

# **Practical copyright for library and information professionals**

Paul Pedley



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Published by Facet Publishing  
7 Ridgmount Street, London WC1E 7AE  
www.facetpublishing.co.uk

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*British Library Cataloguing in Publication Data*

A catalogue record for this book is available from the British Library.

ISBN 978-1-78330-061-7

First published 2015

Text printed on FSC accredited material.



Typeset from author's files in 10/13 pt Aldine 401 and Humanist 521 by  
Flagholme Publishing Services.

Printed and made in Great Britain by CPI Group (UK) Ltd,  
Croydon, CR0 4YY

# Acknowledgements

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I would like to thank Ruth MacMullen for reading through a draft of the book, and providing feedback, comments and suggested improvements to the text.

As a member of LACA - the Libraries and Archives Copyright Alliance - since 1998, I also want to acknowledge how this has helped me develop my knowledge of copyright. The LACA membership brings together copyright experts across what some might refer to as the 'GLAM' sector, namely galleries, libraries, archives and museums.

**Paul Pedley**

# **Disclaimer**

Paul Pedley is not a lawyer and is not able to give legal advice. The contents of this book do not constitute legal advice and should not be relied upon in that way.

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# Abbreviations

ALCS	Authors' Licensing and Collecting Society
ARROW	Accessible Registries of Rights Information and Orphan Works
BBC	British Broadcasting Corporation
BECS	British Equity Collecting Society Ltd
CC0	Creative Commons Zero (works which are free of copyright restrictions)
CDPA	Copyright, Designs and Patents Act 1988
CILIP	Chartered Institute of Library and Information Professionals
CLA	Copyright Licensing Agency
CJEU	Court of Justice of the European Union (sometimes referred to as the ECJ – the European Court of Justice)
CMO	collective management organization
DACS	Design and Artists Copyright Society
DRM	digital rights management
DVD	digital versatile disk
ECJ	European Court of Justice (see also CJEU)
EIDR	Entertainment Identifier Registry (a unique identifier for movie and television assets)
EIFL	Electronic Information for Libraries
ERA	Educational Recording Agency
EWCA	England and Wales Court of Appeal (law reports)
EWHC	England and Wales High Court (law reports)
EWPC	England and Wales Patent County Court
IPIC	[Washington Treaty on] Intellectual Property in Respect of Integrated Circuits
IPO	Intellectual Property Office
ISAN	International Standard Audiovisual Number
ISBD	International Standard Bibliographic Description
ISBN	International Standard Book Number
ISMN	International Standard Music Numbering system

ISRC	International Standard Recording Code
ISSN	International Standard Serial Number
ISWC	International Standard Musical Work Code
MOOC	Massively Open Online Course
NLA	NLA Media Access (formerly known as the Newspaper Licensing Agency)
OHIM	Office for Harmonization in the Internal Market
PLS	Publishers Licensing Society
PPL	Phonographic Performance Limited
PRCA	Public Relations Consultants Association
PRS	Performing Right Society
RCUK	Research Councils UK
s, ss	section, sections (of a statute)
TLIB	Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives
TPM	technical protection measures
TRIPS	Trade Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
VIAF	Virtual International Authority File
VIPs	visually impaired persons
VLE	virtual learning environment
WATCH	Writers, Artists and Their Copyright Holders
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization
WWW	World Wide Web

# Glossary of terms

*Acquis communautaire* – the accumulated body of European Union law.

**Commercial purpose** – The legislation doesn't define 'commercial purpose'.

The European Court of Justice has the final say. The test is whether the research is for a commercial purpose, not whether it is done by a commercial body (see the wording of recital 42 of the Copyright Directive 2001/29/EC).

**Copyleft** – the term 'copyleft' refers to the practice of making a work freely available, where there is a requirement for all modified and extended versions of the work to be freely available in the same way.

**Copyright *acquis*** – the body of copyright law of the European Union.

**Derogatory treatment** – is when the treatment of a work amounts to distortion or mutilation of the work, or is otherwise prejudicial to the honour or reputation of the author or director.

**Disabled person** – (for the purposes of the copyright exceptions in sections 31A–31BB of the CDPA 1988) means a person who has a physical or mental impairment which prevents the person from enjoying a copyright work to the same degree as a person who does not have that impairment, and 'disability' is to be construed accordingly (see CDPA 1988 s31F).

**Educational establishment** – (the meaning of 'educational establishment' for the purposes of the copyright exceptions is set out in a series of descriptions which can be found in the schedule to SI 2005/223.)

**Embedded works** – A copyright-protected work may include other works within it. If, for example, a book includes photographs, these will have their own separate rights.

**Exhaustion** – the principle of 'exhaustion' provides that a copyright owner's right to control copies of their work 'exhausts' on its first sale. So, for example, if someone were to buy a copy of a paperback book they would be at liberty to sell that to a second-hand book dealer. However, this principle does not automatically translate across into the digital sphere (see Section 5.9).

**Fair dealing** – a legal term which is used in order to establish whether a use of material protected by copyright is lawful, or whether it infringes copyright.

**Industrial property** – a useful way of collectively referring to patents, trade marks and designs, although the phrase is rarely used nowadays.

**Judicial proceedings** – includes proceedings before any court, tribunal or person having authority to decide any matter affecting a person's legal rights or liabilities.

**Lending** – means making a copy of the work available for use, on terms that it will or may be returned, otherwise than for direct or indirect economic or commercial advantage.

**Library** – in the context of the library exceptions means a library which is publicly accessible, or the library of an educational establishment; neither of these should be conducted for profit. Museums and galleries also benefit from the library exceptions. (The full definition can be found in s 43A, CDPA 1988.)

**Made available to the public** – means that the work has been made available by any means, including:

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

**Original** – In order for a work to qualify for copyright protection it must be 'original', and whilst the term is not defined in the CDPA 1988, case law indicates that to qualify for protection it must be the result of the expenditure by the author of skill, judgement and experience, or labour, skill and capital.

**Orphan work** – is the term that has come to be used in order to describe a work where the rights holder is difficult or even impossible to identify or locate.

**Parliamentary proceedings** – 'includes proceedings of the Northern Ireland Assembly or of the Scottish Parliament or of the European Parliament and Assembly proceedings within the meaning of section 1(5) of the Government of Wales Act 2006'. (s 178, CDPA 1988)

**Private study** – does not include any study which is directly or indirectly for a commercial purpose.

**Rental** – means making a copy of the work available for use, on terms that it will or may be returned, for direct or indirect economic or commercial advantage.

**Rights management information** – means any information provided by the copyright owner or the holder of any right under copyright which identifies the work, the author, the copyright owner or the holder of any intellectual property rights, or information about the terms and conditions of use of the

work, and any numbers or codes that represent such information.

**Royal Commission** – includes a Commission appointed for Northern Ireland by the Secretary of State in pursuance of the prerogative powers of Her Majesty delegated to him/her under section 7(2) of the Northern Ireland Constitution Act 1973.

**Statutory inquiry** – means an inquiry held or investigation conducted in pursuance of a duty imposed or power conferred by or under an enactment.

**Substantial part** – the term is not defined in copyright law. It isn't just a question of quantity, but also of quality. The phrase has been interpreted by the courts to mean a qualitatively significant part of a work even where this is not a large part of the work in terms of quantity.

**Sufficient acknowledgement** – an acknowledgement identifying the work in question by its title or other description, and identifying the author unless:

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

# Introduction

Copyright is an issue which information professionals ignore at their peril. They need to be aware of the potential risks and their consequences, and how those risks can be minimized. The problem is: how do they keep up to date with the law, and what aspects of copyright law are of most relevance to them?

Keeping up to date with copyright law can be very time-consuming. I invest a lot of time in monitoring copyright developments in the UK, Europe and beyond (such as initiatives from WIPO, the World Intellectual Property Organization). And indeed, now that the UK's copyright legislation has had a significant overhaul, the focus has switched to European and wider international developments. This book is a distillation of the knowledge that I have built up, and it will hopefully be of benefit to people who aren't able to monitor dozens of RSS feeds, Twitter feeds, blogs and the like covering copyright on a daily basis.

It is only on very rare occasions that copyright law can be considered to be a matter of black and white. Instead it is often a matter of opinion. This book reflects my understanding of the law. It is important to bear in mind that I am not a lawyer, and that what it contains does not constitute legal advice. The book aims to be a core text for library and information professionals, covering the copyright issues which are of the greatest importance for carrying out their day-to-day work. In view of the many changes to copyright law that took place in 2014 it is important for practitioners to be able to refer to an up-to-date text.

During the course of 2014 a number of significant amendments were made to the Copyright, Designs and Patents Act 1988: important changes were made to the copyright exceptions and a number of measures were introduced to help address the problem of how to use orphan works legitimately.

The changes to the copyright exceptions will undoubtedly be of benefit to many librarians:

- The vast majority of the copyright exceptions could previously be overridden by contracts and licences, whereas now many – but certainly not all – of the exceptions have clauses within them which expressly forbid contract override.



- There was a lack of certainty around copyright declaration forms and the use of electronic signatures, whereas now a signature isn't required and the forms can be completed electronically.

The extent to which libraries, museums and archives are able to benefit from the changes to the copyright exceptions will in many ways be dependent upon their attitude towards risk. Here are some examples of how libraries and museums have made use of the new or amended exceptions:

- A national library has provided sound recordings to individuals who aren't able-bodied and who are unable to visit in person.
- A number of libraries in the higher education sector are now content-mining sound recordings.
- A national museum has used the dedicated terminals exception to provide access to digitized papers which are too fragile to be displayed.
- Museums are using the preservation exception to make digital copies of their collection items.
- The library of a musical conservatoire has used the illustration for instruction exception to reproduce excerpts of sheet music and audio tracks and upload these to the VLE.
- A number of libraries have been receiving copyright declaration forms electronically, which has been of particular benefit to distance learners.

### **Who is this book for?**

The book has been written primarily for library and information professionals, regardless of sector. It will also be relevant for students on information-related courses, as well as for authors and publishers who are interested in how library and information staff use their works. The book has been written primarily with people in the United Kingdom in mind. But it will also be of interest to librarians in Europe, and common law countries such as the USA, Australia, Canada and New Zealand.

The most likely use of the book is as a point of reference for librarians to be able to look up a particular topic and to see what the book says about that particular issue (such as mass digitization of copyright-protected works, embedding, e-book lending, or the extent to which publicly accessible libraries can rely on the exception for making available content on dedicated terminals).

★ Throughout the book, particularly useful resources are highlighted with shading and a star in the margin, thus.

The book contains an index, a glossary of terms, a list of abbreviations, and listings of relevant legislation and case law. It also has quite a few figures and tables which try to summarize the key points on topics such as the copyright implications of MOOCs, how digital rights management systems affect libraries, the interface

between copyright exceptions and licences, a summary of the educational exceptions and key points about ‘commercial purpose’ and about the meaning of ‘substantial’.

## **What is covered?**

The main body of the book consists of eight chapters:

- Chapter 1 – General principles
- Chapter 2 – Legislative framework
- Chapter 3 – The copyright exceptions
- Chapter 4 – Licensing
- Chapter 5 – Digital copyright
- Chapter 6 – Orphan works
- Chapter 7 – Copyright compliance
- Chapter 8 – Copyright for the corporate sector.

The first two chapters serve to set the scene – Chapter 1 sets out the basics of copyright, while Chapter 2 outlines the various component parts which together make up the legislative framework within which we operate.

In order to copy material people need permission, and this can be achieved either through the use of a copyright exception or through having a licence in place, and so there are separate chapters on each of those topics. Together, Chapters 3 and 4 could be said to form the core of the book. Chapter 3 looks in depth at the copyright exceptions. It draws out the points of most relevance to library and information professionals. Chapter 4 looks at the use of copyright licences to cover copying activities where it isn’t possible to rely on a copyright exception.

Chapter 5, on digital copyright, examines issues which are relevant to the use of content in the digital world. For example, it considers the exclusive right to communicate a work to the public as the right only applies to communicating a work to the public by electronic means. Drawing upon relevant case law it looks at topics such as the use of hyperlinks as well as the embedding of content, archiving and preservation of digital content, mass digitization, digital goods and the exhaustion of rights, as well as rental and lending of digital content.

Chapter 6 runs through the available solutions for copying orphan works: one solution is free of charge in the form of an exception that covers the copying of orphan works by publicly accessible libraries. Another solution has a price-tag attached, namely the use of licences. And the cost of a licence depends upon the type of the intended usage – whether it be for a commercial or a non-commercial purpose. The chapter considers how these solutions work in practice, and the boundaries or limits on the extent to which these solutions can be relied upon.

Chapter 7 looks at copyright compliance. Staying within the law is both a legal

and also an ethical issue for information professionals. The chapter considers topics such as what constitutes an infringement of copyright, how copyright should be considered as a matter of risk management and how different copying activities need to be graded according to level of risk. Another important topic considered in the chapter relates to liability – who would be liable for an infringement of copyright: would it, for example, be the employing institution who would be pursued or an individual librarian? The chapter also looks at how to trace rights owners and describes the copyright clearance process. It also considers what happens when things go wrong, and in particular the question of dispute resolution.

Information professionals working in the corporate sector are very constrained in terms of what they can copy under the copyright exceptions, and this is true for a number of reasons. For example, a number of the exceptions limit the copying to where it is being done for a non-commercial purpose; there are a number of exceptions which are only available for the benefit of publicly accessible, not-for-profit libraries. I have written Chapter 8 specifically for corporate information professionals, because of the particular difficulties that they face.

### **What is not covered**

One topic which isn't covered by the book is open access. To do it justice, one could write an entire book about open access. It is of most relevance to the academic sector, and because I don't work in the academic sector I believe that copyright experts working at universities and further education colleges would be able to write about open access in a more informed way, and could do so far better than myself.

**Paul Pedley**

## General principles

This chapter runs through the basics of UK copyright law and equips the reader with a framework for analysing copyright problems. The chapter covers:

- 1.1 What copyright is (1.1)
- 1.2 What copyright protects (1.2)
- 1.3 How one obtains copyright protection (1.3)
- 1.4 How long copyright lasts (1.4)
- 1.5 Copyright ownership (1.5)
- 1.6 Who is an ‘author’? (1.6)
- 1.7 Economic and moral rights (1.7)
- 1.8 How copyright fits within the wider range of intellectual property rights (1.8)
- 1.9 A framework for analysing copyright problems (1.9).

### 1.1 What copyright is

Copyright protects the works of authors and performers for a specific period of time. During the period that the protection is in place, the owner of the rights in a work is able to exploit the work in any way they wish.

Copyright isn’t a single right, but is instead a whole bundle of rights that are given to the creators of various types of works. It includes, for example, reproduction right, the right of communication to the public and the right to make an adaptation or translation of the work.

Copyright is intended to encourage and stimulate the creation of works by writers, artists, dramatists, musicians, photographers, film producers and so on by providing safeguards which protect and reward their creativity.

One might think of copyright as a negative right, because it is the right to prevent other people from copying the work.

## 1.2 What copyright protects

In order for a work to be protected by copyright it must be:

- 1 original
- 2 fixed
- 3 one of the types of works that are given protection (see 1.2.3)
- 4 by a UK citizen, or have had its first publication in the UK (see a fuller explanation at 1.2.4).

### 1.2.1 Original

The word 'original' is not defined in the Copyright, Designs and Patents Act 1988. However, case law helps to clarify what is meant by the word 'original'. Phrases that have been used by judges in various copyright cases<sup>1</sup> to explain the requirement of originality show that to qualify for protection it must be the result of the expenditure by the author of skill, judgement and experience, or labour, skill and capital. There is, however, a definition of the word 'original' with regard to a database, and that can be found in the CDPA 1988 section 3A:

a literary work consisting of a database is original 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

National Archives, 2015

### 1.2.2 Fixed

Copyright does not protect ideas. It only protects works which have been expressed in a material form. In other words, copyright protects works where they have been fixed in a form that makes it possible for them to be copied. If, for example, someone has the idea of taking a picture of a sunset they cannot use copyright law to protect the idea as such. However, if they were to take a picture from their back bedroom window of the sun setting, that specific picture would be protected.

### 1.2.3 The types of work that are protected

Copyright protects works that can be categorized as being one of the following:

- literary works
- dramatic works
- musical works
- artistic works

- sound recordings
- films
- broadcasts.

Copyright law only protects works where they fit within these categories. In the case of software, for example, copyright protects an author's original expression in a computer program as a 'literary work'. The source code can therefore be viewed as a human-readable literary work, which expresses the ideas of the software engineers who authored it. Not only the human-readable instructions (source code) but also binary machine-readable instructions (object code) are considered to be literary works or 'written expressions', and are therefore also protected.

In addition to the categories or species listed above, copyright also protects the typographical arrangement of published editions. Copying the typographic arrangement would involve making a facsimile copy of the page layout or arrangement.

#### **1.2.4 UK nationality, domicile or residence or first publication in the UK**

In order for a work to be protected under the UK's copyright laws, the author's nationality, domicile or residence must be in the UK or else the work must have been first published in the UK (this would include where it has been simultaneously published elsewhere within 30 days). The legal requirements regarding authorship are set out in section 154 of the CDPA 1988. As a result of the UK's commitments under international agreements such as the Berne Convention for the Protection of Literary and Artistic Works 1886 the UK does protect the works of authors from other countries (see the last paragraph of Section 1.3 below).

### **1.3 How one obtains copyright protection**

Copyright is automatic. As soon as a work is created and meets the requirements for protection (that it is original, that it is fixed in a material form, that it is by a British citizen or was first published in the UK, and that it fits into the protected categories or species) the work will automatically be protected by UK copyright law. This is one of the fundamental differences between copyright and 'industrial property' (a collective term which has fallen out of regular use, but which refers to patents, trade marks and designs). In the case of copyright the protection arises automatically and there is no registration process involved. Indeed, compulsory registration would contravene the Berne Convention of 1886, which is the main instrument governing copyright at an international level, whereas in the case of industrial property the rights have to be applied for. With industrial property the

completion of a registration process is normally required, along with payment of a fee in order to receive protection.

The other major difference between copyright and industrial property rights relates to international protection. In the case of patents, trade and service marks, and design rights, one applies for protection in one country – in this case it would be protection within the UK. In the case of patents, there is no such thing as a single international or worldwide patent. Normally it is necessary to file separate patent applications in each of the countries for which protection is sought. However, there are a number of systems which help to make the process of applying for protection in multiple countries as efficient as possible. These include the filing of an international Patent Cooperation Treaty patent application or a European patent application; and it will soon be possible to apply for patent protection throughout most of the European Union using the Unified Patent system.

In the case of copyright a work is automatically protected around the world as a result of the Berne Convention, which has as one of its main principles the idea of mutual protection. Each of the Berne Union's 168 member countries is required to protect works from other countries to the same level as it protects works originating in its own country. This is sometimes referred to as the principle of national treatment.

Part I of the Copyright, Designs and Patents Act 1988 confers copyright on the creators of certain works. Part II of the Act confers rights on performers and persons having recording rights in relation to a performance. The performances that are protected by performance right are dramatic performances, musical performances, readings or recitations of literary works and the performance of a variety act. It means that anyone other than the performer who holds the rights requires their consent in order to exploit the performances. This means that live performances are protected, as are broadcasts of the performance and other recordings of the performance.

There is a statutory instrument which deals with the protection of works from other countries. The protection depends on which countries are signed up to the international treaties and conventions, most notably the Berne Convention; and as a result a new statutory instrument is published every so often containing a consolidated list of the countries to which the reciprocal protection provisions apply. The current statutory instrument covering the protection of works from other countries is The Copyright and Performances (Application to Other Countries) Order 2013: SI 2013/536 as amended by the Copyright and Performances (Application to Other Countries) (Amendment) Order 2015: SI 2015/216. However, if section 22 of the Intellectual Property Act 2014 on recognition of foreign copyright works and performances is brought into force it will amend sections 154 and 155 of the CDPA 1988 and will provide for the automatic extension of certain copyright provisions of the CDPA to nationals of,

and works first published in, other countries without the need to include an extensive list of countries and territories in an order. The section inserts references to a large number of those countries and territories into the body of the CDPA wherever relevant. In many cases protection will automatically extend to new signatory states without the need for a new order to implement the UK's obligations under the relevant treaty.

## 1.4 How long copyright lasts

If anyone were to ask how long copyright lasts that may seem a straightforward question, but as with so many areas of copyright law, the answer isn't quite as straightforward as the question might at first suggest. The rule of thumb is that copyright lasts for the lifetime of the author plus 70 years. This is true not just for the UK but also for the rest of the European Economic Area, which consists of the 28 member states that form the European Union plus Norway, Iceland and Liechtenstein.

When calculating the date of copyright expiry a point to bear in mind is that the date on which copyright ends isn't 70 years after the precise date on which the author died, but is rather 31 December of the 70th year after the year in which the author died. So if an author died on 15 March 1956, the copyright would expire on 31 December 2026.

There are some exceptions to copyright lasting for the life of the author plus 70 years. They include:

- Crown and parliamentary material: where the work has been published commercially copyright lasts for 50 years from date of creation; and in the case of Crown material, for works which haven't been published commercially copyright lasts for 125 years from the end of the calendar year in which the work was made
- typographical arrangement of published editions: 25 years from the end of the calendar year in which the edition was first published
- computer-generated works: 50 years from the end of the calendar year in which the work was made
- broadcasts: 50 years from the end of the calendar year in which the broadcast was made
- unpublished literary, dramatic and musical works which were still unpublished when the CDPA 1988 came into force in 1989 are in copyright until 2039.

The lifetimes of copyright protection for various categories of work are summarized in Table 1.1.

At the end of October 2014 the government published a consultation on reducing the duration of copyright in certain unpublished works and the 2039 rule



<b>Category</b>	<b>Materials included in category</b>	<b>Lifetime of copyright protection</b>
Literary works	Written works. Includes lyrics, tables, compilations, computer programs, letters, memoranda and e-mails.	Author's life plus 70 years after death.
Dramatic works	Plays, works of dance and mime, and also the libretto of an opera.	Author's life plus 70 years after death.
Musical works	Musical scores.	Author's life plus 70 years after death.
Artistic works	Paintings, drawings, diagrams, maps, charts, plans, engravings, etchings, lithographs, woodcuts, photographs, sculptures, collages, architectural works and works of artistic craftsmanship.	Author's/creator's life plus 70 years after death.
Computer-generated works	Literary, dramatic and musical works.	50 years from the end of the calendar year in which the work was made.
Databases	Collections of independent works, data or other materials which (a) are arranged in a systematic or methodical way, or (b) are individually accessible by electronic or other means.	Full term of other relevant copyrights in the material. In addition, there is a database right for 15 years where a substantial investment has been made in the selection and arrangement of the contents of the database; and a further substantial investment would trigger another 15-year period of protection.
Sound recordings	Regardless of medium or the device on which they are played.	<p>The length of term of copyright in a sound recording depends on whether or not it has been published (released) or has been communicated to the public (for example, played on the radio):</p> <ul style="list-style-type: none"> <li>• If a recording is not published or communicated to the public, copyright lasts for 50 years from when the recording was made.</li> <li>• If a recording is published within 50 years of when it was made, copyright lasts for 70 years from the year it was first published.</li> <li>• If a recording is not published within 50 years of when it was made, but it is communicated to the public, copyright lasts for 70 years from the year it was first communicated to the public.</li> <li>• If a recording is first communicated to the public within 50 years of when it was made and is then published at a later date (but within 70 years of its first communication to the public), copyright lasts for 70 years from the year it was first published.</li> </ul>

<b>Category</b>	<b>Materials included in category</b>	<b>Lifetime of copyright protection</b>
Films	Any medium from which a moving image may be reproduced.	70 years from death of whoever is the last to survive from: principal director, author of dialogue, composer of film music.
Broadcasts	An electronic transmission of visual images, sounds or other information (see CDPA 1988 s6).	50 years from when broadcast first made.
Published editions	The typography and layout of a literary, dramatic or musical work.	25 years from first publication.
Crown copyright	All works 'made by Her Majesty or by an officer or servant of the Crown in the course of his [or her] duties' (s 163, CDPA 1988).	Published work: 50 years from the end of the year when first published. Unpublished work: 125 years beyond the year in which the work was created.
Parliamentary copyright	Works made by or under the direction or control of the House of Commons or House of Lords.	50 years from the end of the calendar year in which the work was made.

see [www.gov.uk/government/consultations/reducing-the-duration-of-copyright-in-certain-unpublished-works](http://www.gov.uk/government/consultations/reducing-the-duration-of-copyright-in-certain-unpublished-works). Some very old unpublished works are still protected by copyright in the UK, even though their authors may have died hundreds of years previously. In 2013 Parliament approved powers to remove these complex rules so as to reduce the duration of copyright in certain unpublished works. However, the IPO did not implement the proposed changes to the term of protection during the first quarter of 2015 as planned. This was on human rights grounds – specifically relating to the protection of property, which is set out in Article 1 of the European Convention on Human Rights. The article says that ‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.’ Reducing the copyright term from 2039 to life plus 70 would deprive rights holders of income which they were expecting to continue to receive until 2039.

## **1.5 Copyright ownership**

In general, the author of a work is the first owner of any copyright in it.

Where the work is made by an employee in the course of his/her employment, the employer is the first owner of any copyright in the work, in the absence of a written agreement to the contrary. This only applies to employees, not to contractors, so the mere fact that a work has been commissioned and paid for does

not give the ownership of the copyright to the commissioning party. So, if an employee on behalf of his or her company were to pay an external consultant to write a report, the mere fact that the consultant has been paid doesn't mean that the consultant is no longer the holder of the copyright in that report. Copyright issues need to be thought through right from the outset, before any commissioning contract is signed. It is advisable for a clause in the commissioning agreement with the external consultant to be included where they agree to either transfer the copyrights in any outputs from the commissioned work to the company who are paying for the work to be done or alternatively to license the commissioning company to use the work in a number of different ways, such as to be able to load a copy of the report onto its organizational intranet.

It is also worth bearing in mind that copyright is an intellectual 'property' right, and that property ownership is subject to change. For example, the rights could be sold and/or signed over to someone else. This is an important point to take into account when one is trying to trace a rights holder – the first owner of copyright is not necessarily the current owner.

## 1.6 Who is an 'author'?

'Author', in relation to a work, means the person who creates it. That person shall be taken to be:

- for sound recordings – the producer
- for films – the producer and the principal director
- for broadcasts – the person making the broadcast
- for computer-generated literary, dramatic, musical or artistic works – the person by whom the arrangements necessary for the creation of the work are undertaken.

If the identity of the author is unknown – and cannot be ascertained by reasonable inquiry – or, in the case of a work of joint authorship, none of the authors is known, then these are taken to be works of **unknown authorship**. Where a work is produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors, then these are known as works of **joint authorship**.

## 1.7 Economic and moral rights

The author, as first owner of copyright in the work, has a number of exclusive rights. These can be grouped into economic rights and moral rights. The economic rights consist of the following rights:

- to copy the work
- to issue copies of the work to the public
- to rent or lend the work to the public
- to perform, show or play the work in public
- to communicate the work to the public
- to make an adaptation of the work or to do any of the above in relation to an adaptation.

Copyright is not one right but is instead a bundle of rights which includes the distribution right, the reproduction right and the exclusive right to communicate the work to the public by electronic means. It is important to remember this when undertaking rights clearance, as there may be more than one rights holder involved.

The rights owner has the exclusive right to exploit each of the economic rights, and if anyone other than the rights owner undertakes any of the protected activities without permission, that would constitute a primary infringement. It isn't necessarily the case that anyone wishing to get the required permission to copy the work would have to approach the rights holder directly. Permission can take a number of different forms:

- a copyright exception or permitted act set out in the CDPA 1988 could provide the required permission
- a licence from a collecting society which has been given a mandate by the rights owner to act on their behalf
- or, it could be the written permission of the rights holder.

In addition to the economic rights, the author has four moral rights (section numbers are from the Copyright, Designs and Patents Act 1988):

- 1 the right of paternity, ss 77–79
- 2 the right of integrity, s 80
- 3 the right to object to false attribution, s 84
- 4 the right to privacy s 85.

The **right of paternity**, as set out in sections 77–79 of the CDPA 1988, is the right of the author to be identified as such. This right cannot be infringed unless the author has asserted his/her right to be identified as the author of the work. This is why within the first few pages of a book there will often be a form of words along the lines 'Joe Bloggs asserts his right to be identified as the author of this work'. The publishing contract between the author and a commercial publisher should also contain a clause setting out how the right of paternity will be asserted. There are a number of exceptions to the paternity right. For example, it does not apply to computer programs, designs of typefaces and computer-generated works.

Nor does it apply to works generated in the course of employment.

The **right of integrity**, as set out in section 80 of the CDPA 1988, is the right of the author to prevent or object to derogatory treatment of his/her work. This is especially relevant in the electronic environment, where it is easy to manipulate images or text in art or word-processing packages.

The **right to object to false attribution**, as set out in section 84 of the CDPA 1988, is the right of persons not to have a literary, dramatic, musical or artistic work falsely attributed to them, nor to have a film falsely attributed to them as the director.

The **right to privacy**, as set out in section 85 of the CDPA 1988, is the right of the author to withhold certain photographs or films from publication. Under the UK Act this would apply to a person who commissions the work but decides not to have it issued to the public, exhibited or shown in public.

Moral rights can be waived in writing; however, they cannot be assigned or transferred. But the rights of paternity, integrity and privacy can be 'willed' to someone.

In the consultation paper on taking forward the Gowers recommendations on the copyright exceptions<sup>2</sup> the IPO says:

The UK's legislation contains enforceable moral rights provisions but other options, such as passing off, trade mark infringement, or an action for injurious falsehood may be used to protect business reputations and an action for defamation may also be used to protect the reputation of an individual.

Computer programs are excluded from the moral right to be identified as the author (section 77) or the moral right to object to a derogatory treatment of a work (section 80).

## **1.8 How copyright fits within the wider range of intellectual property rights**

There are four main types of intellectual property:

- 1 patents
- 2 trade marks
- 3 design right
- 4 copyright.

In addition, there are a few other areas of law which are relevant: the law of 'passing off' and the law of confidence, which covers both confidential information and privacy. An action for breach of confidence can be used in order to protect trade secrets and government secrets and also to protect personal secrets.

### 1.8.1 Patents

Patents are for inventions, new and improved products and processes that are capable of industrial application and which involve an inventive step. Patents have to be applied for. They are costly to obtain and especially to maintain if they are renewed for the full period of protection, with the renewal fees increasing yearly throughout the lifetime of the patent. Their maximum lifetime is 20 years from the date when the patent was first applied for. In order to be patentable an idea must be:

- **New** – not already in the public domain or the subject of a previous patent.
- **Non-obvious** – it should not be common sense to any accomplished practitioner in the field who having been asked to solve a particular practical problem would see this solution immediately. That is to say, it should not be self-evident using available skills or technologies.

and

- **Useful**, or applicable in industry – it must have a stated function, and could immediately be produced to fulfil this function.

Software is protected by copyright, and potentially it could be protected by a patent, but only where it consists of something more than a computer program, as was the case in *Symbian Ltd v Comptroller General of Patents* [2008] EWCA Civ 1066, where it was held that a substantive technical contribution was made. To determine whether there is a technical contribution, ask whether:

- technical means are used to produce a result or solve a problem, or
- the invention produces a technical result.

### 1.8.2 Trade and service marks

Trade and service marks are for brand identity of goods and services, and having trade marks allows distinctions to be made between them. Trade marks fall into two types – registered and unregistered. Registered trade marks involve a formal application procedure with associated fees and renewal fees which makes it easier to take legal action against infringers. Unregistered trade marks involve no such procedures or costs, but provide less robust protection. Trade marks are typically a symbol, image or word (although they can in some circumstances be a shape, a colour or a combination of these) that is associated with particular goods or services provided by the owner. Both types of mark can last indefinitely so long as the owner still actively uses them and, in the case of a registered trade mark, that the renewal fees are paid. The owner of a registered trade mark has the right to take legal action to prevent third parties from using their mark (or something deceptively similar) in

the course of trade. In the case of an unregistered trade mark, if the owner of a mark found that someone else was using their mark without permission, they would need to use the common law of ‘passing off’ in order to take action against them. To be successful in a passing off action, you would have to prove that:

- 1 the mark is yours
- 2 you have built up a reputation in the mark
- 3 you have been harmed in some way by the other person’s use of the mark.

### 1.8.3 Design right

Design right covers the appearance of the whole or part of a product resulting from the features of, the lines, contours, colour, shape, texture and materials of the product itself and its ornamentation. The right can last for up to 25 years from the date of filing in the case of registered designs, and will need to be renewed every five years. In the case of unregistered designs, the design right automatically protects designs for 10 years after the design was first sold or 15 years after it was created, whichever is earliest.

### 1.8.4 Copyright

Copyright protects works such as literary, dramatic, and artistic material, music, films, sound recordings and broadcasts. Within copyright there are, as we have already seen in Section 1.7, a series of economic and moral rights, and there are also a number of ‘neighbouring rights’ (rights outside copyright but which are related to it, such as performance rights).

## 1.9 A framework for analysing copyright problems

Copyright can be a complex topic. In order to avoid feeling overwhelmed by copyright questions it is useful to break things down into a number of component parts, and to consider each of these in turn. If you are faced with a copyright query in your role as an information professional, you can use the questions set out in Figure 1.1 to consider the essential issues.

It may very well seem as though these four points are stating the obvious. But they can be used as a step-by-step approach to analyse copyright problems. It is important to work through the questions one at a time in the order

- |  |
|--|
| <ol style="list-style-type: none"> <li>1 Is the work protected by copyright?</li> <li>2 Is there a copyright exception that covers my intended use of the work?</li> <li>3 Is there a licence available that would cover my intended use?</li> <li>4 Do I need to get permission from the rights owner for my intended use of the work?</li> </ol> |
|--|

**Figure 1.1**  
*A framework for analysing copyright problems*

shown in Figure 1.1, as each subsequent step follows on logically from the previous one. Working through each of the questions one by one will ensure that you have systematically considered the essential points that are required for solving copyright problems.

### 1.9.1 Is the work protected by copyright?

The first question asks whether the work to be copied is protected by copyright and therefore requires permission to copy from it, or whether the work is part of the public domain and as a result no longer subject to the restrictions of copyright.

Copyright does not protect facts, ideas, numbers or names; although a collection of facts could potentially be protected by database right.

The reference to the term ‘public domain’ relates to where a work has either been through its period of copyright protection, and is now no longer protected by copyright, or to a work which the rights owner has chosen to mark as being public domain.

To decide whether a particular work is now out of copyright it is necessary to think through the period of protection that applies to that particular work. The normal rule of thumb is ‘life of the author plus 70 years’, but bear in mind situations where the period of protection differs from the normal rule of thumb:

- Crown and parliamentary material, 50 years from date of creation
- published editions (typography), 25 years from first publication
- computer-generated works, 50 years from first creation.

There are a number of tools available to help people establish whether a work is in the public domain. Figure 1.2 lists a couple of examples.

Even if the work would still be within copyright, the next question to ask is whether the rights holder has marked the work with a public domain symbol. The Creative Commons movement has a CC0 (CC Zero) symbol (Figure 1.3 on the next page). This is a tool which

- <http://outofcopyright.eu> (the Europeana public domain calculator)
- [www.calculateurdomainepublic.fr](http://www.calculateurdomainepublic.fr) (a public domain calculator provided through a partnership between the Open Knowledge Foundation France and the French Ministry of Culture and Communication)

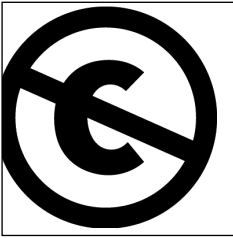
**Figure 1.2**

*Tools for identifying if a work is in the public domain*

enables the rights owner to free their work of copyright restrictions around the world. It can be used even if the work is free of copyright in some jurisdictions in order to make sure that it is treated as being free of copyright everywhere. (Section 4.10 looks at the Creative Commons licences in more detail.)

The CC0 symbol allows copyright holders to place works in the public domain to the extent legally possible, worldwide. Rights holders can waive all of their





**Figure 1.3**

*Public domain symbol (Work found at <https://creativecommons.org/about/downloads>. Licensed under a Creative Commons Attribution 4.0 international licence <https://creativecommons.org/licenses/by/4.0>)*

copyrights and related or neighbouring rights, including their moral rights, to the extent that these can be waived.

You would need to be confident that where the CC0 symbol is given on a work that it has been placed there by the rights holder, or with their permission. An individual cannot waive rights to a work either that they do not own or where they do not have the permission of the owner.

It is important to distinguish between public domain and what is publicly accessible. There is often a perception, especially in view of the considerable body of material that is available on the internet, that anything which is publicly accessible can be copied and used without restriction. Researchers may well try to justify their copying on the basis that a work is available on the web and there is no copyright symbol on the work and no copyright statement on the website. But copyright is automatic, and so even if the rights owner hasn't put a copyright statement on their work, if it is original, fixed, and fits into the various categories that are protected by copyright law, then it will have the protections of copyright law.

### 1.9.2 Is there a copyright exception that covers my intended use of the work?

If you have established that the work you wish to copy from is still protected by copyright, the next step would be to think through whether your intended use of the work would be covered by one of the copyright exceptions or permitted acts. The main copyright exceptions used by library and information professionals are considered in detail in Chapter 3. Even if there is an exception available it may be that your intended use still falls outside the scope of the permitted act you were thinking of, because of something qualifying or limiting the scope of the exception, for example where:

- it only covers use for a non-commercial purpose; or
- it only covers use by publicly accessible libraries, archives, museums, galleries and the libraries of educational establishments that are not for profit; or
- it is only available where the use would be considered to be fair dealing.

All of the copyright exceptions are subject to a three-step test:

- 1 only applies in special cases
- 2 doesn't conflict with a normal exploitation of the work, and
- 3 doesn't unreasonably prejudice the legitimate interests of the rights holder.

The three-step test comes from Article 9 of the Berne Convention, and also appears in Article 5(5) of the Copyright Directive (2001/29/EU, also known as the ‘InfoSoc’ Directive).

### 1.9.3 Is there a licence that covers my use?

Where your intended use of the work is not covered by one of the copyright exceptions, the next step would be to consider whether a licence agreement would provide the solution. Licence agreements may allow you to use a work for one or more specified purposes and may apply only for a limited time or in specific places. A number of different types of copyright licence are available. They include:

- licences from collective licensing societies such as the Copyright Licensing Agency, NLA Media Access, the Educational Recording Agency or the Performing Right Society.
- an orphan works licence. In October 2014 a licensing regime for the use of orphan works was introduced. This could be a licence directly from the Intellectual Property Office, or in due course it is anticipated that there will be licences available through collecting societies where they have been authorized by the IPO to operate an orphan works licence for a particular category of material.
- a Creative Commons licence (see Figure 1.4). As there are a number of different Creative Commons licences available, it is important to check whether the licence terms covering the work you have in mind would cover your intended use. For example, are you planning to use the work for a commercial purpose, because not all of the Creative Commons licences allow this.
- one of the licences available within the UK Government Licensing Framework: the main licence under the government licensing framework is the Open Government Licence, but there is also a non-commercial government licence, and a Charged Licence; or
- the Open Parliament Licence.

Chapter 4 explores copyright licensing in more detail (see Section 4.10 for Creative Commons licences).

Attribution (CC BY) Attribution No Derivatives (CC BY ND) Attribution Non Commercial Share Alike (CC BY NC SA) Attribution Share Alike (CC BY SA) Attribution Non Commercial (CC BY NC) Attribution Non Commercial No Derivatives (CC BY NC ND)
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**Figure 1.4** *Creative Commons licence types*

### 1.9.4 Do I need permission from the copyright owner for my use?

Having worked through the first three questions, the final point to consider is whether it is necessary to contact the rights holder directly in order to get their permission to copy the work.

As part of the process of getting permission from the rights holder, ask the following questions:

- Have I got the permission in writing?
- Have I got permission from the right person?
- And have they provided a warranty and an indemnity to back up the assertion that they are indeed the rights owner?

Chapter 7 on copyright compliance covers the process of getting permission from the copyright holder in more detail.

### Notes

- 1 Cases which explore the meaning of 'original' include *Ladbroke v William Hill* [1964] 1 All ER 465, *Macmillan v Cooper* (1923) 93 LJPC and *Interlego v Tyco* [1988] RPC 343.
- 2 Intellectual Property Office (2007) *Taking Forward the Gowers Review of Intellectual Property: proposed changes to copyright exceptions*, <http://bufvc.ac.uk/copyright-guidance/mlr/index.php/site/436>.