

I What is copyright?

I.1 Nature of copyright

I.1.1 Introduction

Copyright is, to quote the *Oxford English Dictionary*, ‘the exclusive right given by law for a certain term of years to an author . . . to print, publish or sell copies of his work’. Clearly, it is not merely the right to copy. Rather, the word ‘copyright’ derives from another meaning of copy, as in an advertiser’s ‘copy’, his or her material for the printer. In this context, a copy is, as Dr Johnson put it in his *Dictionary* (1810), ‘the autograph; the original; the archetype; that from which any thing is copied’. Copyright, then, is the right in the ‘copy’, the author’s original work.

The right to enjoy copyright protection is regarded internationally as arising from natural justice, in accordance with the Universal Declaration of Human Rights of 1948, which says that ‘everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author’. Copyright also exists in order to benefit society generally, by providing an incentive for creativity as an encouragement for learning and the arts. It originated, though, with the much more immediately practical purpose of giving printing monopolies as a form of government censorship. Then, in statutory form it replaced the individual monopolies with a regime designed to outlaw the piracy of publications. In the UK, therefore, it has always been regarded as primarily an economic property right: the right of the owner to benefit from the fruits of his or her skill, judgement and labour. This is the ‘common law’ approach exported from the UK to Ireland, the Commonwealth and the USA, as distinct from the ‘civil law’, ‘author’s right’ approach of most other European countries which emphasizes the protection of the author’s personality as expressed in his or her work.

In all jurisdictions, an attempt is made to limit the rights of copyright owners in the public interest. The countries that are parties to the World Intellectual Property Organization (WIPO) (see 1.2.6) Copyright Treaty recognize ‘the need to maintain a balance between the rights of the author and the larger public interest, particularly education, research and access to information’. Very little is entirely new so all authors use the works of their predecessors in one way or another: copyright must reward but it must not stifle creativity and innovation.

For most practitioners copyright continues to mean copyright in published works. There are relatively few people, even among lawyers specializing in intellectual property law, who are much interested in the intricacies of copyright in unpublished material, but

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that is what is of most concern to archivists, records managers and the users of archival materials. Copyright law in itself can seem bad enough, but when combined with limited expert commentary and the tangled web of different copyrights that might subsist even in a single file of correspondence, it is not surprising that many fight shy. The archivist or records manager cannot afford to, however, and this book is an attempt to show him or her a way through the maze.

Dr Johnson's Dictionary, 10th edn, 1810; Universal Declaration of Human Rights art 27(2); WIPO Copyright Treaty, 1996, preamble; *Nova Productions v Mazooma Games*, 2007

1.1.2 Definition of copyright

Copyright is (in very broad terms, and with exceptions as to details):

- a property right, one of a group of intellectual property rights (see 1.1.3);
- in certain types of work (see 1.1.4);
- which have been made in a certain way (see 1.1.5);
- which are the original products of skill, labour and judgement by their author (see 1.1.6);
- and whose duration is for a fixed period (see 1.1.7);
- which gives the owner (see 1.1.8);
- the power to control use (see 1.1.9);
- of a substantial part (see 1.1.10);
- but which does not give the owner a monopoly in facts or ideas (see 1.1.11); and
- which is subject to certain defined exceptions (see 1.1.12).

1.1.3 Intellectual property rights

Copyright is one of a group of rights known as intellectual (sometimes industrial and intellectual) property rights (IPRs) (see Figure 1.1.3). There is no distinct right called an 'intellectual property right' as such.

These rights fall, on the whole, into one of two categories. Rights in designs, trade marks and patents are monopoly rights, so that the owner of the rights may prevent anyone else using the design, mark or invention even if they thought of it independently. The other rights do not confer a monopoly; anyone else may create a work just the same so long as it is by their own effort, not by copying (see 2.1). This book is primarily about copyright, but gives some information about other intellectual property rights that are likely to affect archivists and records managers (see Chapter 8).

Copyright, like these other rights, is an exclusive property right. Much as with property in things, such as land or a book, it may be owned, sold and bequeathed, and permission may be given to others to use it. It is effectively a negative right to restrain someone else from exploiting the property: the positive right to exploit the work may

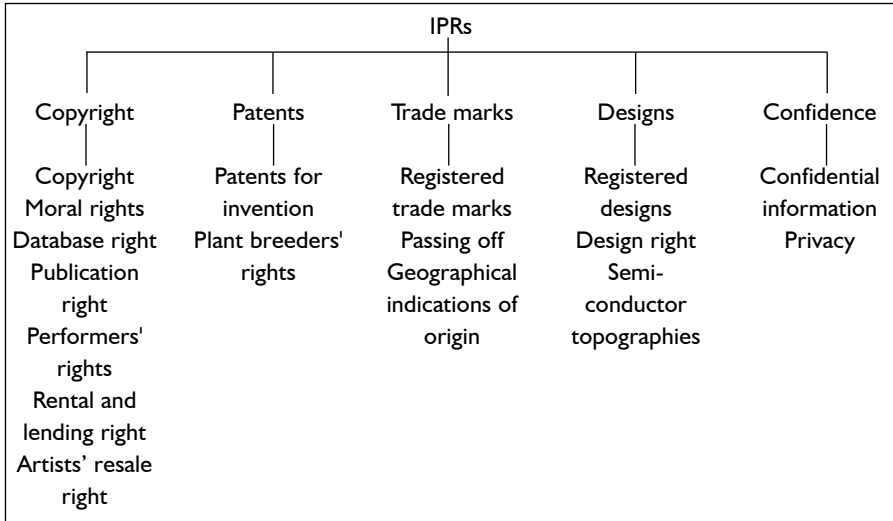


Figure 1.1.3 Chart of intellectual property rights

actually be restricted in various ways. For instance, the author of a book may own the copyright in the text, which means he or she may prevent someone else copying it, but he or she will not own every published copy of the book, the publisher will own the copyright in the typographical arrangement and an artist might own the copyright in the illustrations. The permission of the publisher and artist would be needed before the author could republish the book, and the owner of each published copy is at liberty to sell it or give it away. Moreover, the right is circumscribed by exceptions and limitations (see 5.2, 5.3) in order to provide balance in the public interest (see 1.1.1).

1.1.4 Scope of copyright

Copyright is extensive in scope, covering works of many kinds. It includes not only literary (that is, written, see 2.2) and artistic (that is, graphic, photographic or three-dimensional, see 2.3) works, but also dramatic works (such as plays, ballets, operas, see 2.2), musical works (see 2.2), films (see 2.4), sound recordings (see 2.5), radio and television broadcasts (see 2.6.1–14), computer software (see 2.2) and typographical arrangements of published editions (see 2.6.15–17). In effect it protects the expression of virtually any product of the mind ('authorial works') as well as many products of investment which have had little or no intellectual input ('entrepreneurial works'), if the work is capable of being copied or imitated, regardless (for the most part) of the aesthetic or technical quality of the work. Copyright may subsist in a list, a single entry in a diary, a sketch, a short poem or a business letter just as much as in a novel or a symphony.

British Oxygen v Liquid Air, 1925; *A v B*, 2000

1.1.5 Subsistence of copyright

Copyright is said to subsist in a work; it subsists, rather than exists, because it is intangible: it cannot be held and cannot exist independently of the work it protects. It does so automatically in all countries that have signed or that observe the Berne Convention (see 1.2.6, 3.1.4). While some countries (such as France) will protect even an unrecorded work, in the UK copyright arises (in most cases) as soon as the work is recorded in some way (see 2.1.3). There is no need for any formality or registration before copyright subsists or before action may be taken against someone infringing copyright (but see 1.2.9, 9.1.4 (USA)). There is thus no need to 'claim' copyright, although some sort of assertion may be helpful (see 3.4). On the other hand, an assertion of moral rights is necessary for some purposes (see 8.1).

1.1.6 Originality and authorship

Literary, dramatic, musical and artistic works must be original, not in the sense of being unique but in the sense of not having been copied from another work. The author of a work must have 'originated' it by investing some minimal quantity of his or her own skill, labour or judgement in creating it (see 2.1.5). So long as a work is original, it may attract copyright even if someone else has produced the same thing previously (see also 2.1.7). So, for example, consider two individuals setting out to survey Hyde Park. All being well, the resulting maps will show the same features in the same relative positions. If the surveyors choose the same scale and use the same set of mapping symbols their maps may well look virtually identical, but each will be a copyright work without infringing the other because neither was derivative, each was created independently. In copyright terms, each is 'original' (see 2.1.7).

It is also possible to create an original work that infringes copyright in a pre-existing work (see 2.1.11). Unfortunately for the author of the new work, the existence of a new copyright is irrelevant to a decision on whether there has been infringement of the copyright in the earlier one. A derivative work contains within it underlying copyrights in the source work or works, permission for the use of each of which must be obtained before the new work is used (see 2.1.6, and see also 2.4.6).

The term 'author' applies to the creator of any literary, dramatic, musical or artistic work, including for instance, composers of music, photographers and painters, and to the producer of a sound recording, the producer and principal director of a film, the person making a broadcast and the publisher of a published edition. For the role of the author in relation to duration see 2.1.16.

1988 (CDPA) s9; *Wilkins v Aikin*, 1810; *University of London Press v University Tutorial Press*, 1916; *Geographia v Penguin Books*, 1985; *Scottish and Universal Newspapers v Paul Mack*, 2003

1.1.7 Duration

The duration of copyright depends on a number of factors, though which ones apply depends on the circumstances:

- the type of work;
- the date of creation and (where applicable) when it was first made available to the public or first published;
- the date of the author's death; and
- ownership of the copyright (Crown and Parliamentary copyright (see 3.2.8), and copyright belonging to some international organizations (see 3.1.4) only).

Until the passing of the 1988 Act (see 1.2.3), most unpublished literary works and engravings enjoyed a term of copyright that was unlimited until first publication, irrespective of whether the author died in 1066 or 1966. This perpetual copyright, a relic of pre-20th century common law protection (see 1.2.2), has now been abolished (see 2.2.19, 2.3.15), although the transitional provisions mean that the full effect of abolition will not be felt until the year 2040 (see 2.1.20). Perpetual copyright in unpublished works can be a problem in other common law (see 1.2.2) countries too (see 1.2.10, 9.1.4).

In all cases, the duration of copyright includes the remainder of the year in which the triggering event takes place followed by a fixed term running from the end of that year. Details of duration in different circumstances are given in Chapter 2. Flow charts to simplify the calculation of the duration of copyright in literary, dramatic, musical and artistic works are in the Appendix (see 9.1.1–2).

Where duration is based on the life of the author, it is authorship, not ownership, that matters even if the author was an employee of the first owner (see 2.1.16). First or subsequent ownership of copyright by a person other than the author, or by a corporate body, does not affect duration. Where duration depends on the death of the author and there are joint authors, it is the death of the last surviving author that matters.

1.1.8 Owner

The first owner of copyright is normally the author, but where an author is an employee the first owner is the employer. Before 1989, the person who commissioned some kinds of artistic work was the first owner of the copyright in them (see 3.2.19). The owner may also assign the copyright to someone else (see 3.3.8–9) even, in some circumstances, before the work is created.

1.1.9 Use

There is an exhaustive list of restricted acts, including copying, issue to the public, communication to the public (for instance on the internet), adaptation and performance,

that may be done with a copyright work only by the copyright owner or with his or her permission (see 5.1.1–10).

1.1.10 Substantial

Copyright does not protect insubstantial parts of a copyright work, but ‘insubstantial’ does not necessarily mean ‘small’ (see 5.2.3–5).

1.1.11 Not a monopoly

Copyright is not a monopoly right. Identical works may each be protected (see 1.1.6), and copyright does not subsist in a fact or a general idea. Not until a collection of facts has been gathered together so that the sum means more than the parts, or a general idea has been formulated in a way that particularizes it, can copyright arise, and even then the original facts and ideas taken individually remain unprotected. The setting of this boundary between unprotected ideas and protected expression is one of the trickiest problems facing commentators and courts (see 2.1.4).

1.1.12 Exceptions

Parliament seeks to find a balance between the rights of copyright owners on the one hand and the interests of society in the ready exchange of information and ideas and the encouragement of creativity on the other. It therefore sets limits on the exclusive rights given to owners by allowing limited exceptions, which may apply to particular types of work or types of people, to particular circumstances and to particular kinds of use (see 5.2).

1.2 Development of copyright

1.2.1 Monopolies and statutes before 1911

Copyright originated in the granting of monopolies to individuals to print and publish specified works, for instance in Venice in 1469 and in England in 1553. In England, the Stationers’ Company was given a charter by Queen Mary in 1556 allowing it to require that all works published be first registered and thus licensed by the Company. The refusal of Parliament to renew the Company’s charter in 1694 led to a publishing free-for-all that was found to benefit no one. The solution was a statute, the Copyright Act 1710, known as the Statute of Anne. It was the first time in any jurisdiction that the general law was used for this purpose. The next country to legislate was Denmark in 1741; the USA acquired copyright legislation in 1790 followed by France in 1793.

The Act of 1710 and subsequent UK Acts in the 18th and 19th centuries gave protection for a limited period to published works and also to certain categories of other

material, including drawings and photographs, whether published or not. Some of these statutory copyrights (books and other written works, paintings, drawings, photographs, music) were enforceable only if they were registered with the Stationers' Company at Stationers' Hall. As had been the case under its earlier charters, the Company's registration covered both the initial ownership of copyright and any subsequent assignments, so the records of the Company are a valuable source for the history of intellectual and artistic material. Other types of work (engravings, sculptures) were protected only if the work carried the name of the copyright owner on each copy. Each statute was limited in scope to a specific category of material, so that, for instance, the author of a novel gained no copyright protection against the performance of a play that was based on it, and each statute defined the terms and duration of the protection it gave.

The statutory registers to 1842 are preserved at Stationers' Hall. Statutory registers from 1842 to 1912 (and in some cases to 1923) are in The National Archives (see 2.1.17). For documents relating to the early history of copyright, see the website Primary Sources on Copyright, 1450–1900 at: www.copyrighthistory.org/ and for a database of English copyright cases before about 1800 see: www.oldcopyrightcases.org/.

Goubaud v Wallace, 1877; *Warne v Lawrence*, 1886

1.2.2 The common law

Unpublished works of every kind, including books, lectures, letters and photographs, were protected under the common law until the passing of the 1911 Copyright Act, giving the author the 'right to judge whether he will make his sentiments public or commit them only to the sight of his friends'. This protection was perpetual until the work was published, but until the late 19th century any action to enforce it had to be taken in two different courts: a court of equity such as Chancery to secure an injunction to prevent or stop the infringing use and a court of law such as King's Bench to secure any damages due.

In most cases the author seems to have been the first owner of the common law copyright but the position of copyright in works by employees was not at all clear (see 3.2.16). Publication was taken to mean the distribution of copies to the public or the communication of the work to the public generally (for instance, by delivering a sermon in church), but the giving of a university lecture or the performing of a play to a ticketed audience, for instance, did not count as publication.

Common law protection also extended to questions of privacy, protecting a person who commissioned photographs for private purposes from seeing them published by the photographer without permission. Similar protection is now provided by the statute (see 8.1.10).

The common law is a creature of the English legal tradition, and its practices have been exported to many parts of the Commonwealth, to the USA and to Ireland, though

not in the same way to Scotland. Scotland's legal system owes more to the civil, or Roman, law traditions to be found elsewhere in Europe. The term 'common law' may be applied specifically to non-statutory law or more generally to a shared legal tradition distinct from the civil law.

Yates J in *Millar v Taylor*, 1769; *Donaldson v Beckett*, 1774; *Prince Albert v Strange*, 1848–9; *Mayall v Higbey*, 1862; *Pollard v Photographic Co*, 1889; *Stedall v Houghton*, 1901; *Mansell v Valley Printing*, 1908

1.2.3 Copyright law since 1911

The Copyright Act 1911 came into force on 1 July 1912, replacing all common law copyright with statutory copyright and replacing almost all the existing statutory rights with a single, uniform code. It also gave protection, for the first time, to sound recordings. It was needed not only so as to simplify and improve the law of copyright in the UK, but also to allow the UK to ratify the amendments made in 1908 in Berlin to the Berne Convention of 1886 (see 1.2.6). Most of the 1911 Act was repealed by the Copyright Act 1956, with the exception of the provisions covering the legal deposit of publications (now replaced by those in the Legal Deposit Libraries Act 2003). The 1956 Act was also required so that the UK could ratify international conventions; it came into force on 1 June 1957. It gave protection for the first time to films and broadcasts as distinct types of work. Subsequent amendments gave protection to cable programmes and computer software. The 1956 Act as amended was repealed by the Copyright, Designs and Patents Act 1988, which was intended to be flexible enough to cope with changes in technology and again to allow adherence to new international conventions. This is the statute currently governing copyright in the UK. It came into force on 1 August 1989, but has been very significantly amended since then following initiatives in the European Union and to take account of the WIPO treaties (see 1.2.6), themselves prompted by changes in communications technology.

1911 s37(2); SI 1957/863; SI 1989/816

1.2.4 Continuity of the law

Continuity of copyright protection has been a recurrent theme of UK legislation. The intention, at each major revision, has been to prevent works from suddenly losing copyright protection to which they had previously been entitled. From 1 July 1912, when it came into force, the 1911 Act substituted the new statutory rights for existing common law and statutory rights over materials created earlier and still protected on that date. The 1956 Act contained complex transitional provisions which allowed for continuity of protection for works entitled to it at commencement on 1 June 1957. The 1988 Act also contains transitional provisions for works still entitled to protection on 1 August 1989

when it came into force. These transitional provisions limit or modify the extent to which the new legislation applies to existing works and specify that certain matters are to be determined in accordance with the law in force at the time when a particular work was made. This means that earlier statutes continue to be of significance and archivists must have some awareness of them. Where appropriate, such provisions are taken into account in this book.

1911 ss24, 31, Sch 1; 1956 Sch 7; 1988 (CDPA) Sch 1

1.2.5 National protection

Very occasionally, the courts have to consider whether overseas law applies to an issue and whether the local (England and Wales, Scotland or Northern Ireland) courts have jurisdiction (see 6.2.6), but archivists and records managers working in the UK may safely assume that local law and jurisdiction will apply to them. Sometimes problems arise where there is a conflict of laws, for instance, where it is unclear which country's law applies. This book does not attempt to deal with such issues.

The different jurisdictions within the UK are not bound by each other's decisions (except in appropriate cases those of the House of Lords or its successor the Supreme Court) but will normally follow them, as they will also sometimes follow the decisions of courts in other Commonwealth countries. All UK courts are bound by decisions of the European Court of Justice when interpreting European treaties and directives.

Qualifying material (see 3.1.1–4) held in a UK archive is protected by UK copyright law: the copyright laws of other countries may apply only in strictly limited ways (notably for the duration of copyright, see 1.2.10, 9.1.3–4). If a work does not qualify it has no copyright protection in the UK at all, regardless of the law of the country where it was made. Conversely, since UK law does not apply outside the UK (except in some Commonwealth countries, and except in respect of some things done outside the UK whose effect is felt inside), protection and even ownership overseas may be entirely different (see 1.2.9, 6.2.6).

Huston v Turner Entertainment, 1992; *Abkco Music v Music Collection International*, 1995; *Blau v BBC*, 2002; *Sawyer v Atari Interactive*, 2006

1.2.6 The Berne Convention and the World Intellectual Property Organization

Until the later 19th century, UK copyright works were not protected in many foreign countries and the UK did not protect the work of a foreigner who was not, at the time of publication, resident in the UK or in a British colony or dominion. Reciprocal protection between individual countries began to become available as a result of bilateral treaties but this was not of great assistance to publishers who suffered from

pirated copies printed elsewhere. Eventually the Berne Convention for the protection of literary and artistic works was signed in 1886, laying down a minimum standard of protection to be provided by countries that were members of the Berne Union. Under the Convention, the law that applies is the national law of the country in which protection is claimed, so the law applying to a copyright infringement is, except in rare cases, the law of the country in which the infringement occurs. There may though be associated infringements in the UK (for instance if an archivist has supplied a copy knowing that it is to be used for publication in the other country, see 5.3.12) and there may be consequences if an infringing copy made overseas is brought into the UK (see 5.1.19).

The Berne Convention is administered by the World Intellectual Property Organization (WIPO). This is a United Nations body that sponsored the WIPO Copyright Treaty agreed in 1996. The purpose of that treaty was to update and clarify the Berne Convention in the light of technological and social changes, avoiding the almost impossible task of amending the Berne Convention itself. Accession to the WIPO Copyright Treaty means compliance with the whole of the latest version (the Paris Act of 1971) of the Berne Convention.

Today, any country that is a member of the World Trade Organization must be a party to the Trade-Related Intellectual Property Rights elements (the TRIPS Agreement) of the World Trade Agreement. This is legally enforceable on member states and requires them to comply with almost all of the Paris Act of the Berne Convention even if they are not formally part of the Berne Union. Most countries of the world are now signatories of the Berne Convention or the TRIPS Agreement or both (except notably Afghanistan, Laos and the Maldives, and also currently the Channel Islands, but see 7.7.6–8), giving reciprocal rights to protection. The countries recognized by the UK as giving appropriate protection are ‘qualifying countries’ (see 3.1.1–4). They are listed in a statutory instrument, which is updated from time to time; the current one dates from 2008.

Berne Convention and WIPO treaties: www.wipo.int/

TRIPS: www.wto.org/

Berne Convention art 5(2); SI 2008/677, Sch; *Jefferys v Boosey*, 1854

1.2.7 Other conventions

The Universal Copyright Convention (UCC) was signed in 1952 under the auspices of the United Nations and amended in 1971; it is now administered by UNESCO. It guarantees a lower level of protection to copyright owners than does the Berne Convention, and is much vaguer about the exceptions allowed for users, but was significant for bringing many countries, notably the USA, into the international copyright system. This was important in itself, but has since proved even more valuable

as a preliminary to the near-universal acceptance of the Berne Convention through the TRIPS Agreement. There are no longer any countries that are signatories only of the UCC and not of the Berne Convention, the WIPO Copyright Treaty or the TRIPS Agreement, so the specific provisions of the UCC are no longer of much practical application. Even so, the © symbol introduced by the UCC remains useful as a means of asserting a claim to copyright (see 3.4).

The Rome Convention (1961) provides for performers, producers of phonograms (records) and broadcasters in a similar way to Berne, and most EU member states are signatories. Membership of the Rome Convention is not as widespread internationally as membership of the Berne Convention, and countries that are parties to the TRIPS Agreement are not obliged to apply it. Significant countries that are not members include the USA and Russia. The TRIPS Agreement itself specifies only a limited range of rights for performers, record producers and broadcasters. Countries that were reluctant to give rights to performers subsequently agreed a more restricted Geneva Convention (1971) for record producers only. The UK gives protection under its domestic legislation to performers, record producers and broadcasters from countries that qualify (see 3.1.1–4), and they are listed in the ‘application to other countries’ statutory instrument (see 1.2.6). The list of countries is much less extensive than that for literary, dramatic, musical and artistic works, films and typographical arrangements. By definition, the countries listed give reciprocal protection to equivalent creators, or equivalent creations, from the UK.

Rome and Geneva Conventions: www.wipo.int/

UCC: www.unesco.org/

SI 2008/677, Sch

1.2.8 The European Union

Copyright law in the UK has been significantly influenced in the years since the passing of the 1988 Act by developments in the European Union. Eight directives (see 11.1) have been passed as part of a programme to ‘harmonize’ aspects of copyright law that are thought to obstruct the free flow of goods and services throughout the EU’s Internal Market or that discriminate between citizens of different member states, and others have had an impact while not requiring amendment of the 1988 Act. It should be noted that some or all of these directives apply not only in the EU but throughout the European Economic Area (EEA: the EU plus Norway, Iceland and Liechtenstein) and Gibraltar (see 9.1.3), and to a limited extent to the UK Crown dependencies (see 7.7.6–9, 9.1.3). They also apply, following bilateral agreements, elsewhere in Europe.

Judgments of the European Court of Justice in the interpretation of EU law are binding on UK courts, and have been taken into account where appropriate in this book.

A national of, or a person normally resident in, an EU member state enjoys the full protection of the local law in all other member states. It is not permissible to discriminate against an EU national or resident on grounds of his or her country of origin. This means, among other things, that the UK provisions for duration apply in the UK to all works of EEA origin (see 2.1.23).

Directives 1986, 1991, 1992, 1993 (two), 1996, 2001, 2004; *Collins v Imtrat*, 1994; *Land Hessen v G Ricordi*, 2003; *Tod's v Heyraud*, 2005

1.2.9 Variations between countries

Despite the international conventions and the European directives there are wide variations in protection between countries even within Europe, and still wider ones beyond Europe. The definition of the owner, for instance, can vary markedly, so that quite different people qualify as owners of copyright in the same work in different countries. Even the definition of a protected work can vary so that a work protected in the UK may not be protected at all in some countries and equally a work of overseas origin may not be protected in the UK (see 3.1). The possibility of such differences should be borne in mind if works are exploited overseas (for instance on the internet). The placing of copyright works on the internet is a particular problem internationally. If the copyright owner is giving permission, he or she should understand that the work will be accessible in places where UK law does not apply; it could even be that the law in the country of use does not recognize that the work qualifies for protection (see 3.1.1–4) or makes a quite different person the author or the owner of the copyright.

1.2.10 Variations between countries: duration

Although UK law protects works that qualify for protection (see 3.1) but that were created outside the EEA (see 1.2.8), it does not give protection for any longer than would be given by the country of origin. The member states of the EEA, Australia, Brazil, Hungary, Israel, Paraguay, Peru, Romania, Russia, Singapore, Switzerland, Turkey and the USA (among others) have a standard term of the life of the author plus 70 years, but this is more than in most countries. The standard (minimum) term under the Berne Convention is for the life of the author plus 50 years though there are further variations (75 years in Mexico and New Zealand, for instance, 60 years in India). In order to decide the term of copyright enjoyed in the UK by works of overseas origin it is necessary to know the term that would apply in the country of origin. This can then be compared to the UK term to discover which is shorter. For a table giving the range of possible terms of copyright in a selection of non-EEA countries see 9.1.4.

Because of the rule preventing non-discrimination, the UK is obliged under EU law

to extend the full term of protection under UK law to all works of EEA origin, even if the duration in the country of origin is shorter (see 1.2.8, 2.1.23). It is worth noting though that France gives longer terms in some circumstances. 30 years are added if the author was *mort pour la France* (killed on active service, as recorded on the death certificate). Also, extra periods are given for a musical work (but no longer for any other) to cover the two World Wars: for the First (1914–19), an additional five years and 153 days if published before 1 January 1920 and still in copyright on 3 February 1919, and for the Second (1939–48), an additional eight years and 122 days if published before 1 January 1948 and still in copyright on 13 August 1941. These extra periods apply in France alone. In Spain alone, any work by an author who died before 7 December 1987 has a term of life plus 80 years.

Outside the UK, there are four principal jurisdictions in the British Isles and one other principal British territory in Europe: the Republic of Ireland (see 7.7.1–5), Guernsey (see 7.7.6, 7.7.8), Jersey (see 7.7.6–7), the Isle of Man (see 7.7.9) and Gibraltar. The Republic is a member of the EEA; the Isle of Man and the Channel Islands are treated for this purpose as if they were part of the UK; and Gibraltar is a dependent territory of the UK and thus EU law has direct effect there, so works by people from all these jurisdictions enjoy the full term of protection in the UK. For the duration of copyright within these jurisdictions, see 9.1.3.

It is especially important to note that most countries do not offer the long duration enjoyed in the UK by unpublished literary, dramatic and musical works (see 2.2.17). All other member states of the EEA offer the standard term for such works. Nevertheless this lengthy term applies in the UK to works by EEA nationals, again because of the rule preventing non-discrimination. Similarly long terms, and in some cases perpetual terms, for unpublished literary works are to be found in some other common law (see 1.2.2) countries (see 9.1.4).

1879; 1985 (France) art 8; 1988 (CDPA) ss12(6), 13A(4), 13B(7), 14(3); 1992 (France) arts L.123-8–10; 1996 (Spain) transitional provisions art 4; *Collins v Imtrat*, 1994; *Land Hessen v G Ricordi*, 2003; *Société des Auteurs dans les Arts Graphiques et Plastiques v Editions Fernand Hazan*, 2007

1.3 Copyright and records

1.3.1 Context

Files and archival documents consist almost exclusively of materials that are or have been protected by copyright. Infringement of that copyright can lead to civil damages and even to criminal prosecution. The administration of copyright will rarely be entirely in the hands of the archivist or records manager, and its ownership will often be obscure, not least because copyright persists for so long in unpublished works, which are what make up the bulk of files and archival collections. An archivist or records manager will often

be asked about copyright in a work, sometimes with the assumption that because the work is in a file or in the archive the institution holding it owns the copyright too. A knowledge of how copyright affects materials for which they are responsible, what they may do with them, and what could be the consequences of authorizing, or appearing to authorize, acts that could infringe, is thus of vital importance to the archivist and records manager.

1.3.2 The dangers of infringement

Many copyright owners, or their representatives, are increasingly assertive of their rights, particularly in the face of the growth of electronic media which can enable the mass distribution of perfect copies of copyright works (see 6.1.1). Universities, schools, companies and copy-shops have all discovered to their cost that unauthorized use of copyright works can prove to be an expensive option, even where the actual damage to the copyright owner has been very small. Almost all infringement cases are settled out of court, but the settlements can result in costs of tens of thousands of pounds, including substantial payments for damages. Scholarly purposes, even within a single institution, are not always sufficient to justify the unauthorized copying of works: the limits of fair dealing (see 5.2.6–11) in copyright materials are quite narrow, and licences must be obtained for more extensive use (see 5.4.1).

Moorhouse v University of New South Wales, 1976; *Sony Music Entertainment v Easyinternetcafé*, 2003

1.3.3 Archives and libraries

All archivists, but especially those who are closely associated with library materials, including librarians who are working with special collections among a library's holdings, will need to ensure that they are fully aware of how copyright affects library materials and services. Much guidance is available for this purpose (see 10.2), and it should be studied carefully.

1.3.4 Digitization

Archivists and records managers should be extremely wary of demands from users and superiors that their material be copied without authority, but especially of demands that they be digitized for access electronically or that electronic records be made widely available electronically (see Chapter 6). The ready availability of journals and other works on the web should not be accepted as evidence that archival works and electronic files can be similarly made available without a lot of effort (and often cost) to secure the many permissions that will usually be needed (see 3.3.20, 5.4.18–20, and for detailed

guidance see 10.2). Copyright must thus be an issue that is considered at the very beginning of any project to digitize archival material or to make electronic records available remotely (see 6.5.3); if digitization can be directed towards works in which copyright has expired (such as early photographs) or in which copyright is owned by the institution the difficulties will be much reduced.

1.3.5 Checklist of copyright queries

Archivists and records managers are likely to receive enquiries from colleagues and members of the public about copyright restrictions on particular documents. The following checklist suggests an approach to the problem, but it must be emphasized that they should give advice on the answers to these questions only in general terms unless they are quite sure about what they are saying (see 5.1.11).

- Is it a work that qualifies to be protected by copyright (see 3.1)? Relatively few items in an archive or in files will not, but remember that a file or document may contain many separate copyright works, and that a copyright work can be as small as a single letter, a short poem or (perhaps) a signature (see the definitions in Chapter 2). Might other rights apply (see Chapter 8)?
- Who was the author (see the sections on authorship in Chapter 2)? This can affect duration, ownership and moral rights.
- Is it still in copyright (see the sections on duration in Chapter 2)?
- Is copying of the work allowed? Public records may be copied without formality (see 5.3.1) but non-public records may in many cases only be copied if they are out of copyright or if the purchaser has completed a declaration form (see 5.3.9, 5.3.12). Copyright artistic works in archives, that are not public records (including maps or photographs), should not normally be copied on their own without permission (see 5.3.8). Records that are not yet in an archive may be copied under fair dealing if appropriate (see 5.2.6ff.) or perhaps for educational purposes (see 5.2.14), but in many cases will require a licence (see 5.4.1).
- Is what is being requested allowed without permission, because the use is insubstantial (see 5.2.3), because a particular exception applies (see 5.2), or because copyright may be presumed to have lapsed (see 3.3.20)?
- Who was the first owner of the copyright (see 3.2) and who is the owner now (see 3.3)?

1.3.6 Checklist for publishing

Following on from the basic checklist above, if publication is intended there may be, depending on the answers to the initial questions, some further things to think about when using a copyright work. The same considerations apply whether the prospective

publisher is a member of the public or the institution itself.

- How do I trace the copyright owner (see 5.4.18–20)?
- Do I need to bother (see 5.4.19)?
- Do any other intellectual property rights apply and how do I trace the owners (see Chapter 8)?
- Have I secured permission to cover everything that I want to do with the work?
- Have I acknowledged the permission given, the author and title of the work (see 5.2.6, 5.2.9–10) and the author's moral rights (see 8.1)?
- Have I acknowledged the custody of the institution holding the work and given its document reference?
- Where what I am publishing is sufficiently original and substantial to qualify for protection itself (see 2.1.5ff.), have I asserted my moral rights in it and announced in it that I have done so (see 8.1.5), and have I properly claimed my own copyright and all other relevant intellectual property rights in it (see 3.4)?