

© Basics

1. Introduction

Copyright is a bundle of the following exclusive rights:

- a. Reproduction.
- b. Distribution.
- c. Rental.
- d. Performance.
- e. Communication (to the Public).
- f. Adaption.

Note that viewing and reading are *not* exclusive rights so that just as it is not infringing to read a book offline, nor is it infringing to read something online. See Case 360/13 *PRCA v Meltwater*. The Copyright Designs and Patents Act 1988 (CDPA) governs the law in the UK and is a very comprehensive code. There is also substantial harmonization within the EU and internationally under the main copyright treaties—the Berne Convention and the TRIPS accord.

2. Protection

Copyright protects the fixation of ideas and not ideas themselves—see *Baigent & Anor v Random House* [2007] EWCA Civ 247. This is known as the idea/expression

dichotomy. The law of confidence may protect ideas in certain circumstances however a degree of fixation is also required. Copyright is not therefore a monopoly and *independent creation is a defence* to infringement—if it can be proved—and often there are evidential difficulties in proving the date of creation. There are no formalities and no registration is necessary to protect copyright in a work—the protection of the law applies automatically on creation of a qualifying work. There is also no need to use the © sign or to post a copy to gain protection.

The term for most copyright is now the life of the creator plus 70 years. Ownership of copyright arises through the act of fixation by the author—unless the author is an employee when the employer will own the copyright subject to any contrary agreement (§11 CDPA). The producer and director jointly own the copyright in a film. Where there is no relationship of employment, even for commissioned works—the ownership will remain with the author and this is the position with all consultants and freelancers. In short—other than in an employment relationship—copyright stays with the author unless there is a contract assigning it. See *Ray v Classic FM* [1998] FSR 622. This applies equally to modern photographs. Where however, a person commissions a photograph for a private or domestic purpose, then that person has a moral right not to have copies issued to the public.

Moral rights also apply to and protect copyright protected works; these are rights of paternity, attribution and integrity, see §77 CDPA.

Different types of copyrights subsist in different works, literary, dramatic, musical or artistic tend to be governed by the same rules, while there are differences in relation to photographs and films and software and database content (in addition to the database right which can protect the database itself). For recorded music and broadcasts, the producers and broadcasters have their own copyright in the recording or broadcast—often called entrepreneurial copyrights. Similarly performers have their own performance rights. Press publishers are also to have their own entrepreneurial copyright with a 20 year term. In Europe software is not, as a rule, patentable and is mainly protected by copyright. The functionality of a software programme is not however protected by copyright but the user interface and other elements maybe.

3. Infringement

To infringe copyright, a person who is not the owner, and is not acting with his consent, will do an act protected by and within the scope of one of the six exclusive rights—which are reserved to the owner. In relation to the reproduction right, this requires copying of a substantial or original

part. See Case C-5/08 *Infopaq International*

A/S vs Danske Dagblades Forening (clipping service infringed by the copying and reproduction of just 11 words of a news article). The test to be applied is whether the work is the "author's own intellectual creation" and the creator of the work must express his "creative ability in an original manner by making free and creative choices", and thus "stamp his personal touch".

Actual copying is required for infringement of the reproduction right however if copying is disputed, proof of similarity together with access to the original (opportunity) will create a rebuttable presumption of copying which must be answered. See *Baigent & Anor v Random House* [2007] EWCA Civ 247. Remedies include injunctions and damages.

Unlike the US, the UK does not have a flexible fair use defence, instead it has 3 main very narrowly defined "fair dealing" defences in the Copyright Designs and Patents Act 1988 (CDPA):

1. Private study or research of literary, dramatic, musical or artistic works for non-commercial purposes (§29).
2. Criticism or review of a work already in the public domain with acknowledgement, (§30(1)).
3. Reporting of current events with acknowledgement (note this does not apply to photographs) (§30(2)).

Other defences include:

4. Quotation with acknowledgement (§30 A)).
5. Parody (§30(4)).
6. Consent/Licence.
7. Temporary and transient electronic copies (§28).
8. Time-shifting of a broadcast or cable programme (§70) and private performances (§19) and recordings thereof (§182).
9. Public interest may also be a defence (see *Ashdown v Telegraph* [2001] EWCA Civ 1142).

There is no general personal use defence and a proposed personal format shifting defence

was quashed.¹ All defences are subject to the values in the Berne Convention's three step test, which includes a consideration of whether the use unfairly competes with the copyright owner's commercial exploitation.

10. Licences

Traditionally all of the exclusive rights were licensed together however, in reaction to the Napster litigation, Lawrence Lessig, developed the Creative Commons Licence, whereby different rights are licensed or retained separately –signified by the symbol CC. This is now also common in other licensing scenarios.

11. Linking

Linking or embedding copyright works already online is not infringing as there is no *new public*. See *Svenson C -466/12* and *Bestwater C348/13*. This can be the case, even where the original upload was infringing provided the linker/embedder did not know and if for a business, had checked, see Case C150/16 *GS Media*.

¹ Proposed as §28B, this was quashed following judicial review in *British Academy of Songwriters, Composers and Authors and Others v Secretary of State for Business* (No.2) [2015] EWHC 2041 (Admin) 17 July 2015.