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# MEDIA LAW

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## CLEARING RIGHTS

This chapter explains the considerations which are relevant to the clearance of rights in the context of television programmes and films. The same principles apply equally to clearance of rights for inclusion in other types of material, for example, books. The chapter considers clearance of copyright, moral rights and performance rights. It should be read in conjunction with Chapters 6 and 17.

‘Clearing rights’ means the process of ensuring that the use of a work is not an infringement of copyright, moral rights or performance rights.

Note that the chapter considers rights clearance in the context of the UK. Different considerations may apply for other territories. Rights clearance is a complex process, and this chapter gives only an overview of the clearance process. For more detail, regard should be had to specialist texts.<sup>1</sup>

### GENERAL POINTS

#### Copyright

Where copyright in a work has not expired, unauthorised use of a substantial part of the work will infringe copyright unless the use of the work falls within one of the permitted uses considered in Chapter 6.

Authorisation for the use of the work must therefore be obtained. You should always seek to have the consent confirmed in writing. Never assume that you have obtained consent – for example, because of the circumstances which surround your use of the work. In particular, do not use the device of asking for permission and relying on a lack of response by the rights owner as giving rise to consent. Positive consent should be sought.

Consent should ideally be obtained before the copyright work is used. Although consent may be obtained retrospectively, a party who has already made use of a work and subsequently applies for consent will usually find it difficult to negotiate from a position of strength the terms on which the right is used.

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1 Eg, Edwards, S, *Rights Clearances for Film and Television Productions*, in association with the Producers’ Alliance for Cinema and Television (PACT), available from PACT.

Consent for the use of copyright will generally take one of two forms:

- (a) an assignment; or
- (b) a licence.

These terms are described in the preceding chapter.

Remember that the consent must come from the owner of copyright. Sometimes, it can be difficult to establish who the owner is. You may encounter a long chain of title to copyright, where the right has been assigned a number of times. You should also remember that the owner of copyright will not necessarily be the physical owner of the work in question, so if you want to copy film footage the fact that it is in the possession of, say, a film library does not mean that permission to borrow the film from the library equates to a copyright licence to make use of the material.

#### *Different owners for different rights*

Do not forget that, where it seems that copyright has been assigned, it may be the case that only some of the rights which make up copyright have been transferred. An assignment can transfer certain rights only and leave the rest in the hands of the copyright owner. This means that it is possible that one party may own the rights to record a musical work, whilst another party may own the rights to perform it in public or to broadcast it. We shall see that this is the position which governs the use of most musical works.

#### *Different owners for different territories*

Remember, also, that rights may be assigned to a party for a particular territory only – for example, A may own the reproduction rights in a work for the UK, but B may own them for the US. If you wish to make copies of the work in both territories, you may need to obtain consents from A and B.

#### *The terms of the licence/assignment*

When permission is obtained for use of a copyright work, take care to ensure that you obtain the rights that you need. Consider the following points:

- (a) does the licence/assignment cover the uses to which I want to put the copyright work?;
- (b) is the grant of rights specific enough?;
- (c) is the consent subject to conditions, and if it is, can you fulfil those conditions? For example, sometimes the copyright owner may want prior approval of the finished work before he will confirm consent to use the copyright work. Is that feasible? If not, can you renegotiate?;

- (d) is the term/duration of the licence (and where the assignment is to take effect for a certain period only, the assignment) sufficient for your needs?;
- (e) is the territory covered by the licence/assignment sufficient?;
- (f) if you are taking a licence, consider whether it gives you sufficient exclusivity to make use of the work.

## **Moral rights**

As we have seen, moral rights cannot be transferred, but they may be waived. The contents of the waiver are considered in the preceding chapter. If you wish to make use of a copyright work, you should check whether the moral rights have been waived and whether any waiver is wide enough for your purposes. If this is not the case, consider whether to take a waiver from the moral rights owner. Remember that the right of paternity (the right to be identified as the author) must be asserted before it may be enforced by the author.

Where you do take a waiver, or where there is a waiver in place, check that it is wide enough for your purposes. Is it revocable or irrevocable? Is it conditional or unconditional? Does the waiver cover the use which you wish to make of the work? Remember that the waiver may be for certain purposes only and expressed to be in respect of only some of the moral rights, for example, it may waive the right to object to derogatory treatment of the work, but assert the right to be identified as the author. If you do not wish to identify the author, you would need to negotiate a separate waiver for that moral right. Consider also whether the waiver will be effective in the territories in which you wish to make use of the work.

### *Example*

You wish to commission A to write a screenplay which is to be based on B's novel. The novel is a literary work for copyright law purposes. Assume that the term of copyright has not expired.

The making of a screenplay based on the book is an adaptation of the book for the purposes of s 21 of the Copyright, Designs and Patents act (CDPA) 1988. This is one of the acts of primary infringement identified in the CDPA.

As an initial step, you would need to identify the copyright owner. It may be B, or B may have assigned his copyright to a third party – perhaps to his publisher (although, in the book publishing industry, an assignment of copyright would be unusual). If B has died, the copyright will form part of his estate and may have been bequeathed to a relative or to an unconnected party. Having carried out the necessary checks, you establish that B is the copyright owner.

You must therefore obtain permission from B to adapt his novel. If you fail to do so, you will infringe copyright.

On these facts, a licence is generally the most appropriate method of obtaining permission. As you are unlikely to want your screenplay to be in competition with another screenplay from the same source, you will probably seek an exclusive licence to adapt the screenplay. The effect of such a licence would be that no one else (including B himself) could adapt the novel into a screenplay during the licence period in question in the territory covered by the licence. You would need to satisfy yourself that the licence period and its territory are sufficient for your purposes.

B will also own moral rights in the book. Have these been waived? If they have not, consider how appropriate they are for your purposes.

If B has asserted his right to be identified as author of the novel, are you happy to identify him as such in the film credits? Under s 77 of the CDPA, the right of paternity extends to identifying the author of the work from which an adaptation is made. If you are not happy to do this, then you should seek an unconditional irrevocable waiver of this right from B.

Consider also the right of integrity. This is the right to object to derogatory treatment of a copyright work. In this case, B has a right to object to derogatory treatment of his novel. Treatment includes an adaptation of a work. If it could be said that the adaptation which you commission is prejudicial to B's honour or reputation, then the screenplay will infringe B's right of integrity. In order to protect your position as fully as possible, you should check whether B has waived his right of integrity. If not, persuade him to do so and ensure that the waiver is sufficient to meet your needs. The waiver should be unconditional and irrevocable.

## **Clearance of music and sound recordings**

### *Music*

The profitability of the music industry is largely dependent on effective exploitation of copyright. Unsurprisingly, the music industry has evolved a very systematic procedure for the exploitation of copyright.

In Chapter 6, reference was made to a number of collecting societies which administer rights on behalf of their members. The term 'administer' means that they grant licences and collect royalties for distribution amongst their members. The existence of the societies simplifies the clearance procedures. A potential user of a piece of music will not need to identify and locate a composer of a piece of music to obtain permission to record the music. Instead, the collecting society can be contacted and arrangements made for

use of the music in accordance with the rates which prevail throughout the industry.

Remember that a new arrangement of music will be a copyright work in its own right. Therefore, permission may be needed on behalf of the original composer and a separate permission from the arranger. Similarly, take care where a musical work is out of copyright (that is, copyright has expired in the work). A new arrangement of an out of copyright work attracts a separate copyright. You may therefore have to clear rights in music which was composed hundreds of years ago.

The two relevant collecting societies which operate in relation to music are the Performing Right Society (PRS), and the Mechanical Copyright Protection Society (MCPS).

### *The PRS*

The Members of the PRS assign part of their copyright to the society, namely, the right to control the *broadcast, public performance and inclusion in cable programme services* of a work. These rights are often referred to as the 'performing rights'. The term 'performing rights' is not to be confused with *performers' rights*, which belong to the musicians who actually perform a piece of music. Performers' rights are described at the end of Chapter 6.

The PRS licenses the rights and collects and distributes licence fees on behalf of its members. Licensees prepare and submit information to the PRS about the music which has been broadcast, transmitted or performed. The PRS uses that information to carry out the distribution of royalties.

A broadcaster who wishes to broadcast a piece of music which is in copyright, should contact the PRS for permission to do so. Note that it is the *broadcaster* who contacts the PRS, rather than the maker of the programme. Similarly in the case of a film, the cinema where a film which contains music is to be exhibited, rather than the filmmaker, should obtain a PRS licence.

Where the owner of copyright is not a member of the PRS, it must be approached direct for permission to broadcast, transmit or perform the music. Where the broadcaster wishes to broadcast a song, the owner of copyright in both the music and lyrics should be contacted, one or both of whom might be a member of the PRS.

In Chapter 6, we saw that, in the music industry, copyright in music and lyrics is usually assigned by the author to a music publisher. It is generally the publisher who gives permission to make use of the work where the relevant rights are not administered by a collecting society. The publisher's role is to promote the work of the composer and to generate revenue from the exploitation of the work.

The PRS has reciprocal agreements in place with its equivalent overseas collecting societies, which enable the PRS to collect revenue from overseas use of its members' music for distribution amongst its members.

### *The MCPS*

The MCPS administers the right to *record* music and to *issue copies of the record* to the public. Unlike the PRS, members of the MCPS do not assign their rights to the MCPS. Instead, the MCPS acts as agent for its members.

The right to record encompasses what are referred to as '*synchronisation rights*'. Synchronisation rights are the rights to copy music and synchronise it with pictures – for example, the montages which broadcasters often show at the end of sporting events consisting of highlights of the event set to appropriate music. Synchronisation is essentially a specialised form of copying. The recording of the music by the broadcaster would infringe the copyright owner's rights if permission were not obtained.<sup>2</sup>

Where the copyright owner is not member of the MCPS, it should be approached directly for permission to record and issue copies of the record to the public. This will involve inquiries about the identity of the copyright owner. In Chapter 6, we saw that, in the music industry, copyright in music and lyrics are usually assigned by the author to a music publisher. It is generally the publisher who gives permission to make use of the work where the relevant rights are not administered by a collecting society.

MCPS has reciprocal agreements in place with its equivalent overseas collecting societies which enable MCPS to collect revenue from overseas recording of its members' music for distribution amongst its members.

### *Blanket agreements*

Most national broadcasters have 'blanket agreements' in place with the PRS and MCPS. The terms of each broadcaster's blanket agreement varies, but in each case the blanket agreement is intended to eliminate the need for the broadcaster to seek specific permission in advance of broadcast for each particular piece of music used. The broadcaster completes 'music cue sheets' setting out details of the music which is broadcast, and submits the sheets to the collecting society. The music cue sheets generally set out the title of the music, the name of the composer (or arranger), the performers, details of any sound recording used, the timing of the music used and details of how it was used.

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2 But note that, where music is commissioned for recording onto a soundtrack of a film or television programme, the synchronisation rights will be administered by the PRS rather than the MCPS.

### *Sound recordings*

Readers will recall from Chapter 6 that the sound recording of a piece of music is a separate copyright work from the music. Care must therefore be taken to ensure that permission is sought not just for the use of the music, but also for the use of the sound recording of the music. As a general rule, copyright in a sound recording belongs to the record company which released the recording.

Because a sound recording is a different copyright work to the musical work itself, copyright may subsist in a recording of a work which is itself out of copyright, for example, because copyright has expired. Similarly a sound recording whose copyright has expired may attract a new copyright where the recording is re-mastered (digital re-mastering is much in vogue today).

There is a collecting society which administers copyright in sound recordings: Phonographic Performance Ltd (PPL).

PPL administers the rights in the *broadcast, public performance and inclusion in a cable programme service* of sound recordings. It is essentially the equivalent body to PRS – but for sound recordings rather than music. PPL also administers the right to record the recording for inclusion in a television programme or film – the so called ‘dubbing right’. (The synchronisation rights and the dubbing rights are essentially the same thing, except synchronisation relates to *music* whereas dubbing relates to the *sound recording*.)

Most broadcasters have blanket agreements in place with PPL. If the owner of rights in a sound recording is not a member of PPL, it should be approached directly for permission to make use of the sound recording.

### *Moral rights*

The author of music and lyrics own moral rights in their work. As these cannot be assigned, any waivers or permissions relating to the moral rights should be obtained directly from the authors. There is no collecting society administering moral rights on behalf of authors. The reader is referred to the earlier part of this chapter for comments about clearing moral rights.

### *Performers and music and sound recordings*

Performance rights subsist in both the musical work itself and the sound recording of that work. Some of the performance rights may have been assigned (namely, the reproduction right, the distribution right and the rental and lending right), usually to the relevant record company. The owner of the performance rights – whether musician or record company – should be contacted for permission to make use of the performance.



Some performance rights may not be assigned, although they may be waived. Details of these rights were set out in Chapter 6. As with moral rights, checks should be made as to whether an adequate waiver has been given. If not, a waiver or permission should be sought from the musician in question.

Where a musician is a member of the Musicians' Union, the union may grant consent on behalf of their member to the exploitation of their performance rights under the terms of the relevant MU agreement. If the musician is not a union member, he/she must be contacted directly.

At the time of writing, performers do not own moral rights in their performances, although there are proposals to introduce such rights into UK law, as indicated at the end of Chapter 6.

### *Music promotional videos*

There is a collecting society in place to administer copyright in music videos. The collecting society is a sister organisation of PPL, called Video Performance Ltd (VPL). Most of the members of VPL are record companies. Note that VPL licenses the use of music promotional *videos* (that is, the 'film' and 'sound recording' to use the terminology of the CDPA), but it does not license the music or the lyrics used in the video. These are separate copyright works, and must be cleared in accordance with the procedures described above.

The musicians' rights in music videos are usually dealt with in the musicians' contract with the record company, meaning that it is generally not necessary to obtain a separate consent to the broadcast, transmission or performance of the video.

## **Clearing film clips**

Where a film or programme maker wishes to make use of a film clip in which copyright has not expired, he must obtain permission from the owner of the various copyrights which make up the clip.

As a preliminary step to clearing rights, he should identify the various copyrights which make up the film. This will involve consideration, not just of the film, but of the underlying rights within the film. These are likely to be:

- (a) the film itself. Copyright in a film may be infringed by the reproduction of a single image from the film;<sup>3</sup>
- (b) the film may be a dramatic work if it is a work of action capable of being performed in public.<sup>4</sup> The reader is referred to Chapter 6 for more information about films as dramatic works. Copyright in the dramatic

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3 CDPA 1988, s 17(4).

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

work will be infringed where a substantial part of the work is reproduced. From a clearance point of view, copyright in both the film and dramatic work may be wise. The owner of the copyright in the film may not be the owner of copyright in the dramatic work, especially as the confirmation that a film can be a dramatic work was made in a very recent case with the result that it is possible that copyright in the dramatic work may have been overlooked in any assignment of rights in the film;

- (c) if the clip contains music, the music must be cleared in accordance with the procedures set out above;
- (d) copyright in the screenplay must be considered – has a substantial part of the screenplay been reproduced? Remember that substantiality is a qualitative test. A very small part of the screenplay may have been reproduced in terms of quantity, but if it formed a substantial part of the film in terms of its quality, the unauthorised use may infringe copyright.

In addition, the performance right of the actors should be cleared. There is a standard form agreement in place between the Producers Alliance for Cinema and Television (PACT) and Equity governing consents in relation to the exploitation of performers' rights in footage.

The same principles will apply in relation to the clearance of clips which make up television footage. Remember that broadcasts and cable service transmissions are copyright works in their own right, and so consents will be required for the use of those works.

### **Clearance issues and insurance cover**

A producer of a television programme or film may insure against the risk of legal liability for content of the programme or film by way of an *errors and omissions policy* (an E&O policy). Not all broadcasters have E&O cover, and relatively newspaper publishers carry such cover. This is partly because the amount of premium payable for such cover can be prohibitively expensive, especially where the insured has a bad track record of being sued, but also because insurance cover can compromise the editorial independence of the media. The insurers are likely to want to reserve the right to demand changes to a production where it perceives a danger of liability. If the insured refuses to make such changes, it will face the risk of being placed off cover.

The cover provided for an E&O policy extends beyond copyright, moral rights and performers' rights infringement. The policy will cover matters such as liability for defamation or malicious falsehood, other forms of intellectual property infringement and many of the other issues considered in Part 1 of this book.

The policy generally insures for payment of legal costs and damages arising from a claim which relates to content (subject to an excess figure). In order for the cover provided by the policy to be effective, the producer generally has to comply with clearance procedures put in place by the insurer. Common examples of such procedures are:

- (a) insurer/insurer's legal adviser reads script or screenplay before production to eliminate at an early stage material which infringes legal rights, for example, defamatory material;
- (b) a copyright report must usually be obtained to check whether the film or television programme will infringe copyright in any relevant territories. There are a number of specialist copyright research agencies that compile such reports. The costs of the reports are generally included in the insurance premium payable by the insured;
- (c) similarly, a title report must normally be obtained confirming that the chosen title does not infringe any rights in any relevant territory;
- (d) where music is used, all relevant licences should be obtained in writing in advance of production;
- (e) written agreements must be in place between the producers and all authors, performers and persons who are providing material for the production, for example, set designers. Written permission for the exploitation of their work must be obtained. Where extracts from copyright works are to be used, for example, quotations from literary works, written licences for the use of the work should be in place in advance of production;
- (f) the insured generally reserves the right to check both the actual shooting script and rough cuts as the production develops for possible areas carrying the risk of legal liability and to demand changes which it feels are necessary to avoid the risk. There is an obvious risk that this can lead to tension between insurer and insured during the production process.

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