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Content Space

Basic IP Definitions

Copyright

Copyright is the right for an author to control the reproduction and dissemination of literary and artistic works that he/she creates (authorial works). Also protected are the media through which authorial works are made available including sound recordings, films and broadcasts. These rights are called either copyright or neighbouring rights. The rights give to the owner exclusive economic rights for a set period of time to copy the work, issue copies of the work to the public, rent or lend the work to the public, perform, show or play the work in public, communicate the work to the public, and to make an adaptation of the work. The author also has moral rights in the authorial works with the right of integrity and the right of attribution being the most common.

Digital copyright

Digital copyright is not a legal term but is often used to describe those circumstances in which authorial works and neighbouring rights are created, used and disseminated within digital environments. Encompassed within this term are the specific legal frameworks that have developed to address both the making available of works in digital environments (many of which stem from the World Intellectual Property Organisation Copyright Treaty 1996) and the challenges of enforcing rights within the digital environment.

Intellectual Property

Intellectual Property can be described as ‘the novel products of human intellectual endeavour’. Intellectual property rights are the rights and remedies that the (statutory and common) law grants to the owner to enable her to exert control over the products of intellectual endeavour. The main statutory rights are copyright, patents, trademarks and design rights. Common/Civil law actions include those in passing off/unfair competition and breach of confidence.

Author of copyright

For copyright, the author is the person who expresses creative ability in an original manner when developing a literary or artistic work: the standard is one of intellectual creation. Where choices are dictated by technical considerations, rules or constraints, then the criterion of intellectual creation is not met. An example is when footballers play in a football match. This could not be protected by copyright because the players play the game in accordance with pre-existing rules.

Joint or co-authorship arises where two or more people have contributed the right level of intellectual creation to a copyright work and their contributions cannot be separated. For example, in a collection of essays authorship in each of the essays will reside with the individual author because they can be readily be separated from each other. Where however two or more authors have collaborated in painting a picture, and it is not possible to point to part of that picture and say that one author rather than another painted that part, then the authors will be joint authors in law.

Owner of copyright

The first owner of copyright in a work is the author except where there is agreement to the contrary such as a commissioning agreement assigning ownership to a third party (where permitted by national laws). In some jurisdictions (e.g. the UK) where an employee creates a work in the course of employment, then the first owner is the employer. In other jurisdictions (e.g. France) it is not possible for an employer to be the first owner of copyright; rather the author must licence or assign the copyright to an employer.

Orphan works (EU)

An orphan work is a work in respect of which none of the rightholders (the author or owner) can be identified or located despite a diligent search. A diligent search is one that is carried out in good faith and consults appropriate sources for the type of work under consideration as determined in each Member State of first publication or broadcast and would include legal deposit, publishers associations and collecting societies.

Collective licensing (EU)

Collective licensing is a mechanism whereby collecting societies are given a mandate by their members to licence specified uses of copyright protected works to third parties. These works are made available via blanket licences which apply to a particular class of user (e.g. schools) and for a specific type of use (e.g. photocopying). Collecting societies are regulated under EU law to ensure good governance. To date licences are limited to individual territories. A current EU proposal suggests a multi-territorial approach for on-line music licences.

Extended collective licensing

Extended collective licensing is a form of collective licensing where the collecting society licences third parties to use categories of works for specified uses in return for a payment for the copyright owner. They often represent all rights owners on a non-exclusive basis for a specific category of work even though only a majority of rights holders are members of the scheme. Some laws allow for an opt-out for the right holder. Non-members need to be treated in the same way as member of the scheme

The most developed schemes are found in the Nordic countries and cover TV and radio broadcasting, on-demand services and mass digitisation by libraries. The UK has recently consulted on draft regulations that would introduce a limited extended collective licensing scheme in the UK. This will be most useful for those organisations with large archives and where clearance is costly.

Assignment of copyright

An assignment (assignation) of copyright is an outright transfer of the ownership of the economic rights in the copyright to a third party. Some jurisdictions in the droit d'auteur tradition do not permit assignation. National rules will dictate the formalities required, for example who has to sign the assignation (whether the assignor and the assignee) and if witnesses are needed.

Licence of copyright

A licence of copyright is the grant to a third party to exercise some or all of the exclusive rights to do some or all of the exclusive acts granted by copyright. A licence may be exclusive (no-one other than the licensee may exercise the rights), non-exclusive (the licensor may license the same rights to many licensees) or sole (the licensor may exercise the rights in addition to one licensee). National rules will dictate the formalities required, for example, who has to sign the licence (whether the licensor and the licensee) and if witnesses are needed.

Moral rights/Droit Moral

International (Berne Convention 1886).

Non-transferable inalienable rights to claim authorship of a work, and to object to derogatory treatment of a work that would be prejudicial to the author's honour and reputation. The rights recognise non-economic interests an author may continue to exercise in respect of a work even though no longer owner of the copyright or of the tangible work in which the copyright reside. The rights last as long as the copyright in the work in some countries (UK); and forever in other countries (France). Some countries allow moral rights to be waived or require assertion before they are enforceable (UK); in others the rights are perpetual, inalienable and imprescriptible (France).

Communication to the public (EU)

The Information Society Directive (2001/29) Article 3 provides for an exclusive right to communication to the public of works protected by copyright.

Three criteria have been identified as important through the developing Court of Justice case law:

- **The public:** There should be a relatively large but indeterminate number of potential beneficiaries of the communication. Communicating a signal to hotel rooms (an indeterminate public) where there is a revolving public is sufficient, but a dentists' waiting room is not (a small determinate group at any one time).
- **The new public:** The communication must be directed at a public, not taken into account by the copyright owner at the time of the initial communication – a new public.
- **The profit making nature of the communication:** Does the communication influence the behaviour and decisions of clients? Communication in a hotel is of a profit making nature because it is an additional service that might attract additional guests. A dentists' waiting room is not a profit making nature and would not have any impact on the number of clients.

Performer

A performer is an actor, singer, musician, dancer or other person who acts, sings, delivers, declaims, plays in or otherwise performs a literary or artistic work.

In respect of unfixed performances, a performer has the rights to prevent the broadcasting and communication to the public of their performance, and the fixation of their performance. Where a performance is fixed, the performer has the exclusive right to authorise reproduction, distribution, making available, rental and communication to the public of copies of their performance. The rights last at least until the end of a period of 50 years from the end of the year in which the performance was fixed (70 years EU). Where the rights are transferred to a third party, national law may provide for equitable remuneration for the performer.

Audio visual and aural performers have moral rights to claim to be identified as author of the performance (except where omission is dictated by the manner of the use of the performance) and to object to any distortion, mutilation or other modification of their

performance that would be prejudicial to their reputation. The rights should generally last for at least as long as the economic right.

Out-of commerce works

Memorandum of understanding on the digitization and making available of out of commerce works (MOU) (EU). Publishers and authors have agreed via the MOU to negotiate in good faith via collecting societies with publicly accessible cultural institutions to make available out of commerce works for agreed uses.

An out of commerce work is one which the work and adaptations of the work are no longer available in customary channels of commerce. The availability of tangible copies in libraries and second hand bookshops does not thereby mean that a work is not out of commerce.

Copyright term

The length of time for which copyright subsists in a protected work calculated from first of January in the year following the event giving rise to the term.

International

At international level, the Berne Convention 1886 provides that literary and artistic works should be protected for the life of the author plus 50 years. Many countries including the EU have raised this to 70 years after the death of the author.

EU

- Literary or artistic work: 70 years after the death of the author. In the case of joint authors 70 years after the death of the last author
- Anonymous or pseudonymous works: 70 years after the work is lawfully made available to the public. When the pseudonym leaves no doubt as to the identity of the author, or if the author discloses his identity, then the term of protection shall be as for literary and artistic works.
- Cinematographic or audiovisual works: 70 years after the death of the last of the principal director, the author of the screenplay, the author of the dialogue

and the composer of music specifically created for use in the cinematographic or audiovisual work.

- Musical composition with words: 70 years after the death of the last author
- Photographs: 70 years after the death of the author.
- Phonograms (sound recordings): 70 years after the fixation is made. If the phonogram has been lawfully published within this period, 70 years from the date of the first lawful publication.

Exceptions and limitations to copyright (EU)

Things that may be done with a work protected by copyright without the consent of the owner of the copyright. The Information Society Directive contains a closed list of exceptions and limitations that Member States may incorporate into their domestic laws.

In relation to the right of reproduction these include:

- photographic reproductions on paper or any similar medium of works (excluding sheet music) provided that the rightholders receives fair compensation;
- reproductions on any medium made by a natural person for private use which is non-commercial provided that the rightholders receives fair compensation;
- reproduction made by libraries, educational establishments, museums or archives, which are non-commercial;
- archival reproductions of broadcasts;
- reproductions of broadcasts made by “social institutions pursuing non-commercial purposes, such as hospitals or prisons” provided that the rightholders receives fair compensation.

In relation to the rights of reproduction and communication to the public these include:

- illustration for teaching or scientific research, provided the source, including the author’s name, is acknowledged;
- uses for the benefit of people with a disability;
- current event reporting, provided the source, including the author’s name, is acknowledged;

- quotations for purposes such as criticism or review, provided the source, including the author's name, is acknowledged;
- use necessary for the purposes of "public security" or to the proper performance or reporting of "administrative, parliamentary or judicial proceedings";
- use of political speeches and extracts of public lectures or similar works, provided the source, including the author's name, is acknowledged;
- use during religious celebrations or official celebrations "organised by a public authority";
- use of works such as architecture or sculpture located permanently in public places;
- incidental inclusion of a work in other material;
- the advertising the public exhibition or sale of artistic works;
- caricature, parody or pastiche;
- for demonstration or repair of equipment;
- use of an artistic work, drawing or plan of a building for the purposes of reconstruction;
- for non-commercial research or private study.

An emerging 'European' understanding of some of the exceptions and limitations is developing through case law emanating from the Court of Justice.

Public domain

Works that are no longer protected by copyright or which were never protected by copyright. This would include works on which the term of protection has expired as well as works that fall into an exception or limitation in copyright law. Works that are in the public domain may be used freely by third parties in relation to any of the acts restricted by copyright without permission from or payment to the author or owner.

Infringement

The use of works protected by copyright without the permission of the owner of the copyright thus infringing the exclusive rights of the copyright owner.