



CREATE Working Paper 2018/09 (October 2018)

Digitising the Edwin Morgan Scrapbooks: Copyright Guidance Notes (2nd Edition)

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CREATE Working Paper Series DOI: 10.5281/zenodo.1442591

These notes were created as part of the 'Digitising the Edwin Morgan Scrapbooks' project, available at www.digitisingmorgan.org. This edition has been edited by K. Patterson; the first version is available as R. Deazley, K. Patterson & P. Torremans, *Copyright Guidance Notes (1st Edition)* (2017): www.digitisingmorgan.org/resources

The project was supported by the RCUK funded Centre for Copyright and New Business Models in the Creative Economy (CREATE), AHRC Grant Number AH/K000179/1.

Digitising the Edwin Morgan Scrapbooks:

Copyright Guidance Notes (2nd Edition)

Ronan Deazley, Kerry Patterson & Paul Torremans

Edited by Kerry Patterson

1.	COPYRIGHT IN TITLES AND NEWSPAPER HEADLINES by Ronan Deazley and Kerry Patterson	3
2.	COPYRIGHT IN THE TYPOGRAPHICAL ARRANGEMENT OF PUBLISHED EDITIONS by Ronan Deazley and Kerry Patterson	9
3.	COPYRIGHT IN PSEUDONYMOUS AND ANONYMOUS WORKS by Ronan Deazley and Kerry Patterson	12
4.	COPYRIGHT IN NEWSPAPER ARTICLES by Ronan Deazley and Kerry Patterson	16
5.	COPYRIGHT IN PHOTOGRAPHS: DURATION by Ronan Deazley and Kerry Patterson	23
6.	COPYRIGHT IN PHOTOGRAPHS: OWNERSHIP by Ronan Deazley and Kerry Patterson	29
7.	USING INSUBSTANTIAL PARTS OF A COPYRIGHT PROTECTED WORK by Ronan Deazley and Kerry Patterson	36
8.	COPYRIGHT ACROSS BORDERS by Paul Torremans, with Ronan Deazley and Kerry Patterson	41
9.	MORAL RIGHTS: ATTRIBUTION by Ronan Deazley and Kerry Patterson	48
10.	MORAL RIGHTS: FALSE ATTRIBUTION by Ronan Deazley and Kerry Patterson	54
11.	MORAL RIGHTS: INTEGRITY by Ronan Deazley and Kerry Patterson	57
12.	MORAL RIGHTS: THE RIGHT TO PRIVACY IN CERTAIN PHOTOGRAPHS AND FILMS by Ronan Deazley and Kerry Patterson	66

INTRODUCTION

These twelve Notes explore copyright issues commonly encountered in digitisation projects, and are designed for use by cultural heritage institutions. Written by specialists in copyright and archives, they should be regarded as guidance and not legal advice. They are designed for users in the UK.

The Notes should be accessible for those without a law background, but contain legal references to give them enough weight to be of use at all levels of decision making. Each document provides a legislative context and outlines practical implications, including examples from the Edwin Morgan Scrapbooks.

1. COPYRIGHT IN TITLES AND NEWSPAPER HEADLINES

Ronan Deazley and Kerry Patterson

1.1. Introduction

What are the legal implications for digitising newspaper headlines and other titles? This guidance provides the legal background to copyright protection in titles and newspaper headlines, discussing the definition of a literary work and with reference to relevant cases.

1.2. In Practice

As there is no definitive piece of UK copyright law that refers to titles and headlines, a decision on digitising such items requires being aware of significant legal cases and making a risk judgement. The date the headline or title was created will be relevant, and the influence of European copyright rulings on UK copyright law has been significant.

Date work created	Relevant Legal Cases	Implications	Risk Level of copying headlines
Before 22 December 2002	<i>Francis Day, Shetland Times, Fairfax Media Publications, Meltwater</i>	<p>In theory a newspaper headline may be capable of protection but in general they will not be sufficiently substantial to justify a claim to protection.</p> <p>All decisions must be made on a case-by-case basis, but prior to <i>Meltwater</i>, all attempts to establish copyright protection in a title or a newspaper headline in the UK or Australia were unsuccessful.</p>	No risk or very low risk
After 22 December 2002	<i>Meltwater, Infopaq</i>	<p>Headlines are capable of being literary works, whether independently or as part of the articles to which they relate.</p> <p>However, a headline will only be protected if it is original in the <i>Infopaq</i> sense, and whether an individual newspaper headline meets that standard will depend on the case. All decisions must be made on a case-by-case basis, but remember that the concept of the author's own intellectual creation is not necessarily a threshold that is easily met.</p>	Low to medium risk

1.3. Why 22 December 2002?

Decisions of the European Court of Justice on the definition of an original work only apply to works created after the relevant harmonising Copyright Directive. For authorial works (other than computer programs, photographs and databases) this date is 22 December 2002, when the *Information Society Directive 2001* came into force.

1.4. Definition of a Literary Work

The term 'literary work' does not imply literary merit or style.¹ Literary works include those things we normally think of as literature such as novels, short stories and poetry as well as the ordinary and the banal: listings of stock exchange prices, chronological tables, logarithm tables.

When problems have arisen in deciding whether or not something is a literary work, the courts have tended to rely on the test set out in *Hollinrake v. Truswell* (1894) in which the Court of Appeal suggested that to qualify as a literary work, the work must provide 'either information or instruction, or pleasure, in the form of literary enjoyment'.

1.5. Legislative Background

Literary works first received statutory protection in the UK under the *Statute of Anne* 1710. Today, they are protected under s.1(1) of the *Copyright Designs and Patents Act* 1988 (the CDPA). The CDPA defines literary works to include 'any work, other than a dramatic or musical work, which is written, spoken or sung' (s.3(1)), and this definition includes:

- a table or compilation (other than a database)
- a computer program
- preparatory design material for a computer program
- a database

The CDPA states that to qualify for protection a literary work must be 'original' (s.1(1)(a)). Under UK law, judicial decisions on the concept of originality have not always been consistent. However, the courts are generally agreed that if the author expended labour, skill and judgment in the production of the work, the work should be copyright-protected. This is often referred to as the *sweat of the brow theory*. Within the UK the threshold for protection traditionally had been set at a very low level such that even the expenditure of *non-creative* skill and labour could result in a work attracting copyright protection.

Since the 1990s, a succession of European directives specifically adopted a higher standard in determining what was original or not. Both the *Software Directive* and *Database Directive* stated that a computer program or a database would only be protected if the work was original in the sense that it was the 'author's own intellectual creation'. Similarly, Article 6 of the *Term Directive* set out that: '[p]hotographs which are original in the sense that they are the author's own intellectual creation shall be protected'.

There is a growing consensus that the European Court of Justice (the ECJ) has established the concept of 'an author's own intellectual creation' as *the* benchmark for satisfying the

¹ See, e.g., the comments of Lord Evershed in *Ladbroke (Football) Ltd v. William Hill* (1964), at p.281.

originality criterion in relation to all types of authorial works, and not just computer programs, databases and photographs. The key decision of the ECJ in this regard is *Infopaq International A/S* (2009) discussed below.

This new standard only applies to works created after the protection of a particular type of work had been harmonised within Europe. These dates are:

Computer programs	After 1 January 1993
Photographs	After 1 July 1995
Databases	After 11 March 1996
All other types of literary, dramatic, musical and artistic works (including newspaper articles)	After 22 December 2002 (in accordance with the <i>Information Society Directive</i>)

1.6. Relevant Legal Cases

Typically, the titles of books, plays, songs, films, and so on, have not been afforded copyright protection as literary works in themselves. For example, claims for protection were rejected for the following:

- *Splendid Misery* for a book (*Dick v. Yates (1881)*)
- *The Licensed Victuallers' Mirror* for a newspaper (*Licensed Victuallers' Newspaper Co v. Bingham (1888)*)
- *Nellie the Elephant* for a song (*Animated Music Ltd's Trade Mark [2004] ECDR 27*)
- *Opportunity Knocks* for a TV gameshow (*Green v. Broadcasting Corp of New Zealand [1989]*)

In *Francis Day v. Twentieth Century Fox* (1940) the claimants (Day) sought damages for the unauthorised use of their song title *The Man Who Broke the Bank at Monte Carlo*. The defendants had used the song title as the title of their 1935 film, starring Ronald Colman and Joan Bennett. The dispute reached the House of Lords.

Lord Wright commented as follows: '[I]n 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 particular cases 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 ... But this could not be said of the facts in the present case.'

The House of Lords rejected the claimant's argument in this particular instance but left open the possibility that an appropriately literary or substantive title might qualify for copyright protection.

Lord Hamilton made similar comments in *Shetland Times v. Wills* (1997) a case that specifically concerned newspaper headlines. He considered it 'arguable' that a newspaper headline *might* constitute a literary work 'since the headlines at issue (or at least some of them) involve eight or so words designedly put together for the purpose of imparting

information'. The case never progressed to a full trial, however, so no final determination was ever made about whether any of the headlines in question were copyright-protected.

One case in which the argument about the copyright status of newspaper headlines did proceed to full trial was *Fairfax Media Publications* (2010), from the Federal Court of Australia. Although an Australian decision, *Fairfax* is important in that Justice Bennet, the presiding judge, engaged in an extensive review of all relevant British and Australian authorities on this issue. Bennet concluded that '[h]eadlines generally are, like titles, simply too insubstantial and too short to qualify for copyright protection as literary works. The function of the headline is as a title to the article as well as a brief statement of its subject, in a compressed form ... It is, generally, too trivial to be a literary work.'

Bennet conceded that, in theory, a headline might exhibit such extensive and significant character as to attract copyright protection, but continued that, while the majority of headlines are short factual statements of the subject of an article, '[t]he addition of a pun does not, of itself ... convert such statements into literary works'.

The Infopaq case

Infopaq International A/S v. Danske Dagblades Forening (2009) concerned a media monitoring business, *Infopaq*, that scanned newspapers on a daily basis to identify and summarise articles of interest to its clients. Their media monitoring process involved the automated copying of eleven-word extracts of text from relevant newspaper articles. The European Court of Justice was asked for guidance as to whether this automated copying might constitute copyright infringement.

The decision of the ECJ is notable for two reasons.

First, the Court set out that copyright only applies to a literary, dramatic music or artistic work that is original 'in the sense that it is its author's own intellectual creation' (para.37). In other words, the Court standardised the test for originality as a criterion for copyright protection across Europe.

Second, the Court determined that parts of a copyright work will enjoy copyright protection so long as 'they contain elements which are the expression of the intellectual creation of the author of the work' (para.39). The Court continued that individual sentences *or even parts of sentences* from a literary work, such as a newspaper article, would be protected by copyright 'if that extract contains an element of the work which, as such, expresses the author's own intellectual creation' (para.48). As such, the copying of an eleven-word extract from a newspaper article without permission might constitute infringement, depending on the nature of the extract.

After Infopaq: the Meltwater case

In *Newspaper Licensing Agency v. Meltwater* a British court, for the first time, expressly acknowledged that newspaper headlines were protected by copyright as free-standing literary works. The High Court decision in *Meltwater* was handed down by Mrs Justice Proudman in 2010, and approved by the Court of Appeal in 2011.

Referring to *Fairfax Media Publications* (2010) Proudman commented that '[e]ven though Bennet J's analysis is persuasive as a historical analysis of the law any historical perspective has for the purposes of this Court been overtaken by the decision of the ECJ

in *Infopaq*.' In short, in Proudman's opinion, the *Infopaq* decision had changed the legal landscape on this issue. Headlines, she noted 'involve considerable skill in devising and they are specifically designed to entice by informing the reader of the content of the article in an entertaining manner. / In my opinion headlines are capable of being literary works, whether independently or as part of the articles to which they relate.'

In determining whether a specific headline was copyright protected, she continued, the only real test to apply was whether the headline was original in the *Infopaq* sense. In other words, did it constitute the author's own intellectual creation?

Proudman's decision was upheld on appeal, Lord Justice Jackson noting that it was 'plainly correct'.

The *Infopaq* effect

Infopaq has had a curious, somewhat counterintuitive, impact on the landscape of British copyright law as it applies to titles and newspaper headlines.

Before *Infopaq*, case law on the concept of originality was not always consistent in the UK but the courts were generally agreed that so long as the author expended labour, skill and judgment in the production of the work, the work should be copyright-protected. That is, even the expenditure of *non-creative* skill and labour could result in a work attracting copyright protection.

Following *Infopaq*, non-creative skill and labour will *not* be sufficient to satisfy the criterion of originality. That is, a higher threshold has been established regarding originality, such that only works that are the author's own intellectual creation will enjoy copyright protection. But at the same time as establishing this higher standard, titles and newspaper headlines – works that were typically thought too insubstantial and too short to qualify for copyright protection within the UK – have, for the first time, been extended copyright protection by the courts, so long as they can be considered original.

1.7. Legal References

Legislation

Copyright Designs and Patents Act 1988 c.48 (www.legislation.gov.uk/ukpga/1988/48/)

Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L122/42 (the *Software Directive*)

Directive 93/98/EEC of October 1993 harmonizing the term of protection of copyright and certain related rights [1993] OJ L290/9 (the *Term Directive*)

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20 (the *Database Directive*)

Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (the *Information Society Directive*)

Cases

Animated Music Ltd's Trade Mark [2004] ECDCR 27

Dick v. Yates (1881) LR 18 Ch D 76

Fairfax Media Publications Pty Limited v. Reed International Books Australia Pty Limited [2010] FCA 984

Francis Day v. Twentieth Century Fox [1940] AC 112

Green v. Broadcasting Corp of New Zealand [1989] RPC 469

Hollinrake v. Truswell (1894) 3 Ch 420

Infopaq International A/S v. Danske Dagblades Forening [2009] (C-5/08)

Ladbroke (Football) Ltd v. William Hill (Football) Ltd [1964] 1 WLR 273

Licensed Victuallers' Newspaper Co v. Bingham (1888) LR 38 Ch D 139

Newspaper Licensing Agency v. Meltwater [2010] EWHC 3099 (Ch) and [2011] EWCA Civ 890 (CA)

Shetland Times v. Wills [1997] SC 316

2. COPYRIGHT IN THE TYPOGRAPHICAL ARRANGEMENT OF PUBLISHED EDITIONS

Ronan Deazley and Kerry Patterson

2.1. Introduction

When is the arrangement of printed text protected by copyright under UK law? This guidance considers the relevance of this protection for digitisation projects involving books and articles from newspapers and magazines.

2.2. In Practice

There is *no copyright* in the typographical arrangement of any edition published for the first time before 1 June 1957. It was first introduced under the 1956 Copyright Act and continued in The *Copyright Designs and Patents Act* 1988 (the CDPA). The CDPA defines a published edition as ‘a published edition of the whole or any part of one or more literary, dramatic or musical works’: artistic works are not protected. The duration of the typographical right is 25 years from the end of the calendar year in which the work was first published.

What does this mean within the context of the Edwin Morgan project and other digitisation initiatives? As Morgan’s final Scrapbook was made in 1966, the copyright protection for any printed text would have expired in 1991 at the very latest. As such, we needn’t worry about having to deal with copyright in any typographical arrangement.

However, when dealing with a clipping from material published within the last 25 years, copying the article would have to amount to copying *a substantial part* of the published edition to constitute infringement.

Put another way, when thinking about typographical copyright, given the decision in *Newspaper Licensing Agency* (2003), making a copy of an individual article from a newspaper or magazine typically can be regarded as non-infringing or, at the very least, a very low-risk activity. Only when reproducing entire pages (or more) from a newspaper or magazine might infringement of copyright in the typographical arrangement pose more of an issue.

Of course, aside from typography, one should always bear in mind that a separate copyright is likely to exist in the article itself (as a literary work), as well as any accompanying photographs or images.

2.3. Legislative Context

The protection of typographical arrangement was first introduced by the *Copyright Act* 1956 which came into force on 1 June 1957. There is *no copyright* in the typographical arrangement of any edition published for the first time before this date.

The *Copyright Designs and Patents Act* 1988 (the CDPA) provides the same scope of protection for typographical arrangement as the 1956 Act; as such the following commentary applies to all works created on or after the 1 June 1957.

Section 1(1)(c) of the CDPA states that copyright subsists in the typographical arrangement of published editions. Section 8(1) defines a published edition to mean 'a published edition of the whole or any part of one or more literary, dramatic or musical works'. Note that the protection provided extends to *literary, dramatic and musical works only*: that is, artistic works are not protected in this way.

The duration of the typographical right is limited to 25 years from the end of the calendar year in which the relevant work was first published (s.15). This is considerably shorter than the protection afforded to other types of copyright-protected work. Imagine, for example, an edition of a book is first published in 2010. The text of the book (as a literary work) will be protected for the life of the author plus 70 years after his or her death (s.12), whereas the typographical arrangement of the published edition will only be protected until 31 December 2035 (25 years from the end of the year of first publication).

The CDPA also states that 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' (s.8(2)).

Consider our example from before, the book first published in 2010. Should the publisher simply reprint the book in 2015 using the same typesetting as the first edition, the copyright in that typographical arrangement will still expire in 2035; the 2015 edition does not attract a new copyright in the typographical arrangement. If, however, the publisher issued a new edition in 2015, with entirely new typesetting, then a new copyright would arise (expiring 31 December 2040).

2.4. Relevant Cases

In *Newspaper Licensing Agency v. Marks and Spencer* (2003) the defendants (M&S) subscribed to a press-cutting service which provided the company with photocopies of items of interest to the company from national and daily newspapers.

M&S made further photocopies of these clippings for distribution within the company. The Newspaper Licensing Agency (the NLA) claimed that by making these further photocopies for internal distribution, M&S were infringing the typographical arrangement in the newspaper clippings.

M&S argued that typographical arrangement existed in the newspaper in its entirety, rather than in the individual articles that had been clipped.

In the House of Lords, Lord Hoffman observed that 'the frame of reference for the term "published edition" is the language of the publishing trade. The edition is the product, generally between the covers, which the publisher offers to the public'. That is, while each individual article may have enjoyed copyright in the text as a literary work, this did not mean that each article was a 'published edition' that qualified for typographical protection in its own right.

Put another way, with respect to newspapers and other similar publications, the typographical arrangement protected under the CDPA concerns the overall design of the newspaper and not the typography relating to each individual article. Lord Hoffman explained this in the following way:

It is not the choice of a particular typeface, the precise number or width of the columns, the breadth of margins and the relationship of headlines and strap lines to

the other text, the number of articles on a page and the distribution of photographs and advertisements but the combination of all of these into pages which give the newspaper as a whole its distinctive appearance. In some cases that appearance will depend upon the relationship between the pages; for example, having headlines rather than small advertisements on the front page. Usually, however, it will depend upon the appearance of any given page. But I find it difficult to think of the skill and labour which has gone into the typographical arrangement of a newspaper being expressed in anything less than a full page.

So, copyright will not subsist in the typographical arrangement of an individual article from a newspaper or magazine *per se*. But, copying an article might infringe the typographical arrangement of the newspaper or magazine if the article represents a substantial part of that newspaper or magazine.

In *Newspaper Licensing Agency* the House of Lords held that the photocopies of the clippings concerned did not constitute a substantial part of the newspapers from which they were taken.

2.5. Legal References

Copyright Designs and Patents Act 1988 c.48 (www.legislation.gov.uk/ukpga/1988/48/)

Copyright Act 1956 c.74 (www.legislation.gov.uk/ukpga/1956/74/contents/enacted)

Newspaper Licensing Agency v. Marks and Spencer [2003] 1 AC 551

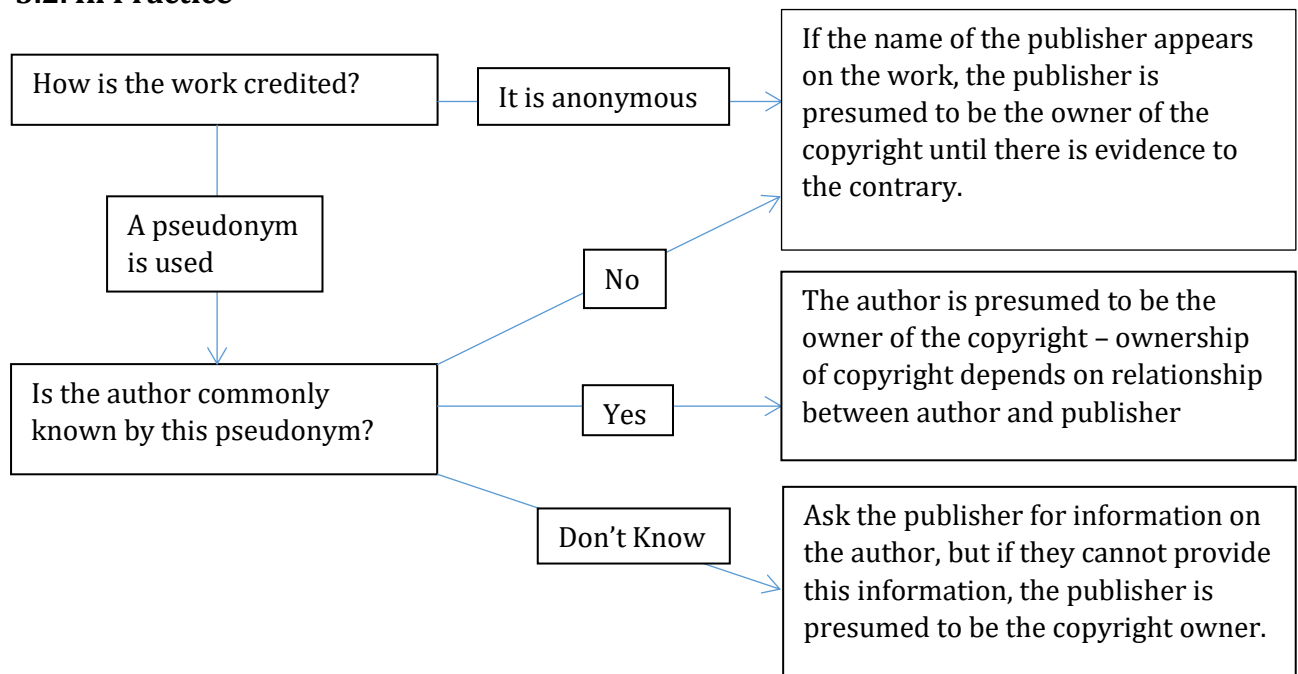
3. COPYRIGHT IN PSEUDONYMOUS AND ANONYMOUS WORKS

Ronan Deazley and Kerry Patterson

3.1. Introduction

The use of pseudonyms has a long-standing tradition in newspaper and magazine publishing. *The Economist*, for example, operates a well-established practice of editorial anonymity in that all of their columnists publish under pseudonyms such as Bagehot, Lexington and Schumpeter.² This Guidance explains what is stated in the law about the authorship of works made under a pseudonym, and about the ownership of copyright in works created both anonymously and under a pseudonym, and considers the implications these presumptions have for rights clearance projects.

3.2. In Practice



Within the pages of the Edwin Morgan Scrapbooks examined as part of this research project, there is one letter, cut from a newspaper letters page, which has been published under a pseudonym: *Navigator*. In it, the writer relates the experience of seeing a mysterious 'aircraft'/UFO over Glasgow. So, what do the legal presumptions suggest about the copyright in the letter?

Regarding the initial presumption about ownership of copyright, the key question will be: is the pseudonym a name *by which the author in question was commonly known*? And this, of course, begs many other questions: commonly known to whom? Those who purchased and read the newspaper in question? Or would it be sufficient that the identity of the writer was known to his or her professional peers? As there are no reported UK cases

² However, the names of editors and correspondents are listed on the media directory pages of *The Economist's* website. Moreover, the authors of stories and articles published by *The Economist* are allowed to note their authorship from their own personal web sites.

addressing these issues, the answer is unclear. In this case, it seems likely that the choice of the pseudonym relates to the experience detailed in the letter, and that this was not a name normally used. However, it is impossible to say this definitively as the letter is taken out of context.

Practically, an obvious step is to ask the relevant publisher whether they can provide any details about the identity of the author. However, the law provides the publisher with an incentive *not* to investigate or disclose details about the author concerned: if the publisher cannot provide any details as to the identity of the author, and in the absence of any other relevant evidence regarding the identity of the author, s.104(4) of the *Copyright Designs and Patents Act 1988* (the CDPA) suggests that the publisher should be regarded as the copyright owner of the work in question. It may be in the publisher's best interests *not* to provide any details or information about the identity of the author concerned.

3.3. Legislative Context

The *Copyright Designs and Patents Act 1988* (the CDPA) sets out the presumptions concerning the authorship of published works, and the ownership of copyright in works of unknown authorship. These presumptions apply to works created both *before and after* the 1 August 1989, when the CDPA came into force.

3.4. Presumed authorship and pseudonymous works

Section 104(2) of the CDPA sets out that 'where a name purporting to be that of the author appeared on copies of the work as published or on the work when it was made, the person whose name appeared shall be presumed, until the contrary is proved – (a) to be the author of the work'.

A similar provision was contained in the *Copyright Act 1956*. However, s.20 of the 1956 Act specifically made reference to pseudonymous works:

Where, in the case of a literary, dramatic, musical or artistic work, a name purporting to be that of the author appeared on copies of the work as published ... the person whose name so appeared (if it was his true name *or a name by which he was commonly known*) shall, in any action brought by virtue of this Part of this Act, be presumed, unless the contrary is proved, (a) to be the author of the work (emphasis added).

Section 104(2) does not contain a similar explanatory clause regarding pseudonymous works. Should we interpret this to mean that s.104(2) does not apply to works published under a pseudonym? Almost certainly not; the recognition of the use of a pseudonym instead of the author's real name is acknowledged in both European and international copyright law.

Within Europe, A.5(a) of the *Directive on the Enforcement of Intellectual Property Rights* states that 'for the author of a literary or artistic work, in the absence of proof to the contrary, to be regarded as such ... it shall be sufficient for his name to appear on the work

in the usual manner'. Moreover, the inclusion of this presumption gives effect to 'the rule laid down in Article 15 of the Berne Convention'.³

The Berne Convention is the principal international treaty on copyright in literary and artistic works (the UK first signed the Berne Convention on 9 September 1886). Article 15(1) states that 'in order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such ... it shall be sufficient for his name to appear on the work in the usual manner. This paragraph shall be applicable even if this name is a pseudonym, *where the pseudonym adopted by the author leaves no doubt as to his identity.*'

So, while s.104(2) makes no explicit reference to the use of pseudonyms, it is clear that the use of a pseudonym will give rise to a presumption of authorship so long as the name is one by which the author is commonly known (or, one that leaves no doubt as to the author's identity). Thereafter, the normal presumptions about the author being the first owner of the copyright in the work (or not) will apply.⁴

Conversely, when a pseudonym is adopted by which an author is not commonly known, or which gives rise to doubt as to the author's identity, the presumption in s.104(2) would not apply. In the absence of contrary evidence or proof, the work would fall to be regarded as, in effect, anonymous: a work of unknown authorship.

3.5. Presumptions about ownership of copyright in anonymous or pseudonymous works

For literary, dramatic, musical and artistic works published without the name of the author appearing on the work, s.104(4) of the CDPA states that if the name of the publisher appears on the work when first published, the publisher is presumed to be the owner of the copyright at the time of publication until the contrary is proved. However, this is merely a presumption; it will not apply in the face of evidence or proof of ownership lying with the author of the work (or indeed elsewhere).

What about pseudonymous works? Where the pseudonym provides a reliable (knowable) substitute for the author's name, then ownership of the copyright in the work will turn on details concerning the relationship between the author and the publisher.⁵

Where, however, the pseudonym is not a name by which the author in question was commonly known (or so long as the pseudonym leaves no doubt as to the identity of the author), the presumption in s.104(4) would appear to apply. That is, we should presume that the publisher is the first owner of the copyright in the work, subject to evidence or proof to the contrary.

³ The Preamble to the Directive also sets out that as copyright 'exists from the creation of a work and does not require formal registration, it is appropriate to adopt the rule laid down in Article 15 of the Berne Convention, which established the presumption whereby the author of a literary or artistic work is regarded as such if his name appears on the work' (paragraph 19).

⁴ See, e.g., *Newspaper Articles: Copyright Duration and Ownership*.

⁵ For further commentary on work created by employees, employed journalists and commissioned works of art, see: *Newspaper Articles: Copyright Duration and Ownership*; and, *Photographs and other Artistic Works: Copyright Duration and Ownership*.

3.6. Legal References

Berne Convention for the Protection of Literary and Artistic Works, available here: www.wipo.int/treaties/en/text.jsp?file_id=283698

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157), available here: eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004L0048R%2801%29

4. COPYRIGHT IN NEWSPAPER ARTICLES

Ronan Deazley and Kerry Patterson

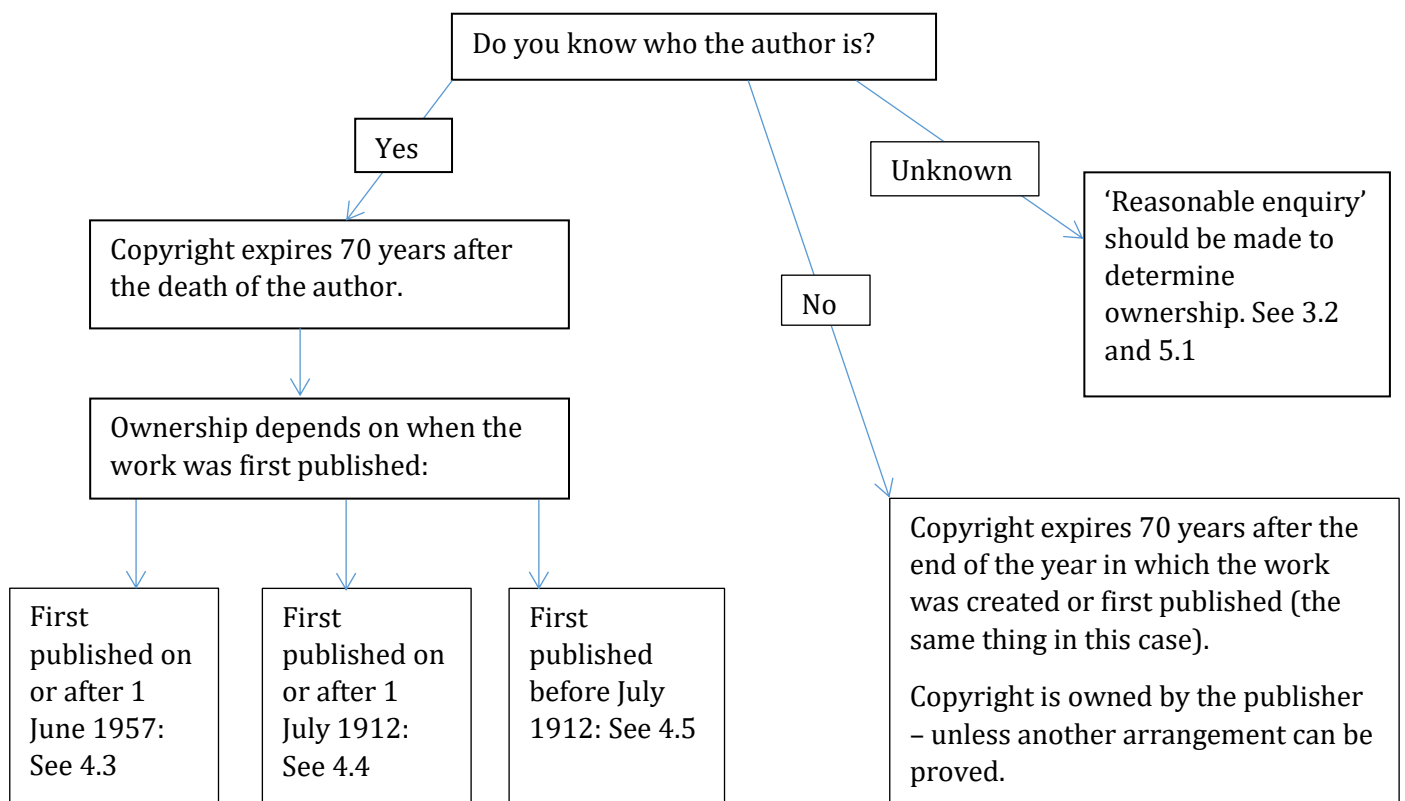
4.1. Introduction

This Guidance concerns the duration and ownership of copyright in newspaper articles. Determining who owns the copyright in historic material of this nature often requires familiarity with the provisions of several Copyright Acts. In this note, we focus on material created before 1 August 1989, that is, material created before the current copyright regime came into force: the Copyright Designs and Patents Act 1988 (the CDPA). We consider:

- the importance of establishing whether the author of the work is known or unknown and the impact this can have on the duration of protection in the work
- which legislative presumptions about copyright ownership apply to newspaper articles published at any time before 1 August 1989

4.2. In Practice

Determining the duration and ownership of copyright can be especially challenging, as work in newspapers, magazines and other similar publications was often published without authorial attribution. Whether an author can be identified will impact the duration of the copyright term in relation to that work, and understanding the nature of the relationship between the author and the publisher will be crucial in understanding who first owned the copyright in the work. The chart below will help to direct you to the relevant sections, while section 5.2 is a set of example scenarios exploring the implications of the law.



4.3. Works of unknown authorship

4.3.1. Unknown authorship: understanding the public domain

Historically, newspaper articles were often published without authorial attribution or a relevant byline, and whether the author of a work is known or remains unknown may significantly impact the duration of protection a work enjoys under the copyright regime.

The CDPA states that if a work is of unknown authorship then copyright expires 70 years after the end of the year in which the work was created (s.12(3)(a)). However, if the work is made available to the public during that 70 year period, copyright expires 70 years from the end of the calendar year in which the work was first made available (s.12(3)(b)). For newspaper articles and other similar material, the year of creation and year of first publication are likely to be one and the same. What matters though is that, once published, the term of protection expires 70 years from the end of the year of publication.

This means that any work of unknown authorship first published on or before 31 December 1946 can from 1 January 2017 be considered to be in the public domain. That is, the copyright term in the article will expire 70 years from the end of the year in which the work was first published.

Moreover, with every passing year more previously published work will enter the public domain. So, if you are reading this commentary after 2017, then the relevant date to bear in mind (in relation to published works of unknown authorship) is not 31 December 1946, but 31 December 1947. Anything published on or before this date can be regarded as now in the public domain.

4.3.2. When is a work of unknown authorship?

What steps do you need to take in order to determine whether a work is of unknown authorship?

The CDPA states that a work is of unknown authorship if the identity of the author is unknown or, in the case of joint authorship, if the identity of none of the authors is known (s.9(4)). It continues that ‘an author shall be regarded as unknown if it is not possible for a person to ascertain his identity by reasonable inquiry’ (s.9(5)), although the Act does not define what constitutes a ‘reasonable inquiry’.

For newspaper and magazine articles published without a named author, a reasonable inquiry must surely involve approaching the relevant (or parent) newspaper to see if they can provide details of authorship. If the newspaper is unable to provide any such details, and in the absence of any other relevant identifying information, one might reasonably consider these works to be of unknown authorship.

4.3.3. Ownership of copyright in works of unknown authorship

If the work of unknown authorship is still in copyright, the CDPA sets out a number of presumptions concerning copyright ownership that apply regardless of when the work was created. That is, they apply to all works of unknown authorship created both before and after 1 August 1989 (when the CDPA came into force). The relevant presumptions are set out in ss.104-106.

For literary works of unknown authorship s.104(4) states that where there is no author's name but the name of the publisher appears on a copy of the work as first published, then the publisher is *presumed* to have been the owner of the copyright at the time of publication. There is no reason to think that this presumption would not apply to unattributed articles first published in a newspaper, and the newspaper should be presumed to be the first owner of the copyright.

However, these rules about the first ownership of copyright are *presumptive* only. This means they provide you with a starting point in determining ownership in the absence of other relevant evidence. They do not apply if the copyright in the work has been proved to belong to someone other than the newspaper proprietor.

4.4. Ownership of works of known authorship

4.4.1. Duration of protection

Under the CDPA, copyright in literary, dramatic, musical and artistic works expires 70 years after the death of the author (s.12(2)). Moreover, when dealing with newspaper articles and other similar material created and first published before 1 August 1989 – when the CDPA came into force – duration of protection is governed by the standard rules set out in the CDPA (life plus 70).

4.4.2. First ownership of the work created before 1 August 1989

The first ownership of copyright in works created on or after 1 August 1989 is determined in accordance with the provisions set out in s.11 of the CDPA. However, in relation to material created *before* 1 August 1989, the first owner of the copyright in the work is determined by *the law in force at the time when the work was made or completed* (CDPA, Schedule 1, paragraph 11(1)).

Typically, the first ownership of copyright in works created before 1 August 1989 lies with the author although this is not always the case. Given the historical nature of archive material, it is important to be familiar with earlier copyright legislation. These are:

- the *Copyright Act 1956* (for work created on or after 1 June 1957)
- the *Copyright Act 1911* (for work created on or after 1 July 1912)
- the *Copyright Act 1842* (for literary, dramatic and musical works created before 1 July 1912)

As noted above, the rules about the first ownership of copyright in different types of protected work are *presumptive* rules. This means they provide you with a starting point in determining ownership in the absence of evidence of express agreement between the relevant parties. When dealing with the work of a known author produced for publication in a newspaper or magazine, it may be that a contract exists that sheds light on the ownership of the copyright in the work; if so, you should be guided by the terms of the contract. In the absence of a contract, you should be guided by the statutory rules set out in the relevant legislation.

4.3. Works of known authorship first published on or after 1 June 1957

Relevant legislative regime: the Copyright Act 1956.

The 1956 Act sets out special rules about the ownership of copyright in literary, dramatic and artistic works created by a journalist in the course of her employment for the purpose of publication in a newspaper, magazine or periodical. These presumptive rules *do not* apply to work created by freelance journalists.

Where the journalist is an employee of a newspaper or magazine proprietor, the employer is entitled to the copyright in the work but *only* in relation to publication in the newspaper or magazine. In all other respects, the copyright in the work remains with the employed journalist (s.4(2)). For example, this would enable the journalist to have their article reproduced as part of an anthology publication without the need for permission from their employer. Similarly (and of relevance to digitisation initiatives) the right to permit making the work available online would remain with the employed journalist.

Note also that this provision concerns both literary and artistic works, and so would encompass material created for the newspaper by staff writers as well as photographers and illustrators (where relevant).

And, as explained in the previous section, these presumptions apply only in the absence of relevant contract terms between the journalist and their employer.

4.4.4. Works of known authorship first published on or after 1 July 1912

Relevant legislative regime: the Copyright Act 1911.

Under the 1911 Act, in the absence of any agreement to the contrary, the right to publish the work remains with the author *other than* as part of a newspaper, magazine or periodical (s.5(1)(b)). That is, similar to the 1956 Act, only certain types of rights are retained by the newspaper publisher in relation to articles in question: publication *as part of a newspaper, magazine or periodical*. In all other respects, the copyright in the work is presumed to belong to the employed journalist, unless, that is, the contract of employment states otherwise.

Note also that this provision concerns work that constitutes ‘an article or other contribution to a newspaper, magazine, or similar periodical’; as such it would seem to encompass material created for the newspaper by staff writers as well as photographers and illustrators (where relevant).

4.4.5. Works of known authorship first published before 1 July 1912

Relevant legislative regime: the Copyright Act 1842.

The 1842 Act states that ‘where the proprietor of a review, magazine or periodical employs a person to write essays, articles or portions thereof, and such work is composed under such employment, *on the terms that the copyright therein shall belong to the proprietor*, the copyright in such work shall be the property of the proprietor as if he were the actual author thereof’ (s.18). So, where the terms of a contract of employment state that copyright belongs to the employer, then copyright belongs to the employer. If the contract is not explicit on this point, copyright is likely to remain with the author.

However, even if copyright in the work belongs to the owner of the newspaper, magazine or periodical, the 1842 Act includes an important proviso as follows: 28 years after first publication, the right of publication shall revert to the author for the remainder of the copyright term (s.18).

So, for journalistic works first published before 1 July 1912, one cannot simply assume that the copyright in works created under contract first belonged to the newspaper; that is, the contract of employment must specify that the copyright belongs to the newspaper. Moreover, even if those rights do belong to the newspaper as an employer, the copyright may well have reverted back to the author after the statutory period of 28 years.

4.5.1. Clearing Rights

When dealing with unattributed articles from newspapers and magazines, the publisher will be the only meaningful source for information regarding the authorship and ownership of the copyright work. When dealing with publishers in trying to clear rights in material of this nature, it may be helpful to ask:

- Do they know who the author of the article was and/or when the author died?
- Do they know if the author an employee of the newspaper at the time the work was composed and/or published?
- Can they provide any details about the contract of employment and copyright ownership of work created by this author/employee?

That said, our experience of contacting newspaper proprietors was not particularly productive in terms of determining who the author was and whether they were a staff writer or worked on a freelance basis. We approached seven proprietors regarding material from ten printed publications. Five of those were unable to provide either names or any information on their contractual arrangements with the journalists concerned, although permission was granted for reproduction in any case. Reasons given for not providing information were that their records did not extend back that far or that they did not have the staff or resources to check. One respondent (DC Thomson) offered an interesting anecdote that shows the complex nature of this issue:

“The reporters were employees of the newspaper and as far as we are aware copyright lies with DCT although contracts have not survived. Pay packets I believe had a statement on them, even with freelancers, that all content was copyright DCT although I’ve never seen an example of this.”

Of the two remaining proprietors contacted, one ignored the questions completely and provided only their list of expensive terms in response. The other (The Times) was able to provide the names (and contractual details) of writers not named in the printed newspaper from as early as 1912.

4.5.2. Examples

Scenario A: an article was first published in a newspaper on 19 March 1900 without any authorial attribution. You have not been able to identify the author, nor has the newspaper been able to provide any relevant information.

Who first owned the copyright in the work? This is effectively a redundant question as the work is likely to be out of copyright. That is, in accordance with the rules on the duration of copyright in works of unknown authorship – when the identity of the author cannot be identified by reasonable inquiry – copyright lasts for 70 years from the end of the calendar year in which the work was first made available to the public (s.12(3)(b)); in this case: until 31 December 1970.

Now consider two similar scenarios:

Scenario B: an article was first published in a newspaper on 19 March 1900 attributed to a named author. As the author died in 1950, you know that the article remains in copyright (until 31 December 2020).

Who first owned the copyright in the work? Without any further information, we must start with the presumptions about ownership set out in the CDPA.

Here, s.104(2) applies: it states that where a name purporting to be that of the author appears on the work as published, that person shall be presumed to be author, and it shall be presumed, until the contrary is proven, that the work was not created in the course of employment. So, we presume that the first ownership of the copyright lay with the author.

In this case, it would be in the newspaper's best interests to provide evidence of some kind to establish that they hold the rights in the published work.

Scenario C: an article was first published in a newspaper on 19 March 1900 without any authorial attribution, although you have been able to work out who the author is from other relevant sources. As the author died in 1950, you also know that the article remains in copyright (until 31 December 2020).

Who first owned the copyright in the work? As above, we must start with the presumptions about ownership set out in the CDPA although they operate differently for Scenario C than they did for Scenario B.

In Scenario C, s.104(4) applies: it states that where there is no author's name but the name of the publisher appears on a copy of the work as first published, the publisher is *presumed* to be the owner of the copyright at the time of publication. So, we presume that the ownership of the copyright at publication lay with the newspaper.

These are just presumptions, and they do not apply in the face of any contrary evidence or proof.

Now imagine that you approach the newspaper to try to establish whether ownership lies with the author, the newspaper or indeed elsewhere. Evidence about the nature of the relationship between the author and the newspaper and, if she was an employee at the relevant time, what the terms and conditions of the contract of employment reveal, will be particularly important. If the author was an employee when the work was published, and the newspaper still has a relevant contract for that employee within its own archive records, then you should be guided by the terms of the contract. What exactly does it say about who owns what rights and for how long?

However, what if the author was an employee but the contract of employment cannot be found or no longer exists?

In our scenario above this may impact any claim the newspaper has to the copyright in the work. That is, s.18 of the 1842 Act may prove decisive as to whether copyright lies with the newspaper or not. Although the copyright may have belonged to the newspaper

at the time of first publication (either because the author was an employee, or because the presumption in CDPA s.104(4) applies), s.18 of the 1842 Act provides that 28 years after first publication the right of publication reverts to the author for the rest of the copyright term. So, unless the newspaper can provide evidence – whether in the form of a contract or otherwise – that they also owned the author’s reversionary interest, one should presume that the copyright in question did indeed revert to the author 28 years after first publication.

Again, in this case, it would be in the newspaper’s best interests to provide evidence of some kind to establish that they hold the rights in the published work.

5. COPYRIGHT IN PHOTOGRAPHS: DURATION

Ronan Deazley and Kerry Patterson

5.1. Introduction

Calculating the duration of copyright protection for photographs requires consideration of the copyright regime under which the photograph was created. In this guidance we explain the characteristics of the legislation you will encounter, and consider copyright duration in photographs of unknown authorship.

5.2. In Practice

For help on calculating the duration of copyright in photographs, see flow chart 5.9 in the appendix. Dates of publication are discussed more fully in sections 3 and 4, and works of unknown authorship are discussed in section 5.

5.3. Photographs taken on or after 1 June 1957 (but before 1 August 1989)

It is important to determine whether the photograph was *published* before 1 August 1989 as this changes the way in which the term of protection is calculated.

If the photograph was published, copyright will expire either 50 years after the end of the year of publication (in accordance with the 1956 Act) or 70 years after the death of the author (in accordance with s.12(2) of the CDPA) whichever is longer.

If the photograph remained *unpublished* when the CDPA came into force, copyright will expire either on 31 December 2039 (in accordance with the so-called 2039 rule)⁶ or 70 years after the death of the author (in accordance with s.12(2)) whichever is longer. This means that 1 January 1969 is the key date for determining which rule should apply: if the author *died* before 1 January 1969 then the 2039 rule will *always* provide the longer

⁶ The transitional provisions in the CDPA provide that the duration of copyright in many unpublished literary, dramatic, musical and artistic works, films and sound recordings, continues until 50 years from the end of the calendar year in which the 1988 Act came into force (that is, until 31 December 2039). Moreover, these provisions – collectively referred to as the 2039 rule – apply regardless of when the works in question were created or when their authors died. The 2039 rule affects the following categories of unpublished work: (i) anonymous or pseudonymous literary, dramatic, musical or artistic works (other than photographs); literary, dramatic and musical works, engravings and photographs taken on or after 1 June 1957; sound recordings made on or after 1 June 1957, and films which have not been registered under the Cinematograph Films Act 1938 (and subsequent legislation); Crown copyright works. For further details, see CDPA, Schedule 1, paragraphs 12 and 41. See also: Intellectual Property Office, *Government response to the consultation on reducing the duration of copyright in certain unpublished works* (29 January 2015), available here: <https://www.gov.uk/government/consultations/reducing-the-duration-of-copyright-in-certain-unpublished-works>.

term.⁷ However if the author died on or after 1 January 1969, life plus 70 will always provide a term of protection equal to or greater than the 2039 rule.⁸

What is meant by ‘publication’? Publication is defined in the CDPA to mean the issue of copies of the work to the public, including making it available to the public by means of an electronic retrieval system (s.175(1)). However, this is subject to a number of conditions relating to artistic works. In relation to photographs, the following *do not* constitute publication (s.175(4)(b)):

- the exhibition of the work
- the issue to the public of copies of a film including the work
- the communication to the public of the work (otherwise than for the purposes of an electronic retrieval system)

5.4. Photographs taken before 1 June 1957

The 1911 Act drew no distinction between duration for published and unpublished photographs. Copyright expired 50 years after the work was *made*, regardless of whether it was ever made public in any manner. The Act set out that duration of protection for photographs taken before the 1 July 1912 (when the 1911 Act came into force) was to be calculated in accordance with the rules of the 1911 Act.⁹ This meant that, for all photographs taken before 1 June 1957 copyright expired 50 years after the work was made.

When the 1956 Act was passed, the rules on duration for photographs taken before 1 June 1957 remained unchanged: the term set out in the 1911 Act continued to apply and remained in force under the CDPA. While the CDPA introduced a standard term of protection for photographs that was equivalent to other artistic works (at that time, life of the author plus 50 years), this term *did not apply* to photographs created before 1 June 1957. However, implementation of the Term Directive has meant that photographs taken before 1 June 1957 have benefited by way of both extended copyright and revived copyright. We explore each in turn.

5.4.1. Photographs taken on or after 1 January 1945 but before 1 June 1957

Consider two photographs taken one year apart, the first on 1 January 1944, the second on 1 January 1945. Prior to the changes made under the Term Directive, copyright would have expired in the first photograph on 31 December 1994 (50 years from the end of the year in which the photograph was taken), and copyright in the second photograph would expire at midnight on 31 December 1995.

⁷ For example, if the author died in December 1968, the 70 year post mortem term would be calculated from 1 January 1969, expiring on 31 December 2038.

⁸ If the author died in December 1969, the 70 year post mortem term would be calculated from 1 January 1970, expiring on 31 December 2039. If the author died in December 1970, the 70 year post mortem term would be calculated from 1 January 1971, expiring 31 December 2040.

⁹ That is, 50 years from the end of the year in which the work was made; Copyright Act 1911, s.24 and Schedule 1 (rights in existing works were to last ‘for the term for which it would have subsisted if this Act had been in force at the date when the work was made’).

The Duration Regulations 1995, which implemented the Term Directive within the UK, set out that any work still in copyright on 31 December 1995 benefits from an extended copyright under the Directive.¹⁰ Therefore, while the first photograph might benefit from a revived copyright, the second photograph benefits from an extended copyright. For that reason, following the implementation of the Directive, the duration of protection for *any* photographs taken on or after 1 January 1945 but before 1 June 1957 will be the life of the author plus 70 years.

5.4.2. Photographs taken before 1 January 1945

Any photograph taken before 1 January 1945 will *only* be in copyright today if copyright has been *revived* following the implementation of the Term Directive. If copyright protection has been revived, duration is calculated according to the standard term of life of the author plus 70 years.

As discussed above, for works to benefit from the revived term, it must be established that they were still protected in at least one other member state on 1 July 1995. Because German copyright law provided a life plus 70 term of protection for authorial works before the Term Directive came into force, Germany is typically the jurisdiction most often relied upon to establish that a work was still in copyright in a relevant member state on the relevant date.

In relation to photographs, however, we need to sound a note of caution. In part, this is because the Berne Convention, the foundational instrument of international copyright, only requires that photographs be protected for a minimum of 25 years from the making of the work (A.7(4)),¹¹ unlike other literary and artistic works which are to be afforded a minimum term of protection of life plus 50 years (A.7(1)). Moreover, a number of European jurisdictions, including Germany, Italy and others, distinguish between the duration of protection afforded to artistic or creative photographs (life plus 70 years) and the duration of protection afforded to more prosaic ‘non-original’ photographs (typically 25 or 50 years only).

In short, determining whether copyright is revived in a photograph taken before 1 January 1945 will not always be straightforward. In *The Law of Photography and Digital Images*, Christina Michalos offers this advice: ‘When considering whether a photograph taken before January 1, 1945, can claim revived copyright it will usually be prudent to take advice from lawyers specialising in copyright law of the relevant EEA state in respect of which it is sought to establish that [the work] was protected, in order to ensure that copyright survives any transitional provisions or requirements for registration or otherwise’.¹²

Michalos is right to suggest caution when dealing with photographs taken before 1 January 1945. However, it seems unlikely that many cultural institutions will have the available funds to secure specialist legal advice on this issue. With that in mind, the

¹⁰ Duration Regulations 1995, regulation 14.

¹¹ A.7(4) provides that ‘[i]t shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work’.

¹² C. Michalos, *The Law of Photography and Digital Images* (London, Sweet & Maxwell, 2004), 58.

prudent course of action might simply be to assume that copyright has been revived in the photographs in question, unless it can easily be established that copyright has not been revived.

5.5. Photographs of Unknown Authorship

Many photographs held in archives and other collections are of unknown authorship which will impact how duration of copyright is calculated.

When is a work of unknown authorship? The CDPA states that a work is of unknown authorship if the identity of the author is unknown or, in the case of joint authorship, if the identity of none of the authors is known (s.9(4)). It continues that 'an author shall be regarded as unknown if it is not possible for a person to ascertain his identity by reasonable inquiry' (s.9(5)), although the Act does not define what constitutes a 'reasonable inquiry'.

For photographs that appear in newspapers and magazines without a named author, a reasonable inquiry must surely involve approaching the relevant (or parent) publication to see if they can provide details of authorship. It might also include approaching relevant photographers or photography associations, such as the Association of Photographers, the British Press Photographers Association of the National Union of Journalists. If no identifying information is discovered after making a reasonable inquiry, the work can be considered a work of unknown authorship.

Under the CDPA, the copyright for a work of unknown authorship expires 70 years after the end of the year in which the work was created (s.12(3)(a)), unless the work is made available to the public during that 70 year period in which case the copyright expires 70 years from the end of the calendar year in which the work was first made available (s.12(3)(b)).

So, in the case of a photograph of unknown authorship appearing in a newspaper or magazine, copyright will expire 70 years from the end of the year in which the work was first published.

However an enormous number of photographs held in archives throughout the UK are likely to have been unpublished at the time of accession to the institution, whether they concern private, family, corporate or government collections. The majority of these works will not have been created for commercial purposes, but rather to document or record a particular moment in time. Where these works are of unknown authorship, copyright expires (or will have expired) 70 years from the end of the year in which the work was first created.

This, in turn, has important consequences regarding photographs taken before 1 January 1945. In the previous section we considered the challenges in determining whether photographs from this period are in copyright. What we *can* say, however, is that *if the photographs are works of unknown authorship* (presuming an appropriate reasonable inquiry has been undertaken) then the work *will be out of copyright*, unless it was published or made available to the public within 70 years after the end of the year of creation. For most photographs, the context and nature of the collection in which they sit will help in determining whether they are likely to have been published or made available to the public. If not published or made available in the 70 years following creation, then copyright has expired.

Take the example of a photograph taken on New Year's Eve in 1945. The work has never been made available and was taken by an unknown author. If the author cannot be identified, then the term of protection set out in s.12(3) applies: copyright expires 70 years after the end of the year in which the work was created, i.e. 31 December 2016.

5.6. Legislative Context

When the CDPA came into force on 1 August 1989, the standard term of protection for authorial works, including photographs, was the life of the author plus 50 years after the author's death. In 1993, however, the *Directive on the Duration of Copyright* (the European Term Directive) was introduced to harmonise the term of protection for certain authorial works at 70 years post mortem. Within the UK, adopting the life plus 70 term of protection required by the Directive involved two things:

- extending the duration of protection for works that were still in copyright (*extended copyright*)
- reviving the duration of protection for certain works in which copyright, under UK law, had already expired (*revived copyright*)

In relation to the extension of existing copyright terms, the change was relatively unproblematic. Works that were already in copyright simply enjoyed an additional 20 years of protection.

However, *reviving* copyright in works that were out of copyright posed a number of challenges. The most fundamental question concerned determining which works should benefit from the revived copyright. The Directive stipulated that any work that was still protected in at least one member state on 1 July 1995 should benefit from the new harmonised term, and that copyright in such works would be revived as of 1 January 1996; of particular importance was the fact that Germany already offered a life plus 70 years term of protection for authorial works at that time.¹³

So, for example, consider the literary estate of D.H. Lawrence who died in 1930; in the UK all copyright in his published work had expired as of 1 January 1980. However, as his work was protected in another member state on 1 July 1995 (Germany), the copyright in Lawrence's published work was revived in the UK and throughout the EU, until 2000, in accordance with the Term Directive.

For those works that enjoyed a term of life plus fifty years under the CDPA when first enacted, the implications of revived copyright under the Directive has now run its course. That is, as more than 20 years have passed since the commencement of the Directive (1 January 1996), any additional revived period of protection will now have expired. However, for one class of work revived copyright still remains of particular significance: photographs taken before 1 January 1945. We consider this in further detail below.

5.7. The relationship between the CDPA and earlier legislation

Photographs taken before 1 August 1989 pose particular problems when calculating duration of protection, for a number of reasons. For one thing, the term of protection for photographs has changed quite dramatically under different legislative regimes. For

¹³ German Copyright Act 1965, A.64.

example, under the Fine Art Copyright Act 1862, duration was calculated in accordance with the life of the author plus seven years post mortem. Thereafter, duration of protection has varied as follows:

- 50 years from the making of the original negative (1911 Copyright Act)
- 50 years from the end of the year in which the photograph was first published (1956 Copyright Act)
- 50 years from the end of the calendar year in which the author dies (CDPA)
- 70 years from the end of the calendar year in which the author dies (CDPA, as amended in 1995 to implement the Term Directive)

Today, the standard term of copyright set out in the CDPA (life plus 70 years) applies to photographs created both before and after the Act came into force. However, it is still important to be aware of the terms of protection that applied under previous Acts, specifically the 1956 Act. This is because the CDPA *also* contains various transitional provisions addressing the CDPA's relationship with previous legislation. One of the basic principles of these provisions is that a change in the copyright legislation should not lead to a reduced term of protection for existing works. In other words, if a work would have enjoyed a longer period of protection under a previous legislative regime that longer term will apply.

To illustrate the relevance of these transitional provisions, consider the following example:

A photographer X takes a series of photographs in 1958 and dies the following year; the photographs remain unpublished until they feature in a book, published in 1984, on the life and work of X. According to the CDPA, copyright in the photographs will expire 70 years from the end of the calendar year in which the author dies; that is: 70 years commencing 1 January 1960. In other words, on 1 January 2030 the photographs would be out of copyright. However, applying the term of protection initially granted to photographic works under the 1956 Act, the copyright will only expire 50 years after the end of the year in which they are *first published*. This means the photographs remain in copyright until 1 January 2035, five years longer than the protection provided under the CDPA. That is, because of the transitional provisions, the CDPA defers to the term of protection provided under the previous law (the 1956 Act).

5.8. Legal References

Copyright Designs and Patents Act 1988 c.48 (www.legislation.gov.uk/ukpga/1988/48/)

Copyright Act 1956 c.74 (www.legislation.gov.uk/ukpga/1956/74/contents/enacted)

Copyright Act 1911 c.46

(www.legislation.gov.uk/ukpga/1911/46/pdfs/ukpga_19110046_en.pdf)

Duration of Copyright and Rights in Performances Regulations 1995 No.3297

(legislation.data.gov.uk/uksi/1995/3297/made/data.htm?wrap=true)

Directive 93/98/EEC of October 1993 harmonizing the term of protection of copyright and certain related rights [1993] OJ L290/9 (the *Term Directive*)

6. COPYRIGHT IN PHOTOGRAPHS: OWNERSHIP

Ronan Deazley and Kerry Patterson

6.1. Introduction

Determining who owns the copyright in embedded photographs that feature in newspaper and magazines can be challenging: it will not necessarily lie with the newspaper or magazine proprietor. Moreover, this often requires familiarity with the provisions of several Copyright Acts. In this note, we focus on material created before 1 August 1989, when the current copyright regime came into force: the Copyright Designs and Patents Act 1988 (the CDPA).

6.2. In Practice

In the sections that follow we consider the following:

Ownership of copyright in works of unknown authorship created both before and after 1 August 1989	Section 4
Ownership of works of known authorship created by employees, freelance workers and on commission, before 1 August 1989	Sections 5, 6 and 7
The effects of revived copyright on photographs taken before 1 January 1945, as a result of the implementation of the European Term Directive	Section 8
The case of <i>Alan Grisbrook v. Mirror Group Newspaper Limited</i> (2009), a decision with important implications for the digitisation of freelance photographs first published in commercial newspapers and magazines	Section 9

Experience of contacting newspapers to clear rights as part of the Edwin Morgan project has shown that newspapers often cannot provide information on contractual arrangements with journalists as far back as the 1950s. However, there were exceptions: The Times was able to provide the names and contractual status of writers not named in the printed newspaper, from 1912.

In the absence of reliable information about whether work was created by an employee or on a freelance basis, as well as details about the contractual arrangements between the employee/freelancer and the publisher, it is necessary to rely on the presumptive rules set out within the relevant legislation.

For example, consider the issue of photographs from magazines or included in newspaper clippings. Whether the author of the photograph is known, and when the work was first published will guide which Copyright Act should be consulted.

If there is no author's name accompanying the work when published but the name of the publisher does appear on a copy of the work as first published, then the publisher is presumed to be the owner of the work (in accordance with s.104(4) of the CDPA). This presumption may be rebutted depending on other available evidence.

However, if you know who the author of the work is, the relevant presumption to apply will depend on when the work was published. For example, if the work was first published in 1956, as the 1956 Copyright Act only came into force on 1 June 1957, the governing law about first ownership is set out in the 1911 Act.

If the photographer in question was a staff photographer then the copyright, as it relates to publication in a newspaper, magazine or periodical, belongs to the publisher (s.5(1)(b)) subject to the terms and conditions of the contract of employment (if one still exists). If the photographer was commissioned by the newspaper for valuable consideration (in effect, for money) then copyright belongs to the publisher, subject to any contrary agreement (s.5(1)(a)).

If the photograph was not commissioned by the newspaper, and the photographer was not an employee, then the copyright likely lies with the photographer, subject to evidence of any contrary agreement.

Finally, it is important to bear in mind the special rules concerning the rights in photographs taken before 1 January 1945 that benefit from a revived copyright (in accordance with the Term Directive). That is, ownership of the revived copyright lies with the owner of the copyright in the work immediately before it expired, *unless* the former copyright owner had died before the commencement of the Regulations in which case the revived copyright vests in the author (or, if the author is dead, in her personal representatives).

6.3. Legislative Context

The first ownership of copyright in works created on or after 1 August 1989 is determined in accordance with the provisions set out in s.11 of the CDPA.

However, in relation to material created *before* 1 August 1989, the first owner of the copyright in the work is determined by *the law in force at the time when the work was made or completed* (CDPA, Schedule 1, paragraph 11(1)).

Typically, the first ownership of copyright in works created before 1 August 1989 lies with the author, as is the case under the CDPA, although this is not always the case. Given the historical nature of archive material, it is important to be familiar with earlier copyright legislation including the 1911 and 1956 *Copyright Acts*, the forerunners to the CDPA.

6.4. Works of unknown authorship

In relation to the first ownership of copyright in works of unknown authorship the same rules apply under the CDPA whether the work was created *before or after* 1 August 1989.

For literary, dramatic, musical and artistic works published without the name of the author appearing on the work, s.104(4) of the CDPA states that if the name of the publisher appears on the work when first published then the publisher shall be presumed to have been the owner of the copyright at the time of publication.

However, this is just a presumption; it will not apply in the face of contrary evidence or proof of ownership lying with the author of the work or elsewhere.

6.5. Work created under the Copyright Act 1956

6.5.1. Work created by employees

Similar to the CDPA (s.11(2)), the default position under the 1956 Act is that, in the absence of any agreement to the contrary, copyright in work made by an employee in the course of her employment shall be owned by her employer (s.4(4)). This relates to works created between 1 June 1957 (when the 1956 Act came into force) and 31 July 1989 (after which the CDPA came into force) but is subject to the exceptions discussed in sections 4.2 and 4.3 below.

6.5.2. Work created by employed journalists

Special rules apply to the ownership of copyright in literary, dramatic and artistic works created by a journalist in the course of her employment for the purpose of publication in a newspaper, magazine or periodical. However, these presumptive rules do not apply to work created by freelance journalists (see section 7 for further discussion).

Where the journalist is an employee of a newspaper or magazine proprietor, the employer is entitled to the copyright in the work but *only* in relation to publication in the newspaper or magazine. In all other respects, the copyright in the work remains with the employed journalist (s.4(2)). For example, this would enable a staff photographer or illustrator to reproduce their work elsewhere, including online without the need for permission from their employer.

6.5.3. Commissioned works of art

In relation to photographs made on commission for money or for some other valuable consideration (that is, for some form of payment), the copyright shall belong to the person commissioning the work and not the author (s.4(3)).

So, for example, with a photograph commissioned by a newspaper or magazine the presumption would be that the commissioning publisher owns the copyright in the photograph.

6.6. Work created under the Copyright Act 1911

6.6.1. Work created by employees

Similar to the CDPA, the default position under the 1911 Act is that, in the absence of any agreement to the contrary, the copyright in a work made by an employee in the course of her employment shall be owned by her employer (s.5(1)(b)). This relates to works created between 1 July 1912 (when the 1911 Act came into force) and 31 May 1956 (after which the 1956 Act came into force) but is subject to the exceptions discussed in sections 5.2 and 5.3 below.

6.6.2. Work created by employed journalists

Special rules apply to the ownership of copyright in articles or other contributions created by the employees of newspapers, magazines and periodicals. These presumptive rules do not apply to work created by freelance journalists.

Under the 1911 Act, in the absence of any agreement to the contrary, the right to publish the work remains with the author *other than* as part of a newspaper, magazine or periodical (s.5(1)(b)). This rule, as set out in the 1911 Act, applies to any work that constitutes 'an article *or other contribution* to a newspaper, magazine, or similar periodical' (emphasis added); as such it would seem to encompass both literary and artistic contributions, such as photographs taken by a staff photographer.

6.6.3. Commissioned works of art

In relation to photographs made on commission for valuable consideration, then, subject to any contrary agreement, copyright shall belong to the person commissioning the work (s.5(1)(a)).

6.7. Work created before 1 July 1912

Before the 1911 *Copyright Act*, the UK copyright regime was made up of a number of different copyright acts:

- Copyright in literary, dramatic and musical works was regulated by the *Copyright Act 1842*
- Copyright in paintings, drawings and photographs was regulated by the *Fine Arts Copyright Act 1862*
- Copyright in works of sculpture was regulated by the *Sculpture Copyright Act 1814*
- Copyright in engravings was regulated by the *Engravers Copyright Acts 1735 and 1766*

None of these Acts set out any general rules about work created by employees in the course of their employment. Whether copyright in work created in the course of employment belonged to the employer or to the employee was a matter for the courts to decide at common law. Unfortunately, judicial discussion of this issue throughout the nineteenth century was neither very consistent nor clear. Often, although not always, the courts would conclude that the author (employee) owned the copyright even though the work had been created in the course of employment.

The 1842 *Copyright Act* did include provisions regarding the ownership of work created by journalists however the scope of the Act does not include artistic works such as photographs.

6.7.1. Commissioned works of art

The ownership of copyright in a work produced on commission (as opposed to a work created by an employee) was specifically addressed in the *Fine Arts Copyright Act 1862*. The 1862 Act states that ownership of the copyright of any painting, drawing or photograph made for or on behalf of another person 'for a good or a valuable consideration', lies with the person commissioning the work *unless* copyright has been expressly retained by the author in writing (s.1).

6.8. Ownership and Revived Copyright: Photographs taken before 1 January 1945

As discussed in our note on *Photographs: Understanding Copyright Duration*, the duration of protection for photographs within the UK has a complicated history, often making it difficult to determine whether a photograph taken before 1 January 1945 is in copyright or not. What we can say, however, is that if a photograph taken before 1 January 1945 is in copyright, it is because the copyright in the work has been revived as a result of the implementation of the *Directive on the Duration of Copyright* (the European Term Directive).¹⁴

The Term Directive was implemented within the UK by the Duration of Copyright Regulations 1995. Importantly, for our purposes, the Duration Regulations included special rules regarding the ownership and use of copyright in works benefitting from a revived copyright.

First, Regulation 19 of the Duration Regulations states that ownership of the revived copyright lies with the owner of the copyright in the work immediately before it expired, *unless* the former copyright owner had died before the commencement of the Regulations in which case the revived copyright vests in the author (or, if the author is dead, in their personal representatives).

Second, the Duration Regulations allow for anyone to make use of a revived copyright *as of right*. That is, the regulations state that any acts restricted by copyright shall be treated as licensed by the copyright owner so long as reasonable notice of intention to use is given to the copyright owner and subject to the payment of a *reasonable royalty* (whether or not a fee has been agreed upon at the time of use).¹⁵ In other words, so long as you give notice and are prepared to pay a reasonable fee to make use of the work, the copyright owner *cannot refuse permission*.

6.9. Digitising Freelance Photographs

Often, when dealing with photographic images published in a newspaper or magazine, the photograph will not have been taken by a staff photographer but rather by a freelancer. In many cases, the freelance photographer will have granted the newspaper or magazine a licence to publish their work, rather than assigning their copyright to the publisher. Understanding the scope of that licence is particularly important when dealing with material that was first published in a pre-internet era. The implications of this issue when digitising archive material is well illustrated by the case of *Alan Grisbrook v. Mirror Group Newspaper (MGN) Limited*.

Between 1981 and 1997, Alan Grisbrook, a freelance photographer, supplied the *Daily Mirror* with photographs, many of which appeared on the front page of the *Mirror* as well as other titles in the MGN stable. During the time that Grisbrook worked for MGN, no written contract was ever concluded between the two parties. Instead, as was standard practice with all freelance photographers, Grisbrook would provide the *Mirror's* night picture editor with images who would then decide whether or not to use them; if used, Grisbrook would subsequently contact the picture editor to agree a price for that use.

¹⁴ For further details, see *Photographs: Understanding Copyright Duration*.

¹⁵ Duration Regulations 1995, regulation 24. In default of agreement between the two parties, the Copyright Tribunal is authorised to determine what constitutes a reasonable royalty.

In June 2006 MGN launched *mydailymirror.com* which allowed users to both access the front pages of archived editions of the *Daily Mirror* from 1903 to the present day and purchase a reproduction of any front page either as a poster, T-shirt, or a greetings card. Grisbrook complained about the inclusion on the website of front pages containing his photographs (111 in all) and asked that they be removed. MGN tried to negotiate, but Grisbrook was unwilling to accept a fee for the inclusion of his photographs on the website. As a result, MGN decided to delete from their website any front pages featuring a photograph by Grisbrook.

Subsequently, in April 2007, MGN established *mirrorarchive.co.uk*, a resource primarily aimed at academic and library users. Unlike *mydailymirror.com*, *mirrorarchive.co.uk* was not limited to front pages but provided access to all articles and stories from the daily archives of the *Daily Mirror* from the 1903 onwards. In March 2008 Grisbrook once again complained about the inclusion of his photographs on the *mirrorarchive* website, at which point MGN decided to argue the issue before the courts.

In court, it was agreed between the parties that Grisbrook, in submitting his photographs to MGN for inclusion in one of their publications, granted a licence to MGN to reproduce the photographs upon payment of a fee. It was also accepted that MGN was entitled to retain the original negative for use in further editions (again subject to the payment of an appropriate fee), and that Grisbrook was entitled to revoke the licence to make further use of those photographs at any time.

Where the parties disagreed, however, was in relation to the subsequent use of his photographs in already published editions. MGN maintained that the initial licence granted by Grisbrook to MGN to permit the publication of his photographs must necessarily be treated as extending to any subsequent reproduction or use of that published material, including online. As such, they argued, making their previously published material available on a resource such as *mirrorarchive.co.uk* was within the scope of their existing licence and did not require any additional permission from Grisbrook.

Lord Justice Patten disagreed. In the absence of an express contract between the two parties, he reviewed the legal authorities regarding the implication of contractual terms. Before any term might be implied into the agreement between the two parties, he observed, it had to be reasonable and equitable, and it had to be necessary to give business efficacy to the contract. In other words, no term would be implied if the contract could be effective without it. Moreover, in relation to implied terms when dealing with the licensing of a copyright work, he continued that the scope of a licence 'must be the minimum which is required to secure to the client the entitlement which the parties to [the] contract must have intended to confer upon him', which licence must accordingly 'be limited to what is in the joint contemplation of the parties at the date of the contract, and does not extend to enable the client to take advantage of a new unexpected profitable opportunity'. With that in mind, Patten LJ continued that the commercial exploitation of MGN's archive through websites such as *mirrorarchive.co.uk* would not have been contemplated at the time when Grisbrook granted a licence to MGN to make use of his photographs. In short, by including his work within the *mirrorarchive* resource, MGN had infringed Grisbrook's copyright.

The decision in *Grisbrook* is obviously specific to the facts of that particular case, but it does give rise to an important consideration when digitising material from newspaper and magazines held in archive and other collections. With freelance material, even if the

publisher has licensed or owns the right to reproduce the work in print they may not hold the rights to reproduce the work online. Much will depend on the facts of the case, whether a contract exists between the freelancer and the publisher, and what the terms of that contract say. Moreover, the case neatly illustrates how a publisher might interpret an agreement to mean one thing while the freelancer interprets it to mean another. Determining who actually owns which rights will not always be straightforward in these situations.

6.10. Legal References

Copyright Designs and Patents Act 1988 c.48 (www.legislation.gov.uk/ukpga/1988/48/)

Copyright Act 1956 c.74 (www.legislation.gov.uk/ukpga/1956/74/contents/enacted)

Copyright Act 1911 c.46

(www.legislation.gov.uk/ukpga/1911/46/pdfs/ukpga_19110046_en.pdf)

Duration of Copyright and Rights in Performances Regulations 1995 No.3297

(legislation.data.gov.uk/uksi/1995/3297/made/data.htm?wrap=true)

Directive 93/98/EEC of October 1993 harmonizing the term of protection of copyright and certain related rights [1993] OJ L290/9 (the *Term Directive*)

Fine Arts Copyright Act 1862 c.68

(www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_uk_1862)

MGN Limited v. Alan Grisbrook [2010] EWCA Civ 1399

7. USING INSUBSTANTIAL PARTS OF A COPYRIGHT PROTECTED WORK

Ronan Deazley and Kerry Patterson

7.1. Introduction

This guidance explains UK copyright law as it affects the use of insubstantial parts of copyright protected work. It outlines what constitutes infringement, and considers the extent to which you can make use of part of a work without the need for permission and without infringing the copyright in that work.

This note does not take into account copyright exceptions that may be relevant to a digitisation initiative. That is, while copying a part of a work may be considered substantial for the purposes of copyright compliance, you might still benefit from one of the many exceptions to copyright (e.g., making a preservation copy of a work in accordance with s.42 of the *Copyright Designs and Patents Act 1988*, the CDPA).

However, you will not need to rely on an exception at all if the part of the work you are copying is not substantial enough to trigger copyright liability in the first place. And so, in this note, we focus on understanding the line between substantial and insubstantial copying.

7.2. In Practice

There is no simple way to determine whether use of part of a work will qualify as substantial or insubstantial use. Whether a substantial part of a protected work has been copied must be decided on a case-by-case basis, and will often be a matter of impression. As such, it is particularly helpful to be aware of how substantiality has been defined in past legal cases – see section 3.3 for discussion.

The type of material in the Edwin Morgan Scrapbooks which might be considered insubstantial includes cuttings of printed text and crops of images from newspapers and other periodicals. The majority of texts and images are partial or cropped in some way, and rarely are they accompanied by an indication of source. The decontextualized nature of these items within the Scrapbooks makes a determination about substantiality difficult. Each item needs to be considered individually.

With longer extracts of texts, even when removed from their original context, it is probably safer to assume that the extract represents a substantial part of the original work. Shorter pieces of text are more problematic. The Scrapbooks contain newspaper headlines (in part and in full), image captions, single sentences from articles, and even cuttings or one or two words. Under certain circumstances, headlines can be considered works that attract copyright.¹⁶ A single sentence – perhaps the opening or closing taken from a famous novel – may be argued to be substantial, but when taken from a more commonplace source such as a newspaper article, this will be less clear cut. And certainly, it seems unlikely that reproducing a one- or two-word cutting would ever give rise to copyright concerns.

¹⁶ See Guidance *Copyright in Titles and Newspaper Headlines*

It is worth considering the potential implications of using substantial extracts of works in collection catalogues in more detail. For example, an extract from a literary work (whether published or unpublished) could be included in the contextual information accompanying the online catalogue entry for a particular record or document. Might this trigger liability for copyright infringement? The first question to ask should be: does the transcribed extract amount to a substantial part of the work in question? If so, is it permissible under any of the existing exceptions for libraries and archives? If the work in question has been published then one might rely on the quotation exception so long as the use of the extract is fair and the extent of the quotation is no more than is required for the purpose of cataloguing.¹⁷ If the work is unpublished, however, the matter is less clear cut. Indeed, it may be advisable to avoid the use of extracts from unpublished documents within a catalogue, if the extracts in question might be regarded as substantial in nature.

As for images, there are many cropped photographs in the Scrapbooks that share the same problem as the text cuttings. Removed from their original context, it can be impossible to confirm whether or not the cropped image represents a substantial part of the original work. Some cuttings are so small in size (as small as 1cm x 1cm) and/or show something that cannot be determined, e.g. a close up of a grassy hillside or a natural formation that has been cut from a much larger image. These have become almost abstract and might be considered insubstantial. But even for less abstract images where cropping has obviously occurred, the lack of the source image makes it impossible to definitely determine the crop as substantial or insubstantial.

It is also worth considering captions that accompany images. Within the context of a newspaper or magazine article, they may be part of the literary work (the text), or a separate work accompanying the image. The captions accompanying images are likely to be by the photographer or a photo editor, rather than by the author of the article itself. As such, we might consider them separate works in themselves so long as they are sufficiently original. Where captions are simple or factual in nature, they will not attract protection. For example, the caption to a photograph of the island Ailsa Craig included in the Scrapbooks reads as follows: 'Ailsa Craig from the west, early morning'. This is little more than a statement of fact, providing information about where and when the photograph was taken. A more florid description of the scene, however, may be considered a literary work protected by copyright.

7.3. Legislative Context

7.3.1. When infringement occurs

In certain circumstances, making use of a copyright work without the permission of the copyright owner will infringe the copyright in that work. Copyright infringement takes one of two forms: *primary infringement* or *secondary infringement*.

Primary infringement occurs when someone carries out any of the 'acts restricted by copyright' (CDPA ss.16-21) without the copyright owner's permission. Secondary

¹⁷ The same would hold true for including headlines and titles that may be copyright-protected in catalogues.

infringement provides owners with protection against those who aid and abet the primary infringer in some way or who deal in or with infringing copies (CDPA ss.22-26).

The ‘acts restricted by copyright’ represent the bundle of economic rights the copyright owner enjoys in their work for the duration of the copyright term. Section 16 of the CDPA defines the acts restricted by copyright as including the right to:

- copy the work: the reproduction right (further defined in s.17 of the CDPA)
- issue copies of the work to the public: the distribution right (see s.18)
- rent or lend the work to the public: the rental right (see s.18A)
- perform, show, or play the work in public: the public performance right (see s.19)
- communicate the work to the public [including broadcasting the work and making it available online]: the communication right (see s.20)
- make an adaptation of the work or do any of the above in relation to an adaptation: the adaptation right (see s.21)

Doing any of these acts without permission will infringe copyright in the work, and the owner typically will be entitled to some form of relief or compensation. However, not all of these rights are granted to all copyright owners. Instead, the economic rights enjoyed by a copyright owner will vary depending on the type of work they have created. For example:

- performing or showing an *artistic work* in public is *not* an offence under s.19 of the CDPA
- the public communication right does *not* apply to the *typographical arrangement of published editions* (see s.20 for further details)
- the right to make an adaptation of a work *only* applies to *literary, dramatic, or musical* works, and not to artistic works, sound recordings, films or broadcasts (see s.21 for further details)

In the table that follows we provide an overview of which economic rights apply to each type of work protected under the CDPA.

ECONOMIC RIGHTS THAT APPLY UNDER CDPA

	MAKE COPIES	DISTRIBUTE COPIES	RENT OR LEND	PERFORM IN PUBLIC	COMMUNICATE TO THE PUBLIC	MAKE AN ADAPTATION
LITERARY	Y	Y	Y	Y	Y	Y
DRAMATIC	Y	Y	Y	Y	Y	Y
MUSICAL	Y	Y	Y	Y	Y	Y
ARTISTIC	Y	Y	Y*	-	Y	-
FILM	Y	Y	Y	Y	Y	-

SOUND RECORDING	Y	Y	Y	Y	Y	-
BROADCAST	Y	Y	-	Y	Y	-
TYPOGRAPHIC ARRANGEMENT	Y	Y	-	-	-	-

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

7.3.2. Copying part of the work

Copyright protection is not confined to preventing the copying or use of works in their entirety. Simply copying part of the work can also infringe. This principle is set out in s.16(3)(a) of the CDPA which states that infringement can occur in relation to 'the work as a whole *or any substantial part of it*' (emphasis added). It is also enshrined in European copyright law. Article 2 of the *Information Society Directive* 2001 defines the reproduction right to include reproduction 'in whole or in part'. Although the *Directive* makes reference to copying 'in part', whereas the CDPA makes reference to copying the work 'or any *substantial* part of it', it is generally accepted that the 'substantial part' test under UK law is in conformity with – and will be guided by – the requirements of the *Directive* as interpreted by the European Court of Justice.

However, the logical implication of the substantial part test is that while it is not permitted to copy a substantial part without permission, it is permissible to make use of protected work as long as you are not copying any more than a substantial part of that work. But where do you draw the line between a substantial and an insubstantial part?

7.3.3. Defining Substantiality - Relevant cases

It is often said that this question of substantiality will depend upon the *quality* of what has been taken rather than the *quantity*. In *Sillitoe v. McGraw-Hill* (1983) Mr Justice Mervyn Davies QC observed that '[s]ubstantiality is a question of fact and degree determined by reference not only to the amount of work reproduced but also to the *importance of the parts reproduced*' (emphasis added).

This distinction between *quantitative* and *qualitative* importance is well illustrated by the comments of Mr Justice Arnold in the decision of *England and Wales Cricket Board v. Tixdaq* (2016). The court was asked to consider whether making an eight-second clip of a film or broadcast of a cricket test match constituted copying of a substantial part of each session of play (over two hours of footage). Arnold J observed:

Quantitatively, 8 seconds is not a large proportion of a broadcast or film lasting two hours or more. Qualitatively, however, it is clear that most of the clips uploaded constituted highlights of the matches: wickets taken, appeals refused, centuries scored and the like. Thus most of clips showed something of interest, and hence value ... Accordingly, in my judgment, each such clip constituted a substantial part of the relevant copyright work(s).

In recent years courts have become less likely to excuse unauthorised copying on the ground that what was copied was an insubstantial part. Previously, liability might only

be triggered if the defendant had copied an essential, vital or significant part of the protected work. Now, however, courts are more inclined to find infringement unless '*no more than an insignificant part of the copyright work is copied*' (quoting Lord Bingham in *Designer Guild Ltd v. Russell Williams* (2000)).

The decision of the European Court of Justice in *Infopaq International v. DDF* (2009) has consolidated this trend. The case concerned a media monitoring business (Infopaq) that scanned newspapers on a daily basis to identify and summarise articles of interest to its clients. Their media monitoring process involved the automated copying of eleven-word extracts of text from relevant newspaper articles. The European Court of Justice was asked for guidance as to whether this automated copying might constitute copyright infringement.

The Court decided that parts of a copyright work will enjoy copyright protection if 'they contain elements which are the expression of the intellectual creation of the author of the work'. The Court continued that individual sentences *or even parts of sentences* from a literary work, such as a newspaper article, would be protected by copyright 'if that extract contains an element of the work which, as such, expresses the author's own intellectual creation'. In short, the copying of an eleven-word extract from a newspaper article without permission might constitute infringement, depending on the nature of the extract.

So, when considering whether an extract is substantial or not, ask yourself whether the part that is being copied contains a feature or features that express the author's intellectual creation; that is, whether the part that is copied evidences the kind of skill and labour on the part of the author that makes her work original. As *Infopaq* demonstrates, even a part of a sentence might be sufficient to constitute a substantial part. On the other hand, the part that is copied may be trite or insignificant within the context of the work, it may be a commonplace phrase, or material that is not itself original to the work: that is, it may have been influenced by or copied from an earlier source.

7.4. Legal References

Copyright Designs and Patents Act 1988 c.48 (www.legislation.gov.uk/ukpga/1988/48/)

Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (the *Information Society Directive*)

Designer Guild Ltd v. Russell Williams [2000] UKHL 58

England and Wales Cricket Board Ltd [the ECB] & Anor v. Tixdaq Ltd & Anor [2016] EWHC 575 (Ch)

Infopaq International A/S v. Danske Dagblades Forening [2009] (C-5/08)

Sillitoe v. McGraw-Hill Book Co (UK) Ltd [1983] FSR 545

8. COPYRIGHT ACROSS BORDERS

Paul Torremans, with Ronan Deazley and Kerry Patterson

8.1. Introduction

We think of copyright as a global phenomenon. Copyright owners enjoy protection around the globe for their literary and artistic works just as users similarly benefit from exceptions and limitations. But the reality of copyright across borders is more complex. Indeed, there is no such thing as ‘international copyright’, no single global and uniform copyright regime or model law.

The purpose of this Guidance Note is to explain how national borders and copyright law interact. It discusses the regulations that affect international copyright law and explores some key questions on copyright infringement.

8.2. Practical Questions

8.2.1. Do I (potentially) infringe everywhere in the world when I post material online?

The answer to the question is very simple but not very satisfactory: it depends. It depends on the local copyright law in each country where the question of infringement is raised. The court will – along the lines of article 8 of the *Rome II Regulation* – apply the national copyright law on a country by country basis for the allegedly infringing activity in each of the countries where the claimant asserts copyright protection in the material that has been posted online.

That said, as a general rule of thumb, making work available on a website for viewing and downloading anywhere in the world without the permission of the copyright owner might theoretically give rise to a potential claim of infringement in most jurisdictions around the world, so long as the owner enjoys copyright protection within the relevant jurisdiction (and provided no exceptions or limitations apply).

8.2.2. Can I be sued in the UK for infringement of foreign copyright?

Article 4 of the *Brussels I Regulation* sets out the general rule: the claimant can always sue the defendant (that is, the alleged copyright infringer) in the courts of the country in which the defendant resides. So, if you are accused of infringing a foreign copyright, the claimant can sue you in the UK. Moreover, because the jurisdiction of the court to hear the case is linked to the defendant (that is: you), irrespective of any other facts of the case, the case might cover an alleged infringement anywhere in the world.¹⁸

¹⁸ See the judgment of the UK Supreme Court in *Lucasfilm Limited and others (Appellants) v. Ainsworth and another (Respondents)* [2011] UKSC 39.

8.2.3. If a UK court has jurisdiction in relation to a foreign infringement, what law applies?

The logical answer here is the law of the country where protection is sought. In other words, the UK court will apply the national copyright law of the country where the claimant argues the work enjoys copyright protection. If protection is claimed in several countries the national copyright law of each country will apply on a country by country basis.

But what about exceptions and limitations: which law applies? The answer is the same: the law of the country where protection is sought. That is, just as the UK court will apply the relevant national copyright law of the country where the claimant argues the work enjoys protection, so too will the limitations and exceptions set out within that country's copyright regime apply. Put another way, if a claimant seeks to argue before a UK court that the defendant has infringed in accordance with the law of another jurisdiction, the defendant is entitled to rely upon the limitations and exceptions within that other jurisdiction's copyright law to deny any liability.

Whether the relevant law of another jurisdiction applies at all, however, is a decision that needs to be made by the relevant judge. Only the judge who hears the case can determine the applicable law in a particular case. This inevitably brings us back to the rules on jurisdiction.

8.2.4. Can I be sued in another jurisdiction for infringement of copyright in that jurisdiction?

In this situation, article 7.2 of the *Brussels I Regulation* presents the claimant with two options.

First, they might rely on the *place of the event giving rise to the damage* to establish the required link between the facts of the case and the court. For example, this might involve someone uploading content without permission in jurisdiction D. In this case, a court based in jurisdiction D will be able to hear the whole case, even if damage is alleged to have taken place in jurisdictions E, F and G also.

However, determining whether the alleged infringer has actually acted within the relevant jurisdiction (in our example, jurisdiction D) is for the court to decide as a matter of fact (not law). There is no room here for presumptions or other legal arguments about whether the event giving rise to the alleged damage has in fact taken place in the relevant jurisdiction.¹⁹ This will always be determined on a case by case basis.

The second option concerns *where the damage occurs* (or might occur). It relies on the link between the court and the place where the damage resulting from the alleged copyright infringement arises. The CJEU has made clear that in order to sue for infringement of copyright on the basis of where the damage occurs, the work in question must be protected by copyright in that jurisdiction (within a European context, this will rarely present any problems).²⁰ Moreover, in this situation, the national court will only

¹⁹ See case C-228/11 *Melzer v MF Global UK Ltd* EU:C:2013:305.

²⁰ See Case C-523/10 *Wintersteiger* EU:C:2012:220, paragraph 25, and C-170/12 *Pinckney*, EU:C:2013:635, paragraph 33.

have authority to deal with local damage, that is, damage that occurs *only* within that country (and not anywhere else in the world).

That said, the implications of bringing litigation in any country where damage occurs are potentially far reaching, and especially when making copyright protected material available online. Consider, for example, the decision of the CJEU in *Pez Hejduk v. EnergieAgentur* (2015).²¹ In this case, the defendant company (EnergieAgentur) was based in Germany while the claimant, a professional photographer, lived in Austria. The defendant made photographs taken by the claimant available on its website for viewing and downloading, without permission. The claimant sued for copyright infringement in Austria. The defendant argued that although the photographs were accessible in Austria, and elsewhere in the world, the website in question was not directed (or targeted) at Austria or indeed any jurisdiction other than Germany; as such, if the claimant wanted to sue for infringement, she should do so before the German courts.

Did the Austrian court have jurisdiction on the grounds that damage or harm occurred in Austria? Did it matter that the website in question was country-specific, in the sense that it involved a German top level domain (that is: .de)? The CJEU decided it was irrelevant that the website at issue was not directed at the Member State in which the court was based, that is Austria. The Austrian court had jurisdiction, on the basis of the place where the alleged damage occurred, to hear an action for damages in respect of copyright infringement where the photographs were placed online on a website that could be accessed from Austria.

As already indicated in section 5.1 above, the approach of the CJEU in *Pez Hedjuk* and other cases suggests that anyone making copyright material available online, without appropriate permission, could hypothetically be subject to the jurisdiction of any court in the world. But again, this must be determined on a country by country basis.

8.3. Legislative Context

The Berne Convention 1886 is the preeminent international treaty on copyright protection. Although it lays down grand principles, key concepts such as literary and artistic works and originality are not defined. In other words, there is no harmonised single criterion for deciding which works could be copyright works and what threshold of originality must be satisfied before a work will effectively qualify for copyright protection. And there is no standard or complete list of exceptions and limitations to guarantee and safeguard the interests of users, such as the right of access to information.

On a more positive note, the Berne Convention does deliver protection within an international context by way of the principle of national treatment. This means that 'international copyright' is based on the simple technique of giving foreign authors and creators access to the national copyright systems of the various countries that have signed up to the Convention; that is, by treating an author in one member state as if they were a national of every other signatory member state (at the time of writing, the Berne Convention has 171 member states²²). The simplicity of this system is almost baffling. However, national treatment also embeds an underlying and problematic reality within

²¹ C-441/13 *Pez Hejduk v EnergieAgentur.NRW GmbH* ECLI:EU:C:2015:28.

²² For details, see: http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15.

the international copyright regime. That reality is one of a patchwork of territorial laws based on the idea of one national copyright regime per country, albeit that each national regime adheres to common ideas and certain minimum standards established in the Convention. Consequently, international copyright protection is founded upon a patchwork of national copyright acts.

This approach may have worked in an era where copyright works were exploited on a national basis, that is, where authors of literary works typically had a different publisher in each country, and where each publisher roughly covered their own national market. In such a model there is an obvious, pragmatic parallelism between the national exploitation of copyright works and the national copyright regimes that govern the protection, use and exploitation of such works. But that model no longer exists. In the online environment, copyright works are exploited globally. Cross-border exploitation operates at a global scale, and the user may not know from where in the world they are downloading a copyright work. What has not changed, however, is the territorial, national character of copyright law. In other words, the parallelism between copyright law and copyright exploitation no longer exists. Instead one finds inconsistency, uncertainty, and many opportunities for potential conflict.

8.4. The Role of Private International Law

Just like each country has its own national copyright law, each country has its own private international law. There is no universal international system that takes over. Each country merely has rules in its own national legal system to deal with cases that involve an 'international' aspect. The word 'international' merely indicates that the situation with which one is concerned involves an international dimension, for example, that the litigating parties are of different nationalities, or have their place of residence or business in different countries. The solution to these questions about jurisdiction and choice of law is not 'international'. Rather, it is 'private' in that the sense that we are concerned with issues of private law (rather than public law). And, like any other aspect of private law, private international law is a matter for each country to determine.

Each national set of rules on private international law first needs to address the issue of jurisdiction. This concerns the question of whether a court in a particular country is able to hear and decide the case. The presence of an international element means there are at least two potential countries involved whose courts could hear the case. Each of these countries – for example, on the one hand the country where the alleged infringer of copyright has its principal place of business and on the other hand the country where the infringing copies are put onto the market – has a link with the case and has an interest in facilitating a solution to the copyright problem between the parties by offering access to the courts. Essentially, this involves an offer of a forum for the resolution of the dispute between the private parties. Rules on jurisdiction will decide in which circumstances the link between the case and the country concerned are strong enough for such an offer of a forum to be made. But, when is a country closely enough concerned for it to be willing (in the sense of offering to, but also in the sense of demanding to) to hear and decide the case? Every country speaks for itself on this point and the approaches (and therefore the expectations) may differ.

Once the issue of jurisdiction has been resolved, judges must next decide which national copyright law to apply when hearing the case. This need not be the law of the jurisdiction in which the case is being heard. Rather, the court's national rules on private international

law will also determine the relevant choice of copyright law, and the international aspects of the case will once again mean that there is more than one option on this point, as well as an absence of international harmony on this issue.

For reasons of completeness, private international law also deals with the recognition and enforcement of foreign judgments. The party that obtained a judgment in one national court may wish to enforce it in another country, for example, where the defendant has assets or where the infringing behaviour took place. Again national rules will apply, but this aspect is not directly relevant for our current purposes and so we leave it to one side.

8.5. Where does this leave us?

At a global level the answer to our question about copyright infringement and limitations and exceptions across borders is as follows: there is no single or harmonised approach that can be relied upon; both in terms of copyright and the applicability of private international law answers must be sought on a country by country basis. This gives rise to a confusing and complex picture.

Within the EU, however, the picture that emerges is slightly more hopeful. While the European harmonisation of copyright law has only been partially successful, the EU has agreed a single approach when dealing with private international law issues.

8.5.1. Jurisdiction of the court: which forum?

When it comes to the jurisdiction of the court, the matter is governed by the *Brussels I Regulation*.²³ For our purposes articles 4 and 7 are particularly relevant.

- Article 4.1: Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
- Article 7: A person domiciled in a Member State may be sued in another Member State ... (2) in matters relating to tort, delict or quasi-tort, in the courts for the place where the harmful event occurred or may occur.

Article 4 lays down the general rule that the claimant can always sue the defendant (that is, the alleged copyright infringer) in the courts of the country in which the defendant habitually resides (or is 'domiciled'). This represents the default position.

But what if the claimant does not want to litigate in the defendant's jurisdiction? As long as the defendant has a habitual residence in one of the member states, then the claimant has an alternative option. That option does not depend on where the defendant resides; rather, what matters is that the facts of the case – that is, the nature of the alleged infringement – provide a necessary link to the relevant court in another country. In this respect, it is important to appreciate that copyright infringement is a tort (a civil wrong that unfairly causes someone to suffer loss or harm) and the place where that harmful event occurs – or may occur – falls, according to the case law of the Court of Justice of the

²³ REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters(recast), [2012] OJ L351/1.

European Union (CJEU), *either* in the place where the act of infringement takes place *or* in the place where the damage arising (directly) from the infringement occurs.

So, within Europe, if the copyright owner suffers damage or harm in jurisdiction A (where the owner resides) as a result of the infringing activity of a defendant who resides in jurisdiction B, the copyright owner might choose to sue the defendant either in jurisdiction B where the defendant is domiciled (in accordance with A.4) or in jurisdiction A where the claimant has (also) suffered damage or harm (in accordance with A.7). Moreover, if the copyright owner can establish that damage or harm occurred or may occur in jurisdiction C, they might equally decide to bring legal proceedings in that jurisdiction (again, in accordance with A.7).

8.5.2. What is the applicable law?

When it comes to the issue of applicable law (that is, which country's law should apply?) the relevant piece of legislation to consider is the *Rome II Regulation*.²⁴ The law applicable to the infringement of copyright and the limitations and exceptions that apply in that respect is set out in two key provisions of article 8 of the Regulation:

- Article 8.1: The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed
- Article 8.3: The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14

In practice this means that the applicable law for both the question of whether copyright infringement did take place *and* whether any limitations or exceptions apply in a particular case will be governed by the law of the country in which the claimant argues that his or her work benefits from copyright protection.

8.6. Conclusion

The daunting reality of the 'country by country' approach is that when making material available online one has to consider whether copyright permission is needed in each and every country where the material is made available. And just because an exception to copyright might apply in one country this does not mean it applies in another. On that point too, the country by country approach applies.

In terms of jurisdiction, one can be sued for infringement occurring globally in one's country of habitual residence or in the country where the allegedly infringing act of uploading occurs. And for local damage one can be sued in each country where the material that has been made available online can be accessed.

But in practice, things may not be that dire. Institutions holding collections of national interest are unlikely to attract litigation from outwith national borders. It is also important to remember that litigation is often driven by competition between commercial entities and the possibility to collect substantial amounts by way of damages. Generally speaking, cultural institutions who merely want to provide access to their

²⁴ REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

collections occupy a different position in this respect. They are not directly in competition with commercial entities and there is no lucrative market where sizeable damages can be collected. Cultural institutions are rarely sued for copyright infringement, even less so in a transnational context. Most national laws also have some limitations and exceptions that will be applicable.²⁵

²⁵ See Crews, K (2015) *Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised*, available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=306216 (accessed 28th March 2016)

9. MORAL RIGHTS: ATTRIBUTION

Ronan Deazley and Kerry Patterson

9.1. Introduction

When undertaking a digitisation initiative, it is important to understand when attribution of authorship is required. This briefing note explains the protection which UK law provides for the moral right of attribution – the right to be identified as the author of a work. It considers the implications of this right for non-commercial digitisation initiatives and addresses a number of related questions.

9.2. In Practice

To help determine whether you need to be concerned about this right, consider the charts 9.8.1 and 9.8.2 in the appendix.

9.3. Legislative Context

In addition to the bundle of economic rights that make up the scope of copyright protection, the *Copyright Designs and Patents Act 1988* (the CDPA) also provides for certain moral rights in relation to certain types of work (sections 77-89). There are four types of moral right to be aware of:

- the right to the privacy of privately commissioned photographs or films
- the right to object to false attribution of the work
- the right to be identified as the author of the work (attribution)
- the right to object to the derogatory treatment of a work (integrity)

The moral rights of attribution and integrity are intended to protect an author's non-economic and non-proprietary interests in their work. In this note, we identify a number of features common to both the right of attribution and the right of integrity, before considering how the right of attribution might impact the digitisation of material held in archive and other cultural heritage collections. Details about the moral right of attribution are set out in sections 77-79 and 86-89 of the CDPA.

9.4. Attribution and Integrity: common features

The right of attribution and the right of integrity share a number of common features.

First, they only extend to certain types of copyright-protected work: literary, dramatic, musical and artistic works, and films. They do not apply to sound recordings, broadcasts or the typographical arrangements of published editions.

Second, each right lasts for as long as copyright subsists in the work. That is, both rights last for the life of the author plus 70 years from the end of the year in which the author died. When copyright expires so too do the author's moral rights.

Third, while neither right can be assigned to another person (that is, the rights cannot be transferred from the author to a third party) the rights can be *waived* in certain circumstances (CDPA s.87). In effect, this means the author can agree not to assert their

rights of attribution and integrity. So, if you think that your use of a work might contravene either of the moral rights for some reason (perhaps you are cropping an image of an artistic work to post it online and are concerned that cropping might constitute a derogatory treatment) then you could always ask permission of the author and they might waive their moral right of integrity in relation to your use.

Fourth, there are specific rules to bear in mind regarding the existence of these rights when dealing with works created before 1 August 1989 (when the CDPA came into force). We deal with these rules in the next section.

9.5.1. Works made before 1 August 1989

Both the right to be identified as the author of a work (s.77) and the right to object to derogatory treatment of the work (s.80) apply to all relevant works created on or after the CDPA came into force, that is: 1 August 1989. In relation to works created *before* 1 August 1989, however, the rights do not apply to the following:

- literary, dramatic, musical or artistic works created by an author who died before 1 August 1989
- any film made before 1 August 1989, regardless of whether the author is alive or dead

So, when dealing with films, what matters is *when the film was created*: if it was created before 1 August 1989 the attribution and integrity rights do not apply. In relation to the other types of protected work – that is, literary, dramatic, musical and artistic works – what matters is *when the author died*. If the author died before 1 August 1989 the attribution and integrity rights do not apply. We can summarise this as follows:

WHEN DO MORAL RIGHTS APPLY?

	AUTHOR DIED BEFORE 1 AUGUST 1989	AUTHOR ALIVE ON 1 AUGUST 1989 BUT WORK CREATED BEFORE THAT DATE	WORK CREATED ON OR AFTER 1 AUGUST 1989
LITERARY	No Moral Rights	Moral Rights May Apply*	Moral Rights May Apply*
DRAMATIC	No Moral Rights	Moral Rights May Apply*	Moral Rights May Apply*
MUSICAL	No Moral Rights	Moral Rights May Apply*	Moral Rights May Apply*
ARTISTIC	No Moral Rights	Moral Rights May Apply*	Moral Rights May Apply*
FILM	No Moral Rights	No Moral Rights	Moral Rights May Apply*

* The right of attribution only applies to these works in certain circumstances: see section 4.1 below for further discussion.

9.6. The Moral Right of Attribution

9.6.1. Excluded material

The right of attribution applies to literary, dramatic, musical and artistic works, as well as films, but even in relation to these categories of work there are a number of exceptions to keep in mind. For example, the right does not apply to:

- computer programs and computer-generated works (s.79(2))
- any work that was made for the purpose of reporting current events (s.79(5))
- any literary, dramatic, musical or artistic work made for the purpose of publication in a newspaper, magazine or similar periodical, or in an encyclopaedia, dictionary, yearbook or other collective work or reference (s.79(6))
- Crown and Parliamentary copyright material, unless the author or director has previously been identified as such in or on published copies of the work (s.79(7))
- works in which copyright vests in certain international organisations,²⁶ unless the author or director has previously been identified as such in or on published copies of the work (s.79(7))

So, for example, making a newspaper article available online as part of a digitisation project but without attribution details (perhaps you have not been able to identify who wrote the article) will not trigger any liability under this moral right on the basis that the work was both created for reporting current events (s.79(5)) and/or for publication in a newspaper (s.79(6)).

Within the Edwin Morgan Scrapbooks, examples of excluded material include cuttings from newspaper articles (s.79(5)) and artistic works such as cartoons that were created for publication in a newspaper, magazine or periodical (s.79(6)).

9.6.2. No infringement unless the right has been asserted

The CDPA states that while the author of a relevant work may enjoy the moral right of attribution in that work, the right is not infringed unless the author has *asserted* her right of attribution (s.77(1)). That is, without asserting the right the author cannot complain of a breach of that right.

Typically, assertion involves the author creating a signed, written document which states they are asserting their moral right. Alternatively, a provision asserting the attribution right might be written into a contract when the author is contracting with a publisher, producer, and so on. In relation to artistic works, this might involve providing details about the author on the work itself whenever it is being publicly exhibited (e.g., on the work, or on the frame, mount or other thing to which it is attached).

The fact that the right of attribution must be expressly asserted by the author is an important consideration when dealing with the types of work that are typically held in archive and other heritage collections. Think, for example, of the number of copyright works that you create in the course of an ordinary day: a letter drafted for work purposes, an email written to a friend, or a photograph taken on your phone and posted to a social media site. These are all likely to be protected by copyright, but the moral right of attribution is never likely to arise as you are unlikely ever to assert your moral right in

²⁶ See CDPA s.168 and the *Copyright (International Organisations) Order 1989* for further details of the relevant international organisations.

relation to this type of everyday ephemera, none of which is created with commercial exploitation in mind. And so it will be with the records and documents typically held in archives and other heritage collections: they are accessioned to a collection because of their evidential value – they speak to the fact that something happened in the world, information that is worth preserving for future generations – but rarely were these records created with the possibility of commercial or other forms of public exploitation in mind, and rarely will author have expressly asserted their moral right of attribution.

9.6.3. Scope of protection

If the work qualifies for protection, and the author has asserted their right of attribution, the right applies in relation to the use of the work in its entirety or to any substantial part of the work (s.89(1)). So, even a partial reproduction of the work, if substantial, will require attribution under the right.

9.6.4. Infringement

If the right of attribution can exist in relation to a particular work, and that right has been asserted by the author, then what constitutes infringement of the right?

Infringement is only triggered by making use of the work in certain circumstances without properly identifying the author. Moreover, the types of activity that trigger infringement will vary depending on the type of work you are dealing with. So, whereas doing something with a literary work without attribution might constitute infringement, doing the same thing with a musical work may not. The following table provides an overview of when an offence might be committed, although you should refer to the provisions set out in s.77 for further details.

POTENTIALLY INFRINGING ACTS*

	LITERARY	DRAMATIC	MUSICAL	ARTISTIC	FILM
PUBLISH COMMERCIALY	Y	Y	Y	Y	-
ISSUE COPIES TO THE PUBLIC	-	-	-	-	Y
ISSUE TO THE PUBLIC AS PART OF A FILM OR SOUND RECORDING	Y	Y	Y	Y	-
EXHIBIT IN PUBLIC	-	-	-	Y	-
PERFORM IN PUBLIC	Y	Y	-	-	-
SHOW IN PUBLIC	-	-	-	-	Y
INCLUDE IN A FILM SHOWN IN PUBLIC	-	-	Y	Y	-

COMMUNICATE TO THE PUBLIC	Y	Y	-	Y	Y
BROADCAST	Y	Y	-	Y	Y
MAKE AVAILABLE ONLINE	Y	Y	-	Y	Y

*Refer to the provisions set out in s.77 for further details.

In relation to the table above, it is important to note that the lyrics that accompany a song (that is, any literary work ‘intended to be sung or spoken with music’) are treated *as if they were a musical work*. So, whereas broadcasting or performing a literary work in public (for example, reciting a poem) should be accompanied by an appropriate attribution, when broadcasting or playing a song in public it is not necessary to attribute the author of either the music or the lyrics of that song.

In addition, in relation to musical works (including songs and song lyrics), it is worth noting that authorial attribution is not required when communicating the work to the public, which involves making the work available online.

9.6.5. Qualification of the right: work created by employees

The CDPA qualifies the application of the right of attribution in relation to work created by employees where copyright originally vested in the employer (that is, work created in the course of employment) (s.79(3)). So, as long as you have the permission of the copyright owner (rather than the author) to make use of the work, then the right of attribution does not apply.

For example, if the author was an employee at the time she created the relevant work the copyright in that work may well have first vested in her employer: in this situation, as long as you are using the work with the employer’s permission, the author cannot complain of any potential breach of her moral rights (whether attribution or integrity). This would be of particular significance when dealing with corporate or other business archives.

9.6.6. Exceptions to the right

Even if the moral right of attribution exists in relation to a work, and you are making use of the work in a manner that triggers the need for attribution (as set out in the table above), the CDPA also provides for a number of exceptional circumstances in which attribution is not required.

The right does not apply to anything done by or with the authority of the copyright owner where copyright in the work originally vested in the author’s or director’s employer (as discussed in 2.1. above).

In addition, attribution is not required when the use of the work relates to the reporting of current events (as defined by s.30 of the CPDA), or when the work has been incidentally included in an artistic work, sound recording, film or broadcast (as defined by s.31 of the

CDPA), neither of which are likely to be of great relevance when digitising archive material to make it available online.

9.7. Legal References

Copyright Designs and Patents Act 1988 c.48 (www.legislation.gov.uk/ukpga/1988/48/)

Copyright (International Organisations) Order 1989 SI 1989/989

9.8. Do I need to be concerned about this right?

The charts 9.8.1 and 9.8.2 in the appendix can help you to determine if you need to consider the right to attribution in your project.

10. MORAL RIGHTS: FALSE ATTRIBUTION

Ronan Deazley and Kerry Patterson

10.1. Introduction

UK law provides against the false attribution of authorship of a copyright protected work. This guidance considers the implications of this right for non-commercial digitisation initiatives.

10.2. Practical implications

Archivists and other information professionals strive to provide the fullest and most accurate information about documents, records and other objects, and in particular about the authorship of the work in question (when known). As such, the implications of the moral right of false attribution will rarely if ever be an issue of concern.

However, mistakes can be made, and innocent misattribution can occur. But, when considering the relevance of this particular moral right to digitisation initiatives, there are two important points to keep in mind.

First, when communicating a work to the public (that is, when making work available online) the moral right only relates to literary, dramatic and musical works, as well as films. It *does not apply to artistic works*, such as photographs, drawings, maps and plans. So, if the material you are digitising is artistic in nature, the potential consequences of false attribution are entirely redundant: you do not need to worry about them at all.

Second, an allegation of false attribution when making relevant works available online will only bite when the person making the work available knows that the attribution is false, or has reason to believe that the attribution is false. That is, liability is fault-based. Put another way, an innocent misattribution will not trigger liability.

10.3. Legislative Context

In addition to the bundle of economic rights that make up the scope of copyright protection, the *Copyright Designs and Patents Act 1988* (the CDPA) also provides for certain moral rights in relation to certain types of work (ss.77-89). There are four types of moral right to be aware of:

- the right to the privacy of privately commissioned photographs or films
- the right to object to false attribution of the work
- the right to be identified as the author of the work
- the right to object to the derogatory treatment of a work

In this note we consider the moral right to object to false attribution might impact the digitisation of these types of material held in archive and other cultural heritage collections. Details about the right to object to false attribution of a work are set out in sections 84 and 86-89 of the CDPA.

10.4. False attribution of authorship

The right to object to false attribution of a work predates the CDPA. Its roots lie in the *Fine Art Copyright Act 1862* which included a number of provisions concerning the fraudulent production and sale of works of art. Similarly, the 1956 *Copyright Act* – which preceded the CDPA – specifically addressed situations of false attribution of authorship (s.43 of the 1956 Act).

Within the CDPA, s.84 states that the false attribution right applies to persons wrongly named as the author of literary, dramatic, musical and artistic works, as well as the director of a film. It does not apply to the other categories of copyright-protected work: to sound recordings, broadcasts or the typographical arrangement of published editions.

Only certain activities will trigger liability in relation to certain types of work. For example, putting an artistic work on exhibition in public with a false attribution will trigger liability; but exhibiting a literary work (such as a manuscript letter) in public falsely attributed will not. The following table provides an overview of when an offence might be committed.

POTENTIALLY INFRINGING ACTS

	LITERARY	DRAMATIC	MUSICAL	ARTISTIC	FILM
ISSUE COPIES	Y	Y	Y	Y	Y
EXHIBIT IN PUBLIC	-	-	-	Y	-
PERFORM IN PUBLIC	Y	Y	Y	-	-
SHOW IN PUBLIC	-	-	-	-	Y
COMMUNICATE TO THE PUBLIC	Y	Y	Y	-	Y

Moreover, depending on the type of activity involved, infringement will turn on whether the person making the false attribution knows – or should have reason to believe – that the attribution is false. So, in some situations false attribution – even when innocent – constitutes an offence. We can refer to these as situations of *strict liability*. That is: the innocence of the person making the false attribution is irrelevant; ignorance is no defence. Strict liability applies in relation to the following types of activity:

	LITERARY	DRAMATIC	MUSICAL	ARTISTIC	FILM
ISSUE COPIES	Y	Y	Y	Y	Y
EXHIBIT IN PUBLIC	-	-	-	Y	-

In other situations, infringement will only occur when there is an element of fault or blame on the part of the person making the false attribution. That is: the person will only be liable for infringement when they know that the attribution is false, or when they have reason to believe that the attribution is false. Fault-based liability applies in relation to the following types of activity:

	LITERARY	DRAMATIC	MUSICAL	ARTISTIC	FILM
PERFORM IN PUBLIC	Y	Y	Y	-	-
SHOW IN PUBLIC	-	-	-	-	Y
COMMUNICATE TO THE PUBLIC	Y	Y	Y	-	Y

Section 84 also sets out a number of offences that concern claims of false attribution made in the course of a business. They have limited relevance for cultural heritage institutions engaging in non-commercial digitisation initiatives.

If false attribution has occurred in relation to a particular work in a relevant situation then infringement will have occurred: that is, there is no need for the complainant to establish that they have actually suffered any damage; so long as the attribution is false, the moral right has been infringed.

Finally, in terms of duration of protection, the right of false attribution last for the life of the author plus 20 years after their death. Thereafter, one no longer needs to worry about the potential implications of false attribution.

10.5. Legal References

Copyright Designs and Patents Act 1988 c.48 (www.legislation.gov.uk/ukpga/1988/48/)

11. MORAL RIGHTS: INTEGRITY

Ronan Deazley and Kerry Patterson

11.1. Introduction

When undertaking a digitisation initiative, it is important to have a clear idea as to when the right of integrity is relevant or not to works held within a collection, as well as when your use of a work might trigger liability. This guidance note explains the protection which UK law provides for the moral right of integrity – the right to object to the derogatory treatment of a work. It considers the implications of this right for non-commercial digitisation initiatives, explores the definition of ‘derogatory treatment’ and addresses a number of related questions.

11.2. In Practice

Given the professional and ethical standards that archivists and other cultural heritage custodians bring to bear on the preservation and public dissemination of the material in their collections, breaching the right of integrity in a qualifying work will rarely pose any problems. Although, as we have seen, simply possessing an infringing article might constitute infringement.

To help understand whether the right of integrity is relevant to works within your collection, consider section 7.

11.3. Legislative Context

In addition to the bundle of economic rights that make up the scope of copyright protection, the *Copyright Designs and Patents Act 1988* (the CDPA) also provides for certain moral rights in relation to certain types of work (sections 77-89). There are four types of moral right to be aware of:

- the right to the privacy of privately commissioned photographs or films
- the right to object to false attribution of the work
- the right to be identified as the author of the work (attribution)
- the right to object to the derogatory treatment of a work (integrity)

The moral rights of attribution and integrity are intended to protect an author’s non-economic and non-proprietary interests in her work. In this note, we identify a number of features common to both the right of attribution and the right of integrity, before considering how the moral right of integrity might impact the digitisation of material held in archive and other cultural heritage collections. Details about the right of integrity are set out in sections 80-83 and 86-89 of the CDPA.

11.4. Attribution and Integrity: common features

The right of attribution and the right of integrity share a number of common features.

First, they only extend to certain types of copyright-protected work: literary, dramatic, musical and artistic works, and films. They do not apply to sound recordings, broadcasts or the typographical arrangements of published editions.

Second, each right lasts for as long as copyright subsists in the work. That is, both rights last for the life of the author plus 70 years from the end of the year in which the author died. When copyright expires so too do the author’s moral rights.

Third, while neither right can be assigned to another person (that is, the rights cannot be transferred from the author to a third party) the rights can be *waived* in certain circumstances (CDPA s.87). In effect, this means the author can agree not to assert their rights of attribution and integrity. So, if you think that your use of a work might contravene either of the moral rights for some reason (perhaps you are cropping an image of an artistic work to post it online and are concerned that cropping might constitute a derogatory treatment) then you could always ask permission of the author and they might waive their moral right of integrity in relation to your use.

Fourth, there are specific rules to bear in mind regarding the existence of these rights when dealing with works created before 1 August 1989 (when the CDPA came into force). We deal with these rules in the next section.

11.4.1. Works made before 1 August 1989

Both the right to be identified as the author of a work (CDPA, s.77) and the right to object to derogatory treatment of the work (CDPA, s.80) apply to all relevant works created on or after the CDPA came into force, that is: 1 August 1989. In relation to works created *before* 1 August 1989, however, the rights do not apply to the following:

- literary, dramatic, musical or artistic works created by an author who died before 1 August 1989
- any film made before 1 August 1989, regardless of whether the author is alive or dead

So, when dealing with films, what matters is *when the film was created*: if it was created before 1 August 1989 the attribution and integrity rights do not apply. In relation to the other types of protected work – that is, literary, dramatic, musical and artistic works – what matters is *when the author died*. If the author died before 1 August 1989 the attribution and integrity rights do not apply. We can summarise this as follows:

WHEN DO MORAL RIGHTS APPLY?	AUTHOR DIED BEFORE 1 AUGUST 1989	AUTHOR ALIVE ON 1 AUGUST 1989 BUT WORK CREATED BEFORE THAT DATE	WORK CREATED ON OR AFTER 1 AUGUST 1989
LITERARY	No Moral Rights	Moral Rights May Apply*	Moral Rights May Apply*
DRAMATIC	No Moral Rights	Moral Rights May Apply*	Moral Rights May Apply*
MUSICAL	No Moral Rights	Moral Rights May Apply*	Moral Rights May Apply*
ARTISTIC	No Moral Rights	Moral Rights May Apply*	Moral Rights May Apply*
FILM	No Moral Rights	No Moral Rights	Moral Rights May Apply*

* The right of attribution only applies to these works in certain circumstances: see section 4.1 below for further discussion.

11.5. The Moral Right of Integrity

The moral right of integrity allows an author to object to the derogatory treatment of their work whenever the treatment would be prejudicial to the honour or reputation of the author.

11.5.1. Excluded material

The right of integrity applies to literary, dramatic, musical and artistic works, as well as films, but even in relation to these categories of work there are a number of exceptions to keep in mind. For example, the right does not apply to:

- computer programs and computer-generated works (s.81(2))
- any work that was made for the purpose of reporting current events (s.81(3))
- literary, dramatic, musical or artistic works made for the purpose of publication in a newspaper, magazine or similar periodical (s.81(4))
- literary, dramatic, musical or artistic works made for publication in an encyclopaedia, dictionary, yearbook or other collective work or reference (s.81(4))

Unlike the moral right of attribution, an author does not need to assert their claim to the moral right of integrity: that is, if the work qualifies for protection then the right of integrity applies.

11.5.2. Scope of protection

If the work qualifies for protection, the right applies in relation to the use of the work in its entirety *or to any part of the work* (s.89(2)). So, even subjecting a part of the work – however small or insubstantial – to a treatment that could be regarded as derogatory might infringe.

11.5.3. Infringement

If the right of integrity exists in relation to a particular work, what constitutes infringement of the right?

Infringement is only triggered by subjecting the work (or any part of the work) to a derogatory treatment in certain circumstances. Moreover, the types of activity that trigger infringement will vary depending on the type of work you are dealing with. The following table provides an overview of when an offence might be committed, although you should refer to the provisions set out in s.80 for further details.

POTENTIALLY INFRINGING ACTS *

	LITERARY	DRAMATIC	MUSICAL	ARTISTIC	FILM
PUBLISH COMMERCIALY	Y	Y	Y	Y	-
ISSUE COPIES TO THE PUBLIC	-	-	-	-	Y

ISSUE TO THE PUBLIC AS PART OF A FILM OR SOUND RECORDING	-	-	-	Y	-
EXHIBIT IN PUBLIC	-	-	-	Y	-
PERFORM IN PUBLIC	Y	Y	Y	-	-
SHOW IN PUBLIC	-	-	-	-	Y
INCLUDE IN A FILM SHOWN IN PUBLIC	-	-	-	Y	-
COMMUNICATE TO THE PUBLIC	Y	Y	Y	Y	Y
BROADCAST	Y	Y	Y	Y	Y
MAKE AVAILABLE ONLINE	Y	Y	Y	Y	Y

*You should refer to the provisions set out in s.80 for further details.

See chart 11.7.2 in the appendix for further guidance.

11.5.4. Qualification of the Right

The CDPA qualifies the application of the right of integrity in relation to three categories of work:

- work created by employees where copyright originally vested in the employer (that is, work created in the course of employment)
- works in which Crown or Parliamentary copyright subsists
- works in which copyright vests in certain international organisations²⁷

For most UK-based collections, the third of these categories will be of little relevance.

In relation to all three categories the CDPA provides that the right of integrity *does not* apply to anything done in relation to the work by or with the authority of the copyright owner. This qualification is subject to two provisos:

- where the author or director is identified at the time of the relevant act (that is, at the time of the allegedly derogatory treatment)
- where the author or director has previously been identified in or on published copies of the work

The Act also continues, however, that if the right *does* apply, the treatment will *not* constitute an infringement if there is a *sufficient disclaimer* (s.82(2)). A 'sufficient disclaimer' is further defined as follows: 'a clear and reasonably prominent indication (a) given at the time of the act, and (b) if the author or director is then identified, appearing

²⁷ See CDPA s.168 and the *Copyright (International Organisations) Order 1989* for further details of the relevant international organisations.

along with the identification, that the work has been subjected to treatment to which the author or director has not consented' (s.178).

11.5.5. What constitutes a derogatory treatment of a work?

The treatment of a work is defined in the legislation as any 'addition to, deletion from, alteration to or adaptation of the work', however, this does not include the translation of literary or dramatic works, or arrangement or transcribing a musical work involving no more than a change of key or register (s.80(2)).

The treatment of the work will be 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' (s.80(2)(b)). There is no simple test that can be applied to determine whether a work has been treated in a derogatory manner, although the courts have indicated that this should be determined objectively. That is, it is not sufficient that the author thinks the work has been subjected to a derogatory treatment (a subjective perspective); rather, one should ask whether a reasonable person would regard the treatment as derogatory (an objective perspective).

Given the professional and ethical standards that archivists and other cultural heritage custodians bring to bear on the preservation and use of the material in their collections, breaching the right of integrity in a qualifying work will rarely pose any problems. There are, however, two situations that warrant further consideration: altering or cropping a digital surrogate for some reason; and, the destruction of work that is not to be accessioned to a collection. We discuss these in sections 5.6 and 5.7 below.

11.5.6. Is the treatment prejudicial to the honour or reputation of the author?

Even if the treatment distorts or mutilates the work, this does not necessarily mean an offence has been committed. In *Confetti Records v. Warner Music* (2003) the argument was presented that a distortion or mutilation of a work that was not prejudicial to the honour or reputation of the author might nevertheless infringe an author's right of integrity. This argument was rejected by the court. Mr Justice Lewison specifically set out that 'the author can only object to distortion, mutilation or modification of his work *if it is prejudicial to his honour or reputation*' (emphasis added). That is, simply distorting or altering a work *per se* will not trigger liability unless that distortion is objectively prejudicial to the author's reputation.

By way of illustration: in *Tidy v. Trustees of the Natural History Museum* (1996) the cartoonist Bill Tidy granted the Natural History Museum permission to exhibit and reproduce a number of his black-and-white cartoons of dinosaurs. The gallery reproduced the cartoons in a smaller size and added colour backgrounds to the original drawings without the artist's permission. Mr Tidy complained that his right of integrity had been infringed. The court decided that, while the drawings had been altered in a material way, no evidence had been presented as to how the public perceived the Museum's actions, and without appropriate evidence of *actual prejudice* to Mr Tidy's reputation no offence had been committed.

11.5.7. Digital copies, alterations and cropping

Creating a digital copy of a work will be considered to be a treatment of that work although it is unlikely to constitute a derogatory treatment of the work unless the digital image is manipulated or altered in a manner that would be regarded as prejudicial to the honour or reputation of the author. Moreover, within the context of a digitisation initiative it is unlikely that the digital surrogate will represent anything other than a faithful reproduction of the underlying work. But what about cropping an image for use on a website or for promotional purposes?

In *Delves-Broughton v. House of Harlot Ltd* (2012) a specialist clothing company was held liable for breach of a photographer's moral right of integrity by making use of a cropped version of her photograph on their website. The original photograph was of a model taken in a forest wearing an article of clothing provided to the photographer by the company; the company reversed the image and cropped it to remove the forest background before reproducing it on their website. It was decided that cropping the image amounted to a distortion of the original work that, while not prejudicial to the author's reputation, did nevertheless constitute an infringement of her moral right of integrity.

The correctness of this decision has been questioned on the grounds that the court should not have found a breach of the right of integrity without *also* finding that the cropped image was prejudicial to the author's reputation (as discussed in section 5.5). However, the *House of Harlot* decision does illustrate that simply cropping an image of a relevant work *might* give rise to an action for infringement of the right of integrity.

11.5.8. Destruction of a work

The work of archivists and other information professionals may involve the destruction of copyright-protected works, including destroying the only known copy of a document or record. Does this constitute an infringement of the right of integrity? That is, does the destruction of a unique document or record amount to the 'distortion or mutilation of the work'? Or do the concepts of distortion and mutilation suggest the need for the continued existence of the work?

This issue has never been authoritatively resolved by the courts although whether destruction might fall within the concept of 'treatment' has been discussed in passing. Indeed, in *Harrison v. Harrison* (2010) Mr Justice Fysh QC suggested that destruction of a work might well fall within the concept of treatment:

"Treatment" of a work is I think, a broad, general concept; *de minimis* acts apart, it implies a spectrum of possible acts carried out on a work, from the addition of say, a single word to a poem to the destruction of the entire work. Where does one draw the line otherwise?

What we can say, however, is that the destruction of a work by an archivist is unlikely to trigger liability under the Act because every instance of primary infringement outlined above (see section 5.2.) requires that the allegedly derogatory treatment of the work is brought to the attention of the public in some way (eg, by *publishing* the work commercially, exhibiting *in public*, and so on). So, even if the destruction of a work does amount to a 'treatment' under the Act, the destruction would likely have to take place in public before liability would attach.

11.5.9. Possessing or dealing with an infringing article

It is also worth noting that, in relation to the right of integrity, the CDPA states infringement can occur by simply possessing or dealing with work that has been subjected to a derogatory treatment. These offences are set out in s.83 of the Act. Of particular relevance to cultural heritage institutions is that liability might be triggered by:

- possessing an infringing article in the course of a business
- exhibiting the infringing article in public in the course of a business

Moreover, a business is defined as including 'a trade or profession' (s.178) which will almost certainly encompass the work of an archive, a library or museum. Here, however, the *knowledge* of the alleged infringer is relevant to the commission of an offence. That is, liability turns on 'knowing or having reason to believe' that the article in question has been subjected to a derogatory treatment (what is generally referred to as *actual or constructive knowledge*).

What about the images or texts that have been cropped for the purpose of inclusion in the Morgan scrapbooks? Obviously these works were all created before 1 August 1989, but the authors in question may well have been alive when the CDPA came into force and so the right of integrity might apply. But even if the authors were alive at the relevant time, the vast majority of material in the scrapbook was originally created for the purpose of reporting current events, or for publication in a newspaper, magazine or other similar periodical. As such, this material is excluded from the right of integrity in accordance with s.81(3)(4) (see section 5.1). So, simply possessing texts and images in a scrapbook that have been cropped from newspapers and magazines will not pose any problems.

In relation to material within the scrapbook that is not excluded, then the relevant question to ask is, objectively considered, have they been subjected to a derogatory treatment such that the honour or reputation of the author has been impugned?



Example 1



Example 2

We can present two examples of the way in which material has appeared in the Scrapbook in a potentially infringing manner. Example 1 shows a photograph by Edward Saxe (dates unknown) which has been drastically cropped by Morgan from its original state, which shows the artist Yves Tanguy and his wife Kay Sage standing within a large frame, with some of Tanguy's paintings behind them. Example 2 shows how a portrait photograph by Bernard Poinssot (1922-1965) has been included in a page, surrounded by other cuttings. Unfortunately we were unable to find information on the rightsholder of the Saxe photograph to confirm that they were happy for us to use this very cropped version of Saxe's image but it is included here as an example of the type of drastic cropping that is commonplace in the Scrapbooks and which would potentially be unacceptable for rightsholders. The rightsholder of the Poinssot photograph was contacted regarding this work, and although the portrait has not been significantly cropped, the rightsholder was unhappy by the presentation of the image alongside a selection of diverse collage of cuttings, which he described as "far from representing the meticulous and studied work" of Poinssot. In this instance, the rightsholder still granted permission for the photograph to be shown as part of the page, with a specifically-worded disclaimer:

© The Estate of Bernard Poinssot. The condition and presentation of this image are not representative of the photographic skill of Bernard Poinssot.

11.5.10. Exceptions to the right

The CDPA sets out a number of exceptions to the right of integrity. For example, under s.81(5) the right is not infringed by anything done for the purpose of:

- avoiding the commission of an offence (for example, redacting material to comply with data protection obligations, or perhaps to comply with the *Obscene Publications Act*), or
- complying with a duty imposed by or under an enactment

These exceptions apply, where 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), provided your use carries a sufficient disclaimer (see section 5.3. for discussion of the concept of a 'sufficient disclaimer').

The CDPA also states the right of integrity is not infringed by any use which by virtue of s.57 or s.66A would not infringe copyright in the work. In effect, this simply means the right of integrity does not apply when making use of work for whenever it is reasonable to assume that the copyright has expired, or when the relevant author of the work (if known) has been dead for 70 years or more. But, given that the right does not apply at all to work created by an author who died before 1 August 1989, these exceptions have very limited relevance at the present time.

11.6. Legal References

Copyright Designs and Patents Act 1988 c.48 (www.legislation.gov.uk/ukpga/1988/48/)

Confetti Records v. Warner Music [2003] ECDR 31

Delves-Broughton v. House of Harlot Ltd [2012] EWPC 29

Tidy v. Trustees of the Natural History Museum [1996] EIPR D-81

Harrison v. Harrison [2010] EWPC 3

11.7. Do I need to be concerned about this right?

The charts 11.7.1 and 11.7.2 in the appendix can help you to determine if you need to consider this right.

12. MORAL RIGHTS: THE RIGHT TO PRIVACY IN CERTAIN PHOTOGRAPHS AND FILMS

Ronan Deazley and Kerry Patterson

12.1. Introduction

UK law provides protection regarding the moral right of privacy in privately commissioned photographs and films. This guidance considers the implications of this right for non-commercial digitisation initiatives.

12.2. Practical implications

Typically, this moral right should not present many problems for those digitising historic and other cultural heritage collections, for the two reasons detailed below: first, the scope of the right is limited to work that has been commissioned for private and domestic purposes; second, more significantly, the moral right only relates to material created on or after 1 August 1989.

12.3. Legislative Context

In addition to the bundle of economic rights that make up the scope of copyright protection, the *Copyright Designs and Patents Act* (the CDPA) also provides for certain moral rights in relation to certain types of work (ss.77-89). There are four types of moral right to be aware of:

- the right to the privacy of privately commissioned photographs or films
- the right to object to false attribution of the work
- the right to be identified as the author of the work
- the right to object to the derogatory treatment of a work

In this note we consider how the moral right to privacy in privately commissioned photographs and films might impact the digitisation of these types of material held in archive and other cultural heritage collections. Details about the nature of this right are set out in sections 85-89 of the CDPA.

12.4. The right to the privacy of privately commissioned photographs or films

Under the CDPA a person who, for private and domestic purposes, commissions the taking of a photograph or the making of a film has the right to prevent copies of the work being issued to the public, to prevent the work being exhibited or shown in public, or having the work communicated to the public which would include having the photograph or the film made available online.

It is important to note that this provision does not concern all photographs and films but only those that have been *commissioned* by the subject(s) for *private and domestic purposes*. Everyday snapshots, whether domestic or work-related, will not fall within the scope of the moral right: only works that have been *commissioned*.

If someone does enjoy a right of privacy in a commissioned work, whether a photograph or a film, the CDPA does provide for certain exceptions in which the use of the work will not infringe the moral right, however, they have little relevance in relation to the digitisation of archive and other heritage material (see s.85(2) for further details).

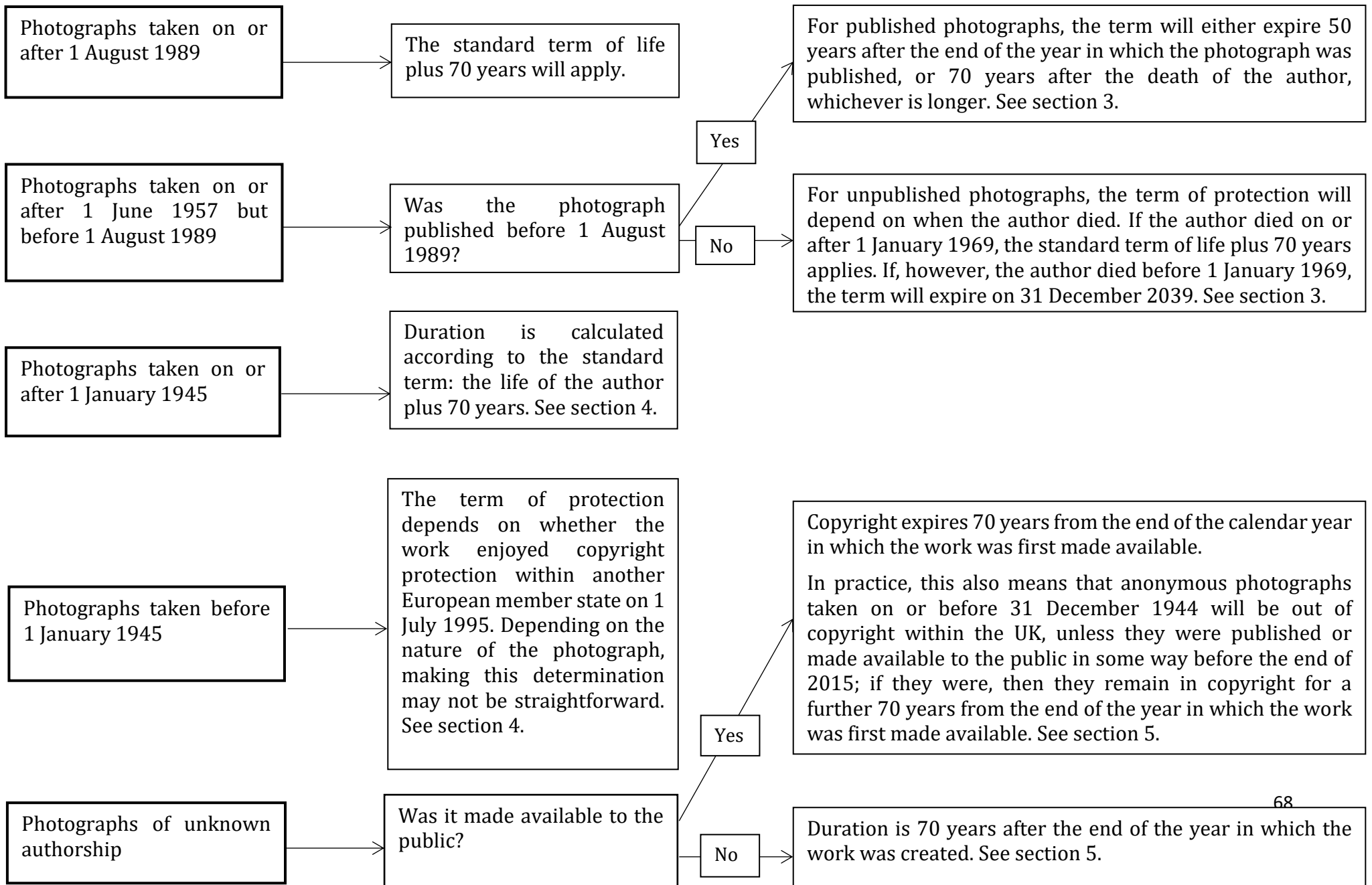
12.5. Works made before 1 August 1989

It is important to note, however, that the moral right of privacy does not apply to photographs taken or films made before 1 August 1989. That is, the right does not apply to any work created before the CDPA came into force. Only when dealing with photographs and films created *on or after* 1 August 1989 will this statutory right to privacy be of relevance.

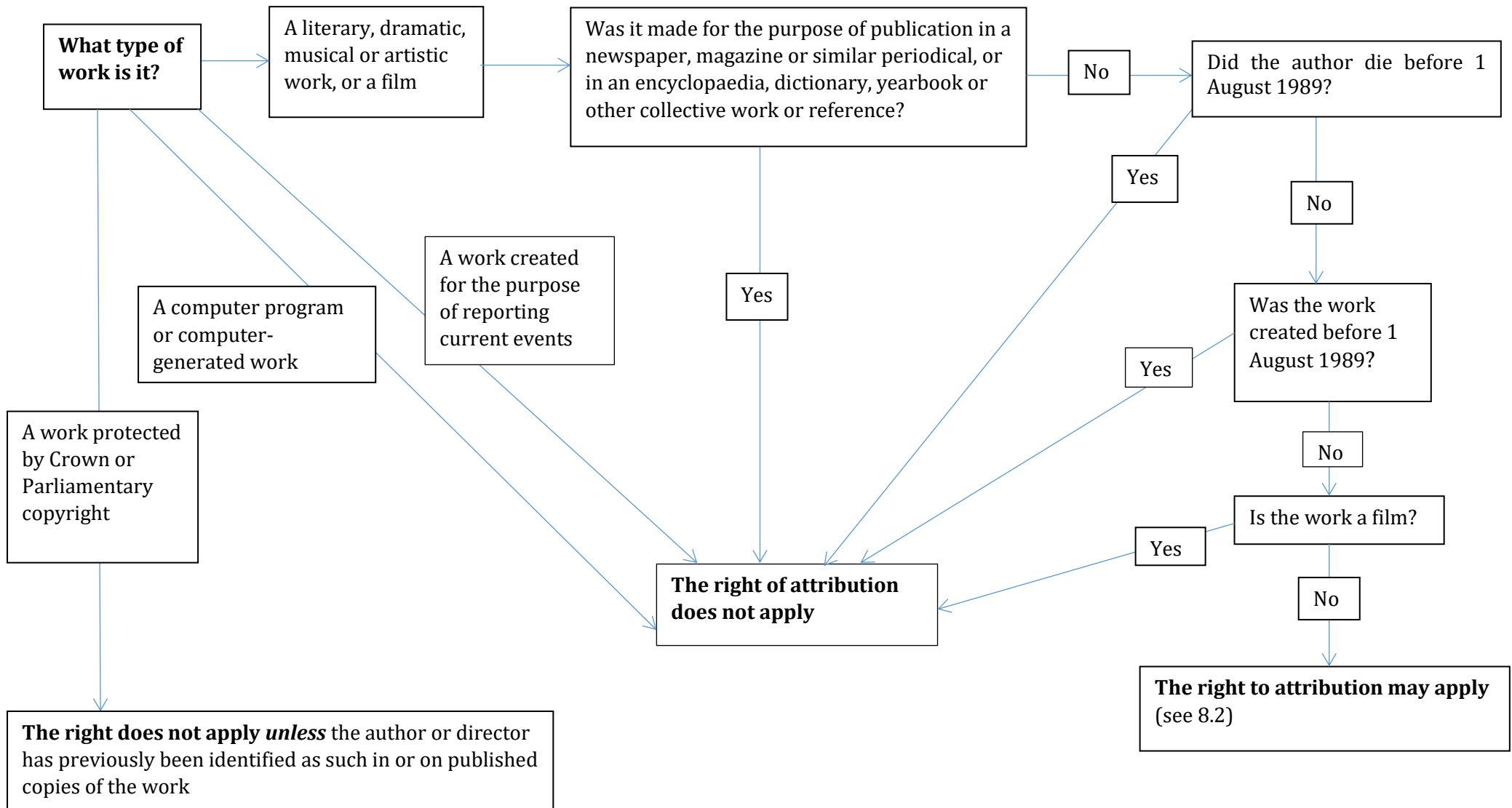
12.6. Legal References

Copyright Designs and Patents Act 1988 c.48 (www.legislation.gov.uk/ukpga/1988/48/)

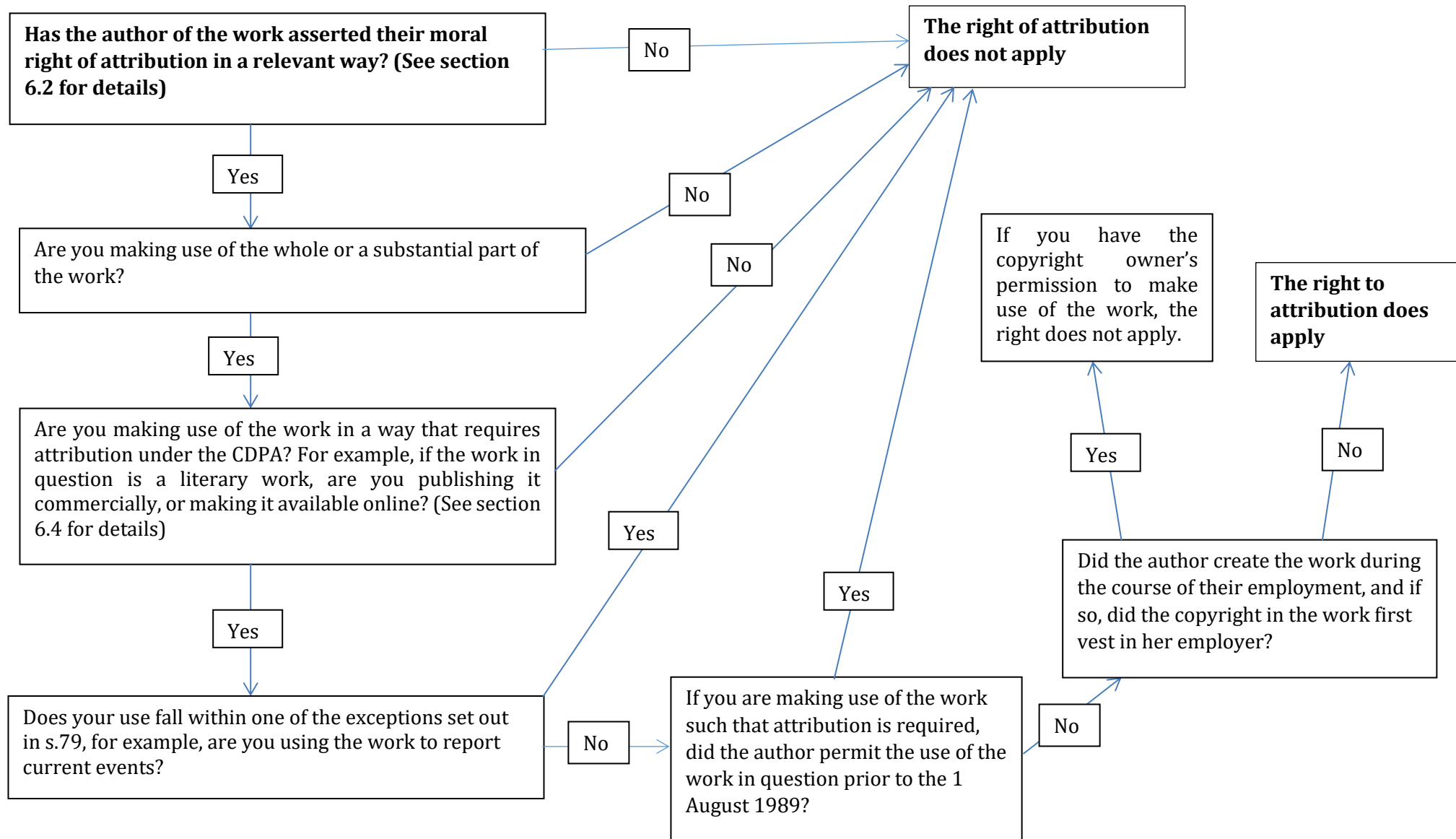
5.9. Photographs: Copyright Duration Flowchart



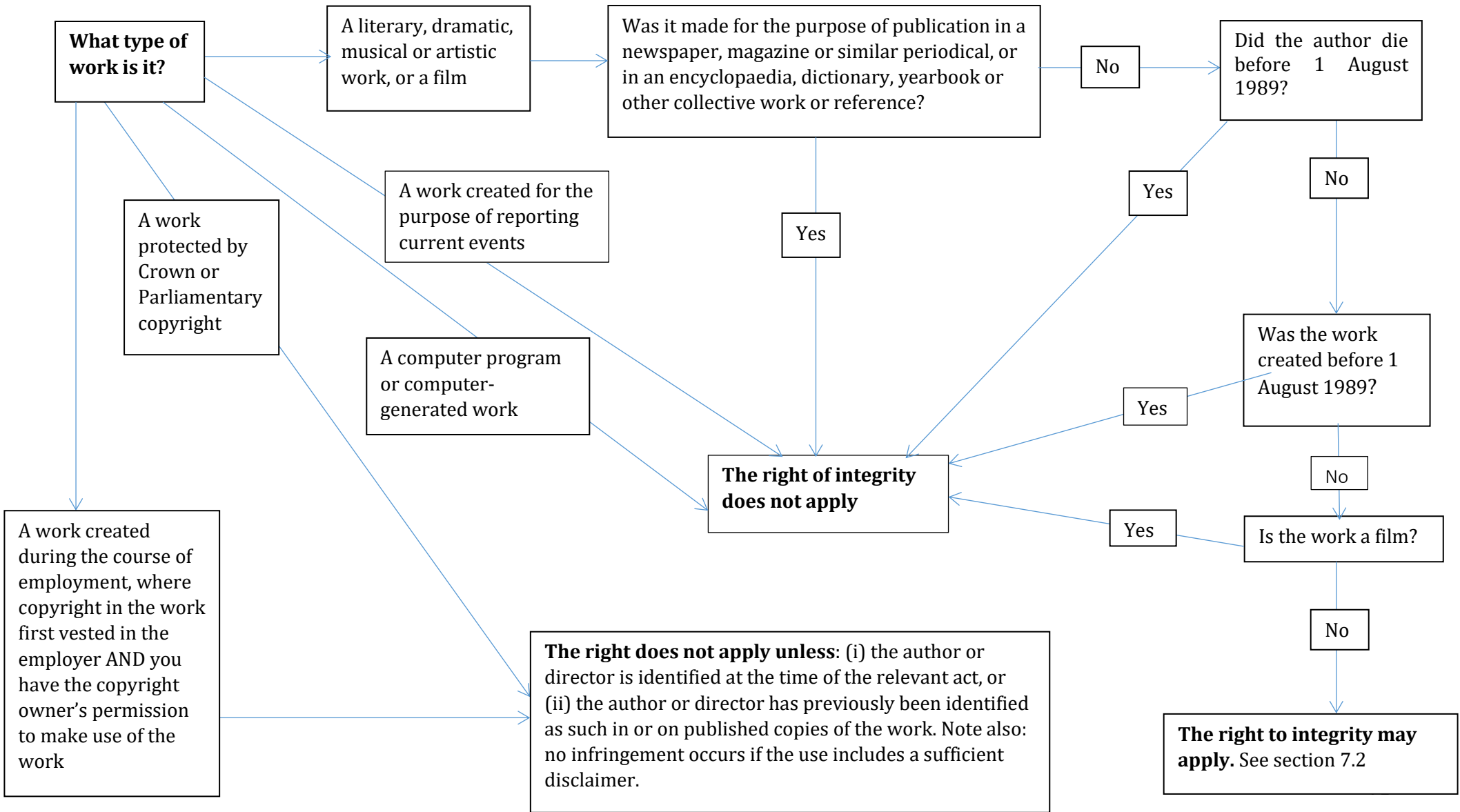
9.8.1 Type of work & date of creation Flowchart



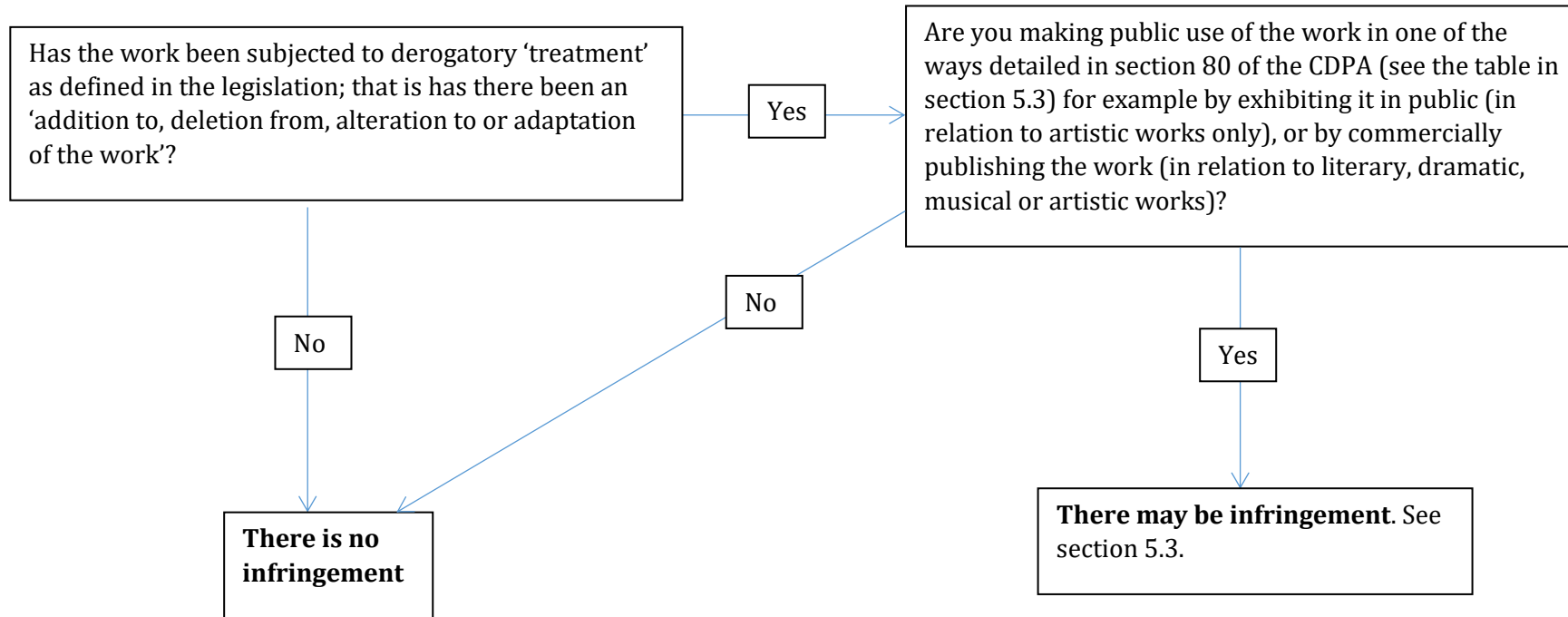
9.8.2 Asserting Rights, Exceptions & Permissions Flowchart



11.7.1 Type of work & date of creation Flowchart



11.7.2 Infringement Flowchart



11.7.2.1 Do you possess a work that has been subjected to a potentially infringing derogatory treatment?

If you suspect that a work in your collection has been subjected to a derogatory treatment then simply possessing the infringing article may constitute an offence under section 83 of the CDPA. You should discuss with your line manager or Board of Trustees whether to retain the potentially infringing article in the collection or look to the appropriate guidance for your sector, if available. For example, general guidance on disposal for Museums can be found in the Museums Association's Code of Ethics and the Disposal Toolkit, however this does not currently include reference to disposal on the grounds of violating the CDPA.



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