



Basic Law for Web Designers: No. 3: Copyright

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In “Basic Law for Web Designers No.1”¹ and No. 2² I discussed contractual issues. I now wish to discuss intellectual property and more particularly copyright in so far as it concerns web design.

What is Intellectual Property?

“*Intellectual property*” or “*IP*” is the collective term for the bundle of rights that protect investment in “*intellectual assets*”, that is to say *brands, design, technology and creative works*. Examples of those rights include *patents* for inventions, *trade marks* for signs that identify a business or product and, of course, *copyrights* for original artistic, dramatic, literary or musical works, broadcasts, films and sound recordings and typographical arrangements of published editions³. The terms *intellectual property* and *intellectual assets* are often used interchangeably but they refer to different things. An intellectual asset can be a book, film, invention, goodwill or other product of creativity, design, innovation or marketing that could generate revenue for a business. Its intellectual property is the legal right that safeguards that revenue. Some of those rights, such as copyrights, come into being spontaneously when specific circumstances occur. Others, such as patents, registered trade marks and registered designs require registration at the Intellectual Property Office⁴ or some other national, supranational⁵ or intergovernmental intellectual property

¹ <http://www.jdsupra.com/post/documentViewer.aspx?fid=2405f8e5-613d-41d0-a026-91e8b62b5636>

² <http://www.jdsupra.com/legalnews/basic-law-for-web-designers-no-2-websit-52033/>

³ S.1 (1) Copyright, Designs and Patents Act 1988 (“**CDPA**”) <http://www.ipo.gov.uk/cdpact1988.pdf>

⁴ <http://www.ipo.gov.uk>

⁵ The EU trade marks and designs registry, known as OHIM (Office for Harmonization for the Internal Market) is an example of a supranational intellectual property authority.

authority.⁶ Web designers have to be aware of all those intellectual property rights (“IPR”) but the ones of which they should be particularly aware are copyright and rights related to copyright.

What is Copyright?

Copyright is a right to prevent copying and various other acts⁷ in relation to *copyright works*. What is meant by a “copyright work” and how copyright arises will be discussed below.⁸ All that needs to be remembered at this stage is that copyright is a negative right and not a positive one. It does not confer any right to do any of those acts, only a right to prevent others from doing them.

Moral Rights

Closely related to copyright are “*moral rights*”. These subsist in favour of the author, commissioner or director of certain types of copyright work whether that person owns the copyright in the work or not. They include rights to:

- (1) be identified as author or director;
- (2) object to derogatory treatment of a work; and
- (3) privacy of certain photographs and films.

⁶ The European Patent Office, which grants European patents on behalf of the governments that are party to the European Patent Convention, is an example of an intergovernmental intellectual property authority.

⁷ Those acts include publishing, renting, lending, communication to the public or adaptation of original artistic, dramatic, literary and musical works and other types of work mentioned in the preceding paragraph. It also includes a right to prevent a number of other acts such as importation, possession in the course of business, selling, letting for hire, offering or exposing for sale or hire, exhibition in public or distribution in the course of a business articles known, or reasonably believed to be, unlawfully made copies of copyright works.

⁸ In the paragraph headed “What is protected by copyright?”



The right to prevent copying and other acts mentioned in the preceding paragraph are sometimes called “*economic rights*” to distinguish them from moral rights.

Related Rights

Other rights closely related to copyright include:

- (1) **Rights in performances:** the right of an actor, dancer, musician, singer or other performer and his or her broadcaster or film or recording studio to object to the broadcasting, filming or taping of one of the performer’s performances;
- (2) **Unregistered design rights:** the right to prevent another from making an article to a design in which design right subsists;
- (3) **Database rights:** the right to object to extraction and reutilization of the contents of a database; and
- (4) **Publication rights:** the right of a publisher of a work in which copyright has expired to prevent further copying, publishing and other acts in relation to that work.

This list is by no means complete. Many would add such IPR as the right to receive and encode encrypted broadcasts and unregistered Community designs.

What is protected by Copyright?

In the United Kingdom two conditions have to be fulfilled for copyright to subsist in a work. First, the work must be one in which copyright can subsist.⁹ Secondly, the person making the work must be a British citizen or resident or a citizen or resident of some other country that protects the work of British nationals.¹⁰ Alternatively, the work may qualify for copyright protection if it was first published¹¹ in (or in the case of a broadcast first transmitted from¹²) the UK or some other country that protects the works of British authors and publishers. Works that satisfy those requirements are known as “*copyright works*”.¹³

⁹ S.1 (1) CDPA

¹⁰ S.1 (3) *ibid*

¹¹ S.155 (1) *ibid*

¹² S.156 (1) *ibid*

¹³ S.1 (2) *ibid*

Works in which Copyright can subsist

These have already been listed in the paragraph headed “What is Intellectual Property”. They fall into three groups:

- (1) Original artistic, dramatic, literary and musical works;¹⁴
- (2) Broadcasts, films or sound recordings;¹⁵ and
- (3) Typographical arrangements of published editions.¹⁶

A work falling in the first group has to be *original*, that is to say it must involve some independent skill and labour and in some cases knowledge, taste and judgment. A single word such as EXXON¹⁷ or even a catchphrase¹⁸ such as “Youthful appearance is a social necessity, not a luxury” is not enough. Nor is a work of any length that has been copied from an antecedent work such as a court transcript.¹⁹ However, the bar is not set very high and the courts are not required to act as arts or literary critics when deciding whether a work merits legal protection. There is no originality requirement for works falling within the other groups but the CDPA²⁰ contains provisions that copyright will not subsist in a broadcast,²¹ film,²² sound recording²³ or typographical arrangement²⁴ if and to the extent that it is a copy of an existing work.

Artistic Works

The definition of *artistic works* includes graphic works, photographs, sculptures or collages irrespective of artistic quality.²⁵ *Graphic works* include paintings, drawings, diagrams, maps, charts or plans as well as engravings, etchings, lithographs, woodcuts and similar works.²⁶ That definition is broad enough to cover sketches, layouts, wireframes, templates and screen dumps made at any stage of the design process from the back of the envelope

¹⁴ S.1 (1) (a) *ibid*

¹⁵ S.1 (1) (b) *ibid*

¹⁶ S.1 (1) (c) *ibid*

¹⁷ *Exxon Corporation v Exxon Insurance Consultants International Ltd.* [1982] RPC 69

¹⁸ *Sinanide v La Maison Kosmeo* [1928] 139 LT 365 CA

¹⁹ *Warwick Film Productions Ltd. v Eisinger* [1969] 1 Ch 508

²⁰ See footnote 3 for the meaning of CDPA.

²¹ S.6 (6)

²² S.5B (4)

²³ S.5A (2)

²⁴ S.8 (2)

²⁵ S.4 (1) (a) CDPA

²⁶ S.4 (2) *ibid*



to the finished product. It also includes clip art, word art, cartoon characters and other nifty graphics as well as “photographs”. A photograph is defined as “a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film.”²⁷

Literary Works

The definition of “*literary work*” is “any work, other than a dramatic or musical work, which is written, spoken or sung.”²⁸ It includes a table or compilation other than a database,²⁹ a computer program,³⁰ preparatory design material for a computer program³¹ and a database.³² This covers all the content of a site plus the source code and machine code.

Other Works

Web developers may also need to consider *dramatic works*,³³ *musical works*,³⁴ *films*³⁵ and *sound recordings*.³⁶

Sources of Law

Copyright law in the United Kingdom is codified by the CDPA³⁷ which came into force on 1 August 1989. The statute has been modified many times to comply with EU Directives on computer software,³⁸ rental and

lending,³⁹ satellite broadcasting and cable re-transmission,⁴⁰ the term of copyright,⁴¹ databases,⁴² conditional access⁴³ and copyright and related rights in the information society.⁴⁴ A number of statutes have also amended the legislation.⁴⁵ The Intellectual Property Office publishes and maintains an unofficial consolidation of the relevant parts of the CDPA which takes account of these modifications and amendments together with the most important statutory instruments at <http://www.ipo.gov.uk/cdpact1988.pdf>.

Many of the provisions of the CDPA have been inserted to enable HM government to comply with its obligations under a number of international agreements. The following are the most important:

- **Berne Convention** for the Protection of Literary and Artistic Works of 9 Sep 1886;⁴⁶
- **Universal Copyright Convention**;⁴⁷ and
- **TRIPS**: Agreement on Trade-Related Aspects of Intellectual Property Rights.⁴⁸

Countries that are party to one or more of those agreements protect the works of British authors under their national copyright laws. By the same token, the works of citizens or residents of countries that are party to one or more of those agreements qualify for protection under the CDPA.

²⁷ S.5 (2) *ibid*

²⁸ S.3 (1) *ibid*

²⁹ S.3 (1) (a) *ibid*

³⁰ S.3 (1) (b) *ibid*

³¹ S.3 (1) (c) *ibid*

³² S.3 (1) (d) *ibid*

³³ These include dance and mime (s.3 (1) *ibid*).

³⁴ “A work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the Music (s.3 (2) *ibid*).

³⁵ “A recording on any medium from which a moving image may by any means be produced” (s.5B (1)) and the sound track accompanying the film (s.5B (2) *ibid*).

³⁶ These are defined by s.5A (1) of the CDPA as:

- (a) a recording of sounds, from which the sounds may be reproduced, or
- (b) a recording of the whole or any part of a literary, dramatic or musical

work, from which sounds reproducing the work or part may be produced, regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced.”

³⁷ See footnote 3 for the meaning of CDPA.

³⁸ Directive 91/250/EEC on the legal protection of computer programs.

³⁹ Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

⁴⁰ Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

⁴¹ Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

⁴² Directive 96/9/EC on the legal protection of databases.

⁴³ Directive 98/84/EC on the legal protection of services based on, or consisting of conditional access

⁴⁴ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society

⁴⁵ These include the Broadcasting Act 1990, the Broadcasting Act 1996, The Copyright, etc. and Trade Marks (Offences and Enforcement) Act 2002, The Copyright (Visually Impaired Persons) Act 2002 and The Legal Deposit Libraries Act 2003

⁴⁶ http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

⁴⁷ http://portal.unesco.org/en/ev.php-URL_ID=15241&URL_DO=DO_TOPIC&URL_SECTION=201.html

⁴⁸ http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm



Formalities

Unlike the USA and a number of other countries there is no system of copyright registration in the UK. Copyright comes into being just as soon as the work is recorded in writing or some other medium.⁴⁹ In order to obtain protection in countries that do require registration or some other formality, it is prudent to insert the symbol “©” or the word “copyright”, the name of the copyright owner and the year of first publication prominently on the work.⁵⁰ There is also an advantage in placing such a notice on a copyright work even in the UK because s.104 (2) CDPA raises a presumption that the person named in the notice is entitled to the copyright in the work.⁵¹

Ownership

As a general rule, the person who creates a copyright work⁵² owns the copyright in it⁵³ but there are several exceptions. Where an artistic, dramatic, literary or musical work or film is made by an employee in the course of his or her employment, the employer owns any copyright in the work subject to any agreement

⁴⁹ S.3 (2) CDPA

⁵⁰ Art III (1) of the Universal Copyright Convention provides: Any Contracting State which, under its domestic law, requires as a condition of copyright, compliance with formalities such as deposit, registration, notice, notarial certificates, payment of fees or manufacture or publication in that Contracting State, shall regard these requirements as satisfied with respect to all works protected in accordance with this Convention and first published outside its territory and the author of which is not one of its nationals, if from the time of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.”

⁵¹ S.104 (2) CDPA provides:

“Where a name purporting to be that of the author appeared on copies of the work as published or on the work when it was made, the person whose name appeared shall be presumed, until the contrary is proved - (a) to be the author of the work;

(b) to have made it in circumstances not falling within section 11(2), 163, 165 or 168 (works produced in course of employment, Crown copyright, Parliamentary copyright or copyright of certain international organisations).”

⁵² That person is referred to in the CDPA as “the author” regardless of whether or not he or she is an artist, composer, computer programmer, photographer, playwright, song writer or author in the conventional sense (s.9 (1) CDPA).

⁵³ That person is referred to in the CDPA as “the author” regardless of whether or not he or she is an artist, composer, computer programmer, photographer, playwright, song writer or author in the conventional sense (s.11 (1) CDPA).

to the contrary.⁵⁴ Under the previous legislation a person who commissioned a photograph, portrait or engraving became entitled to any copyright subsisting in such work.⁵⁵ Further, the Crown was entitled to any copyright in artistic, dramatic, literary and musical works made by or under the direction or control of a government department.⁵⁶ This was sometimes a problem for software houses that supplied the National Health Service or other departments or agencies. These provisions have not been re-enacted in the CDPA. Thus, copyright in a commissioned work will generally belong to the person who created the work rather than to the person who commissioned it unless there is an agreement between them to the contrary.⁵⁷

Duration

Copyright in artistic, dramatic, literary and musical works last for the life of the author plus 70 years⁵⁸ unless the work was computer generated in which case it subsists for 50 years from the end of the year in which the work was made.⁵⁹ Copyrights in sound recordings continue for 50 years from the end of the year in which the recording was made, published or first made available to the public.⁶⁰ Copyright in a film expires 70 years after the calendar year in which the last of the following persons die: principal director, screenplay writer, dialogue writer or composer of any specially commissioned music.⁶¹ Copyright in broadcasts last for 50 years from the end of the year in which the broadcast was

⁵⁴ That person is referred to in the CDPA as “the author” regardless of whether or not he or she is an artist, composer, computer programmer, photographer, playwright, song writer or author in the conventional sense (s.11 (1) CDPA).

⁵⁵ S.3 (3) Copyright Act 1956 (<http://www.legislation.gov.uk/ukpga/1956/74/section/4/enacted>)

⁵⁶ S.39 (1) (b) *ibid.* (<http://www.legislation.gov.uk/ukpga/1956/74/section/39/enacted>)

⁵⁷ Sometimes such an agreement can be inferred from the circumstances (see *Lakeview Computers plc v Steadman and others* [1999] All ER (D) 1327).

⁵⁸ S.12 (2) CDPA

⁵⁹ S.12 (7) *ibid.*

⁶⁰ S.13A (2) *ibid.* Different periods apply for sound recordings made by persons who are not nationals of a member state of the European Economic Area (EU plus EFTA) (see s.13A (4) *ibid.*).

⁶¹ S.13B (2) *ibid.* Different periods apply for films made by persons who are not nationals of an EEA state (see s.13B (4) *ibid.*).

made.⁶² Copyright in the typographical arrangement of a published edition expires 25 years from the end of the calendar year in which the edition was first published.⁶³

Infringement

Violating an IPR is known as an “infringement”. Copyright is infringed by copying a copyright work or doing any of the other acts referred to in the paragraph “What is Copyright” above.⁶⁴ An owner of a copyright or other IPR can apply to the civil courts for an order (known as an *injunction* in England, Wales and Northern Ireland as an *interdict* in Scotland) to prevent or stop the infringement. Disobedience to such an order may be punished by imprisonment, fine or other sanction. The courts have power to compensate copyright owners for any loss or damage that they may sustain from infringement of their copyrights or to require infringers to disgorge any profits that they have gained from such infringement.⁶⁵ They can also compel infringers to deliver up infringing copies of a copyright work for forfeiture to the copyright owner⁶⁶ and to provide information under oath as to the nature and extent of their infringements. In particularly flagrant cases where the justice of the case so requires, a court can award additional damages to the copyright owner.⁶⁷ Some copyright infringements are also offences⁶⁸ punishable by an unlimited fine or up to 10 years in prison.⁶⁹

⁶² S.14 (2) *ibid*. Different periods apply for broadcasts made by persons who are not nationals of an EEA state (see s.14 (3) *ibid*).

⁶³ S.15 *ibid*.

⁶⁴ See footnote 7

⁶⁵ S.96 (2) *ibid*

⁶⁶ S.99 (1) *ibid*

⁶⁷ S.97 (2) *ibid*

⁶⁸ For instance, s.107 (1) CDPA provides:

A person commits an offence who, without the licence of the copyright owner -

(a) makes for sale or hire, or
(b) imports into the United Kingdom otherwise than for his private and domestic use, or
(c) possesses in the course of a business with a view to committing any act infringing the copyright, or
(d) in the course of a business -
(i) sells or lets for hire, or
(ii) offers or exposes for sale or hire, or
(iii) exhibits in public, or
(iv) distributes, or
(e) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright, an article which is, and which he knows or has reason to believe is, an infringing copy of a copyright work.”

⁶⁹ S.107 (4) *ibid*

Enforcement in England and Wales

Claims for injunctions, damages and other relief for infringement of copyright may be brought in the High Court of Justice, the Patents County Court or the Birmingham, Bristol, Caernarfon, Cardiff, Leeds, Liverpool, Manchester, Mold, Newcastle or Preston County Courts.⁷⁰ Because of its adversarial system, civil litigation in England and Wales has always been significantly more expensive than in other European countries. A report in 2003 by IPAC (the government’s high level advisory committee on IP) found that the average cost of a claim in the Patents County Court was between £150,000 and £250,000 and a claim in the High Court was about £1 million compared to €30,000 to €50,000 in France, €25,000 to €50,000 in Germany and €10,000 to €40,000 in the Netherlands.⁷¹ New rules for litigation in the Patents County Court were introduced on 1 Oct 2010. They limit recoverable costs to £50,000.⁷² A new small claims track will be introduced to the Patents County Court in Oct 2012.⁷³ These rules do not apply to litigation in the High Court or any other county court.

Criminal proceedings are brought by local authority trading standards officers in the magistrates’ courts or, in more serious cases, the Crown Court.

Top Tips

1. Be careful what you copy

In a famous case,⁷⁴ the judge said that “what is worth copying is *prima facie* worth protecting”. Unless you have created the work, otherwise own the copyright or have the copyright owner’s licence to reproduce it, think twice (and perhaps more than twice) before putting an image, clip or other work on your website. The fact that a drawing, font, photo or

⁷⁰ CRP 63.13 <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part63#IDABTLCC>

⁷¹ “The Enforcement of Patent Rights” Intellectual Property Advisory Committee, Nov 2003 at page 50 (http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/contravision_ltd_336_p4_163kb.pdf)

⁷² See Jane Lambert “New Patents County Court Rules” IP/IT Update 31 Oct 2010 (<http://nipclaw.blogspot.co.uk/2010/10/new-patent-county-court-rules.html>)

⁷³ See Jane Lambert “Small IP Claims” NIPC 8 May 2012 (<http://nipclaw.wordpress.com/2012/05/08/small-ip-claims>)

⁷⁴ *University of London Press v University Tutorial Press* [1916] 2 Ch 601



app is on the internet or even described as “clip art” does not prevent copyright from subsisting in the work or indicate that nobody owns that copyright. Software now exists that scours the internet for copies of photos or other works which is used by businesses that make money from collecting payments for unlicensed reproduction. Until now the cost of litigation has deterred those businesses from pursuing those who refuse to pay. The new small claims track for the Patents County Court will remove that deterrent. If you want to copy something that you have found on the internet, try to discover who the copyright owner is and get his or her permission even if you have to pay a licence fee or royalty.

2. Plan for Enforcement Litigation

Despite the new rules on litigation in the Patents County Court mentioned in “Enforcement in England and Wales”, IP proceedings can still be very expensive. Unless you have the means to litigate don’t wait for a problem to arise before considering litigation funding. Very few lawyers are prepared to take IP cases on a “no win no fee” basis for all sorts of good reasons. After-the-event (“ATE”) insurance will be much less attractive after the Legal Aid, Sentencing and Punishment of Offenders Act 2012⁷⁵ takes effect. Your best bet is likely to be before-the-event (“BTE”) insurance. It is considerably cheaper than ATE insurance. More and more brokers are offering BTE cover. For a good introduction to IP insurance, see my article “IP Insurance Five Years On” in my Inventors Club blog.⁷⁶ Also, a new website called “Litigation Futures” lists BTE and ATE insurers and brokers as well as other litigation funders.⁷⁷

3. Assert Your Copyright

Insert your copyright notice at the foot of every page of your website for the reasons given in the paragraph headed “Formalities”. The formula is very simple. Just insert the word “copyright”, the symbol “©”, the year in which the work was created or amended and the name of the person who claims copyright. As I said in Basic Law for Web Designers: No. 2:

⁷⁵ 2012 c 10
(<http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted>)

⁷⁶ Jane Lambert “IP Insurance Five Years On” NIPC Inventors Club, 23 Oct 2010
<http://nipcinvention.blogspot.co.uk/2010/10/ip-insurance-five-years-on.html>

⁷⁷ <http://www.litigationfutures.com>

Website Terms and Conditions,⁷⁸ every website should have website access terms. You should insert any special requirements as to copying, downloading, deep linking, framing and so forth into those terms.

Incidentally, the sign “®” denotes a registered trade mark. If you have registered your brand as a trade mark you can use that symbol. If not, you can use only the initials “™” which will indicate to some that you claim goodwill in the sign and that you have applied to register a trade mark. Others deride the sign as an abbreviation for “totally meaningless.”

4. Take Timely Advice

I know that specialist legal advice can be expensive but the consequences of not taking it at the right time can be ruinous. If you need an injunction between the start of a dispute and its resolution you have to be quick. A delay of even a few days and certainly a few weeks will be held against you. Responding early to a letter before claim can prevent a dispute from festering into a law suit (see my article “IP Dispute Resolution in England and Wales: why sending a US style “Cease and Desist Letter” or old style “Letter before Action” may not be a good idea” 13 Jan 2012⁷⁹). Make sure that your legal advisor has the appropriate knowledge and experience. Membership of the IP Bar Association, IP Lawyers Association, Chartered Institute of Patent Attorneys or Institute of Trade Mark Attorneys is a good sign. Be very careful not to threaten litigation before you consult a lawyer or patent or trade mark attorney otherwise you could find yourself being sued for groundless threats.

Further Information

If you have any questions on this article or IP in general do not hesitate to call or email me. I blog regularly on IP issues at <http://nipclaw.blogspot.com/>, publish an occasional newsletter for web developers⁸⁰ and have accounts on Facebook, G+, LinkedIn, twitter and Xing. □

⁷⁸ <http://www.jdsupra.com/legalnews/basic-law-for-web-designers-no-2-website-52033/>

⁷⁹ <http://www.jdsupra.com/legalnews/ip-dispute-resolution-in-england-and-wal-38314/>

⁸⁰ <http://hosted-p0.vresp.com/307065/b08f1a47f0/ARCHIVE>