the work will scarcely be able to transform the basic concept into a concrete form, that is, 'express' the idea – without furnishing it with details of form and shape ... Each author will draw on his skill, his knowledge of the subject, the results of his own researches, his own imagination in forming his idea of how he will express the basic concept. All these modes of expression have their genesis in the author's mind – these too are 'ideas'. When these ideas (which are essentially constructive in character) are reduced to concrete form, the forms which they take are where the copyright resides.

The distinction between the basic idea and its detailed development is often a difficult one to draw. It will always be a question of degree.

49 *Norowzian v Arks* [1999] FSR 79.

50 *Plix Products v Frank M Winstone* [1989] 2 All ER 1056.

Example

In the case of *Green v Broadcasting Corp of New Zealand*,⁵¹ Hughie Green, the compere of the well known talent show called *Opportunity Knocks*, commenced proceedings for copyright infringement against New Zealand Broadcasting Corporation who, he claimed, had copied the format of his show and were broadcasting a similar show.

Mr Green claimed that he was the owner of copyright in the scripts and dramatic format for *Opportunity Knocks*. However, he did not produce detailed scripts to support his claim, nor a written format. Instead, the court heard only oral evidence that the scripts/format consisted of a number of catch phrases used in each show, the use of a device known as a clapometer and other general, unconnected, ideas.

The court found that in the absence of detailed scripts the claimant was doing no more than seeking to protect the general idea or concept for his talent show and that such a nebulous concept could not be protected by copyright. If the claimant had been able to produce actual scripts and a written summary of the so called format, the result may have been different.

The distinction between expression and ideas is considered further in the infringement section of this chapter.

Copyright in titles, slogans, catchphrases and character names

As a general rule, short phrases, such as titles, advertising slogans and catch phrases are not protected by copyright. In the case of *Francis Day and Hunter v Twentieth Century Fox Film Corp*,⁵² a Privy Council case, Lord Wright observed that:

In general, a title is not by itself a proper subject matter of copyright. As a rule a title does not involve literary composition, and is not sufficiently substantial to justify a claim to protection. That statement does not mean that in a particular case a title may not be on so extensive a scale, and of so important a character as to be a proper subject of protection against being copied.

The way is therefore left open for a title which is sufficiently substantial, on a sufficiently extensive scale and of an important character to be protectable by copyright law as an original literary work, although a claimant seeking copyright protection for a title or other short phrase would face an uphill struggle in the face of Lord Wright's opinion. The *Francis Day* case concerned the title of the song *The Man Who Broke the Bank at Monte Carlo*. The claimant sought copyright protection in the title against the defendant, who had used

51 *Green v Broadcasting Corp of New Zealand* [1989] RPC 700.

52 *Francis Day and Hunter v Twentieth Century Fox Film Corp* [1940] AC 112.

the same title for a film. The Privy Council held that the title was not protected by copyright.

The *Francis Day* case should now be read in the context of a later decision of the Court of Appeal which concerned whether copyright subsisted in a single made up word, EXXON, which was part of the claimants' corporate name and which the claimants had invented.⁵³

In the *Exxon* case, it was held that, although the invented word was original for copyright law purposes in that it had not been copied from another source *and* it had involved the creators in the exercise of skill, judgment and labour, copyright still did *not* subsist in it as a literary work. This decision was reached on the basis that the word was simply an artificial combination of four letters of the alphabet which served a purpose only when used in conjunction with other English words to identify one or other companies in the claimant group. It did not have any of the 'commonsense qualities' which were required for copyright to subsist. These qualities were defined as the conveyance of information, the provision of instructions or the giving of pleasure (in the form of literary enjoyment). In order to be deserving of copyright protection, the Court of Appeal judgment suggests, a literary work must perform at least one of these functions.

On existing case law, copyright is therefore unlikely to subsist in slogans, titles and catch phrases on the basis that they are too insubstantial to be deserving of such protection and/or that they do not satisfy the criteria laid down in the *Exxon* case.

In the *Shetland Times* case,⁵⁴ the Scottish court held (on an application for an interim injunction) that headlines in a newspaper had copyright. This decision has been the subject of criticism on the ground that it represents something of a departure from the *Exxon* decision. However a headline (particularly a headline consisting of a pun) could be said to satisfy at least some of the *Exxon* criteria.

In relation to character names, the general position is that there is no copyright in a name (whether invented or not). The courts have accordingly denied copyright protection to the names 'Kojak',⁵⁵ 'James Bond'⁵⁶ and 'Burberry'.⁵⁷

Even though copyright is not available to protect material of this type, an action for passing off may be available where damage to the claimant's goodwill can be shown. Where the word, name or phrase has been registered as a trade mark, an action for trade mark infringement may also be available.

53 *Exxon v Exxon Insurance Consultants International Ltd* [1981] 3 All ER 241.

54 *Shetland Times v Wills* [1997] FSR 604.

55 *Tavener Rutledge v Trexapalm* [1977] RPC 99.

56 *O'Neill v Paramount Pictures Corpn* [1983] Court of Appeal Transcript 235.

57 *Burberrys v JC Cording* (1909) 26 RPC 693.

The reader is referred to Chapter 14 for further consideration of the protection of character names and likenesses.

Copyright in conversations and interviews

A conversation is theoretically capable of copyright protection as a literary work, provided that it is recorded in a permanent form (whether in writing or otherwise). Copyright in the conversation will belong to the speakers either jointly (as joint authors of the conversation) or separately in relation to each individual's words. The conversation must have involved the expenditure of skill, judgment and labour to satisfy the test of originality. It must also meet the criteria set out in the *Exxon* case by conveying information, providing instruction or giving literary pleasure. A commonplace conversation is unlikely to satisfy these criteria. The author is aware that certain celebrities have asserted copyright in comments they have made during interviews, the objective behind the litigation being the prevention of the unauthorised use of television interview footage. No such case has yet proceeded to trial. Clearly, if copyright does exist in a recorded conversation, its existence could have serious repercussions for freedom of expression.⁵⁸

Copyright in a recording of a literary, dramatic and musical work

We have seen that a literary, dramatic or musical work must be recorded in a permanent form if copyright is to subsist in the work. If the record is a sound recording or a film, the recording or film itself will be a separate copyright work. There is no requirement that sound recordings or films must be original.

However, the situation may be different where the recording takes the form of a written record. Can a verbatim note of a speech be said to be an 'original' literary work in its own right? There is a House of Lords' decision which suggests that a verbatim note of a speech can be a literary work in its own right.⁵⁹ However, the case was decided before the requirement for originality was introduced into the law. It is submitted that the case would probably be decided differently under the current law on the ground that

58 CDPA 1988, s 58 (discussed below) contains an exception to the general principle in relation to recorded interviews used for reporting current events.

59 *Walter v Lane* [1900] AC 539.

merely reproducing the spoken word does not involve skill, judgment or labour in an authorship context.⁶⁰

Duration of copyright – a guide

Copyright does not subsist in a work for an indefinite period. The provisions relating to the duration of copyright are not without difficulty, but the position can be summarised in relation to works which originate in Member States of the EEA and where the author is a national of an EEA State as follows:

- copyright in *literary works, artistic works, dramatic works and musical works* expires at the end of the period of *70 years* from the end of the calendar year in which the author dies unless the work is computer generated in which case copyright expires at the end of *50 years* from the end of the calendar year in which the work was made. Where artistic works are exploited industrially by or with the licence of the copyright owner, the term of copyright protection will be reduced to *25 years* from the end of the calendar year in which such articles are first marketed in the UK or elsewhere;
- in the case of *films*, copyright expires *70 years* from the end of the calendar year after the death of the last to die of the following persons (or the last of the following persons whose identity is known):
 - the principal director;
 - the author of the screenplay;
 - the dialogue writer;
 - the composer of music specially created for the film and used in the film.

Where there is no person falling under the above descriptions, copyright expires at the end of the period of *50 years* from the end of the calendar year in which the film was made:

⁶⁰ Recent cases on joint ownership of copyright support this view – see, eg, *Robin Ray v Classic FM* [1998] FSR 622 and *Fylde Microsystems v Key Radio* [1998] FSR 449, discussed below. However, the Australian case of *Sands v McDougall* (1917) CLR 49 held that *Walter v Lane* was good law, even after the introduction of a requirement of originality, and this reasoning was upheld by Browne-Wilkinson VC in *Express Newspapers v News (UK) plc* [1991] FSR 36, where it was held that ‘if skill, judgment and labour were put into reporting the interviewee’s words, copyright will subsist in the report even though the actual words used were the interviewee’s’. However, on the facts of the *Express* case, the article containing the interview was not simply a verbatim record of what had been said – it involved the selection of quotations, for example, rather than a complete transcript of the interview. The *Express* case can accordingly be distinguished from *Walter v Lane*.

- copyright in *sound recordings* expires *50 years* from the end of the calendar year in which the recording was first released or *50 years* from the making of the recording if it is not released within 50 years. A sound recording is released when it is first published, played in public, broadcast or included in a cable programme service;
- copyright in *broadcasts and cable programmes* expires *50 years* from the end of the calendar year in which the broadcast was made or the programme was included in a cable programme service. Copyright in a repeat broadcast or cable programme expires at the same time as the copyright in the original broadcast or cable programme. No copyright arises in respect of a repeat made after the expiry of the copyright in the original broadcast or cable programme;
- copyright in typographical arrangements of published editions expires at the end of *25 years* from the end of the calendar year in which the edition was first published;
- where works did not originate in a Member State of the EEA or if the author is not a EEA national, then the general principle is that the duration of copyright will be the same as the work is entitled to in the country of origin, provided that that period does not exceed the periods provided for under the CDPA (as set out above).

The above is only a guide to what are complex provisions. For further detail, the reader is referred to ss 12–15A of the Act, as amended by the Duration of Copyright and Rights in Performances Regulations 1995 and to regs 14–21, 23–25 and 36 of the 1995 Regulations. In particular, there are transitional provisions which apply to works which were in existence before the Regulations came into force on 1 January 1996.

It can be seen from the above that copyright lasts for a generous period of time. If an author writes a book when he is 25, copyright will subsist in the book until the author dies, say aged 95. At that point, copyright will already have subsisted for 70 years. Copyright will then last for a further 70 years following the death of the author. Copyright will therefore have lasted for a total of 140 years from when the book was written.

Who owns copyright?

Copyright exists independently of the physical work in which it subsists. The owner of the work will not necessarily own the copyright in the work, even though he may have the work in his physical possession and vice versa. The first owner of copyright is generally the creator of the work. Copyright will remain with the creator until copyright is transferred, regardless of whether the work itself is transferred.

Example

I buy an original painting in which copyright subsists. The act of buying the painting might transfer physical ownership of the painting to me. However, unless copyright is *assigned* to me (see below for a discussion of the meaning of assignment), my purchase of the painting will not transfer ownership of copyright in the painting. I may own the painting, but I will not own the right to control the exploitation of the painting, that is, the copyright.

Authorship

The basic rule is that the creator (known for copyright purposes as the author) of the work will be the first owner of copyright of literary, dramatic or musical works.⁶¹ Often, the identity of the author will be obvious. If I write a book or paint a picture, I am clearly the author for copyright purposes. In the music industry it is common practice for an author of a musical work to transfer copyright to a music publisher. Therefore, although the author is the first owner of copyright, for most practical purposes it is the author's music publisher who controls the exploitation of the works.

The principal exception to the general rule that the author is the first owner of copyright is where a literary, dramatic, musical or artistic work or a film is created by an employee in the course of his employment. In that case, the employer is the first owner of copyright in the work, unless there is an agreement between employer and employee to the contrary.⁶² This agreement does not have to be in writing, although in the interests of certainty it is better if it is.

It will be a question of fact whether the creation of a copyright work was in the course of the employee's employment. If the employee writes a screenplay in his spare time, the writing is clearly unlikely to fall within her employment. However, other situations may not be so clear-cut.⁶³ Regard should be had to any contract of employment or job description to determine the issue – although these will not in themselves be determinative (as opposed to employees under a contract of employment).

Where freelance staff create copyright works under a contract for services, the freelancer will own copyright unless it is assigned. Whenever there is a doubt about whether someone is an employee or working freelance, written

61 CDPA 1988, s 11(1).

62 *Ibid*, s 11(2).

63 For an example of a case where the distinction was not obvious, see *Stephenson Jordan v Harrison* [1952] RPC 10, where copyright in lectures given by an accountant was held to belong to the accountant, rather than his employer. The court held that he was employed to provide accountancy services to clients rather than to give public lectures. The situation might not be the same today, when it is generally acknowledged that it is part of a professional's job to market his practice to potential clients.

assignments should be taken to ensure that copyright ends up where it is intended.

In relation to certain categories of work, the CDPA defines who the author will be in the following terms:

- *computer generated literary, dramatic, musical or artistic works*⁶⁴ – the author is the person who undertakes the arrangements for the creation;⁶⁵
- *databases*⁶⁶ – the maker of a database is the person who takes the initiative in obtaining, verifying or presenting the contents of the database and assumes the risk of investing in that obtaining, verification or presentation;
- *sound recordings*⁶⁷ – the author is the producer. The producer is defined to mean the person by whom the arrangements necessary for the making of the recording were undertaken. In practice, this may be the record company;
- *films*⁶⁸ – the authors will be the producer *and* the principal director. As these may not be the same entity, copyright will in some circumstances be owned jointly. The producer is defined to mean the person by whom the arrangements necessary for the making of the film are undertaken. Where the producer and/or director are employees who make the film in the course of their employment, copyright will belong to the producer/director's employer;⁶⁹
- *broadcasts*⁷⁰ – the author is the person making the broadcast or, in the case of a broadcast which relays another broadcast by reception and immediate retransmission, the person making that other broadcast;
- *cable programmes*⁷¹ – the author will be the person providing the cable programme service in which the programme is included;
- *typographical arrangements*⁷² – the author will be the publisher;
- *photographs*⁷³ – the author is the person who creates the work – generally the photographer unless the photographer is an employee who takes the photograph in the course of his employment in accordance with the principles set out above.

Ownership of commissioned works is considered below.

64 CDPA 1988, s 9(3).

65 Computer generated work is defined in *ibid*, s 178 as a work created by a computer in circumstances where there is no human author.

66 Copyright and Rights in Databases Regulations 1997, reg 14.

67 CDPA 1988, s 9(2)(aa).

68 *Ibid*, s 9(2)(ab).

69 *Ibid*, s 11(2).

70 *Ibid*, s 9(2)(b).

71 *Ibid*, s 9(2)(c).

72 *Ibid*, s 9(2)(d).

73 *Ibid*, s 9(1).

Unknown authorship

Sometimes it is not possible to ascertain the identity of the author of a copyright work. The CDPA provides that a work can be of unknown authorship where the identity of the author is unknown or where, in the case of a work of joint authorship, the identity of none of the authors is known.⁷⁴ The identity of the author(s) shall be regarded as unknown if it is not possible for a person to ascertain the identity by reasonable inquiry.⁷⁵ In relation to the duration of copyright in original literary, dramatic, musical or artistic works of unknown authorship, copyright expires at the end of 70 years from the end of the calendar year in which the work was made or if, during that period, it is made available to the public, at the end of 70 years from the end of the calendar year in which it was first made available.

Joint authorship

Where a work is produced by the collaboration of two or more authors in which the contribution of one author is not distinct from that of the other author or authors, it will be a work of joint authorship.⁷⁶ The joint authors will be the first owners of copyright in the work (provided that they are not employees who have created the work in the course of their employment).

The CDPA provides that a film shall be treated as a work of joint authorship unless the producer and the principal director are the same person.⁷⁷

The courts have considered the circumstances in which someone who contributes to the development of a work can properly be classed a joint author.

In the case of *Fylde Microsystems Ltd v Key Radio Systems Ltd*,⁷⁸ Laddie J held that, whilst it was not necessary for the putative joint author to have carried out the act of fixation (for example, the actual putting of pen to paper), he must have contributed the right kind of skill and labour to the finished work before he could be a joint owner of copyright. The right kind of skill and labour must be *authorship* skill and labour. The facts of the *Fylde* case concerned development of software. The defendants asserted that they were joint authors of the software in question because they had outlined to the claimant what the general functions of the software were to be. They had also tested the prototype software which the claimant had designed and in so doing had revealed that certain changes had to be made to it by the claimant.

74 CDPA 1988, s 9(4).

75 *Ibid*, s 9(5).

76 *Ibid*, s 10.

77 *Ibid*, s 10(1A).

78 *Fylde Microsystems Ltd v Key Radio Systems Ltd* [1998] FSR 449.

Laddie J held that although the contributions made by the defendant were extensive and technically sophisticated they essentially amounted to testing the program. Such efforts were analogous to the skills of a proofreader, but they were not *authorship* skill. Accordingly they did not give rise to a claim of joint authorship. Similarly, merely outlining the general functions of the program to the claimant did not involve authorship skill.

Lightman J reached a similar decision in *Robin Ray v Classic FM plc*.⁷⁹ He held that a joint author must participate in and share responsibility for the way in which the work is expressed. He must accordingly do more than contribute ideas to the author. Whilst there is no need to show actual penmanship, what is required is something approximating to penmanship – a direct responsibility for what appears on the paper. On the facts of the case, the defendant claimed to be a joint author of a catalogue of musical recordings. The court held that the claimant was solely responsible as author for the way that the catalogue had been expressed. Whilst the defendants had discussed the development of the catalogue with the claimant and had initiated and developed a number of ideas which the claimant had then incorporated into the catalogue, that was not sufficient to give rise to a claim of joint authorship. Their input was not sufficient to make them joint authors.

The putative joint author must also have made a significant contribution to the work⁸⁰ of an authorship nature. This does not mean that the contribution must be equal to those of the other author(s), but the contribution must be more than slight.

Some interesting cases concern ownership of copyright in musical compositions. In *Stuart v Barrett*,⁸¹ the court was called upon to determine the authorship of a piece of music which had evolved from a jamming session. In his judgment, Sir Thomas Morison QC described the scene as follows:⁸²

Someone started to play and the rest joined in and improvised and improved the original idea. The final piece was indeed the product of the joint compositional skills of the members of the group present at the time.

He went on to observe:

It would not be sensible to try to lay down any general rules which would apply to all group compositions. One member of a pop group may have an idea which is so nearly perfected that the compositional input of any of the other members of the group would be regarded as insignificant.

This was held to be the case in *Hadley v Kemp*.⁸³ The case concerned the authorship of the songs of the group Spandau Ballet. The issue before the

79 *Robin Ray v Classic FM plc* [1998] FSR 622.

80 *Godfrey v Lees* [1995] EMLR 307.

81 *Stuart v Barrett* [1994] EMLR 448.

82 *Ibid*, p 455.

83 *Hadley v Kemp* [1999] EMLR 539.

court was whether the songs had been written solely by the person acknowledged to be the group's main songwriter, Gary Kemp. Alternatively, could the other members of the group be said to be joint authors by virtue of their interpretation of Gary Kemp's compositions? The court heard evidence that the group's typical songwriting procedure was that Gary Kemp would present a song to the band with the melody and chord structure complete and the structure of the song already laid out. Very few changes would be made leading up to the recording of the song and those that were made would be subject to Gary Kemp's approval.

The court held that Gary Kemp was the sole author of the musical and literary works which made up the Spandau Ballet songs. It held that there was a vital distinction to be drawn between the composition and creation of a musical work on one hand and the performance and interpretation of it on the other. Matters of performance and interpretation did not go to the creation of the musical work. They did not involve the right kind of skill and labour. This would be the case even where there was an element of improvisation in the performances.⁸⁴

Joint authorship example

On the basis of these authorities, if A thinks up the outline plot of a novel and suggests the plot to B who then writes the novel based on A's plot, A will *not* be a joint owner of copyright in the novel. A's input will be insufficient to make him a joint owner. A's skill is not actual authorship skill amounting to responsibility for what appears on the paper. If A wished to protect his idea for the plot, he would have to rely on a claim in breach of confidence against B (assuming that he could meet the criteria for such a claim). The reader is referred to Chapter 5 in this regard and, in particular, to the cases of *Fraser v Thames Television*⁸⁵ and *De Maudsley v Palumbo*.⁸⁶

If B subsequently submits the completed novel to her publishers who then spot a number of typographical errors and suggest a number of minor changes, the publisher's input is also unlikely to give rise to a claim of joint authorship, because: (a) the skill which they have exercised is not authorship skill, but more like the skill of a proofreader; and (b) in any event, the input is not extensive enough to give rise to joint authorship.

If, instead of typing the novel herself, B had dictated it to her secretary, then the fact that B had not actually put pen to paper would not deprive her of

84 The issue as to whether the group members were joint authors of the musical arrangement (a musical work) does not appear to have been raised in argument and the point is not really considered in the judgment.

85 *Fraser v Thames Television* [1984] 1 QB 44.

86 *De Maudsley v Palumbo* [1996] FSR 447.

her claim to authorship. B's secretary will not be able to claim joint authorship because his skill is not authorship skill.⁸⁷

Indivisible contributions

The CDPA 1988 requires that, in order for a work to be one of joint authorship, it must not be possible to separate the contributions of one author from the contributions of the other.⁸⁸ If a book is written by two or more authors, but each author is responsible for distinct parts of a work (say, for separate chapters of a book), they will each be classed as sole authors of their own parts. In the *Hadley v Kemp* case, the judge thought that there was an 'obvious argument' that the contribution of group members who created saxophone solos (known as 'fills') at spaces left for him by the group's main songwriter were separate from the songwriter's contribution to the song. The point does not appear to have been raised in argument and was not developed further in the judgment.

Dealings with copyright works

Assignments

Copyright is property and can be sold or transferred like other forms of property. Transfers can be effected by testamentary disposition or by operation of law (for example, on bankruptcy, copyright will be transferred to the trustee in bankruptcy as part of the bankrupt's estate). It can also be transferred like other personal property.⁸⁹

A transfer of copyright which does not take the form of testamentary disposition or operation of law is called an assignment. Assignments must be in writing and signed by the assignor (the person transferring the copyright) in order to be fully effective.⁹⁰ The assignment should be for consideration (usually a payment, however nominal) or by deed. Assignments can transfer copyright in works which are not in existence at the time of assignment. Such an assignment is known as *an assignment of future copyright*.⁹¹

A mere agreement to assign copyright at a future date does not have to be in writing – it can be in the form of an oral agreement or it can be implied by the conduct of the parties. A binding and enforceable agreement to assign is effective as an equitable assignment and may be carried into effect by an order

87 Although refer to *Walter v Lane* [1900] AC 539 and the comments made above, p 229.

88 CDPA 1988, s 10.

89 *Ibid*, s 90(1).

90 *Ibid*, s 90(3).

91 *Ibid*, s 91.

for specific performance or by a vesting order transferring legal title to the equitable owner.⁹²

Assignments can be limited in the sense that they can transfer copyright for a limited period or for specified purposes only.⁹³

Licences

A licence is a permission by the copyright owner (the licensor) to a third party (the licensee) permitting the licensee to make use of its copyright material in circumstances which would otherwise be an infringement of copyright. A licence does *not* transfer ownership of copyright.

Licences may be exclusive, sole or non-exclusive. It is possible to have licences of future copyright in works which have not yet been created.⁹⁴

An *exclusive licence* is in some ways similar to an assignment in that, whilst it does not transfer ownership of copyright, it gives the licensee the sole and exclusive right to do the acts permitted by the licence to the exclusion of anyone else (including the copyright owner).⁹⁵ Exclusive licences must be in writing and signed by or on behalf of the copyright owner.⁹⁶ An exclusive licensee can bring proceedings to restrain copyright infringement, although it will generally have to join the copyright owner as a party to the proceedings.

A *sole licence* gives the licensee the right to carry out the acts which are set out in the licence to the exclusion of anyone else apart from the copyright owner, who continues to have the right to carry out the acts alongside the licensee.

A *non-exclusive licensee* will not have exclusive rights to use of the copyright granted in the licence, nor will it be able to sue in its own name for copyright infringement.

Non-exclusive and sole licences can be oral but, as with any agreement, it is advisable to have the terms set down in writing and signed by both parties, in the interests of certainty.

Assignments and licences are considered further in Part 3.

Commissioned works

The rule that the first owner of copyright is the author of the copyright works means that where a work is commissioned, copyright vests in the *creator* of the

92 *Lakeview Computer v Steadman* (1999) unreported, CA.

93 CDPA 1988, s 90(2).

94 *Ibid*, s 91(3).

95 *Ibid*, s 92(1).

96 *Ibid*, s 92(1).

work and not the commissioner⁹⁷ in the absence of an express or implied agreement to the contrary.⁹⁸

Example

If a client commissions and pays a design agency to devise a poster, copyright in the artistic and literary works which make up the poster will belong in law to the *agency* and not to the client. The fact that the agency is paid in full for its work will not affect this position. The client may own the physical property such as the original artwork, but the copyright will still belong to the design agency. As we shall see, ownership of copyright means that the agency (and not the client who has paid for the poster) has the right to control the use to which the poster is put.

The commissioner is not, therefore, the automatic owner of copyright in material which it commissions. If copyright is to be acquired in the material, it will have to be transferred to the commissioning party by way of written assignment.

In circumstances where a work is commissioned, the parties should therefore ideally set out in writing, and with as much precision as possible, what the terms of the commission are to be. This provides certainty. Each of the parties will know the extent of their rights. Where it is intended that copyright in the commissioned work will belong to the commissioning party, the agreement should provide for copyright to be assigned to that party. Where copyright is to remain with the author of the work, the agreement should set out what author has agreed that the commissioning party can do with the work (that is, it should set out the terms of the licence (or permission) which the author has granted to the commissioning party).

To take the above example further, the client had commissioned a poster from the design agency. The agency is not prepared to assign its copyright to the client. It is prepared to give the client permission to use the poster in the course of its business for a period of 12 months in the UK. The agreement should set out the extent of this licence granted by the agency to the client.

What happens where there is no written agreement or where the agreement does not deal with the extent of the grant of rights?

Where there is no written agreement between the commissioner and the creator of the work, or where the agreement does not provide for a grant of rights, the courts will imply a term to give effect to the arrangement between the parties. The principles to be applied when doing so were established by

97 CDPA 1988, s 9(1).

98 Although, as we have seen, if an employer commissions a work from an employee in the course of his employment, copyright belongs to the employer.

the decision of the House of Lords in *Liverpool CC v Irwin*.⁹⁹ A term will only be implied into an agreement where it is *necessary to give business efficacy* to the contract and, even then, it will only be implied *to the extent necessary* in the circumstances.

In the case of *Robin Ray v Classic FM*,¹⁰⁰ the claimant entered into a consultancy agreement with the defendant radio station to advise on the composition of its classical music repertoire. The agreement made no express provision about ownership of copyright in any works which the claimant created. As part of his role, the claimant compiled a number of documents containing proposals for the cataloguing of the defendant's recordings and a database which reproduced the contents of the five documents.

The claimant alleged that he owned copyright in the documents and the database. He claimed that the defendant infringed this copyright by making copies of the database and granting licences to foreign radio stations to use the copies. The defendant asserted that it was entitled to exploit the database by making copies for foreign licensees because the consultancy agreement conferred an implied licence on the defendant to exploit the works. The consultancy agreement was silent on the extent of the grant of rights. The judge applied the general principles relating to implied terms in contracts. The ambit of the grant must not be more than the minimum necessary to secure for the commissioner the entitlement which the parties to the contract must have intended to confer on him. The amount of the purchase price which the commissioner pays for the work could be relevant to help to determine this point. On the facts, the limits of what was contemplated by the parties when the contract was made was that the claimant's work would be used to enable the defendant to carry on its business of broadcasting in the UK only. The term which could properly be implied into the agreement was the grant of a licence to the defendant to use the copyright material for in the UK.

On the facts of our example involving the poster, if there was no written agreement between the design agency and the client, the court would be likely to imply a licence to use the poster in order to give business efficacy to the agreement. The extent of that licence would be no more than what is necessary to secure to the client the entitlement which the design agency and the client must have intended would be conferred. On the facts, this is likely to encompass use of the poster in the client's advertising. However, if the client wanted to use the image on the poster in a different format, say on a T-shirt, the implied grant of rights may not be wide enough to cover such a use. The issue would depend on the particular facts, one of which would be the price paid by the client for the poster. The higher the price, in relation to the normal market, the more likely it is that a wider licence would be implied.

99 *Liverpool CC v Irwin* [1977] AC 236; [1976] 2 All ER 39.

100 *Robin Ray v Classic FM* [1998] FSR 622.

Another potential avenue open to the client where there is no agreement about the extent of the grant of rights is the solution that, although the *legal* ownership of copyright rests with the design agency, the client owns the copyright in the work *in equity*. The effect of equitable ownership would be that the client is entitled to call for an assignment of the legal title to the copyright. The court in the *Robin Ray* case considered this approach.

In that case it was held that, in accordance with the general principles relating to the implication of terms in a contract, where it was necessary to imply some form of grant of right (as it was in the *Robin Ray* case) and there was a choice of: (a) implying a licence; or (b) a right for an assignment of the legal title both solutions gave business efficacy to the agreement, then the implied term would be the grant of a licence only. This is in line with the principle that the implied term should go no further than is necessary to give business efficacy to the agreement. The court observed that, although circumstances might exist where it was necessary to imply an assignment, these would be unusual.

The *Robin Ray* decision on the question of an implied right to call for an assignment was not considered in the subsequent case of *Pasterfield v Denham*,¹⁰¹ a decision of Overend J. In the *Pasterfield* case, the claimant was a designer. He had been commissioned to design two leaflets and a brochure by Portsmouth County Council (the second defendant) to be used to promote a tourist attraction. A few years later the council commissioned the first defendant to update the leaflet. The updated leaflet reproduced much of the claimant's original leaflet with some alterations, for example, a number of figures were omitted from drawings and the colouring was slightly different. The claimant was not asked for permission to update his artwork. He sued for copyright infringement in his original drawings. The judge held that by accepting the commission to design the drawings, the equitable interest in the copyright passed from the claimant to the council. There was therefore an implied term in the agreement between the designer and the council that the council could call for an assignment of the legal ownership of the copyright from the designer to the council. The judge referred to the unreported case of *Warner v Gestetner*¹⁰² (a first instance decision of Whitford J) and an *obiter* comment of Templeman J in *Nichols v Rees*¹⁰³ to support his finding. He did not consider *Liverpool v Irwin*¹⁰⁴ or the general principles relating to implied terms in contracts.

The judge in the *Pasterfield* case went on to hold that, even if he was wrong about the implied right to the assignment, there was an implied licence

101 *Pasterfield v Denham* [1999] FSR 168.

102 *Warner v Gestetner* (1987) unreported.

103 *Nichols v Rees* [1979] RPC 127.

104 *Liverpool CC v Irwin* [1977] AC 236; [1976] 2 All ER 39.

allowing for the drawings to be used by the council to promote the tourist attraction generally. The judge was satisfied on the facts that the claimant knew that the council might use the drawings in its promotional material generally at the time when the agreement was reached. Accordingly, there was no infringement of copyright. The judge's decision on the grant of rights *was* consistent with Lightman J's judgment in the *Robin Ray* case.

It is submitted that the *Pasterfield* case was wrong on the question of the implied right to an assignment and that the correct approach was that of Lightman J in the *Robin Ray* case. Following that approach, where an implied term is necessary to give business efficacy to an agreement, it should be no more than the minimum necessary. Accordingly, where the *lacuna* in the grant of rights can be addressed by the grant of a licence or an assignment, the term to be implied is the licence – the ambit of which should be ascertained according to the principles set out in the *Robin Ray* case.

These cases illustrate the importance of spelling out the extent of the grant of rights. If the designer in the *Pasterfield* case had not wanted his designs used on any promotional material other than for the specific material he had in mind when he drew them, he should have expressly stated that to be the case in the commissioning agreement – although he might have found that his fee for designing the artwork would have been reduced.

Infringements of copyright

The acts which the copyright owner can prevent others from doing in relation to the copyright work (known as the *restricted acts*) are as follows:¹⁰⁵

- copying the work;
- issuing copies of the work to the public;
- renting or lending the work to the public;
- performing, playing or showing the work in public;
- broadcasting the work or including it in a cable programme service;
- making an adaptation of the work or doing any of the above acts in relation to an adaptation.

In addition, a person who authorises someone to do any of the above acts also infringes copyright.¹⁰⁶

These activities are the *primary infringements*. If the above activities are carried out without the copyright owner's permission, copyright in the work will be infringed,¹⁰⁷ unless that particular use of the work is permitted under

105 CDPA 1988, s 16.

106 *Ibid*, s 16(2).

107 *Ibid*.

the provisions of the CDPA 1988 (see below for discussion of the permitted uses). A primary infringement of copyright can be committed unintentionally. There is no requirement that a claimant must be able to show that the infringement was deliberate or that the defendant was reckless or negligent.¹⁰⁸

Copying

Copying an original literary, dramatic, musical or artistic work means reproducing the work in any material form.¹⁰⁹ This includes storing the work in any medium by electronic means, such as storing the work on computer disks or on any digital media.¹¹⁰ It also includes making copies which are transient or incidental to another use of the work.¹¹¹

Copying of an artistic work includes making a copy in three dimensions of a two dimensional work or the making of a copy in two dimensions of a three dimensional work.¹¹² This copying by change of dimensions applies to artistic works *only*. Thus, it would not be an infringement of copyright in a written set of instructions (a literary work) to produce a three dimensional article made to those instructions.

The meaning of a substantial part

It is not necessary for the whole of a literary, artistic, musical or dramatic work to be reproduced in order to give rise to an infringement. The reproduction of a substantial part will suffice. The assessment of substantiality is not a simple question of assessing the quantity of what has been taken. Substantiality is a qualitative test rather than a quantitative test. It depends on the importance of what has been reproduced rather than the physical quantity of the material reproduced. The essential question is whether the defendant has appropriated part of the work on which a substantial part of the author's skill and labour was expended.¹¹³ The part copied can be a relatively small part of the work, but if it is important to the work as a whole it may still infringe copyright. Sometimes people talk of a percentage cut off point, for example, 'we won't infringe copyright if we only copy 10% of the work'. Such an approach is wrong in law and should never be relied on, even as a rule of thumb. Instead, the overall importance of the part that is reproduced must be considered.

108 Although the CDPA 1988 provides that damages shall not be awarded against an innocent defendant.

109 *Ibid*, s 17(2).

110 *Ibid*.

111 *Ibid*, s 17(6). But note that transient copies made for the purposes of digital transmission will not be treated as infringements pursuant to the Digital Copyright Directive.

112 *Ibid*, s 17(3).

113 *Pumfrey J in Cantor Fitzgerald v Tradition (UK) Ltd [2000] RPC 95.*

The issue of what is substantial is a question of degree. In the case of *Designers' Guild v Russell Williams*,¹¹⁴ the Court of Appeal made the point that the antithesis of 'substantial' is 'insignificant'. If only an insignificant part of a work is reproduced, there will be no infringement of copyright.

In relation to films, television broadcasts and cable programmes, the CDPA expressly provides that the making of a photograph of the whole or any substantial part of any image forming part of the work will be an infringement.¹¹⁵ Only a facsimile copy of a typographical arrangement in a published edition will amount to an infringement of copyright.¹¹⁶ Mere changes in scale will not prevent the facsimile copy from infringing. The Court of Appeal have held that a defendant did not infringe the copyright in the typographical arrangement of national newspapers by making copy press cuttings. The typographical arrangement related to the whole newspaper. Copying cuttings from the newspaper did not amount to the copying of a substantial part of the arrangement in the whole newspaper.¹¹⁷

Has there been a reproduction of the work?

The question whether there has been a reproduction of a literary, dramatic, musical or artistic work involves two questions:

- is there sufficient similarity between the copyright work and the allegedly infringing work?; and
- has there been copying? (This question is often referred to as a 'causal connection' between the copyright work and the allegedly infringing work.)

We shall look at each of these in turn.

Sufficient similarity

In order for a claim for copyright infringement to be successful, there must be a sufficient resemblance between the copyright work and the allegedly infringing work. Similarity is an objective test of fact and degree. It involves asking whether a reasonable person would conclude that the defendant has reproduced a substantial part of the claimant's work. This decision is one for the court, which will compare the two works. In carrying out this exercise, the court will concentrate on the similarities between the two works. It is *not* the correct approach for the court to concentrate on the differences between the

114 *Designers' Guild v Russell Williams* [2000] FSR 121.

115 CDPA 1988, s 17(4).

116 *Ibid*, s 17(5).

117 *Newspaper Licensing Agency v Marks & Spencer* (2000) unreported.

two works in order to reach the conclusion that they are not sufficiently similar.¹¹⁸

In assessing similarity, the court will generally disregard the reproduction of parts of the work which have no originality on the basis that those parts will not have involved the author in the exercise of skill, judgment or labour. The case of *Ladbroke v Hill*¹¹⁹ concerned the copying of fixed odds football betting coupons. The defendant argued that every football coupon had to contain certain features, whoever produced them, and therefore it was entitled to reproduce such information from the claimant's coupon on its own coupon. Lord Pearce observed that the reproduction of a part of a copyright work which itself has no originality will not normally be a substantial part of the copyright and therefore will not be protected. However, on the facts, he held there to be an infringement of copyright, observing:¹²⁰

There are many things which are common to many coupons. But the respondent's coupon has an individuality. The appellants clearly modelled their coupon on the respondent's coupon and copied many of the things that gave it this originality. I cannot regard those things taken together as other than substantial.

A gloss was added to Lord Pearce's comments by Aldous LJ in *Biotrading and Financing OY v Biohit Ltd*.¹²¹ Aldous LJ indicated that the statement of Lord Pearce must be differentiated from the situation where a person does not just take an unoriginal part of a work in which copyright subsists, but also uses that part in a similar context and way as it was used in the copyright work. In such a case, the defendant takes not only the unoriginal part, but also a part of the work that provided the originality.

To illustrate Aldous LJ's point, take the case of *Warwick Films Production Ltd v Eisinger*.¹²² In that case, it was held that the reproduction of part of the transcript of the trial of Oscar Wilde from a book on the trial did not amount to the taking of a substantial amount of the book, because the transcript was not original to the author of the book. According to Aldous LJ, if the defendant had not only taken the transcript, but had also reproduced the way that the transcript was used in the book, there could have been an infringement of copyright.

The remarks of Aldous LJ are of particular relevance to compilations and databases, both of which fall within the definition of literary works contained in s 3 of the CDPA 1988. Even though the works included in the compilation or database may not be original, if a copyist were to reproduce the selection of

118 *Biotrading and Financing OY v Biohit Ltd* [1998] FSR 109, CA.

119 *Ladbroke (Football) v William Hill (Football)* [1964] 1 All ER 465.

120 *Ibid*, p 480.

121 *Biotrading and Financing OY v Biohit Ltd* [1998] FSR 109, CA.

122 *Warwick Films Production Ltd v Eisinger* [1967] 3 All ER 367.

material and the ordering of it, that would infringe copyright in the compilation.

Where the copyright work concerns a commonplace subject which is presented in a straightforward manner or a simplistic expression of a basic idea, only an exact reproduction of it, or something that is almost an exact reproduction, is likely to constitute an infringement.

Example

In the case of *Kenrick v Lawrence*,¹²³ the claimant claimed copyright in the representation of a hand marking a cross on an electoral voting paper. There was nothing artistically significant in the representation. The court held that there was not an exclusive right to represent the act of voting. Nothing more than a literal copy of the claimant's hand would suffice to establish copyright infringement.

On the other hand, where the expression of an idea is detailed, such as a very ornate depiction of the hand marking the cross, the reproduction of some or all of the detailed features of the design would be likely to be an infringement.

Appealing on the issue of copying

The Court of Appeal has reiterated on a number of occasions that it will be slow to reverse the finding of the trial judge on the question whether a substantial part of a copyright work has been reproduced. Parties should not appeal simply in the hope that the impression formed by the appellate judges will be different from that of the trial judge.¹²⁴

Copying an idea

As we have already seen in relation to the subsistence of copyright, copyright will not exist in an undeveloped idea. Copyright exists to protect the skill and labour of the author in expressing his idea, rather than to confer a monopoly in the idea itself. It is not an infringement of copyright in the expression of an idea to take the idea and to apply it in a different way as long as that application does not involve copying the original expression. This will be a question of fact in every case and it is very often a difficult line to draw.

An example of the difficulty of drawing the line is illustrated by the *Designers' Guild* case.¹²⁵ The claimant was the designer and manufacturer of fabrics and wallpapers. It launched a new design called 'Ixia'. The design

¹²³ *Kenrick v Lawrence* (1890) 25 QBD 93.

¹²⁴ See, eg, *Pro Sieben v Carlton* [1999] FSR 610 and *Norowzian v Arks (No 2)* [2000] EMLR 1.

¹²⁵ *Designers' Guild v Russell Williams* [2000] FSR 121.

consisted of a striped pattern with flowers scattered over it in an impressionistic style. The defendant was a wholesaler and retailer of fabrics which had also developed its own design ranges for fabrics. About a year after the claimant had launched the Ixia design, the defendant launched a new design known as 'Marguerite'. This design also featured a striped design with scattered flowers in an impressionistic style. The claimant brought proceedings for infringement of its copyright in the Ixia design (an artistic work). It alleged that the defendant had copied a substantial part of its design and incorporated it into the Margeurite design. The Court of Appeal held that the defendant had copied the *idea* and had used the same design techniques, but the defendant had not copied a substantial part of the way in which the idea was *expressed*. The Marguerite design featured broad stripes of a painted-on effect superimposed with definite images of flowers of four or three petals with different coloured stamens. The Ixia design, on the other hand, featured narrow stripes with a limited amount of leaf shown in the abstract. The size of the leafs in the Ixia design were different, the flowers depicted on the design were less prominent than in the Margeurite design and they were also deliberately faded in effect. The Court of Appeal was of the view that there was no copyright infringement. It observed that there was 'an obvious danger that if the net of copyright protection is cast too wide it will serve to create monopolies of ideas. Its more limited purpose is to protect the skill and labour of the designer in the expression'.

Parodies

To what extent can a parody of a copyright work be an infringement of copyright?

Parodies by their nature involve the exercise of skill, judgment and labour in their creation. They will, however, usually involve a reference to, or incorporation of, at least part of the work which is being parodied.

The question was considered in the case of *Williamson Music v Pearson Partnership*,¹²⁶ in which an advertising agency produced an advertisement for a bus company which parodied the lyrics and music of the Rogers and Hammerstein song *There Is Nothing Like A Dame*.

The claimants brought proceedings for copyright infringement.

The court found an arguable case that there was infringement in the music to the song (but not in the lyrics, which had been substantially changed by the defendants).

It was held that the relevant test to apply to the parody was the same as in relation to other instances of copying, namely, whether the author of the parody had reproduced a substantial part of the copyright work. The fact that

¹²⁶ *Williamson Music v Pearson Partnership* [1987] FSR 97.

the defendant may have used mental labour to produce a parody of the work was irrelevant if the resulting parody reproduced without licence a substantial part of the copyright work.

The *Williamson Music* case must now be considered in the context of the judgment of Lightman J in *Clark v Associated Newspapers*.¹²⁷ The *Clark* case concerned a series of articles published in the *Evening Standard* which parodied the well known published diaries of the conservative politician and former cabinet minister, Alan Clark. The articles were headed 'Alan Clark's Secret Election Diary' and 'Alan Clark's Secret Political Diary', and featured a photograph of the claimant. The claimant based his claim on passing off and infringement of his moral rights (see below) rather than on copyright infringement. However, the defendant's submissions were also relevant to a copyright infringement claim. The defendant invoked Art 10 of the European Convention on Human Rights, arguing that the claimant's action was an illegitimate limitation on its freedom of expression, namely, its right to parody. Lightman J rejected this argument out of hand on the basis that the passing off and infringement of the moral rights claim were not limitations of the right to parody *per se* because both claims essentially related to the way in which the spoof diaries were presented – leading the reader to suppose (incorrectly) that Ian Clark had actually written the spoof diaries – rather than their content.

The implication of Lightman J's judgment is that an attack on the right to parody might well infringe Art 10. Suppose that the parody had made use of extracts from Alan Clark's own published diary and the claimant had brought proceedings for copyright infringement, it might have been arguable that the action based in copyright *was* an illegitimate restriction on the right to parody the copyright work in breach of Art 10 of the Convention. For if you wish to parody a copyright *work*, it is difficult to envisage how you might do so without incorporating at least part of the work into your parody. If the exercise of copyright were a restriction on the right to freedom of expression, the claimant would then have to show that the enforcement of its copyright was necessary in a democratic society. Where a parody will be recognised as a parody by the general public, the claimant might well have difficulties satisfying that criterion.

Copying plots

In relation to literary works, such as plots for plays or novels, the concept of copying extends to the reproduction of the content of the work even where the actual words or expressions of the author are not copied.¹²⁸ The situations

¹²⁷ *Clark v Associated Newspapers* [1998] RPC 261.

¹²⁸ *Harman v Osborne* [1967] 2 All ER 324; and *Christoffer v Poseidon Films* (1999) unreported.

and incidents in a work, and the mode in which the ideas are worked out and presented, will constitute a substantial part of the claimant's work. On the other hand, the fact that two works share the same idea will not infringe copyright where the works follow independent lines of plotting so that they in fact bear no real resemblance to each other.¹²⁹

Copying films and photographs

Copying a film means copying the actual material recorded on the celluloid or videotape including the reproduction of a single still of such footage.¹³⁰ Reproduction of the subject matter of the film will not infringe copyright in the film.¹³¹ Similarly, reproduction of a photograph involves copying the actual image recorded on the negative. It is not an infringement in the photograph to either recreate the image and take a fresh picture or to photograph the same scene as the claimant's photographer so that the defendant's photograph looks the same as the claimant's.¹³²

Causal connection – has there been copying?

Copyright protects to restrain the copying of the work in which it subsists. It does not confer a monopoly in the work itself. If the defendant's product is the work of independent research, or the similarity is due to coincidence, copyright will not be infringed. In other words, similarity or substantial similarity will not in itself be sufficient to give rise to copyright infringement unless copying can also be established. In *LB Plastics Ltd v Swish Products Ltd*,¹³³ Lord Wilberforce said:

Nor is there infringement if a person arrives by independent work at a substantially similar result to that sought to be protected. The protection given by the law of copyright is against copying, the basis of the protection being that one man must not be permitted to appropriate the result of another's labour. That copying has taken place is for the plaintiff to establish and prove as a matter of fact. The beginning of the necessary proof normally lies in the establishment of similarity combined with proof of access to the plaintiff's productions.

The fact that copying must have taken place can be inferred from the surrounding circumstances (for example, if the defendant's work incorporates errors contained in the claimant's works which the defendant is highly unlikely to have made without having had sight of the claimant's work).

129 *Rees v Melville* [1911–16] Mac CC 168.

130 CDPA 1988, s 17(4).

131 *Norowzian v Arks (No 2)* [2000] EMLR 1.

132 *Creation Records v News Group Newspapers* [1997] EMLR 444.

133 *LB Plastics Ltd v Swish Products Ltd* [1979] RPC 551.

Where the claimant and defendant's works are identical, or very similar, the likelihood that copying has taken place will be increased. In practice this means that, where the similarity is clearly established, the onus of proof of establishing that the defendant's work is his/her independent creation will, in practice, be on the defendant (for example, by showing that he/she never had access to the claimant's work or that his/her work pre-dates the claimant's work).

Copying can take place subconsciously, at least in relation to musical works. The copyist may not be aware of having seen heard the claimant's work, but he may still have copied it. Subconscious copying was considered in *Francis, Day and Hunter v Bron*,¹³⁴ where the claimant claimed copyright infringement in respect of the copying of a song. The defendant denied that he had never heard the claimant's song, nor had he seen the musical notation. The Court of Appeal held that subconscious copying was a possibility which, if it occurred, could amount to infringement of copyright. In order to establish liability, the claimant must show that the composer of the offending work was exposed to the work which is alleged to have been copied (whether or not he was aware of that exposure). The onus is therefore on the claimant to prove the notoriety of its work in order to show that the defendant must have been familiar with it.

Issuing copies of the work to the public

A further act of primary infringement occurs when copies of the copyright work are issued to the public. Issuing copies to the public means putting copies of the copyright work into circulation in the EEA which have not previously been put into circulation in the EEA by or with the consent of the copyright owner, or putting into circulation outside the EEA copies not previously put into circulation in the EEA or elsewhere.¹³⁵

The CDPA 1988 gives no further guidance about when the act of putting into circulation occurs. For example, where a periodical is sent to a wholesaler and then from there onto a retailer, does the putting into circulation occur on sale to the wholesaler or to the retailer? Clarification of this issue is still awaited, over 12 years after the CDPA was implemented.¹³⁶

Any subsequent distribution, sale, hiring or loan of copies which have previously been put into circulation, will not be primary infringements. Subsequent dealings may be secondary infringements of copyright if it can be

¹³⁴ *Francis, Day and Hunter v Bron* [1963] Ch 587.

¹³⁵ CDPA 1988, s 18(2).

¹³⁶ For further discussion of this issue, see Phillips and Bently: 'Copyright issues: the mysteries of s 18' [1999] EIPR 133.

shown that the defendant knew or had reason to believe that he was dealing in infringing copies (see below).

Renting or lending the work to the public

The unauthorised rental or lending of the copyright work to the public is a restricted act giving rise to a primary infringement of copyright in relation to an original literary, dramatic or musical work and an original artistic work other than a work of architecture or a work of applied art. It is also a restricted act in relation to a film or a sound recording.¹³⁷

'Rental' means making a copy of the work available for use, on terms that it will or may be returned, for economic or commercial advantage.¹³⁸ An example would be the rental of a film hired from a video shop.

'Lending' means making a copy of a work available for use, on terms that it will or may be returned, otherwise than for economic or commercial advantage through an establishment which is accessible to the public.¹³⁹ A public library would fall within this category.

Where the author of a literary, dramatic, artistic or musical work or the principal director of a film has transferred the rental right to the producer of a sound recording or a film, he retains a right to equitable remuneration in relation to the rental right which *cannot* be waived.¹⁴⁰ The remuneration is payable by the person entitled to the rental right.¹⁴¹ This right to equitable remuneration is an example of the law operating in the interests of the creator of the work rather than in the interests of the party responsible for the commercial exploitation of the work. This represents a shift in emphasis in UK copyright law, and is an initiative flowing from the European Community. There is little statutory guidance about the meaning of equitable remuneration. The amount is to be decided between the parties or by reference to the Copyright Tribunal, which will consider what is reasonable in the circumstances, taking into account the importance of the contribution of the author to the film or sound recording.¹⁴² Remuneration is not inequitable simply because it is paid in the form of a one-off lump sum payment at the time of the transfer of the right.¹⁴³ An agreement is of no effect in so far as it purports to exclude or restrict the right to equitable remuneration.¹⁴⁴

137 CDPA 1988, s 18A.

138 *Ibid*, s 18A(2).

139 *Ibid*.

140 *Ibid*, s 93B(1).

141 *Ibid*, s 93B(3).

142 *Ibid*, s 93C.

143 *Ibid*, s 93C(4).

144 *Ibid*, s 93B(5).

Performing, showing or playing the work in public

The unauthorised performance in public of a literary, dramatic or musical work is a primary infringement of copyright.¹⁴⁵ The term 'performance' includes the delivery of lectures, addresses, speeches and sermons and, in general, includes any mode of visual or acoustic presentation, including presentation of the work by means of a sound recording, film, broadcast or cable programme of the work.¹⁴⁶ If I play a sound recording of a song in public without permission, I will infringe copyright in the literary and musical works which make up the song.

The playing or showing in public of a sound recording, film, broadcast or cable programme is also an act of primary infringement.¹⁴⁷ By playing a sound recording in public, I am therefore also infringing copyright in the work.

The meaning of 'public'

The CDPA does not define what is meant by 'public'. It is clear that a performance does not have to be before a paying audience. Case law suggests that, in each case, regard must be had to whether a particular performance is a thing likely to whittle down the value of the copyright owner's monopoly to exploit the copyright work. A purely domestic performance would not be a thing likely to whittle down the value of the monopoly. However, a performance at a public theatre or a public concert hall would have that effect. The key issue is, therefore, the relationship of the audience to the copyright owner and the effect that the performance in question would have on his monopoly. In the case of *Turner v Performing Rights Society*,¹⁴⁸ it was held that companies who broadcast music to their employees in working hours were performing copyright works in public and therefore were infringing copyright if they did so without taking (and paying for) a licence to do so. This was despite the fact that the employees were not a paying audience.

Broadcasting the work or including it in a cable programme service

The broadcasting of the work or its inclusion in a cable programme service is an act restricted by the copyright in an original literary, dramatic, musical or

145 CDPA 1988, s 19(1).

146 *Ibid*, s 19(2).

147 *Ibid*, s 9(3).

148 *Turner v Performing Rights Society* [1943] 1 Ch 167.

artistic work, a sound recording or film or a broadcast or cable programme.¹⁴⁹ The topic of incidental inclusion of copyright works is considered later in relation to the permitted acts.

The making of an adaptation of the work

The making of an adaptation of the work is an act restricted by the copyright in an original literary, dramatic or musical work.¹⁵⁰

An adaptation of a literary or dramatic work (other than a computer program or database) is defined by the CDPA to mean the making of a translation of the work, a version of a dramatic work which is converted into a non-dramatic work or of a non-dramatic work which is converted into a dramatic work or a version of a work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical.¹⁵¹

Example

If A adapts B's novel into a screenplay without B's consent, the adaptation will infringe B's copyright in her novel.

In relation to a musical work, an adaptation means an arrangement or transcription of the work.¹⁵²

Example

If A makes a new arrangement of B's new symphony, A will infringe B's copyright in the musical composition unless he first obtains B's permission to do so.

An adaptation of a computer program or database means an arrangement or altered version of the work or a translation of it.¹⁵³ Translation is defined to include a version of the program in which it is converted into or out of a computer language or code or into a different computer language or code.

It is not only an infringement to adapt a copyright work. It is also an infringement of the copyright work to do any of the restricted acts set out in s 16 of the CDPA in relation to the adaptation.

149 CDPA 1988, s 20.

150 *Ibid*, s 21.

151 *Ibid*, s 21(3).

152 *Ibid*.

153 *Ibid*.

Example

A adapts B's novel into a stage play. C and D perform the play in public. Both the adaptation and the performance would amount to infringement of B's copyright in the novel (literary work). Similarly, a broadcast of the stage play would also infringe B's copyright.

Authorisation of infringing acts

It is a primary infringement of copyright to authorise a third party to commit an infringing act. Authorisation means more than the mere facilitation of the infringement. In order to authorise a copyright infringement, the authoriser must grant or purport to grant the *right* to carry out the act of infringement. The purported grant can only come from someone who purports to have the *authority* to make the grant.

In the case of *CBS Songs v Amstrad*,¹⁵⁴ it was alleged that Amstrad, who were manufacturers of a twin deck tape recorder, had authorised purchasers to infringe copyright in sound recordings by making available to the public the means for cassette tapes to be recorded onto blank cassette tapes. The court held that the mere enabling of the infringement brought about by the supply of the equipment did not amount to authorisation. There was no purported grant of the right to make the illicit recordings.

This case was followed *Keays v Dempster*,¹⁵⁵ which concerned the unauthorised reproduction of a photograph of the claimant in a book written by the first defendant. The claimant, who owned copyright in the photograph, commenced proceedings for copyright infringement against the author of the book and the picture library which had supplied the photograph to the publishers, the second defendant. There was no dispute on the facts that the photograph had been reproduced without the claimant's consent. The second defendant sought to argue that the first defendant had authorised the second defendant's infringement. It was held that there had been no such authorisation. All that the first defendant had done on the facts was to select the pictures that he wanted for his book. He had not purported to give any authority to give the second defendant permission to reproduce the photograph he had selected. Under the terms of the contract between the second defendant and the publishers of the book, the responsibility for ensuring that his wishes had been carried out lay with the publishers.

154 *CBS Songs v Amstrad* [1988] RPC 567.

155 *Keays v Dempster* [1994] EMLR 443.

Secondary infringements

We have seen that a defendant can be liable for primary infringement of copyright where the infringement was unintentional – even, potentially, where copying has taken place subconsciously. Secondary infringement is a narrower concept. Unlike primary infringement, acts of secondary infringement depend upon the alleged infringer knowing or having reason to believe that the work with which he is dealing is an infringing copy. ‘Infringing copy’ is defined by s 27 of the CDPA 1988 as an article whose making constituted an infringement of the copyright in the work in question or an article which has been or is proposed to be imported into the UK and its making in the UK would have constituted an infringement of the copyright in the work in question or a breach of an exclusive licensing agreement relating to that work.

A defendant will be taken to have reason to believe that he is dealing with an infringing copy where it has knowledge of such facts as would lead a reasonable person to suspect that he/she is dealing with infringing copies. This is an objective test involving the question whether a reasonable party in the position of the defendant would have reason to believe that it was dealing with an infringing copy. A defendant will not necessarily have reason to believe that it is dealing with an infringing copy simply because the claimant asserts that he is. The claimant should put the defendant in a position where he can determine whether the claimant’s allegation is true.¹⁵⁶ This will not necessarily require the claimant to supply the defendant with the work for which copyright is claimed.¹⁵⁷

Acts of secondary infringement

The activities set out below are secondary infringements if done without the consent of the copyright owner. It will be seen that the activities which make up the secondary infringement provisions of the CDPA relate mainly to dealings with an infringing work after it has been put into circulation. Other secondary infringements relate to the use of apparatus to make infringing copies and the supply of premises and equipment for the unauthorised public performance of a copyright work:

- importation into the UK (other than for the defendant’s private and domestic use) of articles known by the defendant to be an infringing copy of the work or where the defendant has reason to believe that it is an infringement;¹⁵⁸ or

156 *LA Gear v Hi Tec* [1992] FSR 121; and *Hutchinson v Hook* [1995] FSR 365.

157 *ZYX Music v King* [1995] FSR 566.

158 CDPA 1988, s 22.

- possession in the course of business;¹⁵⁹
- selling, hiring, offering or exposing for sale or hire;¹⁶⁰
- exhibition in public in the course of business;¹⁶¹
- distribution in the course of business;¹⁶²
- distribution not in the course of business to an extent as to affect prejudicially the owner of the copyright,¹⁶³

of any article which the defendant knows or has reason to believe is an infringing copy of the work:

- making, importing into the UK, possessing in the course of a business or selling or hiring or offering to do so an article specifically designed or adapted for making copies is a secondary infringement where there is knowledge or reason to believe that the apparatus will be used to make infringing copies.¹⁶⁴

An act will not be carried out in the course of business under any of the above provisions where it is incidental to the business of the defendant.¹⁶⁵

Secondary infringements in relation to public performances of copyright works

Where the performance of a literary, dramatic or musical work in public gives rise to an act of primary infringement (see above), the person who gave permission for a place of public entertainment to be used for the performance will be liable for secondary infringement unless, when he gave permission, he believed on reasonable grounds that the performance would not infringe copyright.¹⁶⁶

Where the performance or the playing or showing of the work in public is carried out by means of equipment for playing sound recordings, showing films or receiving visual images or sounds conveyed by electronic means, the person supplying the apparatus will be liable where he knew or had reason to believe that the apparatus was likely to be used so as to infringe copyright.¹⁶⁷ The same is true for occupiers of premises who gave permission for the apparatus to be brought onto the premises. Where the apparatus is of the kind

159 CDPA 1988, s 23.

160 *Ibid.*

161 *Ibid.*

162 *Ibid.*

163 *Ibid.*

164 *Ibid.*, s 24.

165 *Pensher v Sunderland DC* (1999) unreported, 21 April, confirming that decisions on other pieces of legislation using the same phrase will apply under CDPA 1988, eg, *Davies v Summer* [1984] 1 WLR 1301 and *R and B Customs Broker v UDT* [1988] 1 WLR 321.

166 CDPA 1988, s 25.

167 *Ibid.*, s 26.

normally used for public performances, the person supplying the apparatus must show that he did not believe on reasonable grounds that it would be used to infringe copyright.¹⁶⁸

A person who supplies a copy of a sound recording or a film used to infringe copyright, for example, by an unauthorised showing in public, will be liable for infringement if, when he supplied it, he knew or had reason to believe that it (or a copy made from it) was likely to be used to infringe copyright.¹⁶⁹

Permitted uses of copyright works

Chapter III of the CDPA 1988 sets out a number of uses to which a copyright work, or a substantial part of it, may be legitimately put *without permission from the copyright owner*. These are known as '*the permitted acts*' and they can be found at ss 28–76 of the Act.

The rationale for the permitted acts lies in the fact that the enforcement of copyright necessarily entails a limitation on freedom of expression and of access to the copyright work. As we have seen, the owner of copyright controls the use to which the copyright work can be put. In order to provide a counterbalance to this restriction on freedom of expression, the law provides for certain permitted uses of that work which the copyright owner is not at liberty to restrain. These encroachments on the rights of the copyright owner are directed at achieving a proper balance between protection of the rights of the copyright owner and the wider public interest. The permitted purposes which are of particular relevance to the media are considered below.

The fair dealing provisions

Where the use of a copyright work amounts to a 'fair dealing' for one of the specified purposes set out in the Act, it will *not* infringe copyright. The specified purposes to which the fair dealing provisions apply are:

- fair dealing with a literary (work other than a database), dramatic, musical or artistic work for the purposes of research or private study;¹⁷⁰
- fair dealing with a work for the purpose of criticism or review of that work or of another work or of a performance of the work, provided that it is accompanied by a sufficient acknowledgment (defined below);¹⁷¹

168 CDPA 1988, s 26.

169 *Ibid.*

170 *Ibid.*, s 29.

171 *Ibid.*, s 30(1).

- fair dealing with a work *other than a photograph* for the purpose of reporting current events, provided it is accompanied by a sufficient acknowledgment.¹⁷²

No acknowledgment is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme.¹⁷³

Consideration as to whether the use of the copyright work falls within the fair dealing provisions involves two separate questions:

- (a) was the work used for one of the permitted purposes, for example, criticism or review? If the answer to this question is yes, then the second question to consider is;
- (b) was the use of the work fair?¹⁷⁴ If the answer to this question is also yes, then the work has been used for a permitted purpose which the copyright owner cannot restrain.

Considering each of these questions in turn.

Was the work used for one of the specified uses?

For the media, the most relevant of the permitted purposes referred to in the fair dealing provisions of the CDPA 1988 are criticism and review and reporting current events.

The general approach

The assessment of whether the use of the copyright work was for one of the permitted purposes should be made *objectively*. The intentions or motives of the user of the copyright work are of little importance to this question (although they will be relevant to the second question, that is, whether the use was a fair dealing). The words 'for the purposes of criticism or review' or 'for the purposes of reporting current events' in s 30 of the CDPA should each be considered as a composite phrase. The words 'in the context of' or 'as part of an exercise in' could be substituted for 'for the purposes of' without any significant alteration of meaning.¹⁷⁵

It is unnecessary for the court to put itself in the shoes of the defendants in order to decide whether the use was for the purposes of criticism or review or reporting current events. In *Pro Sieben v Carlton*, which is discussed in detail below, Robert Walker LJ observed that:

172 CDPA 1988, s 30(2). The meaning of 'sufficient acknowledgment' is considered below.

173 *Ibid*, s 30(3).

174 *Pro Sieben v Carlton* [1999] FSR 610.

175 *Ibid*.

The court should not in my view give any encouragement of the notion that all that is required is for the user to have the sincere belief, however misguided, that he or she is criticising a work [or reporting current events].

The meaning of the phrases 'criticism or review' and 'reporting current events' have each been the subject of interpretation by the courts. The courts have resisted defining the phrases in precise terms. In the *Pro Sieben*¹⁷⁶ case, the Court of Appeal stated that, as a general principle, the expressions 'criticism or review' and 'reporting current events' are expressions of wide, unlimited scope and should be interpreted liberally. This approach avoids a rigid interpretation of the fair dealing provisions and allows for flexibility with a view to ensuring that they are interpreted in line with contemporary standards. On the other hand, the approach is not as helpful as it might be to a media law practitioner who may have to make the call about whether a particular use of a work is, or is not, for one of the permitted purposes.

*Criticism and review of the copyright work or of
another work or a performance of the work*

This permitted use of a copyright work is concerned with 'protecting a reviewer or commentator who may want to make quotations from a copyright work in order to illustrate his review, his criticism or his comments'.¹⁷⁷ There must be criticism or review if the fair dealing provisions are to apply. In the case of *Sillitoe v McGraw-Hill Book Co Ltd*,¹⁷⁸ the court held that reproduction of extracts from literary works in examination study aids was not made for the purposes of criticism or review of the literature. The aids were held to have an *explanatory function*, rather than a critical function and could not, therefore, fall within the fair dealing provisions.

The scope of the criticism or review provision appears to be dependent on criticism or review *of a copyright work*. Section 30 of the CDPA 1988 specifies that the criticism or review must concern the work from which the material is taken, or another work or the performance of the work. It is a moot point whether the section extends to criticism and review of material which is extraneous to a copyright work. For example, could use be made of a copyright literary work in order to review the author's character or his lifestyle?

The Court of Appeal considered the scope of criticism or review in *Time Warner Entertainment Co plc v Channel Four Television Corpn plc*.¹⁷⁹ The case concerned the film *A Clockwork Orange*, which was, at that time, not available on general release in the UK. The defendant planned to broadcast a

¹⁷⁶ *Pro Sieben v Carlton* [1999] FSR 610.

¹⁷⁷ *Per Whitford J in Independent Television Publications Ltd v Time Out Ltd* [1984] FSR 64.

¹⁷⁸ *Sillitoe v McGraw-Hill Book Co Ltd* [1983] FSR 545.

¹⁷⁹ *Time Warner Entertainment Co plc v Channel Four Television Corpn plc* [1994] EMLR 1.

documentary about the film during the course of which it intended to use extracts from the film to illustrate the conclusion of the programme makers that the film should be re-released in the UK.

The claimants owned copyright in the film and sought to restrain the broadcast of the programme on the basis that the use of the excerpts from the film infringed copyright in the film. The defendants alleged that the use of the extracts from the film was a fair dealing of the footage for the purposes of criticism or review. The claimant alleged that the real motive and purpose behind the defendant's use of the footage was to campaign for the re-release of *A Clockwork Orange* in the UK and that criticism or review of the *decision to withdraw it from circulation* did not fall within the language of s 30.

The Court of Appeal confirmed that the criticism or review of the copyright work could be: (a) of the work itself; or (b) of another copyright work. In addition, the Court of Appeal held that it could extend to criticism or review of *the thought or philosophy behind the work* (italics for emphasis). Henry LJ observed:

It seems to me that the fair dealing defence *may* apply equally where the criticism is of the decision to withdraw from circulation a film in the public domain and not just of the film itself. In the present case the two are, in my view, inseparable [emphasis added].

Laddie J put a gloss on this decision in the first instance judgment in the *Pro Sieben* case,¹⁸⁰ where he said:

The decision to withdraw the film ... was being criticised on the basis of an assessment of the artistic and cultural value of the film itself. The mere fact that criticism or review of a work may be used as a springboard to attack something else does not detract from the fact that the *work* is being criticised or reviewed¹⁸¹ [emphasis added].

The Court of Appeal in the *Pro Sieben* case¹⁸² endorsed Laddie J's view, holding that the criticism of a work is not restricted to criticism of the *style* of the work. It could also extend to criticism of the ideas found in the work and the social or moral implications of the work.

In the *Pro Sieben* case, television footage was used by the defendant to critique works of chequebook journalism. The Court of Appeal held that the footage had been used for the purposes of criticism or review of a body of work generated by chequebook journalism. The court did not go on to consider whether the criticism or review could extend beyond the body of work to comments about the ethics of chequebook in general. A strict interpretation of the provisions of s 30 would suggest that it could not.

180 *Pro Sieben v Carlton* [1998] FSR 43, pp 52–53.

181 *Ibid.*

182 *Pro Sieben v Carlton* [1999] FSR 610.

Use of the work for the purpose of reporting current events

What is a 'current event'?

The term 'current event' was considered in *Newspaper Licensing Agency v Marks & Spencer*¹⁸³ by Lightman J. In that case, the claimant owned the copyright in the typographical arrangements of a large number of national and local newspapers. It sought to establish that the defendant was infringing copyright by making copies of cuttings from newspapers and distributing such copies amongst its employees. The defendant denied copyright infringement on the ground that the reproduction was a fair dealing for the purpose of reporting current events. The judge observed that:

- the threshold to establishing that the use is a report of current events is 'not high or the hurdle difficult to surmount. The value placed on freedom of information and freedom of speech requires the gateway to be wide';¹⁸⁴
- to be a current event, the event need not be national, political or otherwise an important event. It may be a sporting event (in *BBC v BSB*,¹⁸⁵ a football World Cup match was held to be a current event) and it may be a matter of entirely local interest or of interest to only a few people;
- the term 'current event' is narrower than the term 'news'. Reporting of 'news' can go beyond reporting events which are current and can extend to information relating to past events not previously known. On the other hand, 'current event' does not extend to publishing matters which are merely currently of interest but are not current *events* or to publishing matters not previously known which are of historical interest alone;
- the publication of a report in the press is itself *capable* of constituting a current event. The reproduction of the report may constitute fair dealing even though it contains no analysis or comment or any matter, but this does not mean that whatever is reported in the press will be a current event;
- publication of matters which are not current events can only be justified under the fair dealing provisions if they are reasonably necessary to understand, explain or give meaning to a report of current events;
- the defendant's use of the copyright work for the purpose of reporting current events does not have to be accessible to the general public in order for the defence to be invoked. The fact that the defendant's report only circulated internally within the defendant's employees would not prevent it from falling within the permitted uses.

¹⁸³ *Newspaper Licensing Agency v Marks & Spencer* [1999] RPC 536 and see Court of Appeal decision (2000) *The Times*, 15 June.

¹⁸⁴ *Ibid.*

¹⁸⁵ *BBC v BSB* [1991] 3 All ER 833.

On the facts, the judge held that the defendant's use of the cuttings went far beyond reporting current events. The use included the reproduction of material such as interviews, comparisons of the products of different retailers, personal interest stories and life stories of entrepreneurs. Such material could not constitute current events.

In the *Pro Sieben* case, the claimant was a German television company. It had purchased exclusive rights to broadcast in Germany an interview with Mandy Allwood, a woman who had achieved temporary celebrity as a result of becoming pregnant with octuplets. The defendant broadcast a current affairs programme, in the course of which they showed an extract which it had recorded from the claimant's exclusive arrangement with Ms Allwood.

The theme of the programme was a critique of chequebook journalism. It was not exclusively about Ms Allwood, although her case was a central part of the programme. The use of the clip in question, which featured the purchase of teddy bears by Ms Allwood for the babies, was used to make the point that, in the defendant's view, Ms Allwood's publicist was tightly controlling the presentation of the image of Ms Allwood and was presenting 'a sanitised version of the truth'.

The claimant alleged infringement of its copyright in the broadcast. In their defence, the defendants claimed that the use of the clip was a fair dealing for the purposes of criticism or review or of reporting current events under the fair dealing provisions of the CDPA.

The Court of Appeal found that the use of the footage was for the purposes of reporting current events.¹⁸⁶ The programme as a whole criticised works of chequebook journalism and in particular the treatment by the media of Ms Allwood's multiple pregnancy. This pregnancy was a current event of real interest to the public. The volume and intensity of the media interest was sufficient to bring the media coverage itself within the ambit of current event.

The meaning of 'current event' was also considered by Jacob J in *Hyde Park Residence v Yelland*.¹⁸⁷ In that case, the claimant provided security services to Mohamed Al Fayed and his family. On 30 August 1997, Diana, Princess of Wales and Dodi Al Fayed visited Mr Al Fayed's house. Still pictures taken from the footage recorded by the claimant's security cameras showed the timing of the arrival and departure of the couple. They demonstrate that the couple were in the house for less than half an hour and that they were unaccompanied. The accident which killed the couple occurred the next day.

Following their deaths, Mohamed Al Fayed led the media to believe that the couple had visited the house in Paris in preparation for their new life together, consistent with their intention to get married and to live in the house.

¹⁸⁶ *Pro Sieben v Carlton* [1999] FSR 610.

¹⁸⁷ *Hyde Park Residence v Yelland* [1999] RPC 655.

The fourth defendant (an employee of the claimant) removed the stills from the video system showing the arrival and departure of the couple and sold them to *The Sun*. *The Sun* published the stills in order to expose Mr Al Fayed's misrepresentations. The claimants sought summary judgment against *The Sun* for the unauthorised reproduction of the stills. The defendants pleaded that the publication was a fair dealing for the purposes of reporting current events.

On the question of whether the use of the work was for reporting current events, Jacob J held that the a visit of the couple to the villa was a current event, notwithstanding that it had taken place over a year before publication of the photographs by *The Sun*. Only two days before the publication, Mr Al Fayed had again put the matter into the public domain in his interview with *The Mirror*. This was coupled with the fact that at the time of publication Dodi and Diana's relationship was still so much under discussion that it would be pedantic to regard it as anything other than 'still current'.

On appeal,¹⁸⁸ the Court of Appeal did not expressly overturn the finding at first instance that the stills were used for reporting current events, but Aldous LJ observed that submissions by the claimant that the visit to the villa was not a current event had 'force'. Reliance on the *Hyde Park Residence* decision for the meaning of 'current events' should therefore be treated with caution. There are strong grounds for believing that the first instance decision pushed the boundaries too far.

For the purposes of the appeal Aldous LJ seemed to be prepared to accept (albeit rather grudgingly) that the false statements made by Mr Al Fayed – at least some of which had been made a few days prior to the publication of the stills – were current events, and that the use of the stills to rebut the statements was a use for the purpose of reporting the false statements.

Photographs have been expressly excluded from the provision relating to reporting current events. The exclusion preserves the ability of freelance photographers to sell photographs under exclusive deals. In the *Hyde Park Residence* case, stills from a video security system were held not to be photographs.

Is the dealing with the copyright work fair?

We have seen that the courts have held that criticism and review and reporting current events are to be interpreted liberally. The constraints on abuse of this freedom lie in the requirement that the use of the copyright work for the permitted purposes must be *fair*.

188 *Hyde Park Residence v Yelland* [2000] RPC 604, CA.

This is a question of fact and degree in every particular case, and will largely be a matter of impression. Lightman J observed in the *Newspaper Licensing*¹⁸⁹ case that ‘a common sense judgment is called for’.

In the case of *Hubbard v Vosper*,¹⁹⁰ Lord Denning MR noted that:

It is impossible to define what is ‘fair dealing’. It must be a question of degree ... After all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide’.

Unlike the decision as to whether the use of the work is for criticism or review or reporting current events (which, as we have seen, requires an objective assessment), the question whether the dealing is fair *is* concerned with the genuineness of the intentions and motives of the user of the copyright material.

In the *Hyde Park Residence* case,¹⁹¹ Aldous LJ indicated that the standard to apply when considering fair dealing is *whether a fair minded and honest person would have dealt with the copyright work in the manner that the defendant did for the permitted purpose in question*. This is an objective test, although the motives of the subjective alleged infringer will be relevant.

Factors which will help to determine whether the use of the work is fair are as follows:

- the extent of the reproduction of the copyright work should be considered. The essential question is whether the use amounts to an illegitimate exploitation of the copyright holder’s work. The number and extent of the reproductions are therefore relevant. Are they too many and too long to be fair?¹⁹²
- the issue of proportion of original comment or criticism as compared to the copyright work should be considered. To take long extracts and attach short comments may be unfair. Short extracts and long comments may be fair. It may be a fair dealing to reproduce the whole of the copyright work (especially if the work is very short) provided that sufficient original comment or criticism accompanies the use of the work;¹⁹³
- has the copyright work been published to the world at large? Publication of a previously unpublished work is more likely to be unfair. Note the judgment of Ungood-Thomas in *Beloff v Pressdram*:¹⁹⁴ ‘... the law by bestowing a right of copyright on an unpublished work bestows a right to

189 *Newspaper Licensing Agency v Marks & Spencer* [1999] RPC 536.

190 *Hubbard v Vosper* [1972] 2 QB 84; [1972] 1 All ER 1023.

191 *Hyde Park Residence v Yelland* [2000] RPC 604, CA.

192 *Hubbard v Vosper* [1972] 2 QB 84; [1972] 1 All ER 1023.

193 *Ibid*.

194 *Beloff v Pressdram* [1973] 1 All ER 241.

prevent its being published at all: and even though an unpublished work is not automatically excluded from the defence of fair dealing, it is yet a much more substantial breach of copyright than publication of a published work.¹⁹⁵

- where the copyright work is unpublished to the world at large, the extent to which the copyright work has been circulated will be a relevant consideration. Even if the work is unpublished, the fair dealing provisions may still operate where the work has been widely circulated, albeit to a limited class of persons. In *Hubbard v Vosper*,¹⁹⁶ Lord Denning observed that 'although a literary work may not be published to the world at large, it may, however be circulated to such a wide circle that it is 'fair dealing' to criticise it publicly in a newspaper or elsewhere';
- the genuineness of the intentions and motives of the user are relevant to fair dealing. Lightman J observed in the *Newspaper Licensing* case¹⁹⁷ that, if it appears that the reporter has dealt with the copyright work not in order to report current events or for the purposes of criticism or review, but for some extraneous purpose, for example, in order to exploit the copyright work under the guise of reporting current events, the use will not be fair. This was echoed in the *Time Warner* case,¹⁹⁸ where the judge at first instance noted that, if the intention behind use of the extracts from *A Clockwork Orange* was to profit from the infringement of copyright under the pretence of criticism, then no matter how balanced or representative the infringing excerpts might be, the purpose would not be for criticism or review;
- where the copyright owner and the user are competitors in relation to the same material, the reproduction of the copyright work is more likely to be unfair. Lord Denning observed in *Hubbard v Vosper*:¹⁹⁹ '... it is not fair dealing for a rival in the trade to take copyright material and use it for his own benefit.' However, trade rivalry in itself will not automatically render a dealing in a copyright work unfair;
- the Court of Appeal in the *Hyde Park Residence*²⁰⁰ case drew attention to the fact that *The Sun's* reproduction of the stills was not *necessary* to expose Mr Al Fayed's falsehoods as militating against fair dealing;
- in the *Newspaper Licensing* case,²⁰¹ Lightman J noted that one of the factors relevant to the question of fair dealing is whether the report could

195 *Beloff v Pressdram* [1973] 1 All ER 241, p 263.

196 *Hubbard v Vosper* [1972] 2 QB 84; [1972] 1 All ER 1023.

197 *Newspaper Licensing Agency v Marks & Spencer* [1999] RPC 536.

198 *Time Warner Entertainment Co plc v Channel Four Television Corp plc* [1994] EMLR 1.

199 *Hubbard v Vosper* [1972] 2 QB 84; [1972] 1 All ER 1023.

200 *Hyde Park Residence v Yelland* [2000] RPC 604, CA.

201 *Newspaper Licensing Agency v Marks & Spencer* [1999] RPC 536.

reasonably have been made in a manner which was less intrusive upon the copyright owner's rights;

- in the case of a previously unpublished work, the method by which the copyright work was obtained may be relevant to fair dealing.

Where a work is already in the public domain, it seems that the way in which the work was obtained will *not* have a bearing on the fairness of the dealing. In the *Time Warner* case,²⁰² the claimant argued that the fair dealing provisions did not apply because of the underhand manner in which the defendants had obtained their copy of the film. Neill LJ indicated that criticism and review of a work already in the public domain which would otherwise be a fair dealing would seldom, if ever, be rendered unfair because of the method by which the copyright material had been obtained.

However, in the *Hyde Park Residence* case,²⁰³ Aldous LJ thought that the fact that the defendants knew that the stills had been dishonestly removed from the claimant's possession militated against fair dealing. The *Hyde Park* decision can be distinguished from the *Time Warner* case on the ground that *Hyde Park* concerned previously unpublished material, whereas *Time Warner* concerned material which was already in the public domain. *It would seem to follow that where previously unpublished work is improperly obtained, there is a strong likelihood that any dealing with it will be unfair. This is likely to have important repercussions for the media;*

- the fact that the user has paid for the copyright material and is publishing it in order to make profits did not prevent the use of the material being a fair dealing at first instance in the *Hyde Park Residence* case.²⁰⁴ Jacob J indicated: 'The reality is that the press often have to pay for information of public importance. And when they publish they will always expect to make money. They are not philanthropists. I do not think that the fact that [the fourth defendant] was paid and that *The Sun* expected to make money derogates in any way from the fair dealing ... justification.'

This point was not expressly overturned in the Court of Appeal,²⁰⁵ but one of its grounds for rejecting the fair dealing defence was that a fair and reasonable person would not have paid for the stills in the circumstances;

- in the case of use of a work for criticism or review, the fact that the criticism is restricted to only one aspect of a copyright work is unlikely to make the use unfair. In the *Time Warner* case,²⁰⁶ Neill LJ observed that the court should be very slow before it rejects a defence of fair dealing on this

202 *Time Warner Entertainment Co plc v Channel Four Television Corpn plc* [1994] EMLR 1.

203 *Hyde Park Residence v Yelland* [2000] RPC 604, CA.

204 *Ibid.*

205 *Ibid.*

206 *Time Warner Entertainment Co plc v Channel Four Television Corpn plc* [1994] EMLR 1.

ground. It is therefore not the case that the criticism or review has to be of the work as a whole in order for the dealing to be fair. Neill LJ indicated that 'one can envisage many cases where it would be legitimate to select and criticise, for example, a single scene of violence even though the rest of the work was free of objectionable material';

- where the claimant has paid for exclusive rights to the copyright work, the use of the work by the user is more likely to be unfair;
- trade practice may be relevant to the fairness of the dealing. In the *Time Warner* case,²⁰⁷ the court considered evidence from the claimant that it was film industry practice that clips of films released for review would normally not exceed one minute's duration per clip and four minutes in length in the aggregate.

Decisions on whether use is unfair

*Pro Sieben v Carlton*²⁰⁸

The total item which had been broadcast by the claimant in Germany was nine minutes long. The defendants had used 30 seconds of that footage.

The dealing was held to be 'fair'. The extract in question was short. It contained no words spoken by Ms Allwood. It did not, therefore, amount to unfair competition with Pro Sieben's use of the exclusive interview rights it had acquired. The use of the footage was not an attempt to dress up infringement of copyright in the footage in the guise of criticism or reporting current events.

*Newspaper Licensing Agency v Marks & Spencer*²⁰⁹

The reproduction of the articles was not for the purposes of reporting current events, nor was it a fair dealing, as it involved the wholesale copying of material which went far beyond what is necessary to report current events.

*Hyde Park Residence v Yelland*²¹⁰

The use of the video stills was not a fair dealing for the purpose of reporting current events. Aldous LJ observed that 'to describe what *The Sun* did as fair dealing is to give honour to dishonour'. The extent of use of the stills was excessive. The only part of the stills relevant to the alleged purpose was the information as to the timing of arrival and departure and that information

²⁰⁷ *Time Warner Entertainment Co plc v Channel Four Television Corpn plc* [1994] EMLR 1.

²⁰⁸ *Pro Sieben v Carlton* [1999] FSR 610.

²⁰⁹ *Newspaper Licensing Agency v Marks & Spencer* [1999] RPC 536.

²¹⁰ *Hyde Park Residence v Yelland* [2000] RPC 604, CA.

could have been given without reproducing the stills. The information about the timing of the arrival and departure did not conclusively establish that Mr Al Fayed's statements were false. The court held that *a fair minded and honest person would not have paid for the dishonestly taken stills and publish them, knowing that they had not previously been published or circulated when all they did was to establish the time of arrival and departure at the villa.*

From the media's point of view, the Court of Appeal decision contains a number of troubling features:

- first, the emphasis on the fact that the use of the video stills was not necessary to report a current event carries the clear implication that use must be shown to be necessary if it is to constitute a fair dealing.

But it will usually be difficult to demonstrate that it was absolutely necessary to make use of the copyright work to report a current event or to criticise or review. Often, the copyright work does not *need* to be reproduced. But the use of the work adds force and realism to reports. Would it be a fair dealing if the journalist makes use of a copyright work for the purpose of improving his report? The Court of Appeal judgment suggests that it might not;²¹¹

- secondly, the emphasis in the Court of Appeal judgment on the published status of the copyright work will make it more difficult for the media to establish fair dealing in relation to a previously unpublished work, especially where there is a question mark over the way in which the copyright work was obtained.²¹²

Time Warner v Channel Four²¹³

The film clips used by the defendant totalled 12 minutes of a 30 minute documentary. They made up 8% of the *A Clockwork Orange* film. On the facts, this was held by the Court of Appeal not to go beyond the bounds of fair dealing. However, Neill LJ indicated that he found this issue to be the most troublesome part of the case. Aspects which he thought relevant to the decision were the fact the clips were accompanied by voiceover commentary containing comments and criticisms and the 'great force' which he found in a comment made by the defendant that serious criticism of the film required the defendant to spend sufficient time showing the film itself.

211 Note, also, that the provisions of the current draft of the Digital Copyright Directive considered on pp 282–85 provide for a more limited fair dealing exception together with a direction that the exceptions be interpreted with a bias towards the copyright owner.

212 The Court of Appeal judgment also concerned the availability of a public interest defence for copyright works. This is considered below.

213 *Time Warner Entertainment Co plc v Channel Four Television Corpn plc* [1994] EMLR 1.

BBC v British Satellite Broadcasting Ltd²¹⁴

The BBC sued BSB for copyright infringement arising out of BSB's use of BBC broadcast footage of 1990 World Cup football matches as part of BSB's contemporaneous news coverage. Each excerpt used by BSB was between 14 and 37 seconds in length and was shown by BSB up to four times in its sports news programmes during the 24 hour period following each match. The source of the film was acknowledged to be the BBC in each excerpt. BSB claimed that its use of the footage was a fair dealing for the purpose of reporting current events.

The court held that a World Cup football match was a current event for the purposes of the fair dealing provisions. The issue was whether the use of the footage was a fair dealing. It held that both the quantity and the quality of what was taken were important. As regards duration, the clips used were very short in relation to the length of the match (30 seconds or thereabouts of a broadcast lasting, say, 90 minutes). Also relevant was the number of times that each excerpt was shown by the defendant. The fact that the clips were repeated in successive news reports over a 24 hour period was not a matter of justifiable criticism, nor was the fact that each clip was repeated up to three times in each news report. The court's overall impression was that the use of the material was short and pertinent to the news reporting character of BSB's programme.

On the issue of quality, the excerpts tended to be the highlights of the matches. The court held to show the best bits (that is, the goal scoring sequences) when reporting on the results of a football match 'is such a normal and obvious means of illustrating the news report as, in my opinion, to deprive [the claimant's] criticism of weight'.

The court held that BSB's dealing with the broadcast footage was fair.

In the *BSB* case, the judge was impressed by guidelines on the fair dealing rules which BSB had given to its staff. The judge saw them as evidence of good faith on the part of BSB. They helped to show that BSB was not simply exploiting the BBC's copyright under the guise of reporting current events, but that there was a genuine intention to report the football matches.

Sufficient acknowledgment

The fair dealing provisions of the CDPA refer to the requirement that use of a copyright work for the purposes of criticism or review must be accompanied by a sufficient acknowledgment.²¹⁵ Use of a copyright work for the purpose of reporting a current event must also be accompanied by a sufficient

214 *BBC v British Satellite Broadcasting Ltd* [1991] 3 WLR 174.

215 CDPA 1988, s 30(3).

acknowledgment, except where the current event is reported by means of a sound recording, film, broadcast or cable programme.

Sufficient acknowledgment is defined in s 178 of the CDPA as meaning an acknowledgment 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 and, in the case of an unpublished work, it is not possible for a person to ascertain the identity of the author by reasonable inquiry.

In the *Pro Sieben* case,²¹⁶ the Court of Appeal held that the requirement of a sufficient acknowledgment of the identification of the author does not extend to requiring that the author be identified by name. Another form of identification may be adopted, such as a corporate logo by which the author is accustomed to identify itself. In the *Newspaper Licensing Agency* case,²¹⁷ Lightman J observed that, in principle, newspaper publishers should be sufficiently identified by the name of the newspaper which they publish and with which they are identified in the public mind. It would not therefore be necessary to identify the publisher of the newspaper.

Other permitted uses

Incidental inclusion of a copyright work

Copyright in a work is not infringed by its incidental inclusion in an artistic work (for example, a photograph), a sound recording, a film, a broadcast or cable programme.²¹⁸

The term 'incidental' is not defined in the CDPA. In the case of *IPC Magazines Ltd v MGN Ltd*,²¹⁹ the term was held to bear its ordinary everyday meaning, namely 'casual, not essential, subordinate or merely background'. The *IPC* case illustrates the approach which should be used when considering whether a use is incidental.

The claimant, IPC Magazines, published *Woman* magazine. The defendant published a woman's magazine supplement to *The Sunday Mirror*. The cover of *Woman* was featured in a television advertisement for the *Sunday Mirror* supplement with a black band superimposed across the middle of it indicating that the cost of *Woman* was 57 p, whereas the defendant's supplement was provided 'free' with *The Sunday Mirror*. The claimant sought summary judgment on the issue of whether the advertisement infringed its artistic copyright in the following elements of the magazine cover: (a) the

216 *Pro Sieben v Carlton* [1999] FSR 610.

217 *Newspaper Licensing Agency v Marks & Spencer* [1999] RPC 536.

218 CDPA 1988, s 31.

219 *IPC Magazines Ltd v MGN Ltd* [1998] FSR 431.

logo/masthead; (b) the layout; and (c) the photographs featured on the cover. The defendant claimed that the inclusion of the magazine cover was 'incidental' to the broadcast, because the purpose of the advertisement had been to advertise *The Sunday Mirror*, not *Woman*.

The court held that the inclusion of the claimant's magazine cover was not incidental. It was, in fact, an essential and important feature of the advertisement. The impact of the advertisement would have been lost altogether if the cover had not been used.

It follows that the correct approach when assessing whether a particular use is incidental is to assess the *impact* of the use of the copyright work rather than the *purpose* for which the copyright work was used.

The CDPA provides that a musical work, words spoken or sung with music or so much of a sound recording, broadcast or cable programme as includes such works shall not be regarded as incidentally included in another work if it is deliberately included.²²⁰ An example cited in Parliament during the passage of the Bill was the filming and broadcast of a football match. If, at half time, a band began to play a piece of music which is still in copyright to the crowd and that performance was broadcast, the music would not be regarded as incidental if it were deliberately included. So, if the camera crew were to zoom in deliberately on the band that might be regarded as deliberate inclusion of the music and therefore an infringement of copyright in the musical work. On the other hand, if the cameras were filming interviews with pundits who were commenting on the first half of the match, and happened also to pick up the music on the microphone, that would not be a deliberate inclusion of the music.

Inclusion of material consisting of the spoken word

Copyright may subsist in spoken words as a literary work once the words are recorded in writing or otherwise.²²¹ Filming or tape recording the speaker will be 'recording' for the purposes of the CDPA. Copyright in the words spoken will belong to the speaker, not to the recorder (although the recorder may own copyright in his record).²²² The speaker could theoretically use his copyright to restrain the broadcast of his words.

It would clearly be draconian restriction on their freedom of expression if the media were to need permission before they could make use of recorded interview footage. In order to minimise the potential restriction, s 58 of the CDPA provides that, where a record of spoken words is made in writing or otherwise for the purpose of reporting current events or of broadcasting or

220 CDPA 1988, s 31(3).

221 *Ibid*, s 3(3).

222 See p 229 for further discussion of this issue.

including in a cable programme service the whole or part of the work, it is not an infringement of any copyright in the words to use the record or material taken from it (or to copy the record, or any such material, and use the copy) for the purpose of reporting current events, provided that the following conditions are met:

- the record is a direct record of the spoken words and is not taken from a previous record or from a broadcast or cable programme;
- the making of the record was not prohibited by the speaker and, where copyright already subsisted in the work, did not infringe copyright;
- the use made of the record or material taken from it is not of a kind prohibited by or on behalf of the speaker or copyright owner before the record was made; and
- the use is by or with the authority of a person who is lawfully in possession of the record.

Works on public display

Copyright in buildings and models of buildings, sculptures and other works of artistic craftsmanship is not infringed by photographing them when they are permanently situated in a public place or premises open to the public.²²³

Copyright and the public interest

Section 171(3) of the CDPA provides that 'nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright on grounds of public interest or otherwise'.

The extent to which use of a work in the public interest might provide a defence to an infringement claim was recently considered by the Court of Appeal in *Hyde Park Residence v Yelland*.²²⁴

Prior to that decision, there was a school of thought that the public interest defence would provide a defence against enforcement of copyright where the copyright work contained information which it would be in the public interest to publish. It was thought that the copyright public interest defence was analogous to the public interest defence in breach of confidence cases.²²⁵ The first instance decision in the *Hyde Park Residence* case endorsed this view.²²⁶ But this view appears now to have been authoritatively refuted by the Court of Appeal, whose decision has severely restricted the defence of public interest in copyright infringement cases.

223 CDPA 1988, s 62.

224 *Hyde Park Residence v Yelland* [2000] RPC 604, CA.

225 Discussed in Chapter 5.

226 *Hyde Park Residence v Yelland* [1999] RPC 655.

The Court of Appeal held that the courts have the inherent jurisdiction to refuse to enforce an action for copyright infringement on the grounds of public interest only where the enforcement of copyright *offends against the policy of the law*. Aldous LJ gave a non-exhaustive list of circumstances where this might be the case as follows:

- the copyright work is immoral, scandalous or contrary to family life; or
- the copyright work is injurious to public life, public health and safety or the administration of justice; or
- the copyright work incites or encourages others to act in a way referred to above.

All the above criteria relate to the *nature of the work itself*. Aldous LJ indicated that the circumstances leading to the conclusion that enforcement would be against the policy of the law must derive from the copyright work, not from the identity of the owner of the copyright. The result is that where the nature of the work offends against policy, the copyright owner loses his right to control the exploitation of the work.

Mance LJ was not so restrictive. He indicated that it might be possible to conceive of situations where a copyright document appeared innocuous on its face, but its publication would be justified in the public interest in the context of other facts, which might include the identity of the owner of the copyright. In such circumstances, he opined, it might be in the public interest to restrain the enforcement of copyright. Mance LJ did not expand on this observation. Its scope is, for the moment, unclear.

It is interesting to consider the decision of the House of Lords in the *Spycatcher* litigation²²⁷ in the light of this judgment. The consensus of the law lords in *Spycatcher* was that Peter Wright would not be able to enforce any copyright which he owned in his memoirs. Lord Keith noted that the courts would not:

... enforce a claim ... to the copyright in a work the publication of which [was] brought about contrary to the public interest.

And Lord Jauncey felt that:

... the publication of *Spycatcher* was against the public interest and was in breach of the duty which Peter Wright held to the Crown. His action reeked of turpitude. It is in these circumstances inconceivable that a UK court would afford to him or his publishers any protection in relation to any copyright which either of them may possess in the book.

On Aldous LJ's reasoning, this finding would not have been so easily available to the Law Lords. The decision not to enforce copyright would have to be based on the *work itself* rather than on the identity and wrongdoing of

227 *AG v Guardian Newspapers (No 2)* [1990] 1 AC 109.

the copyright owner. Unless the *Spycatcher* book could be said to be immoral or damaging to public health (or, by analogy, national security), the enforcement of copyright could not have been restrained on public interest grounds.

Mance LJ's judgment permits a broader approach – the work itself may be innocuous but enforcement of copyright might be against public policy because of other factors, such as the identity and the discreditable actions of the copyright owner.

This uncertainty of the scope of what is, on any reading, a much reduced public interest defence, is unsatisfactory.

Example

Consider a borderline case. In the 12 March 2000 edition of *The Independent on Sunday*, the newspaper reported that it had received a letter from the convicted murderer, Ian Brady, in which he claimed to have in his possession a number of letters which had been written to him by his accomplice, Myra Hindley. Brady claimed that the letter refuted Hindley's on the record comments that Brady had coerced her into carrying out the moors murders.

Now suppose that a newspaper obtained the Brady/Hindley letters. Would Myra Hindley (the author of the letters) be able to enforce copyright in the letters to restrain publication?

Could it be argued that it is against the policy of the law to permit her to enforce her copyright and restrain publication? On Aldous LJ's analysis, probably not, unless the contents of the letters were, for example, immoral or injurious to public safety. Unless Aldous LJ's criteria were satisfied, Hindley could restrain publication of the letters. On Mance LJ's analysis the background facts – for example, the fact that the information might shed light on the sequences of events surrounding the Moors murders – might give rise to public interest considerations which justify restraining Hindley from stopping the publication of the letters.

The rationale for the Yelland decision

The reasoning behind the Court of Appeal's decisions was explained by Aldous LJ. He observed that the CDPA already provides for certain permitted uses which override the right to enforce copyright. Examples are the fair dealing provisions. The only ground on which the court can refuse to enforce copyright are those provided for in the CDPA and the limited circumstances in which enforcement would offend against the policy of the law. It would be wrong for a court that has rejected a fair dealing defence to uphold a common law defence on the ground that publication was in the public interest.

Aldous LJ went on to observe that copyright is concerned with the form of the work in which copyright subsists, rather than in the underlying information itself. Its objective is to protect the product of the skill and labour of the author of the copyright work from appropriation. Copyright does not afford protection to information *per se*. An injunction to restrain infringement of copyright would not prohibit the publication of the information contained in the copyright work if it were expressed in a different form so as not to amount to an appropriation of the skill and labour involved in the creation of the copyright work. On the facts of the *Hyde Park Residence* case,²²⁸ *The Sun* could have given the information about the timings at the villa without reproducing the stills.

The practical effect of the Yelland decision

It is submitted that the practical effect of Aldous LJ's words on investigative journalism is wider than he suggested. The impact of media reporting is likely to be significantly weakened if a copyright work cannot be reproduced or quoted from.

The sensationalism of the *Hyde Park Residence* case makes it a poor model on which to judge the issue. Take, instead, similar facts to those which arose in *Lion Laboratories v Evans*.²²⁹ The case is primarily a breach of confidence case, although it does contain some observations on copyright infringement (which seem now to have been overturned in the wake of the *Hyde Park Residence* decision). It concerned a confidential memorandum which came into the possession of a journalist. The memorandum revealed that a device used for breathalysing motorists had a number of defects, leading to doubts about its accuracy. The journalist wrote an article referring to and quoting from the memorandum.

In the wake of the *Hyde Park Residence* case, the journalist could no longer quote from the memorandum unless the malfunction of the device could be called a 'current event' and the use of the memorandum a fair dealing. Assume that the fair dealing provisions do not apply and the journalist must fall back on a public interest defence, unless the memo itself offends against policy (which is unlikely), the fair dealing defence will not succeed on Aldous LJ's analysis. If an action for copyright infringement is to be avoided, the information contained in the document may be utilised (provided that publication is not in breach of confidence) but the memo may not be reproduced. But the force and the impact of the article will be lessened. Readers/viewers are less likely to sit up and take notice of an article expressed along the lines of 'we have obtained evidence which shows that ...' than they are to 'the memorandum states that ...'.

²²⁸ Set out above, pp 262–63.

²²⁹ *Lion Laboratories v Evans* [1984] 2 All ER 417.

There is also a significant danger for the media that, in paraphrasing or summarising the memorandum, inaccuracies may slip into the report, which, in a worst case scenario, might expose the media to defamation actions. Quotations from the underlying work would be one of the surest ways of guaranteeing the accuracy of what is reported.

A further effect is that the ability of journalists to carry out investigations will be impeded. If a journalist makes a photocopy or a verbatim note of the memorandum or of a substantial part of it for his professional use, he will have infringed copyright. The ability to amass information during the course of investigations has therefore been significantly restricted.

Whilst Aldous LJ's judgment is in line with the traditional role and functions of copyright law, it has, to a large extent, placed the law in a straight jacket so far as the media are concerned. The fair dealing provisions on which it must now rely are fairly rigid, despite judgments which emphasise the flexibility of the terms 'reporting current events' and 'criticism or review'. Aldous LJ's emphasis in the *Yelland* decision on fair dealing, on necessity for the use of the copyright work, protection of the status of previously unpublished works and the way in which a previously unpublished work was obtained by the defendant give the media little room for manoeuvre on the issue of the fairness of any dealing. At the same time, the prospect of a public interest defence appears to have all but disappeared.

The public interest and the Human Rights Act 1998

The Human Rights Act 1998 is considered in Chapter 1. In essence, the Act places public authorities, including courts, under an obligation to give further effect to the Convention rights contained in the European Convention of Human Rights, one of which is freedom of expression (Art 10). Under the case law of the European Court of Human Rights, a limitation on the right to freedom of expression is only permitted, *inter alia*, where it is necessary in a democratic society. One wonders whether the Court of Appeal's limitation of the public interest defence will be vulnerable on the ground that it goes further than is necessary to protect the rights of the copyright owner.

Protecting your copyright

A creator of a copyright work should take steps to deter potential infringers from reproducing the work and to ensure that he is in a position to show that an original literary, dramatic, musical or artistic work is original. The following procedures should therefore be considered:

- mark copyright works with the © symbol. The symbol is not a formal requirement in order to bring copyright into being under UK law (although it is a requirement under the Universal Copyright Convention in

relation to international copyright protection). The symbol will, however, serve to alert potential users to the fact that copyright is claimed in the work. The following formula should be used:

© [name of copyright owner] [year of creation of the work];

- ensure that you *do* own copyright. Often, businesses who commission material believe that they own copyright once they pay for the work. But, as we have seen, that is not the case. Remember that unless the copyright work has been created by an employee in the course of their employment, you will need to take an assignment of copyright. Do not let yourself be caught out by this common misconception;
- ensure that you can prove that the work is original. Retain all material which will help you to show how the work was developed, such as drafts, briefings, samples. Keep a record of the identity of people who worked on the project;
- keep a record of the dates when the work was developed. You may need to prove that your work predates that of the alleged infringer. A useful device for establishing originality and timing is to post a copy of the work to yourself using registered post. The post office stamp will show the date of delivery. You should ensure that it is placed across the flap of the envelope to demonstrate that the envelope has not been tampered with since you posted it.

Avoiding copyright infringement: a case study

Blueboy Ltd is a designer of children's clothes. It wishes to mount a poster advertising campaign in the UK for its latest range of designs using a particular photograph for the poster. The photograph which Blueboy want to use is now 15 years old (and so is still in copyright). The copyright belongs to the photographer, Bill. Blueboy will clearly be reproducing a substantial part of the photograph in its poster. This use of the photograph does not fall within the permitted uses discussed above.

How can Blueboy use the photograph without infringing copyright?

Assignments

The most complete way of avoiding copyright infringement would be for Blueboy to take an assignment of copyright in the photograph from Bill so that ownership of the copyright is transferred to Blueboy. The assignment could transfer copyright for all purposes or for certain limited purposes. The assignment would give Blueboy the right to use the copyright work (the photograph) in the finished advertisement. Blueboy would also have the right to exploit the photograph in the future (unless the assignment was a transfer

of copyright for certain purposes only). If Blueboy wishes to take assignments, it should ensure that Bill *is* the owner of the copyright. It should also ensure that the assignment is otherwise adequate for its purposes. The reader is referred to Part 3 for more detail. The assignment must be in writing.

Blueboy should bear in mind that Bill is likely to want to be paid for assigning copyright in the photograph. The grant of an assignment of copyright is usually relatively expensive. Bill may not even be willing to assign copyright. By doing so, he will lose the right to control the exploitation of his work in the future. An assignment may not therefore be the most practical way forward for Blueboy.

Licences

As an alternative to taking an assignment, Blueboy could obtain an exclusive or non-exclusive licence to use the photograph. The licence would not operate as a transfer of copyright. Instead it would be a permission to use the photograph for the purposes that the licence covers. Blueboy should take care to ensure that Bill is the owner of copyright and has the authority to grant the licence. The licence must also be wide enough to cover the uses that Blueboy intends to make of the photograph. The reader is referred to Part 3 for further detail about licences.

Music and collecting societies

For reasons of convenience many songwriters, composers and music publishers allow collecting societies to administer and enforce copyright on their behalf and to collect royalties. Record companies also make use of collecting societies to administer their copyright in sound recordings. Collecting societies administer hundreds of similar copyrights for different authors. Often it is the relevant collecting society which is authorised to grant a licence for the use of, for example, a piece of music, rather than the author of the work. The potential user of a copyright work should accordingly approach the collecting society for permission to use the copyright work.

Examples of collecting societies are:

- *the Performing Rights Society (PRS)*, which administers the rights to perform works in public or to broadcast such works or include them in a cable programme service on behalf of its member songwriters, composers and music publishers. The PRS licenses the right to carry out these acts in return for a fee payable by the user which it distributes amongst its members in accordance with its regulations;
- *the Mechanical Copyright Protection Society (MCPS)* administers the right to record music in any format, such as on to CD, video, multimedia products and broadcast programmes. It does so on behalf of its member songwriters, composers and music publishers;

- *Phonographic Performance Ltd* (PPL) administers phonographic rights. Phonographic rights are the rights to broadcast or perform *sound recordings* in public. PPL (sound recordings) is the equivalent body to PRS (musical works). PPL has a sister organisation, *Video Performance Ltd* (VPL), which administers the right to its members' music videos.

The roles of the collecting societies are considered further in Chapter 18.

CRIMINAL OFFENCES

The CDPA provides for a number of criminal offences of copyright infringement which make it a criminal offence to make for sale or hire, to import into the UK (other than for private use), to possess with a view to committing an infringing act, to sell, hire or offer or expose for sale or hire, to exhibit or to distribute an article which is, *and which the defendant knows or has reason to believe is*, an infringement of copyright.

It is also an offence to make or possess an article designed to copy a particular copyright work knowing or having reason to believe that it will be used in relation to infringing works.

The criminal offences are aimed principally at counterfeiters and pirates of branded goods, films and sound recordings, although they can also have a wider application.

There are also related offences involving public performance of literary, dramatic and musical works and films.

The offences are punishable by fines or imprisonment.

COPYRIGHT IN DATABASES AND DATABASE RIGHT

Copyright and Rights in Databases Regulations 1997 SI 1997/3032 ('the Regulations')

An overview of the Regulations

The Regulations came into force in the UK on 1 January 1998 by way of amendment to the CDPA. They implement the provisions of Council Directive (96/9/EC) on the legal protection of databases which was intended both to *harmonise* the laws of Member States relating to protection of copyright in databases and to *introduce a new database right* to prevent the extraction and re-utilisation of the contents of a database.

Database is defined as a collection of independent works, data or other materials which are arranged in a systematic or methodical way and which

are capable of being individually accessed by electronic or other means. This is a wide definition, which does not just relate to information stored on computer. Material such as directories of restaurants or entertainment venues fall within the definition, as do encyclopedias (in any format, for example, on CD-ROM or in book form).

The Regulations amend the law relating to copyright in databases and create a new database right which can exist alongside copyright.

The maker of a database is the first owner of both the database right and the copyright in it. Where the maker is an employee who makes the database in the course of his employment, his employer shall be regarded as the maker of the database, subject to any agreement to the contrary.

Changes to copyright law in relation to databases

Prior to the Regulations, the CDPA made no specific provision for databases. Databases were generally viewed as being literary work in the form of compilations provided that they met the originality requirements in s 3 of the CDPA. The Regulations made certain changes to the Act. The CDPA now provides that:

- 'literary work' is defined to specifically include databases. The CDPA provides that a database is *not* to be classed as a compilation for copyright purposes. Databases are a type of literary work in their own right;
- the originality requirements which apply to databases are stricter than the requirements for other types of copyright works. A database is original, and therefore has the status of a copyright work if, *and only if*, by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation. Certain databases will not meet the originality criteria; however, they may still qualify for database right (considered below);
- the duration of copyright in a database is the same as for other types of literary work;
- it is not an infringement of copyright for a person with a right to use the database or any part of it to do, in the exercise of that right, anything which is necessary for the purposes of access to and use of the contents of the database or that part of the database.

Introduction of a new database right for databases

The database right subsists in a database where there has been a substantial investment in obtaining, verifying or presenting the contents of the database. The database right can exist even though the database may not satisfy the originality requirements for a copyright work which are referred to above.

A person infringes database right in a database if, without the consent of the owner of the right, he extracts or re-utilises all or a substantial part of the contents of the database. The *repeated and systematic* extraction or re-utilisation of insubstantial parts of the contents of the database may amount to the extraction or re-utilisation of a substantial part of those contents (and therefore infringe the database right). 'Extraction' means the transfer (permanent or temporary) of the contents of the database to another medium. 'Re-utilisation' means making the contents of the database available to the public by any means. It is not an infringement for a lawful user of the database to extract or re-utilise insubstantial parts of the database. Any term or condition in an agreement which seeks to prohibit or restrict such extraction or re-utilisation is rendered void.

Database right expires at the end of 15 years from the end of the calendar year in which the making of the database was completed or if it is made available to the public before the end of that period, 15 years after the end of the calendar year in which the database was first made available to the public. Substantial changes to the database give a further period for protection. There are transitional provisions for databases completed on or after 1 January 1983 (database right for 15 years from 1 January 1998).

There is a fair dealing exception for database right where a substantial part of the database is extracted for teaching or research purposes (but not for any commercial purpose) and the source of the extract is acknowledged and the user is someone with a right to use the database.

Copyright and database rights are not alternatives. Where a database qualifies for both copyright and database right protection, the owner can choose to enforce both rights.

PUBLICATION RIGHT

Publication right came into force in the UK on 1 December 1996. It applies to literary, dramatic, musical, artistic works and to films. The right applies to any person who, after the expiry of copyright in the work, lawfully publishes or lawfully communicates to the public a previously unpublished work *for the first time*. It confers on the owner of the right a right akin to copyright which lasts for 25 years from the time when the work was first lawfully published or communicated to the public.

In order to acquire the right, the publisher must be able to show that:

- the work once enjoyed copyright protection;
- the copyright period has now expired;

- the work has not been published. Publication means that the work must not previously have been communicated to the public, including by exhibition or public showing;
- the publication must be authorised by the owner of the physical work; and
- the work must be published first within the EEA and undertaken by a national of an EEA State.

THE FUTURE: COPYRIGHT AND DIGITAL MEDIA

Amended proposal on copyright and related rights in the information society (COM (99) 250 final)

The Directive seeks to harmonise copyright and related rights in certain key areas, primarily to deal with digital technology (but the amendments are *not* restricted to digital media). The Directive provides for the following rights:

- *reproduction right* – States are required to provide for the exclusive right to authorise or prohibit direct, indirect, temporary or permanent reproduction of a copyright work by any means and in any form in whole or in part (Art 2). The right applies to authors, performers in respect of fixations of their performances, phonogram producers, film producers and broadcasting organisations. The reproduction right confirms the existing situation under the CDPA which provides that copying a copyright work includes reproduction in any material form.

Exempted from this right are temporary acts of reproduction which are an integral and essential part of a technological process whose sole purpose is to enable use to be made of a work or other subject matter and which have no independent economic significance (Art 5);

- *communication right* – States are required to provide for the exclusive right to authorise or prohibit any communication to the public of originals or copies of their work by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. This right shall not be exhausted by any act of communication to the public of a work, including their being made available to the public. The mere provision of physical facilities for enabling or making a communication does not, itself, amount to an act of communication to the public (Art 3). Online services will be covered by the new communication right, as will digital transmissions allowing for the identification and recording of specific items, such as musical tracks. The communication right covers transmission by wireless means (for example, mobile

telephone networks) and wire means (for example, by cable service or the internet).

The right applies to authors, performers in respect of fixations of their performances, phonogram producers, film producers and broadcasting organisations;

- *distribution right* – States shall provide authors in respect of the originals of their works or copies of them with the exclusive right to any form of distribution to the public by sale or otherwise (Art 4). This right is only exhausted within the EC where the first sale or other transfer of ownership in the EC is made by the rights owner or with his consent.

The draft Directive provides for certain exceptions to the above exclusive rights.

Member States have the *option* to introduce certain limitations to the right of reproduction and, in some cases, the right of communication. Where the Member State wishes to provide for such exceptions, the Directive gives an exhaustive list of the exceptions which are permitted. They include:

- use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved, on condition that the rights owners receive fair compensation;
- uses for the benefit of people with a disability which are directly related to the disability and of a non-commercial nature and to the extent required by the specific disability;
- use of excerpts in connection with the reporting of current events, as long as the source and, if possible, the author's name is indicated, and to the extent justified by the informative purpose and the objective of illustrating the event concerned;
- quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that the source and, if possible, the author's name is indicated, and that their use is in accordance with fair practice, and to the extent required for the specific purpose;
- use for the purposes of public security or to ensure the proper performance or reporting of an administrative, parliamentary or judicial procedure.

But any such exceptions shall:

- (a) only be applied to certain specific cases;
- (b) not be interpreted in such a way as to:
 - allow their application to be used in a manner which unfairly prejudices the right holders' legitimate interests; or

- conflict with the normal exploitation of their works or other subject matter.²³⁰

This provision is not at all clear. For example, what might 'legitimate interests' be? What constitutes unfair prejudice of those interests? What is meant by 'normal exploitation'?

Both the criticism or review exemption and the reporting current events exemption appear to be more restrictive than the current fair dealing provisions of the CDPA. Even more alarming for the user of copyright works, the Directive states that Art 5(4) must be interpreted with a copyright owner bias. The text of the Directive imposes a worrying threat to the media industries. The author understands that it is the subject of vigorous lobbying by media interests at the time of writing. It must be hoped that the effect of the lobbying will be to produce a piece of legislation which offers a more workable alternative for the media.

Obligations as to technical measures (Art 6)

'Technical measures' is defined as any technology, device or component that in the normal course of its operation is designed to prevent or inhibit the infringement of copyright or related rights.

Member States are obliged to provide adequate legal protection against the circumvention without authority of any effective technological measures designed to protect any copyright or related right which the person concerned carries out in the knowledge or with reasonable grounds to know that he or she pursues that objective.

Obligations concerning rights management distribution (Art 6)

Rights management information means any information provided by rights holders which identifies the work or other subject matter, the author or information about the terms and conditions for use of the work or other subject matter and any numbers or codes that represents such information.

Member States shall provide for adequate legal protection against any person performing without authority any of the following acts:

- the removal or alteration of any electronic rights management information;
- the distribution, importation for distribution, broadcasting, communication or making available to the public of copies of works or other subject matter from which electronic rights management information has been removed or altered without authority,

²³⁰ Legal Protection of Databases Directive, Art 5(4).

if such a person knows or has reasonable grounds to know that by so doing he is inducing, enabling or facilitating an infringement of any copyright or any rights related to copyright.

Sanctions and remedies (Art 8)

States shall provide for appropriate sanctions and remedies for infringement and take all measures to ensure that those sanctions and remedies are applied. The sanctions provided shall be effective, proportionate and dissuasive and act as a deterrent to further infringement.

Each State shall take the measures necessary to ensure that rights owners whose interests are affected by an infringing activity carried out in its territory can bring an action for damages and/or apply for an injunction and seizure.

(b) Moral rights

Moral rights exist alongside copyright. They are, however, a different concept from copyright. The owner of copyright in a work may not own the moral rights in the work and vice versa. Moral rights belong to the *author* of a copyright work and they cannot be assigned. They are concerned with protecting the name and reputation of that person as the creator of the work. Upon the death of the owner they pass to his/her estate. So, irrespective of who owns copyright in a work at any particular time, the author still owns the moral rights in the work.

Unlike copyright, which gives the owner the right to exploit the copyright, moral rights control the way in which the work is *treated*. Moral rights stem from the notion that the author's reputation is bound up with the work that he has created. It follows that the author is entitled to protect his reputation by controlling certain aspects of the way in which the work is treated. English law has traditionally concentrated on the economic rights protected by copyright. The concept of 'moral rights' did not exist in English national law until the CDPA, although the Berne Convention for the Protection of Literary and Artistic Works 1886, to which the UK is a signatory, recognises such rights. Art 6 *bis*, para 1 of the Berne Convention states as follows:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

The CDPA, which came into force on 1 August 1989, expressly recognises the following rights:

- *the right of paternity* – this is the right to be identified as author or director of a copyright literary, dramatic, musical or artistic work or a film;
- *the right of integrity* – this is the right of the author or director to object to derogatory treatment of a copyright literary, dramatic, musical or artistic work or a film;
- *the right against false attribution* – this right entitles a person not to have a literary, dramatic, musical or artistic work or a film falsely attributed to him/her;
- *the right of privacy in photographs/films/videos taken for private or domestic purposes.*²³¹

The first three of these rights will now be examined in more detail.

*The right of paternity*²³²

The right to be identified as author or director cannot be infringed unless it is first *asserted* by the author/director in writing.²³³ The right may be asserted generally, or in relation to any specified act or acts. If the right is not asserted, there is no claim against a person who makes use of the work without giving the author credit.

The right of paternity exists only in relation to works in which copyright subsists. If a literary work is not original, and copyright does not subsist in it, there will be no right of paternity in relation to it.

The right entitles the author of a literary work (other than words intended to be sung or spoken with music) or a dramatic work to be identified whenever the work is published commercially, performed in public, broadcast or included in a cable programme service or whenever copies of a film or sound recording including the work are issued to the public. The right also includes the right to be identified as the author of the work from which an adaptation is made whenever any of those events occurs in relation to an adaptation of the work.²³⁴

The right entitles the author of a musical work or of a literary work consisting of words intended to be sung or spoken with music to be identified whenever the work is published commercially, or copies of a sound recording of the work are issued to the public or a film whose sound track includes the work is shown in public or copies of such a film are issued to the public. As

231 The right of privacy is considered in Chapter 8.

232 CDPA 1988, s 77.

233 *Ibid*, s 78.

234 *Ibid*, s 77.

with a literary or dramatic work, the right also applies to adaptations of a musical work.²³⁵

The author of an artistic work has the right to be identified whenever the work is published commercially or exhibited in public or where a visual image of the work is broadcast or included in a cable programme service. It also applies where a film which includes a visual image of the work is shown in public, or copies of such a film are issued to the public. In the case of a work of architecture in the form of a building or a model of a building, a sculpture or a work of artistic craftsmanship, the right applies where copies of a graphic work which represents it or of a photograph of it are issued to the public.²³⁶

The director of a film has the right to be identified whenever the film is shown in public, broadcast or included in a cable programme service or copies of the film are issued to the public.²³⁷

In every case, the identification must be clear and reasonably prominent so that it is likely to bring the author/director's identity to the notice of the audience/user.²³⁸

There are a number of exceptions to the right of paternity.²³⁹ The right does not apply to works made for the purpose of reporting current events, for example, a newspaper article or a photograph taken for that purpose.²⁴⁰ Similarly, it does not apply to the publication in a newspaper, magazine or similar periodical or an encyclopedia, dictionary, yearbook or other collective work of reference of a literary, dramatic, musical or artistic work made for the purpose of such publication or made available by the author for any such purpose.²⁴¹

Other exceptions to the rights are the following descriptions of work: a computer program, the design of a typeface or any computer generated work. The right also does not apply to anything done by or with the authority of the copyright owner where copyright in the work in question was originally vested in the author's employer (that is, where the work was created in the course of the author's employment and there is no agreement that copyright will belong to the employee).²⁴²

235 CDPA 1988, s 77.

236 *Ibid.*

237 *Ibid.*

238 *Ibid.*

239 Set out at *ibid.*, s 79.

240 *Ibid.*, s 79(5).

241 *Ibid.*, s 79(6).

242 *Ibid.*, s 79(3).

Other exceptions to the right are where the use of the work would not infringe copyright under the fair dealing provisions (see above), or because the work is included incidentally.²⁴³

The right of integrity

The right of integrity entitles the author of a copyright literary, dramatic, musical or artistic work and the director of a copyright film to restrain and/or object to the subjection of the whole or any part of his work to derogatory treatment.²⁴⁴ Note that, like copyright, it does not protect the integrity of the author's idea, only the way in which the idea has been expressed. The right is dependent on the existence of the copyright work. Unlike the right of paternity, the right of integrity does not have to be asserted before it can be exercised. The right of integrity is only exercisable if copyright subsists in the work for which the moral right is claimed.

Treatment means any addition to, deletion from or alteration to or adaptation of the work other than a translation of a literary work or an arrangement or transcription of a musical work involving no more than a change of key or register.²⁴⁵ Treatment is *derogatory* if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director.²⁴⁶ The treatment can relate to the whole or any part of the work.²⁴⁷

The test of whether treatment of a work is derogatory is an objective one and it is a question which will fall to be decided by the court. In *Pasterfield v Denham*,²⁴⁸ the claimant was a designer who produced some artwork for a promotional brochure for Plymouth City Council. Some years later, the council used the artwork for an amended brochure. A number of minor changes were made to the claimant's drawings, for example, certain shades of colour were changed and a number of peripheral features were removed. The claimant alleged that the alteration of drawings in the updated brochure amounted to derogatory treatment of his artwork and was therefore an infringement of his moral right of integrity. The court held that it is not sufficient to give rise to an infringement that the author is aggrieved by the treatment of his work. It is the opinion of the court which determines whether in any particular case the work has been subjected to derogatory treatment. On the facts, the differences in the drawings were so trivial as to be only detectable on close inspection. The judge observed that 'the differences may be such that the two versions could well be the subject of a "Spot the

243 CDPA 1988, s 79(4).

244 *Ibid*, s 80.

245 *Ibid*, s 80(2).

246 *Ibid*.

247 *Ibid*, s 89.

248 *Pasterfield v Denham* [1999] FSR 168.

Difference” competition in a child’s comic’. He said that it would be wrong to elevate that to the status of derogatory treatment. It would therefore seem that the extent of the treatment to which the work is subjected is a relevant factor in determining whether the treatment is, in fact, derogatory.

The right of integrity is infringed in the case of a literary, dramatic or musical work by a person who publishes commercially, performs in public, broadcasts or includes in a cable programme service a derogatory treatment of the work or issues to the public copies of a film or sound recording of, or including, a derogatory treatment of the work. In the case of an artistic work, the right is infringed by a person who publishes commercially or exhibits in public a derogatory treatment of the work, or broadcasts or includes in a cable programme services a visual image of a derogatory treatment of a work or issues to the public copies of such a film or in the case of a work of architecture in the form of a model of a building, a sculpture or a work of artistic craftsmanship, issues to the public copies of a graphic work representing, or of a photograph of, a derogatory treatment of the work. In the case of a film, the right is infringed by a person who shows in public, broadcasts or includes in a cable programme services a derogatory treatment of a film or issues to the public copies of a derogatory treatment of a film.²⁴⁹

The right is also infringed by a person who possesses in the course of a business, or sells or lets for hire or offers or exposes for sale or hire or in the course of a business exhibits in public or distributes or distributes other than in the course of a business so as to affect prejudicially the honour or reputation of the author or director an article which he knows or has reason to believe is an infringing article, that is, a work or copy of a work which has been subjected to derogatory treatment and has been or is likely to be the subject of any of the acts mentioned above which would infringe the right.²⁵⁰

There are a number of exceptions to the right of integrity.²⁵¹ The right does not apply to works made for the purpose of reporting current events, for example, a newspaper article or a photograph taken for that purpose.²⁵² Similarly, it does not apply to the publication in a newspaper, magazine or similar periodical or an encyclopedia, dictionary, yearbook or other collective work of reference of a literary, dramatic, musical or artistic work made for the purpose of such publication or made available by the author for any such purpose.²⁵³

249 CDPA 1988, s 80.

250 *Ibid*, s 83.

251 Set out at *ibid*, s 81.

252 *Ibid*, s 81(3).

253 *Ibid*, s 81(4).

The right of integrity does not apply to a computer program or any computer generated work.²⁵⁴

Further, the right is not infringed by anything done for the purpose of avoiding the commission of an offence, complying with a duty imposed by or under any enactment.²⁵⁵ In the case of the BBC (but not, apparently, other broadcasters), the right is not infringed by anything done for the purpose of avoiding the inclusion in a programme broadcast by them of anything which offends against good taste or decency or which is likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling.²⁵⁶

Where copyright in the work which has been subjected to derogatory treatment originally vested in the author's employer (because it was a work created by the author in the course of his employment), the right of integrity shall not apply to anything done to the work by or with the authority of the copyright owner unless the author or director is identified at the time of the relevant act or has previously been identified in or on published copies of the work.²⁵⁷

The right against false attribution

A person has the right not to have the whole or any part of a literary, dramatic, musical or artistic work falsely attributed to him as author or a film falsely attributed to him as director.²⁵⁸ In the case of *Clark v Associated Newspapers*,²⁵⁹ the claimant was Alan Clark, a well known politician who had previously published his political diaries with much success. The defendant published the *Evening Standard*, which published a series of articles entitled 'Alan Clark's Secret Election Diary' and 'Alan Clark's Secret Political Diary'. The articles featured a photograph of the claimant. Alan Clark had nothing to do with the articles and had not given any consent to the use of his name and identity in connection with the articles. They were 'spoof' items. The claimant alleged passing off and infringement of his moral right against false attribution.

The court held that for the purposes of s 84 of the CDPA attribution meant a claim (express or implied) about the identity of the author of a particular item. In deciding whether there is a false attribution, the court has to determine the single meaning which the work would convey to reasonable readers (an approach akin to defamation cases). The claimant does *not* have to show that a substantial number of readers would believe there to be a false

254 CDPA 1988, s 81(1).

255 *Ibid.*

256 *Ibid.*

257 *Ibid.*, s 82(2).

258 *Ibid.*, s 84(1).

259 *Clark v Associated Newspapers* [1998] RPC 261.

attribution. On the facts, there was a clear unequivocal false statement that the claimant was the author of the articles and therefore a false attribution had taken place. The court also observed that, in order to exercise the moral right against false attribution, the claimant must be a professional author (as Mr Clark was). Once a finding of false attribution had been made, the right is infringed without proof of damage.

The right is infringed by a person who issues to the public copies of a work in or on which there is a false attribution or exhibits in public an artistic work or a copy of an artistic work in or on which there is a false attribution. The right is also infringed by a person who, in the case of a literary, dramatic or musical work, performs the work in public, broadcasts it or includes it in a cable programme service as being the work of a person or, in the case of a film, shows it in public, broadcasts it or includes it in a cable programme service as being directed by a person knowing or having reason to believe that the attribution is false. The right is also infringed by a person who possesses or deals with a copy of a work in or on which there is a false attribution or, in the case of an artistic work, possesses or deals with the work when there is a false attribution in or on it knowing or having reason to believe that there is such an attribution and that it is false.²⁶⁰

Duration of moral rights

Moral rights generally continue as long as copyright subsists in the work in question.²⁶¹ The only exception to this rule is in relation to the right against false attribution, which only lasts until 20 years after a person's death.²⁶²

Consent and waiver

Moral rights cannot be transferred. They are personal to the author. Moral rights can be waived (or relinquished).²⁶³ A waiver must be in writing.²⁶⁴ The waiver can relate to a specific work, to works of a specified description or to works generally, including future works which are not yet in existence.²⁶⁵ The waiver may be conditional or unconditional, and may also be expressed to be revocable or irrevocable.²⁶⁶ It is common practice for a party who is commissioning a copyright work or purchasing the rights to such a work to

260 CDPA 1988, s 84.

261 *Ibid*, s 86.

262 *Ibid*, s 86(2).

263 *Ibid*, s 87.

264 *Ibid*, s 87(2).

265 *Ibid*, s 87(3).

266 *Ibid*.

require the author of the work to waive his moral rights unconditionally and irrevocably (see Part 3 of this book for further details).

In *Pasterfield v Denham*,²⁶⁷ the passing of equitable title to copyright or the grant of an implied licence was held not to mean that an author has waived his moral rights, even on an informal basis. Something more definite was required.

Performance rights

Performers do not own copyright in their performances. If an actor stars in a one-woman play, the play is a dramatic work in which copyright subsists. There is no copyright in the actor's performance itself. Instead, the performer may have performance rights in the performance which can be used to control its commercial exploitation. Performance rights have some similarity with copyright. The consent of a performer is generally required to the exploitation of their performance. Section 180(4) of the CDPA provides that performance rights may exist independently of both copyright and moral rights.

'Performance' means a dramatic (including a dance or mime) or musical performance, a reading or recitation of a literary work or a performance of a variety act or any similar presentation, all of which consist of (or so far as they consist of) a live performance given by one or more individuals.²⁶⁸ Dancers, musicians and actors may therefore all own rights in their performances. A performance must be a 'qualifying performance'.²⁶⁹ A qualifying performance must take place in the UK or another Member State of the EEA or it must be given by a citizen who is a subject of or resident in the UK or another Member State.²⁷⁰

The performer has the following rights:

- the *reproduction right* is the right of a performer to prevent any person making a copy of a recording or a substantial part of his performance (other than for their own private or domestic use) without the performer's consent;²⁷¹
- 'recording' means a sound or film recording either made directly from the live performance or made from a broadcast of or a cable programme including the performance or made directly or indirectly from another recording of the performance;²⁷²

²⁶⁷ *Pasterfield v Denham* [1999] FSR 168.

²⁶⁸ CDPA 1988, s 180(2).

²⁶⁹ *Ibid*, s 181.

²⁷⁰ *Ibid*, s 206.

²⁷¹ *Ibid*, s 182.

²⁷² *Ibid*, s 180(2).

- the *distribution right* is the right of the performer to prevent any person issuing to the public copies of his performance or a substantial part of his performance without the performer's consent. Issuing copies to the public means the act of putting into circulation in the EEA copies of the performance not previously put into circulation in the EEA by or with the consent of the performer, or the act of putting into circulation outside the EEA copies not previously put into circulation in the EEA or elsewhere. It does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation;²⁷³
- the *rental and lending right* gives performers the right to authorise or prohibit the rental and lending to the public of copies of a recording of their performance or a substantial part of their performance. 'Rental' means making a copy of the recording available for use, on terms that it will or may be returned, for direct or indirect economic or commercial advantage (such as videos available for hire). 'Lending' means making a copy of a recording available for use, on terms that it will or may be returned, otherwise than for direct or indirect economic or commercial advantage, through an establishment that it is accessible to the public (such as a public library).²⁷⁴

Where a musician has an exclusive recording contract with a record company, the record company may be able to grant permission to use the musician's performance.

The above rights are rights of property which may be assigned in the same way as copyright. They may also be transferred as testamentary dispositions or by operation of law.²⁷⁵ The rights may be assigned in writing, signed by or on behalf of the assignor. The assignment can be partial, that is, limited to apply to one or more (but not all) of the things requiring the consent of the rights owner or to part, but not the whole, of the period for which the rights are to subsist.²⁷⁶

Where a film production agreement is concluded between a performer and a film producer, the performer shall be presumed, unless the agreement provides to the contrary, to have transferred to the film producer his rental rights arising from the inclusion of a recording of his performance in the film.²⁷⁷ The performer retains a right to equitable remuneration for the rental which cannot be assigned.²⁷⁸ Equitable remuneration is payable by the person entitled to the rental right. An agreement is of no effect in so far as it purports

273 CDPA 1988, s 182B.

274 *Ibid*, s 182C.

275 *Ibid*, s 191B.

276 *Ibid*.

277 *Ibid*, s 191F.

278 *Ibid*, s 191G.

to exclude or restrict the right to equitable remuneration. Even where a performer expressly assigns the rental right to the producer of the film, rather than relying on the presumed transfer, he retains the right to equitable remuneration for the rental.²⁷⁹

The performer also has a number of non-property rights which are infringed where the following activities take place without the performers' consent:

- showing or playing the whole or a substantial part of a qualifying performance in public;²⁸⁰
- broadcasting or including in a cable programme service the whole or a substantial part of a qualifying performance;²⁸¹
- importing into the UK other than for private or domestic use a recording of a qualifying performance which is, and which that person knows or has reason to believe is, an illicit recording;²⁸²
- possessing, selling or letting for hire, offering or exposing for sale or hire or distributing a recording of a qualifying performance which is, and which that person knows or has reason to believe is, an illicit recording.²⁸³

Illicit recording is defined to mean a recording of the whole or a substantial part of a performance which was made otherwise than for private purposes without the performers' consent.²⁸⁴

These non-property rights cannot be assigned. They can only be transferred on death, when they will pass to the performer's estate.²⁸⁵

The performer's rights each expire at the end of 50 years from the end of the calendar year in which the performance took place, or if, during that period, a recording of a performance is released, 50 years from the end of the calendar year in which it was released.

Where a commercially published sound recording of the whole or any substantial part of a performance is played in public, or is included in a broadcast or cable programme service, the performer is entitled to equitable remuneration. The performer cannot transfer this right. An agreement between the performer and the copyright owner is void in so far as it purports to exclude or restrict the right to equitable remuneration.²⁸⁶ A new collecting society, the Performing Artists' Media Rights Association (PAMRA) collects

279 CDPA 1988, s 191G.

280 *Ibid*, s 183(a).

281 *Ibid*, s 183(b).

282 *Ibid*, s 183(c).

283 *Ibid*, s 184(1)(b).

284 *Ibid*, s 197.

285 *Ibid*, s 192.

286 *Ibid*, s 182D

income from record companies on behalf of the performers for the public broadcast of their performances.

Similarly, where a performer transfers his rental right in a sound recording to the producer of the sound recording, he retains the right to equitable remuneration for the rental.

The CDPA also contains provisions relating to delivery up and seizure of illicit recordings which are outside the scope of this book.

The UK Patent Office has issued a consultation paper on the possible implementation of moral rights for performers, namely the right to be identified as the performer when a performance is used and the right to object to distortion, mutilation or other modification of a performance which is prejudicial to the honour of the performer. The results of this consultation process are yet to be published at the time of writing.²⁸⁷

²⁸⁷ Implementation of performers' moral rights would bring the law into line with the World Intellectual Property Organisation Performances and Phonograms Treaty.

