Part Two

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Chapter 2

BACKGROUND AND BASIC PRINCIPLES

WHAT IS COPYRIGHT?

Copyright is a property right that subsists in certain specified types of works as provided for by the Copyright, Designs and Patents Act 1988. Examples of the works in which copyright subsists are original literary works, films and sound recordings. The owner of the copyright subsisting in a work has the exclusive right to do certain acts in relation to the work, such as making a copy, broadcasting or selling copies to the public. These are examples of the acts restricted by copyright. The owner of the copyright can control the exploitation of the work, for example, by making copies or selling copies to the public or by granting permission to another to do this in return for a payment. A common example is where the owner of the copyright in a work of literature permits a publishing company to print and sell copies of the work in book form in return for royalty payments, usually an agreed percentage of the price the publisher obtains for the books.

If a person performs one of the acts restricted by copyright without the permission or licence of the copyright owner, the latter can sue for infringement of his copyright and obtain remedies: for example, damages and an injunction. However, there are limits and certain closely drawn exceptions are available, such as fair dealing with the work. An example would be where a person makes a single copy of a few pages of a book in a library for the purpose of private study. Other acts may be carried out in relation to the work if they are not restricted by the copyright: for example, borrowing a recording of music from a friend to listen to in private.

A broad classification can be made between the various types of copyright work. Some, such as literary, dramatic, musical and artistic works, are required to be original. As will be seen later, this is easily satisfied and the work in question need not be unique in any particular way.

Other works such as films, sound recordings, broadcasts and typographical arrangements can be described as derivative or entrepreneurial works and there is no requirement for originality: for example, repeat broadcasts each attract their own copyright. Copyright extends beyond mere literal copying and covers acts such as making a translation of a literary work, performing a work in public and other acts relating to technological developments, such as broadcasting the work or storing it in a computer.

Fundamentally and conceptually, copyright law should not give rise to monopolies, and it is permissible for any person to produce a work which is similar to a pre-existing work as long as the later work is not taken from the first. It is theoretically possible, if unlikely, for two persons independently to produce identical works, and each will be considered to be the author of his work for copyright purposes. For example, two photographers may each take a photograph of Nelson's Column within minutes of each other from the same position using similar cameras, lenses and films, after selecting the

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1 Cable programmes (sent by cable as opposed to being transmitted through the ether) were a separate form of work but, as a result of the Copyright and Related Rights Regulations 2003, they were reclassified as broadcasts, the definition of which was amended accordingly.

2 Under previous copyright legislation, original works were described as Part I works and derivative works were described as Part II works (see Copyright Act 1956). The copyright in a repeat broadcast expires at the same time as the copyright in the original broadcast: Copyright, Designs and Patents Act 1988 s 14. However, no copyright arises in a repeat broadcast made after the expiry of copyright in the original broadcast: s 14(5).

3 In some circumstances, copyright can give a monopoly right: for example, where the content of the work is available only to the creator of the work and none other.
same exposure times and aperture settings. The two photographs might be indistinguishable from each other but copyright will, nevertheless, subsist in both photographs, separately. The logical reason for this situation is that both of the photographers have used skill and judgment independently in taking their photographs and both should be able to prevent other persons from making copies of their respective photographs.

Another feature of copyright law which limits its potency is that it does not protect ideas; it merely protects the expression of an idea. The late Barbara Cartland did not have a monopoly in romantic novels. Anyone else is free to write a romantic novel, since the concept of a romantic novel is an idea and not protected by copyright. However, writing a romantic novel by taking substantial parts of a Barbara Cartland novel infringes copyright, because the actual novel is the expression of the idea. Just how far back one can go from the expression as formulated in a novel to the ideas underlying the novel is not easy to answer. If a person gleans the detailed plot of a novel and then writes a novel based on that detailed plot, there is an argument that there has been an infringement of copyright even though the text of the original novel has not been referred to further or copied during the process of writing the second novel. A detailed plot, including settings, incidents and the sequence of events can be described as a non-literal or non-textual form of expression. However, the boundary between idea and expression is notoriously difficult to draw. Suffice it to say at this stage that judges have been reluctant to sympathise with a defendant who has taken a short cut to producing his work by making an unfair use of the claimant’s work, especially when the two works are likely to compete.

Copyright is also restricted in its lifespan; it is of limited duration, although it must be said that copyright law is rather generous in this respect. For example, copyright in a literary work endures until the end of the period of 70 years from the end of the calendar year in which the author dies. Approximately, therefore, copyright lasts for the life of the author plus 70 years. This temporal generosity can be justified on the basis that copyright law does not lock away the ideas underlying a work.

Ownership of the copyright in a work will often remain with the author of the work, the author being the person who created it or made the arrangements necessary for its creation, depending on the nature of the work. However, if a literary, dramatic, musical or artistic work is created by an employee working in the course of his employment, his employer will be the first owner of the copyright subject to agreement to the contrary. Additionally, copyright, like other forms of property, can be dealt with; it may be assigned; it may pass under a will or intestacy or operation of law, and licences may be granted in respect of it.

Full acknowledgement of moral rights is a relatively recent concept in UK copyright law, though well established in other European countries reflecting differences in the historical development and conceptual foundations of copyright between the UK and continental Europe. These moral rights, such as the right to be recognised as the author of a work and the right to object to a derogatory treatment of the work, remain with the author irrespective of subsequent ownership and dealings with the ownership of the copyright. They recognise the creator’s contribution, a way of giving legal effect to the fact that the act of producing a work is an act of creation and that the creator has a link or bond with the work which should be preserved regardless of hard economic considerations. The tort of defamation has, of course, long been available and could provide remedies if an author’s work were to be distorted or if a work was falsely attributed to someone, depending on the circumstances: for example, if a dreadful musical composition was falsely attributed to a famous and brilliant composer. But the difficulties of suing in defamation and the attendant expense and uncertainty are good reasons for the author–work nexus to be specifically recognised and enforceable under copyright law.
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Copyright law adopts a very practical posture and takes under its umbrella many types of works which lack literary or artistic merit and may or may not have commercial importance. Thus, everyday and commonplace items, such as lists of customers, football coupons, drawings for engineering equipment, tables of figures, a personal letter and even a shopping list, can fall within the scope of copyright law. One important reason for protecting such things is that some of them are likely to be of economic value and usually will be the result of investment and a significant amount of work, such as a computer database. Without protection there are many who would freely copy such things without having to take the trouble to create them for themselves and who would be able, as a consequence, to sell the copied items more cheaply than the person who took the trouble to create the original. If this were to happen, the incentive for investment would be severely limited. Neither is copyright generally concerned with the quality or merit of a work, the rationale being that it would be unacceptable for judges to become arbiters of artistic or literary taste or fashion. Copyright implicitly accepts that tastes differ between people and over a period of time. If the converse were true, many avant-garde works would be without protection from unauthorised copying and exploitation.

The pace of technological development in recent times has been unprecedented, but copyright law has striven to keep pace and the current legislation, the Copyright, Designs and Patents Act 1988, attempted to provide a framework which would be resilient to future changes.

BRIEF HISTORY

Dating back almost to the beginnings of civilisation there have been those eager to profit from the work of others. In ancient times, the idea that the author of a work of literature had economic rights to control dissemination and copying was not particularly well established, and yet those who falsely claimed a work were considered contemptible. Most authors were primarily teachers, hence the emphasis on moral rights. The word ‘plagiarist’, meaning one who copies the work of another and passes it off as his own, is derived from the Latin ‘plagiarius’ meaning kidnapper. The problems of unauthorised copying of works produced by others stretch back into antiquity.

Copyright law has a relatively long history and its roots can be traced back to before the advent of printing technology, which permitted the printing of multiple copies quickly and at relatively little expense. The first record of a copyright case was Finnian v Columba.

of Richard III in 1483 encouraged the circulation of books from abroad. In 1518, the first printing privilege was issued to Richard Pynson, the Royal Printer, which prohibited the printing, for two years, of a speech by anyone else. A copyright notice was appended to the speech. Until the early sixteenth century, the art of printing was practised freely and England was quickly established as an important centre for printing in Europe. But Henry VIII, desiring to restrict and control the printing of religious and political books, eventually banned the importation of books into England. By an Act of 1529, Henry VIII set up a system of privileges and printing came to be controlled by the Stationers’ Company, originally a craft guild. With the backing of the infamous Court of Star Chamber, the government and the Stationers’ Company maintained an elite group of printers and regulated publishing. Only registered members of the Stationers’ Company could print books, the titles of which had to be entered on the Company’s Register before publication. Members of the Company had the right to print their books in perpetuity and this right became known as ‘copyright’, the right to make copies. The Stationers’ Company had powers to enable it to control printing and it could impose fines, award damages and confiscate infringing copies. Following the abolition of the Star Chamber by the Long Parliament in 1640, infringement of copyright was still subject to statutory penalties. For example, in 1649, a penalty of 6s 8d was imposed for reprinting registered books without permission. Eventually, after the lapse of this system, common law copyright was enforced in the Court of Common Pleas which soon recognised that copyright could be assigned. The system of privileges, registration and control survived, going through phases of varying effectiveness and licensing systems, until its ultimate collapse in 1695; and, following a brief period when piracy of books flourished, the Statute of Anne was passed in 1709. In the period leading up to the Act, many had argued that copyright was a property right: just the same as houses and other estates and that existing copies [assignments of copyright] had cost at least £50,000, and had been used in marriage settlements and were the subsistence of many widows and orphans. It was said that Jonathan Swift, the author of *Gulliver’s Travels*, who had himself suffered at the hands of copyright pirates, had a hand in drafting the Statute of Anne. The effect of wide scale piracy of books was described in the Act, in words bordering on the emotional, as being ‘to their [authors and proprietors of books and writings] very great Detriment and too often to the Ruin of them and their Families’. The importance of the law as a means of encouraging the dissemination of information was also recognised in the Preamble which described the Act as being for: . . . the Encouragement of Learning by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies. The Statute of Anne gave 14 years’ sole right of printing to authors of new books (books already published by 1710 were given 21 years’ protection). At the end of that period, the right returned to the author and, if still alive, he was granted an additional 14 years. Infringers were to pay a fine of one penny for every sheet of the infringing book, one moiety of which went to the author, the other to the Crown. By modern standards, this was a considerable fine. In addition, infringing books and parts of books were forfeit to the proprietor who ‘shall forthwith damask and make waste paper of them’. A system of registration was still in place and an action could be brought only if the title had been entered in the register book at the Stationers’ Company before publication. The ‘copy’, by the Act, was the ‘sole liberty of printing and reprinting’ a book and this liberty could be infringed by any person who printed, reprinted or imported [14 Bowker, RR, ibid, p 19.]

[15 As were Germany, France, Venice and Florence.]

[16 8 Anne c. 19.]

[17 Bowker, RR, op cit, p 23.]
18 15 Geo. III c. 53.

19 Copyright, Designs and Patents Act 1988 Sch 1, para 13. The Whiford Committee found that the universities and colleges concerned were not overly anxious to retain perpetual copyright: Copyright and Design Law, Cmd 6732, HMSO, 1977.

20 (1769) 4 Burr 2303.

21 James Thomson was a Scottish poet.

22 (1774) 2 Bro PC 129.


24 (1834) 8 Pet 591.

25 There are now, however, some significant differences which compromise the impact of US precedents.

26 Musical works were protected earlier though the form of protection was unsatisfactory.

27 Hansard, HC Deb vol 56 (5 February 1841). However, he was not arguing for the abolition of copyright, merely against extending it beyond the author’s life.

28 The ‘Berne Convention’.

29 Authors’ rights.

- The Statute of Anne was copied by the US Congress in 1790 and Donaldson v Beckett followed in the Supreme Court in Wheaton v Peters. Hence the similarity between the copyright laws of the UK and the US.

- The scope of copyright was gradually increased to include other works, such as engravings and prints in 1734–35, lithographs in 1734, sculptures in 1798, dramatic works in 1833 and musical works in 1882. Moves were also made to extend the term of copyright, through these changes did not go unchallenged; for example, the historian Macaulay described copyright as ‘a tax on readers for the purpose of giving bounty to writers.’ In the meantime, it was becoming recognised that copyright was important in an international context, and the Berne Convention for the Protection of Literary and Artistic Works was formulated in 1886 with the purposes of promoting greater uniformity in copyright law and giving copyright owners full protection in all Contracting States. Reciprocal protection was based on the place of publication and not by reference to the nationality of the author. The Berne Convention was remarkable in that it successfully reconciled the fundamentally different nature of UK copyright law with the French tradition of droit d’auteur. In the Berlin revision of 1908 (the Berlin Act), inter alia, the term of copyright protection was increased to the life of the author plus 50 years and copyright was extended to cover choreographic works, works of architecture and sound recordings. The revision also introduced the compulsory licence and removed formalities (works still had to be registered in the UK). Major changes to UK copyright law were introduced by the Copyright Act 1911, heavily influenced by the Berlin revision. The 1911 Act formed the basis of copyright law throughout the British Empire and accounts for similarities in copyright law between the UK and countries such as Australia, New Zealand and South Africa.

- Since the Berne Convention and subsequent revisions (and the later Universal Copyright Convention, first promulgated in 1952), the impetus for change in copyright
law has been largely the result of the conventions 30 rather than internal national considerations. The 1911 Act was replaced in the UK by the Copyright Act 1956, which added three new forms of works: cinematograph films, broadcasts and the typographical arrangement of published editions. The Performing Right Tribunal was created. 31 The 1956 Act classified works as being either original works (Part I works – literary, dramatic, musical and artistic works) or Part II works, sometimes known as derivative works or entrepreneurial works (namely sound recordings, cinematograph films, broadcasts and the typographical arrangement of published editions). These works could be described as derivative as they were usually based on a Part I work. For example, a sound recording may be made of the live performance of a musical work. The link was not essential and a Part II work could be subject to copyright protection without an equivalent Part I work: for example, a sound recording of a bird singing could qualify for copyright protection.

Finally, in response to major technological developments, the current Act, the Copyright, Designs and Patents Act 1988, was passed. This Act takes due account of moral rights, inalienable rights which belong to the author irrespective of the ownership of copyright. 32 These are equivalent to the droit moral of the Rome Act of 1928 of the Berne Convention; that is a right to claim authorship of a work and the right to object to any distortion, mutilation or other modification of a work which could be prejudicial to the honour and reputation of the author. 33 This also has the effect of pulling English copyright law closer to that subsisting in other European countries.

COPYRIGHT AND ITS RELATIONSHIP TO OTHER INTELLECTUAL PROPERTY RIGHTS

Like other intellectual property rights, copyright does not stand in splendid isolation. The unfair taking or use of the results of the application of human intellect may infringe more than any one single right. An act giving rise to infringement of copyright may be associated with or accompany a breach of confidence. For example, if an employee copies a confidential report belonging to his employer without permission and then passes on the copy to a competitor of the employer, there will be an infringement of copyright by the act of making a copy without permission and a serious breach of confidence by the employee giving the copy to the competitor, and also by the latter if he realises or ought to realise that the report is confidential. Additionally, the employee will be in breach of his contract of employment. The action taken by his employer may depend on the remedies available and, in the example quoted, it is likely that the employer would dismiss the employee (for being in breach of the contract of employment) and an injunction would be sought (for breach of confidence) against the competitor, restraining him from using the information and from divulging it further. It is unlikely that there would be much to be gained by suing the employee for infringement of copyright, although this could be a case where ‘additional damages’ might be appropriate (see Chapter 6).

Generally, things that fall within the ambit of copyright law are excluded from the grant of a patent, 34 but preliminary materials such as plans, sketches, specifications, and the like, will be protected, in principle, by copyright. That is, copyright will subsist in each of these items irrespective of any patent granted for the invention with which the items are concerned. 35 However, there are two limitations to this, the first being where the details of the invention represented in drawings fall within the scope of the UK unregistered design 36 and the second being that copies may be made of patent applications (including the specification) by permission of the Comptroller-General of Patents, Designs and Trade Marks without infringing copyright. 37 Ideas for a new invention, 38 And, more recently, the European Community.

31 Now replaced by the Copyright Tribunal.

32 Including now the droit de suite, the author’s right to payment on subsequent sale of his work of art or manuscript; Berne Convention, Article 14bis. Introduced into the UK by the Artists’ Resale Right Regulations 2006 SI 2006/346 implementing Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13.10.2001, p 32.

33 Article 6bis of the Berne Convention.

34 Patents Act 1977 s 1(2). But see Chapter 12 for instances when a computer program (which is a literary work under copyright law) can indirectly achieve patent protection.

35 The Patents Act 1977 makes provision for the possibility that an employee might be entitled to a patent for an invention but copyright or design rights might belong to his employer: s 39(3).

36 Indirect copying of a drawing of a design by making the article represented does not infringe the copyright in the drawing. Copyright, Designs and Patents Act 1988 s 51(1).

37 Copyright, Designs and Patents Act 1988 s 47.
while outside the scope of copyright until such time as they are given some tangible form of expression, will be the subject matter of the law of confidence. There is also a close relationship between copyright and the law of designs, and many articles that are subject to design law will have been prepared from drawings and written specifications. However, any potential overlap between design law and copyright is reduced by the Copyright, Designs and Patents Act 1988.\(^{38}\)

Changes to UK registered design and the introduction of the Community design (registered and unregistered) has increased the potential overlap between copyright and design law as, for example, typefaces and graphic symbols may be protected by design law in addition to copyright protection. The difference between registered designs and copyright can be important where there is such an overlap as, although copyright gives longer protection, a registered design gives monopoly protection.

Sometimes, different rights may be relevant at different times during the life of a work. For example, if a musician has an idea for a piece of music, that idea will be protected by the law of confidence, unless it is already in the public domain. When the music is written down, it will be protected by copyright both before and after publication. After publication, of course, confidentiality will be lost. Live performances of the music will be protected under the Copyright, Designs and Patents Act 1988 Part II which deals with rights in performances (replacing the Performers’ Protection Act 1963) and any recordings made will be protected as sound recordings and, separately, as a recording of a live performance. If a copy is made of a record, cassette tape or compact disc of the music, the copyright both in the sound recording (and ‘recording right’) and the original music will be infringed. If the music is a song, the lyrics will be independently protected as a literary work. Thus, it can be seen that a single item may be subject to several copyrights. This is essential as different interests may be involved. For example, in the case of a song, the music may have been written by one person, the words by another. The recording company will also require direct protection of the sound recording so that it may take action against anyone making duplicates of the recordings. The performer and, if recorded live, the recording company, also require protection against persons making unauthorised ‘bootleg’ recordings of the live performance.

**COPYRIGHT AS A MEANS OF EXPLOITING A WORK**

Copyright provides a very useful and effective way of exploiting a work economically. It provides a mechanism for allocation of risks and income derived from the sale of the work. For example, if a poet compiles an anthology of poems, this will be protected as a literary work even if unpublished. Copyright provides remedies in respect of published and unpublished works. If an unpublished work is copied and sold by someone without the permission of the copyright owner, remedies such as damages, additional damages, accounts of profits and injunctions are available depending on the circumstances. They are, however, available only to the owner of the copyright, an exclusive licensee or a non-exclusive licensee expressly granted the right of action by the copyright owner. A beneficial owner of the copyright cannot obtain damages or a perpetual injunction without joining the owner of the legal title to the copyright, although a beneficial owner may be able to obtain an interim injunction on his own. If the poet in the example wants his anthology of poems published, he might decide to approach prospective publishers, and, if one agrees to publish, the poet might grant an exclusive licence to the publisher allowing him to print and sell copies of the poems in book form. Alternatively, the poet might agree to assign the copyright to the publisher. In either case, the publisher usually takes the risk – he pays the cost of printing, binding,
marketing and distributing. In return, the poet will be paid a fee or a royalty of, say, 10 per cent of the income obtained by the publisher on sales of the anthology.

An added attraction, in the case of an exclusive licence, for example, a licence granting the exclusive rights of publishing the work in the UK, is that the publisher has the right to sue for infringement, and, if the publisher is successful, the poet will be entitled to a share of the damages awarded equivalent to his lost royalties attributable to the infringement. Depending on the terms of the exclusive licence, the poet may be free to make agreements in respect of other modes of expression of the poems, such as a sound recording of the poems being recited by a famous actor. Of course, if the poet assigns the work to the publisher, the publisher will be entitled to sue for infringement as owner of the copyright and the assignment agreement may provide for a division of the damages awarded between the author and the publisher. For the author, a major attraction of granting an exclusive licence, or for that matter an assignment, to a publisher is that copyright actions tend to be fairly expensive and daunting for an individual to pursue, but a reputable publishing company will not hesitate in enforcing its rights under copyright law and, indirectly, the rights of the author.

A copyright can be considered to comprise a bundle of rights, associated with the acts restricted by the copyright. These are the acts that only the copyright owner is allowed to do or authorise. These acts include copying, issuing copies to the public, performing, playing or showing the work in public and broadcasting the work. These can be exploited separately and a copyright owner must be careful not to assign or grant licences for more rights than necessary for the exploitation envisaged. For example, the owner of the copyright in a dramatic work might grant an exclusive right to publish the work in book form to a literary publisher. The owner may then later grant other rights to others, such as the right to perform the work on stage, or even the right to make it into a film. In this way, the income the owner derives from the work can be maximised.

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