COPYRIGHT AND DESIGNS

1. Intellectual property defined

Intellectual property is an example of intangible personal property. It is, in its simplest form, a collection of ideas and information in a broadly commercial context that the law recognises as having a value and is, therefore, deserving of protection. Intellectual property as a subject covers trademarks, passing off, copyright, patents and designs. The law protects intellectual property in a negative sense in that it may be used to prevent others from exploiting or infringing the intellectual property rights of the owner. This fact sheet will deal with copyright and designs.

2. What is copyright?

Copyright is the right to prevent others from copying, or reproducing your work. UK Copyright law is set out in the Copyright Designs and Patents Act 1988 (CDPA). Copyright protects the form of expression of an idea, not the idea itself. For example, if you have an idea for the plot of a movie, that idea, whilst still in your head or even if communicated orally to others, will not be a copyright work. However, as soon as you commit that movie plot to paper it becomes a work capable of copyright. The material does not have to have novelty or aesthetic value to get copyright protection, but it does have to be the result of independent intellectual skill and effort.
There is no copyright in a name or title.

You cannot register copyright. It arises automatically upon the creation of a work that qualifies for copyright protection. Under the CDPA, the author will need to show that he/she is a qualifying person or that the work was first published in a convention country. A convention country is any country that is a signatory to either the Universal Copyright Convention or the Berne Copyrights Convention. In practice, this covers most countries of the world.

Works that qualify for copyright protection are defined as:

- Original literary, dramatic, musical and artistic works.
- Sound recordings, films and broadcasts (including cable and satellite broadcasts).
- Published editions of works.

It should be noted that a single work may be protected by a number of copyrights, owned by different people. For example, a song comprises words and music and each of these will have its own copyright protection.

Literary works

A literary work is defined as "any work, other than a dramatic or musical work, which is written, spoken or sung". This will include, for example, a computer programme, a table or compilation other than a database, preparatory design material for a computer program, a database, books, magazines, articles and poems. For a work to be protected it does not have to have literary merit.

In respect of computer programs, recent cases have confirmed that it is not the idea which is protected by copyright but only the form in which it is expressed. The form tends to mean the source code or program architecture. However, it appears as though it can also apply to the graphics of a product.

Dramatic works

There is no definition of original dramatic works but it does include "a work of dance or mime". The courts have suggested a dramatic work requires an element of performance accompanied by action. In order to be protected by copyright, a dramatic work must be recorded in some form; mere performance will be protected by performance rights (see later).

Musical works

This is defined as "a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music". This includes vocal or instrumental sounds, musical composition, printed or written score. The musical work must be recorded in some form for copyright to subsist.

Artistic works

This is "a graphic work, photograph, sculpture or collage irrespective of artistic quality, a work of architecture being a building or model of a building or a work of artistic craftsmanship". In practice, what constitutes an artistic work is subjective and there exist a number of areas of dispute. For example, does designer clothing constitute a work of artistic craftsmanship? The answer is that it depends on the functionality and purpose of the specific design. Artistic works could therefore include:

- Flow diagrams, charts and maps;
- Graphic design materials, such as book jackets, leaflets, greetings cards and post cards;
- Engineering and design drawings;
- Photographs, including photographs of single, static items.

3. Who owns copyright?

The general rule is that the author is the first owner of copyright in a literary, dramatic, musical or artistic work. In the case of films, the principal director and the film producer are joint authors and first owners of copyright. The main exception is where a work or film is made in the course of employment, in which case the employer owns the copyright, unless there is a contractual agreement to the contrary. The copyright in sound recordings, broadcasts and published editions generally belongs to the record producer, broadcaster or publisher.

To prove ownership, the author will need to produce original evidence of the creation of the work and proof of authorship. Such evidence usually requires a date reference. It may help copyright owners to deposit copies of the work with a bank or solicitor. Alternatively, the creator could send himself/herself copies of the work by registered post, leaving the envelope unopened on its return. This could establish that a work existed at the time. Ultimately, it is a matter for the courts to decide.

4. Infringement of copyright

The owner of copyright has the right to prevent others from doing certain specified acts in respect of that work. This includes:

- Copying a copyright work.
- Issuing copies to the public.
- Performing.
- Showing or performing the work in public.
- Communicating the work to the public.
- Making an adaptation of a copyright work.

Should such restricted acts take place without the consent or licence of the copyright owner, they will constitute an infringement if they are done in relation to the whole or a substantial part of the work, either directly or indirectly.

There are also circumstances where an action may amount to a secondary infringement. This includes:

- Supplying apparatus for playing sound recordings, showing films or receiving visual images or sounds conveyed by electronic means, or a substantial part of such apparatus, which has been used to perform, play or show a copyright work in public so as to infringe copyright
- Transmitting a copyright work via a telecommunications system (other than by communication to the public). (For example, this would cover transmission by fax or e-mail.)

5. Using copyright material

It is important to remember that if you purchase or own the original or a copy of a copyright work, this does not give you permission to use it in any way you like. For example, if you buy a copy of a book, CD, video, computer program and so on, this does not necessarily give you the right to make copies (even for private use), play or show them in public.

Other everyday uses of copyright material, such as photocopying, scanning, downloading from a CD-ROM or online database, all involve copying the work, so you would normally need to obtain permission to do this. Also use going beyond an agreed licence will require further permission.
For the avoidance of doubt, the fact that a copyrighted work is freely available, for example on the internet, does not mean that you are free to use it. Use of images, photographs, texts, videos etc. that is available online will still constitute an infringement of the owner's copyright.

6. I often copy material when carrying out research for my business. Am I allowed to do this?

It is likely that most research carried out by businesses will be for commercial purposes. Therefore, it is important to note that any copying for research or private study, which is carried out for a commercial purpose, will require prior permission from the copyright owner and a licence to permit certain copying.

There are several organisations that act collectively for groups of copyright owners. They collect the royalties for copyright owners by issuing licences for commercial use of the protected work. Some of the more prominent agencies are the PPL PRS Limited for use of recorded music and The Copyright Licensing Agency or the Newspaper Licensing Agency for use of printed matter. Once a licence is granted, it should be checked to see whether it allows any use of the work or whether it only gives permission for some uses of a work.

7. Permitted acts

Currently, there are statutory permissions or exceptions to the exclusive rights of a copyright owner. Broadly, these are as follows:

- Copying copyright work for the purpose of an individual's own research or private study.
- Reproduction of a copyright work for the purpose of criticism and/or review.
- Incidental inclusion of a copyright work in an artistic work, sound recording, film, broadcast or cable programme.
- Literary, artistic, dramatic and musical works may be copied or performed by a person giving or receiving instruction.
- Anthologies for educational use.
- Playing, showing or performing in an educational establishment, recordings by educational establishments or reprographic copying by educational establishments.

- Copying by libraries and archives.
- Copying for the purposes of judicial proceedings.

Many of the above exceptions were relied upon when limited copying was being done for commercial purposes on the basis that the copying in question amounted to "fair dealing"; a recognised exception under the 1988 Act. The Copyright and Related Rights Regulations 2003 came into force on 31 October 2003 amending the 1988 Act.

From the above date, any copying that is done for a commercial purpose, even as part of private study or from library archives, no longer enjoy the above exceptions. Only very limited copying for purely personal and non-commercial reasons continue to be exempt.

The same regulations altered the licence requirement provisions for establishments such as cafes, bars, restaurants and bistros that play music for ambience. Again, from 31 October 2003 such establishments are required to be licensed by PPL PRS Limited. See our fact sheet on MUSIC LICENCES.

From 1 June 2014, additional exemptions have been introduced, and the following things can, in certain circumstances, be done, without infringing copyright:

- Caricature, parody or pastiche, if fair and proportionate.
- Quotations, if fair and proportionate.
- Research, private study, education, teaching, archiving and preservation, if fair and proportionate (the scope of previously permitted acts is extended).
- Creating accessible formats for disabled people.

Great care should always be taken when relying on an exception or permitted act, as clearly if the relevant act does not, in fact, fall within the appropriate exemption, then an infringement takes place.

8. Duration of copyright

Copyright in a written, dramatic, musical or artistic work lasts until 70 years after the death of the author. The duration of copyright in a film is 70 years after the death of the last to survive of the principal director, the authors of the screenplay and dialogue and the composer of any music specially created for the film. Sound recordings and music recording usually last 70 years from when it's first published. Broadcasts are usually protected for 50 years and published editions are protected for 25 years from when it's first published.

Until recently, the Copyright, Designs and Patents Act 1988 contained an exemption which limited the term of copyright protection for industrially manufactured artistic works to 25 years. Generally speaking, this meant that when more than 50 copies of these artistic works were made, the protection period was limited to 25 years. The Government repealed this exemption and as from 28 July 2016 all types of artistic works has copyright protection for 70 years after the death of the author. The transitional provisions introduced by the Government ended on 28 January 2017 and businesses are no longer entitled to trade in replicas or unauthorised copies that were made under this exemption.

For more information on this point, please read the Government guidance.

9. The rights granted by copyright

If you own the copyright to work you have the exclusive rights to dictate how that work is used. These rights fall into two main categories, economic and moral rights.

Economic rights

This right gives you the ability to make financial gain from exploitation of your works. This is usually done by either selling the rights or by issuing licenses to others.

As mentioned earlier, the author has the exclusive right to authorise the following acts which are also known as economic rights: reproduction, distribution, rental and lending, public performance, communication to the public by electronic transmission (including broadcasting and adaption).

Moral rights

Authors also have moral rights under the Copyright, Designs and Patents Act 1988. This protects the non-economic interests that may arise from creating a work. Moral rights can be divided into four categories:

- The right to be identified as author or director, in a manner likely to bring the identity of the author or director to the attention of a person seeing or hearing the public performance, exhibition, broadcast or cable programme. In the case of a commercial publication or film or sound recording, the right is to be identified on every copy or in some other manner likely to bring the author's or director's identity to the notice of a person acquiring a copy.
- The right to object to derogatory treatment of work. "Treatment" means an addition to, deletion from or alteration to or adaptation of the work. Treatment is "derogatory" if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the reputation of the author or director.

- The false attribution of work, meaning the right not to have a literary, dramatic, musical or artistic work falsely attributed to a person as being the author and not to have a film falsely attributed as having been directed by a person other than the director.
- The right to privacy of certain photographs and films. This restricts the right of the copyright owner in photographs to deal freely with the photograph. The right is to prevent copies of the photo being shown to the public without the permission of the person who commissioned the photo.

Moral rights continue to subsist as long as copyright subsists in a work. However, breach of moral rights gives rise to a breach of statutory duty, not a breach of copyright. Moral rights are only available for literary, dramatic, musical and artistic works and film, as well as some performances. It cannot be sold or otherwise transferred, but the rights holder can choose to waive these rights.

10. Performance rights

This area of law seeks to protect live performances where there is, typically, no fixed form of the work in question.

Performer's rights are protected under the Copyright, Designs and Patents Act 1988. The Act defines those performances that give rise to performer's rights and recording rights as being dramatic performance (including dance and mime), musical performance, readings and recitations of literary works and variety act performances or similar presentations. This definition is broad enough to include circus and comedy acts. To qualify, the performance must be a live performance and must take place in a qualifying country. Where these preconditions are met, then the Act automatically grants certain rights to the performer.

Performing artists are granted rights lasting 50 years in relation to broadcasting and recording of their live performances; copying, distribution, renting and lending of recordings of their performances; and broadcasting and public performance of sound recordings. The rights are related to copyright and similar considerations to those outlined above apply to those using material protected by performers' rights and to performers wishing to enforce their rights.

11. Copyright changes – 1 January 2021

Protection of UK copyright works in the EU

Most UK copyright works (such as books, films and music) will still be protected in the EU and the UK because of the UK's participation in the international treaties on copyright.

For the same reason, EU copyright works will continue to be protected in the UK. This applies to works made before and after 1 January 2021.

Qualification for copyright

Works that are currently eligible for copyright in the UK will continue to be eligible from 1 January 2021.

Works are eligible for copyright protection in the UK if they are:

- made by a national of the UK, EEA or any country that is party to the international copyright treaties; or
- first published or transmitted in the UK, EEA or any country that is party to the international copyright treaties.

References to the EEA will be removed from UK law. This will not stop EEA works qualifying for copyright, because all EEA states are party to the international treaties.

Copyright duration

Copyright duration in the UK for works from the UK, EEA, or other countries will not change from 1 January 2021.

Currently, EEA works are given the same copyright duration in the UK as UK works. For works from outside the EEA, copyright lasts for the term granted in the country of origin or the term granted to UK works, whichever is less.

References to the EEA will be removed from UK law in this area so that duration for EEA works is calculated in the same way as for non-EEA works. Because copyright duration is equal across the UK and the EEA, there will be no immediate impact on copyright duration in the UK.

12. Designs

The law governing the protection of designs is aimed at enabling the designer to protect the way their article looks and to stop anyone else from manufacturing either the same or a similar looking article. Design protection has two forms:

- Registered designs.
- Unregistered designs.

Registered designs

To obtain a registered design it is necessary to make an application to the Intellectual Property Office (UK-IPO)). An application for registration involves drawings and/or photographs of the article, together with a model of the product. Registration will normally take about 6 months to complete. Once the design is registered, it will last for an initial 5-year period. It may then be extended on 4 other occasions (each renewal lasting 5 years), up to a maximum period of 25 years on payment of a renewal fee.

You can register the look of a product you have designed. The look of your design includes the appearance, physical shape, configuration and decoration. Your design must be:

- Your own intellectual property;
- New;
- Not be offensive;
- Not make use of protected emblems or flags;
- Not be an invention or how a product works (you'll need a patent for that).

Detailed guidance on how to prepare your illustrations for submission and the cost involved can be found here.

From 1 October 2014, the Intellectual Property Act 2014 (IPA 2014) has introduced criminal penalties for infringing registered designs. The offence will require the perpetrator to know, or reasonably believe, they are infringing a registered design.

Unregistered designs

This right is similar to copyright because it arises automatically and cannot be registered. An unregistered design right will exist where:

- There is an original shape or configuration of an article. Two-dimensional shapes such as textiles, graphics or wallpaper are, therefore, excluded (but you may be able to register these as a design).
- The design is not common place (designs that are well known, mundane or routine are excluded).

An unregistered design lasts for 10 years from the date of first marketing the article in the UK, or 15 years from creation of the design – whichever is earliest. Similar to copyright, as the right cannot be registered, it is sensible to keep full details of when the design was first recorded in a material form.

The legal owner of the design will automatically be the person who created it i.e. the designer, and not the person who commissioned it. However, this can be changed by a contractual agreement to the contrary.

13. Design changes – 1 January 2021

EUROPEAN DESIGN PROTECTION

Registered designs

From 1 January 2003 it has been possible to obtain European wide protection for your designs, both registered and unregistered, by way of applying for a Community Design.

However, at the end of the transition period (1 January 2021), registered Community designs (RCDs), and unregistered Community designs (UCDs), will no longer be valid in the UK. These rights were immediately and automatically replaced by UK rights. If you owned an existing right, you did not need to do anything at this stage. Any existing RCD's and UCD's only cover the remaining EU States.

Holders of the new right will be allowed to 'opt out' of holding it. Opting out will mean that the re-registered design will be treated as if it had never been applied for or registered under UK law. You **may not** exercise an opt out right if you have assigned, licensed or entered into an agreement in relation to the re-registered design if you have already launched proceedings based upon it.

How to request an opt out

To request an opt out, you must submit a short notice providing us with the RCD number, along with details of any persons with an interest in the right. The new law requires that notice to interested third parties must be given for opt out to have effect.

Therefore, where needed, you must confirm that such action has been taken. Opt out requests should only be submitted after 1 January 2021. A notice template requesting opt out is available at GOV.UK from 1 January 2021.

Further detailed and extensive information on Community Designs can be found on the EUIPO website that is beyond the scope of this fact sheet.

INTERNATIONAL DESIGN PROTECTION

After the transition period, protected international design registrations designating the EU will no longer be valid in the UK.

On 1 January 2021, these rights were immediately and automatically replaced by UK rights. If you owned an existing right, you did not need to do anything at this stage. Any existing International (EU) Designs will only cover the remaining EU States.

If you do not wish to claim the new right, you may opt-out of holding it. Owners of protected international (EU) registered designs may opt-out of holding a re-registered international design. They can do this through the same opt-out mechanism as is being provided for holders of RCDs and EU trade marks (detailed in Copyrights and Designs Factsheet).

If you wish to opt-out, you will need to submit a short notice providing the number of the protected international (EU) registered design together with details of any persons with an interest in the right. Once received and actioned, the effect of such an opt-out is that the re-registered international design will be treated as if it had never been applied for or registered under UK law.

Further detailed and extensive information on International (EU) designs can be found on the WIPO website that is beyond the scope of this fact sheet.

UNREGISTERED DESIGNS

On 1 January 2021 (the end of the transition period), unregistered Community designs (UCDs), will no longer be valid in the UK. On 1 January 2021, these rights were immediately and automatically replaced by UK rights.

If you owned an existing right, you did not need to do anything at this stage.

Continuing unregistered design

Designs that were protected in the UK as a UCD before 1 January 2021 will be protected as a UK continuing unregistered design and will be automatically established on 1 January 2021. These will continue to be protected in the UK for the remainder of the three-year term attached to it.

The fact that a corresponding UCD was established before 1 January 2021 through first disclosure in the EU but outside of the UK will not affect the validity of the continuing unregistered design.

Supplementary unregistered design

A new UK unregistered design right called supplementary unregistered design (SUD) was created as of 1 January 2021. This right ensures that the full range of design protection provided in the UK before 1 January 202 remain available after the end of the transition period.

The terms of SUD protection are similar to that already conferred by UCD. However, the protection it provides **will not extend to the EU.** SUDs will mirror UCD by providing UK protection for both three and two dimensional designs for a period of three years.

Disclosure of Designs

An SUD will be established by first disclosure in the UK. First disclosure in the EU **will not establish SUD**. However, it may destroy the novelty in that design, should you later seek to claim UK unregistered rights.

Likewise, first disclosure in the UK **may not establish UCD** and could destroy the novelty in that design, should you later seek to claim EU unregistered rights. Guidance should be sought from the EUIPO on this issue, and one must carefully consider how, when and where you first disclose your designs in order to establish unregistered protection in the UK and the EU.

14. Remedies

Where intellectual property rights are infringed the following remedies are typically available:

- Injunction (a restraining order to immediately stop the infringing act).
- Damages (a monetary claim for financial compensation).
- Account of profits (this allows the injured party to claim the profits made by the party who is in breach).
- Delivery up and destruction (the right to both seize goods and have handed over the infringing material or goods).
- Criminal penalties (both copyright and trademark infringement can be a criminal offence, enforcement being carried out by the Trading Standards Authorities).