Protecting your work:

Copyright, confidentiality, and contracts

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Bectu guide to protecting your work – copyright, confidentiality, and contracts

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Mike Holderness acknowledges the historical work of members of Bectu's Writers, Producers & Directors Branch and of its Copyright Committee on earlier documents.

The information in this booklet is given for guidance only. It is not intended to be taken as specific advice for individual circumstances. It is not to be regarded as constituting legal advice and should not be relied upon as such. Any action to be taken will depend on the particular facts and matters that affect each individual. This booklet deals with copyright law as it applies to the United Kingdom only.

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Introduction

How do you protect your creative work against others profiting from it unjustly, or abusing it? Bectu has commissioned this guide to cover the cases that members are most likely to encounter.

First, please be reassured that although copyright and contract law is complex, the basic principles are very simple. In many cases, you do not need a lawyer to enforce your rights[1].

Unless otherwise stated, everything in this guide is about the laws of the United Kingdom. The law of copyright is the same in all the nations of the UK. The information on copyright deals with works covered by the Copyright, Designs and Patents Act of 1988 (CDPA) – those created since the Act came into effect on 1 August 1989.

What is protected and how?

Copyright protects creative **works**.

You have copyright simply by virtue of creating a work, from the moment you create it.

This applies to words, pictures including moving pictures, and to musical scores.

Copyright *does not protect ideas, nor facts*. What it protects is the particular "expression" – the way you tell a story, the way you arrange an image; and so on.

The case of this guide provides a clear example. Copyright means that you cannot *copy* a substantial part of it without permission (except for certain special purposes: see "Exceptions to copyright" – below). You cannot translate it, or make a film of it, without permission – and to get our permission you would need to pay. You are, however, free to write a new guide that conveys the same facts and ideas in different words.

In general, copyright does not apply to very short "works" – such as titles and headlines. Unfortunately, the phrase "who wants to be a millionaire?" is not protected, nor is "fast and furious".

Confidentiality is generally the legal tool you use to protect ideas, such as programme proposals. You make a **contract** with those who want to see your proposal and this specifies that they will keep your work "in confidence" and not spread it around.

Some examples of creative works that are protected by copyright are:

- Photographs;
- Drawings and paintings;
- Playscripts;
- Films;
- Musical scores and arrangements;
- Lyrics;
- Written articles, including reviews and indeed letters that you write; and
- Books.

Performance rights cover musical and acting performances. They are distinct from copyright, but for most purposes the ways in which performers defend their rights are quite similar to what authors, artists, composers and so on need to do. Technically they are

[1] Bectu members can generally expect to receive legal assistance on their employment rights. However, in most cases, a copyright dispute is a contractual issue and legal assistance can only be offered at the discretion of the Head of Bectu. If you need legal assistance though the union, you must contact your branch official before taking other action.

called “neighbouring rights” to copyright. So, you need permission from performers to use a recording or a film clip of their work – see “What if I want to use someone else’s work?” – below.

There are also separate design rights, which are also similar in their application. They last for 15 years from when the design was first made or documented.

If in the course of staging a play you designed an innovative chair, for example, design rights should protect you against unauthorised commercial exploitation of your design by a furniture company. Costume designers and prop designers in particular should seek advice from ACID (Anti Copying in Design).[2]

Some examples of work that you must protect through contracts and confidentiality clauses are:

- Programme proposals; and
- Format proposals, including titles for strands and formats.

We deal with these two cases in separate sections: “Copyright” and “Confidentiality and contracts”.

Copyright protects creative works

In UK law there is no “threshold” for creativity. For example, all photographs are protected, from a studio shot that takes a day to set up to a picture that you accidentally take on your phone. To be protected by copyright, a work does have to be “original”.

Who owns copyright?

With some important exceptions, noted below, if you are the creator, then you are the copyright owner: if you make it, it’s yours.

If, however, you create a work “in the course of employment” the copyright owner is, in most cases, your employer, depending on the terms and scope of the contract. This happens if you have a contract *of employment* – a contract with pension rights and rights against unfair dismissal and so on, not just a contract for casual work. The law does allow for the possibility that you negotiate with your employer an agreement that you keep copyright. For this reason, many of the employment or engagement contracts Bectu members are offered go into a great deal of detail about who owns the copyright (though generally, those contracts assign all rights to the employer or engager).

Copyright in a film or television programme belongs to “the person by whom the arrangements necessary for the making of the production are undertaken” – that is usually the production company. The principal director also has rights: see “The rental right and equitable remuneration – directors’ rights”– below.

Who owns copyright in works done by someone paid by the day, but not employed in the strict sense, is not entirely clear. As always in UK law, it is not always clear what Parliament meant when it passed an Act until a higher court has issued a judgment.

The 1988 Act does not specify how it is applied for such “casuals”. We could have assumed that this meant they kept copyright – until the only nearly-relevant court case appeared: *Beloff v Pressdram*[3] This did not concern normal authorial copyright: the judgment was that the columnist Nora Beloff could not sue Pressdram Ltd (the owner of

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[2] https://www.acid.uk.com/

3 *Beloff v Pressdram* [1973] FSR 33 – discussed at https://www.cipil.law.cam.ac.uk/virtual-museum/beloff-v-pressdram-1973-fsr-33

Private Eye) for printing a memo she wrote, because it belonged to the paper in whose office she wrote it, the *Observer*.

Assume at least that if, for example, you are paid to take photographs for a week, you grant your client a wide licence to use the resulting pictures. It's certainly best to negotiate an agreement setting out what rights you grant: see "contracts"– below. Otherwise, the person or company commissioning a work does not have any special rights to use it, outside those rights specified in a contract between them and the person making the work.

Keeping service companies going, and making a will

If you operate through your own personal service company (PSC) – a company that you own, that employs you as well as paying you dividends, unless you have something in the contract that says otherwise, that PSC will be the first owner of copyright in works you make in the course of employing yourself.

If the PSC does own copyright, it must be the entity that assigns or licenses the works, and for copyright ownership that is expected to have any long-term value, this may cause problems – especially if the company ceases trading. If after seeking advice the PSC still does own copyright, it must be that company that assigns or licenses the works. If such a PSC has rights in a film or TV programme, it may be worth speaking to Directors UK about equitable remuneration for rental.

It is very important to remember that valuable rights may be vested in the PSC. You must take care that nothing happens to threaten the existence of the PSC without ensuring that such rights are assigned back to you, or to others if you choose.

If the service company were to be wound up without dealing with the assignment of any copyright, then a liquidator of the company may be able to sell off the rights. If the company is allowed to lapse and is struck off the Companies House register, any such rights would automatically vest in the Crown.

It is equally important to make proper provision for the disposition of copyright, "residuals" and royalties in the event of your death. These could form a valuable part of your estate. Make a will and specify who inherits your copyright.

An alternative is for your company to make a written agreement with you, the human, stating something like this:

> Agreement between **Jane Doe** and **Jane Doe Limited** dated _____
>
> **Jane Doe** shall retain all copyright and related rights in work done in the course of employment by **Jane Doe Limited**, as provided for in Section 11(2) of the Copyright, Designs and Patents Act 1988.
>
> Signed:
>
> _____ **Jane Doe**
>
> _____ for **Jane Doe Limited**

Who or what is an 'author'?

Copyright in UK law is defined by the Copyright, Designs and Patents Act (CDPA) of 1988[4]. It refers to "authors". The meaning of the word "author" depends on the type of the

4 https://www.legislation.gov.uk/ukpga/1988/48

copyright work. In this legal sense, for the purposes of this guide photographers and illustrators are “authors” and so are composers and lyricists and sculptors.

The 1988 Act recognises the concept of joint authorship.

Registration is not required to have copyright. Registration in the United States may be a good idea for some authors – see “Registering works in the United States”– below. And making a record of evidence that a programme proposal or the like is your work may be a good idea – see “Confidentiality and contracts” – below. You might want to register your work with Bectu’s script registration scheme or for US registration, but beware that the many other offers to register your work for copyright purposes could be a scam.

Copyright protects works, not physical objects

Consider the case of a cartoon. The cartoonist may sell a licence to reproduce it. They may then sell the original artwork to another party – a collector, or perhaps the person portrayed – for a separate fee. The person who has the original does not have the right to re-publish it, unless a contract specifies otherwise. All rights are held by the author or artist until otherwise agreed by contract.

A documentary filmmaker may encounter the case of private correspondence on paper. The person to whom the letter was sent owns the piece of paper. But the person who wrote it, or their estate, retains copyright in the words – what the letter *expresses*. See “What if I want to use someone else’s work?” – below.

What does copyright do for me?

There are two parts to your copyrights:

- The “economic right” is the right to say that your work cannot be copied unless you are paid; and
- The so-called “moral rights” are rights to be credited when your work is used, and to defend its integrity – see “Identification and integrity: the moral rights”.

The “economic right” is basically the right to decide who can copy a work – or make it available to the public or adapt it.

Of course, having that right gives you the power to say “yes, if and only if you pay me.” Anyone who uses your work without that permission – a “licence,” as explained below – is in breach of copyright. You could consider stating something like the following when you write to accept a commission to do work, or failing that on the invoice that you issue for work done:

> I grant you a licence to reproduce this work in the production of *Quatermass XIV*, only, for worldwide distribution.
>
> This licence takes effect only when I receive payment.

If you have agreed to assign rights in your work, amend the example appropriately.

And if someone is in breach of copyright you can negotiate – backed up by the fact that what they have done is not legal.

In practice, if you need to go to law to enforce these rights you do so in the civil courts – that is, if someone breached your copyright you sue them for damages.

When you win in court, damages are generally set at the amount that you would have received had the culprit negotiated in good faith for a licence to use your work. Bectu contends that this is deeply inadequate to deter copyright infringement.

Courts *may* award additional damages, for example for “flagrant” breach of copyright or to reflect the “benefit accruing to the defendant by reason of the infringement”.

The law does define criminal offences for unauthorised copying, but these are hardly ever used for breaches of individual’s copyright. One of the vary rare recent exceptions involved wholesale passing-off of articles from the *Northern Echo* newspaper and of photographs: the offender was also prosecuted for fraud.[5]

There is a small claims court dedicated to hearing cases of copyright infringement. See “What can I do when my copyright is infringed?” for advice on when you need to use it and how.

Bectu can offer its members some support and advice in dealing with copyright infringements, depending on the case.

How do I authorise others to use my copyright work?

In general, the default way of letting a company use your work is to grant it a “licence”. A licence is simply a contract (or part of a wider contract) that says “you can do *this*, and *that* with this work, in *these* places, in exchange for *this much* money”.

UK law, however, like that of most English-speaking countries, allows an author to “assign” their copyright. The first line of the 1988 Act is “Copyright shall be a property right” and the Act goes on to specify that it is entirely transferable.

If you assign your work to someone else they become, in law, the author. With one exception you lose your right to claim money from a collecting society for “secondary use” of your work – see “Join collecting societies!”. The money goes to the company to which you assigned the work, instead.

This is one reason that companies pressure authors to assign all rights. Another is that it means they never have to think about copyright in the work again. A third may be that they can then count the value of the work as an asset on their balance sheet.

In general, then, the payment for assignment of a work should be considerably greater than that for a licence to use it.

Though the phrase “all rights” is often used in contract clauses through which authors assign copyright, these do not of themselves deprive these authors of their moral rights – see below.

Bectu therefore advises members to licence work, and to resist pressure to assign copyright wherever possible.

Often, however, when writers and composers contribute to a film or TV programme they start with copyright in their own contribution to the production – and are asked to assign “all rights” to the production company that owns the film itself. Others such as art directors and costume designers may start out with copyright in their work, subject to their contract and terms of employment.

Yet other contributors, such as editors and those working on camera and sound, are not mentioned in the 1988 Act and use of their work falls entirely under contract and employment law.

In some instances it may be possible for high-profile contributors to negotiate “residuals” payments out of a film’s profits, as part of a contract that assigns copyright.

5 http://www.londonfreelance.org/fl/2012fake.html

In Bectu's view there is a strong moral case for everyone who has creative input into a film or programme to receive such "residual" payments. Achieving this would need effective collective action to change industry practice.

And note once more that when the work is made by an employee in the course of their employment, copyright belongs to the employer.

For example, when Bectu members such as animators are employed by a production company, the company will usually be first owner of copyright in all their work carried out as part of their duties, unless their contract states otherwise.

US practice

Many US contracts are governed by the "work made for hire" concept: if you receive a fee for a day or a month or a year of work you assign your copyright. This concept is pretty much specific to US law: in the UK you are very likely to retain rights. But US producers are likely to insist on working within US law. If you are in a strong enough negotiating position, they may negotiate "residuals" – perhaps a percentage of profits.

There are no moral rights in US law (except in single works of visual art, or those produced in numbered editions of 200 or fewer). So US producers who are aware of moral rights are very likely to ask you to waive them (see "Identification and integrity: the moral rights" below). Since the majority of film projects look for a sale in the US market, rightsholders may be asked to assign, waive or otherwise surrender all their rights in any material they have contributed.

Even with union support and a good agent, it is difficult to resist these economic pressures. The point is to be aware of what is at stake; bargain hard; and not to be browbeaten by the argument that one-sided clauses are "standard practice". They should be standard practice only when there is a large enough "consideration" offered in return.

In the US the relinquishment of all rights in a "work made for hire" contract is usually rewarded by financial compensation; in Europe the lower fees have reflected a greater retention of rights. Beware of getting the worst of both worlds.

You need a signed contract to define the proposed use of, and payment for, your work. Do not be pressurised by pleas of urgency, or promises of good faith, or of cheques being in the post. Avoid parting with your work unless you have both a contract and a down payment.

Again: your original work, produced in your own time, belongs to you. The contractual terms on which you license (or assign) your copyright are vital.

In almost all countries in mainland Europe and the majority worldwide, copyright cannot be assigned. These countries have authors' rights law – and whereas copyright is a property right authors' rights are fundamentally rights of the individual, human creator. Production companies put considerable effort into getting the widest possible rights – or may simply insist that contracts are governed by US law.

Researchers and producers: sample ideas

Applicants for researchers' jobs are commonly asked to put forward a range of "sample ideas". Some later report seeing their ideas used, even when they hear further about the job. Magazine programmes have been known to act in this way, though they are not the only offenders. There is a strong suspicion that producers are "fishing for ideas" under the guise of offering work.

It is difficult to give secure advice on resisting this tactic. You want the job, and it may be worth an idea or two to try to get it. But do make a point of keeping a written record of your suggestions with the date and details of the meeting. Whatever your judgement of the situation, the point is to be aware that "sample ideas" are highly vulnerable, and to avoid revealing valuable project ideas until you've taken steps to protect them. A good track

record should also carry some weight with an employer who is not simply looking for free material.

Producers report similar problems in presenting proposals to broadcasters or to bigger producers. These may reject the proposal as being unworkable or not of interest, only for a very similar idea to be broadcast at a later date. Whatever the true incidence of this practice, there is no doubt that the publishers and broadcasters can benefit from using ideas that are brought to them, and members are right to protect themselves against the appropriation of their ideas in any way that they can. Such shady practice is unlikely to be a breach of copyright: see "Confidentiality and contracts" and "How the law has treated confidentiality and proposals" below. It would be a breach of confidentiality if, for example, you marched into an interview declaring that everything you said was in strict confidence. We are not entirely sure what the effect of this would be.

Bectu also has reports of producers trawling podcasts for ideas as if they were "free outsourced development departments". Once more: if you publish a podcast, there is nothing you can do to prevent someone being "inspired" by it, so long as they do not copy significant parts of it verbatim. Your podcast itself may have been inspired by the film *The Producers*...

The Alliance for Protection of Copyright (APC) was formed with strong support from Bectu.[6] See the Appendix for the APC Code of Conduct which is intended to enable authors and producers to submit material with greater confidence.

Sharp practices

This whole area is fraught with sharp practice, such as deliberately obscure contract wording. Watch out for contracts in which the company may claim copyright in all your work, even when originated in your own time.

See also the section below on contracts, and bear in mind that in other countries the copyright situation may vary.

How long does copyright last?

In the UK, throughout the European Union and in the US since 1998, copyright protection lasts for seventy years after the death of the author. Strictly, a work is in copyright until the end of the seventieth year after the author's death.

Copyright in films lasts until the end of the seventieth year after the death of the last survivor of four main contributors to the film:[7]

(a) the principal director,

(b) the author of the screenplay,

(c) the author of the dialogue, or

(d) the composer of music specially created for and used in the film.

Copyright in other works of joint authorship lasts until the end of the seventieth year after the death of the last surviving author.

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6 To be strictly legally correct, the Alliance for Protection of Copyright should perhaps have been named the "Alliance for Protection of Programme Ideas Through the Law on Confidentiality".

7 CDPA section 13B https://www.legislation.gov.uk/ukpga/1988/48/section/13B
Berne Convention for the Protection of Literary and Artistic Works: https://www.wipo.int/treaties/en/ip/berne/

In other parts of the world, other rules may apply. The word “film” in this sense covers television and video.

On the death of an author the economic rights and the right to protect the moral rights pass to their heir unless they have specified someone else as a “literary executor” or similar in their will.

How should I sign my work?

All you need is your name.

The UK is a party to the Berne Convention,[8] the basic international law setting out standards for member states’ laws. This states that copyright protection should be available “without formality”. This means that the countries that have joined the Convention – the great majority – promise not to include in their laws any special notice procedure to claim copyright. There are very few counties that are not signatories of the Berne Convention.

Some authors like, however, to use the format devised under the Universal Copyright Convention (UCC), which was a US-sponsored rival to Berne. An example is: “**Copyright © 2024 Mo Smart**”.

The US joined Berne with effect from 1 March 1989. Nevertheless, US law continues to require registration of copyright before you can get *effective* legal protection against infringement: see “Registering works in the United States” below.

Identification and integrity: the ‘moral rights’

The confusing term “moral right” is a clunky translation of the original French: *droit moral.* Moral rights protect the integrity of your work as distinct from its economic exploitation.

UK law recognises three distinct moral rights:

- Identification or “paternity”: the right to be identified as the author, director or creator of the work;
- Integrity: the right to object changes that alter the intention or quality of the work in a way that is likely to prejudice the reputation of the creator – “derogatory treatment”; and
- False attribution: the right to object to works being falsely attributed to you.

The rights to paternity and integrity last for seventy years after the author’s death, the same length of time as copyright. The right to object to false attribution lasts for twenty years after the author’s death.

For completists, there is a fourth moral right in UK law: the right not to have films and photographs that are taken for private and domestic purposes (such as wedding videos) made public.

The moral rights are separate from the economic rights. They cannot be sold or transferred, and as noted the act of assigning the economic rights does not itself affect them.

However, under the 1988 Act the right of identification or paternity right cannot be enforced unless it has previously been “asserted”. Typically you would do this by including the phrase “moral rights asserted” in a contract, in an invoice or, in the work itself – on a title page or credit screen, for example.

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8 CDPA section 13B https://www.legislation.gov.uk/ukpga/1988/48/section/13B

Berne Convention for the Protection of Literary and Artistic Works: https://www.wipo.int/treaties/en/ip/berne/

The right of identification includes the right to be identified by the pseudonym or *nom de plume* of your choice or, probably, to insist that the work is unsigned.

The 1988 Act also made it possible for the creator's moral rights to be set aside by a "waiver". As a result companies began to include waivers in all contracts. Watch for wording such as the following:

> *"I hereby unconditionally and irrevocably waive all rights conferred upon me by Chapter IV of the Copyright, Designs and Patents Act 1988."*

It may be customary to waive moral rights for some uses of work: for instance, commercials are not broadcast with credits.

However, creators should resist waivers covering all countries and all rights.

In almost all countries, including the majority in mainland Europe, moral rights cannot be waived. They are generally seen as the foundation of authors' rights law – and whereas copyright is a property right authors' rights are fundamentally rights of the individual, human creator. It is therefore impossible to assign the economic rights in these authors' rights countries. The result is that all authors, whether employed or not, are entitled in these countries to payments for "secondary use" of their work (see "Join collecting societies!" below).

Companies to which you supply copyright work sometimes claim that your right of integrity gets in the way of them editing, formatting, and presenting that work. In publishing it is, however, good practice for them to consult you about changes – and you can agree that the right of integrity applies to the published version that you sign off on – allowing you to take action against *other companies* distorting and re-publishing it. In the case of scriptwriting, however, the client is likely to be intransigent about a waiver.

Although it may be necessary to agree to waive moral rights in order to secure work, it may be possible to qualify the waiver by adding a qualification, for example negotiating to add a clause to a contract specifying that "this waiver does not apply to the use of the work or any part of the work in connection with the production of any other work without prior written approval', or 'provided that such waiver shall not apply to derogatory treatment within the meaning of the Copyright, Designs and Patents Act 1988."

The right of identification does not apply to works made for the purpose of reporting current events, or for good measure to works published in a newspaper, magazine or similar periodical, or an encyclopaedia, dictionary, yearbook, or other collective work of reference. It is very restricted for works made in the course of employment. You have a right of integrity in works made in the course of employment only where you are identified as the author when they are published or made available.

There is very little case law to determine how the moral rights work in UK law. In practice, breaches of moral rights are grounds for increased damages where the author sues at the same time for breach of the economic rights. In one case in a Scottish Sheriff's court photographer got 50 per cent extra for failure to credit him – and a 50 per cent uplift on the new total due to the breach being "flagrant".[9] This does not, however, set a precedent for other courts.

Courts applying "authors' rights" laws often do the same in practice. In August 2023 the Higher Regional Court of Nürnberg (Nuremberg in Germany) ruled[10] that an online

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9 See http://www.londonfreelance.org/fl/0706scc.html

10 *Rakuten*: case number 3 U 2910/22, judgement of 01.08.2023, not final; discussed on the excellent IPKat blog at https://ipkitten.blogspot.com/2023/08/guest-post-german-court-fiends-online.html
The 2021 ruling in the Court of Justice of the European Union spelling out when such platforms

marketplace (Rakuten) was liable for damages after a third-party vendor used a copyright-infringing image to advertise its product. It awarded the photographer €4450 – and then increased that by 50 per cent because the vendor had (unsurprisingly) not given the credit that German law requires.

Join collecting societies!

Whenever someone makes a copy of a copyright work in a university library, for example, that could be a breach of copyright. But it is impractical for authors to grant licences for each of these uses individually. So, collecting societies have been established to collect money for such uses, and distribute it to authors and to performers.

Rental right and equitable remuneration – directors' rights

In April 1997 authors of film and television programmes made in the UK since July 1994 gained an "inalienable" right to authorise the commercial rental of their work. At the same time, "authors" were defined for this purpose as directors or production companies – but not the writers of the script or of other underlying work incorporated in the film.

Since it is normal for all copyright interests in a film or television programme to pass to the production company, it is likely that directors will face a demand to assign their rental right as well. However, the drafters thought of that. This law came from the European Union, in most of whose member states assignment is not possible. Directors retain a right to equitable remuneration that cannot be assigned – which is what it means that this right is "inalienable".

The law does not define what "equitable" means, but it is clear that directors have a right to a specific payment for lending and rental which should be defined in the contract. Directors also have the right to challenge any amounts paid, in the light of subsequent earnings from rental.

The right to equitable remuneration cannot be waived and any attempt to limit the amount of it to the upfront payment is invalid. A percentage of profits may replace equitable remuneration in "work made for hire" contracts.

Again, the Copyright and Related Rights Regulations which came into force on 1 December 1996 identify the principal director of a film or programme as a joint author and co-first owner of copyright along with "the person by whom the arrangements necessary for the making of the film or programme are undertaken" – usually the production company.

Directors have been presented with contracts that require them to assign their share of the copyright to the production company. Directors who do this must understand that they thereby divest themselves of any copyright ownership in the film or programme. The only rights which the director will retain are negotiated contractual rights to payment, appropriate credits and other moral rights (unless waived), plus the right to equitable remuneration.

Where possible directors should seek not to assign or transfer rights, but simply to grant licences to the production company. In this case they will retain copyright ownership, but the production company will be able to exploit the film or programme in accordance with the terms of the licence.

Directors should always assert the right to be identified in the credits of the production.

Directors UK – formerly the Directors' and Producers' Rights Society – administers authorial rights payments on behalf of film and television directors within the UK.

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are liable is discussed at https://ipkitten.blogspot.com/2021/06/cjeu-rules-on-platform-liability-under.html

It seeks agreements with overseas collecting societies to distribute payments collected on behalf of UK film and television directors in those countries. This includes payments for retransmission of films and programmes on cable channels.

It includes home copying from broadcast channels in countries that put a levy on storage devices (including blank cassette tapes!). It includes remaining payments for rental in those countries. What equipment for copying is subject to the levy varies widely from country to country.

Directors UK also works as a lobby to establish and protect the rights of directors in Europe and elsewhere.

If you are a film director, you can contact Directors UK **www.directors.uk.com**

Payment for copying by libraries and schools.

If a library – whether a conventional school, university or public library or a corporation's virtual research department – is going to allow copying of magazine articles, book chapters or any other copyright work, it has to pay a single annual licence fee to the Copyright Licensing Agency. This passes the money on to societies owned and controlled by authors. The money is divided between authors on the basis of a survey of sample libraries.

The rights discussed so far – the rights that you can directly licence – are called "primary rights". These rights to be paid for subsequent uses of work that has already been published or distributed are "secondary rights". (The distinction is rather blurred now that many works are first published as digital copies, but you may still come across these terms.)

To collect your money for secondary rights, you need to join the relevant collecting society and then go online and inform it about the works that you have had published in the course of each year. Bectu recommends that members join each collecting society that is appropriate – ALCS if you have words published; DACS if you have pictures published; and Directors UK (see above) if you are a director.

ALCS – the Authors' Licensing and Collecting Society – is the UK collecting society for writers. Its principal purpose is to ensure that hard-to-collect revenues due to authors are efficiently collected and distributed. It currently pays money to some 120,000 writers and their heirs.

On joining, members license ALCS to administer on their behalf those rights which an author is unable to exercise as an individual or which are best handled on a collective basis. Chief among these are: photocopying; cable retransmission (including the fees for BBC Prime and BBC World Service programming); rental and lending right (but not Public Lending Right – see below); off-air recording; electronic rights; and public reception of broadcasts. The photocopying right is in general collectable only for publications that have an International Standard Book Number (ISBN) or International Standard Serial Number (ISSN) – not (yet) for less formal online publication.

ALCS also distributes money received from collecting societies in other countries in respect of copying of its members' work.

If you have any written works published, you can contact ALCS. See **www.alcs.co.uk**

DACS – the Design and Artists' Copyright Society – is a non-profit-making society that exists to protect and administer the copyright of its membership and to fight for the rights of all visual artists whatever their discipline. DACS collects and distributes copyright payments for those engaged in occupations broadly based on art and design in the UK.

"Primary" rights may be controlled directly by the DACS member, or by DACS on their behalf. Primary rights are licensed by DACS on an individual basis, and DACS agrees terms and conditions with publishers or broadcasters before authorising reproduction. The member receives a fee from DACS which is commensurate with the actual use of the work. DACS polices any infringement of copyright on behalf of its members.

DACS administers “secondary” rights collectively through blanket licensing schemes and agreements with sister societies. Certain secondary rights which do not currently exist in the UK do exist in many other European countries and revenues arising in those countries are collected by DACS for its members. An outline of primary and secondary rights is given in the section on artists.

DACS also publishes for sale a series of fact sheets covering different aspects of copyright in art and design.

If you have any photographs, artworks or illustrations published, see **www.dacs.org.uk**

Public Lending Right

If you have produced words or images for a book you are entitled to be compensated for the sales lost because it is borrowed from libraries, under Public Lending Right (PLR). This is not strictly copyright but sits alongside it: you are entitled to PLR payments by virtue of being the author – of having produced the words or images – regardless of the terms of any contract you may have signed with a publisher. PLR is now administered by the British Library.

To enter your books into the PLR database go to **www.bl.uk/plr**

Artists’ resale right

Artists have a right to a payment every time their work is sold on. This means that they can now benefit from increases in the value of their work over the full period of copyright, instead of receiving only a single payment at the time of first sale. Resale right is known in Europe as *droit de suite*.

There is no resale right in the US, where auction houses and dealers continue fiercely to oppose it. In the UK it is administered by DACS: see **www.dacs.org.uk/for-artists/artists-resale-right**

Registering works in the United States

The US is unique in requiring that you register works to gain effective copyright protection. You should therefore consider registering your copyright in your words and pictures in the US if it seems likely that it will be infringed there. Registration is handled by the Library of Congress, and you need to file a copy of each work.

If you have “timely” registration, you can get “statutory damages”: an amount not less than $750 per work and up to $150,000 if the infringement is found to be “wilful”.

And with “timely” registration, if you win the case the other side must generally pay your attorney’s (lawyer’s) fees.

Registration is “timely” if it is within three months of the work’s first publication (or sometimes later, but before the copyright infringement begins). Those legal fees are likely to be a lot higher if it’s on the borderline of timeliness – and remember that even if you do get them back in the end you will likely have to front them while the case goes through.

Statutory damages are independent of the “actual damages” – which would be the assessed cash value of the infringement: broadly, what the infringer would have paid, had they asked for a legitimate licence and presuming you granted it.

If you do not have “timely” registration, you can recover only “actual damages"” and cannot reclaim your lawyer’s fees. This can result in an incredibly expensive and ineffective process.

If you have timely registration, then US courts will presume that your claim to be copyright owner is valid. As a practical matter, the infringer is therefore far more likely to settle out of court.

So, if you consider it likely that your work will be infringed in the US, consider registering it. Remember that this applies only to copyright infringement, not to people stealing programme ideas and the like. Fees start at $45 for a single work registered online; you can for example register up to 750 photographs for $65.

See **www.copyright.gov/registration**

What if I want to use someone else's work?

Generally, you need to find them and negotiate a licence with them.

Bear in mind that when it comes to licensing others' work your first question should not be "who is the owner of this?" but rather "how many copyrights are there in this?" For example, in a musical recording there will generally be separate copyrights in the composition and the lyrics; and then there are the rights of the performers, and a separate "neighbouring right" protecting the actual recording, which will generally belong to a record company or a studio.

If you are having trouble finding an author, it may well be worth writing to the relevant collecting society asking it to forward a message – see below for contact information for collecting societies.

Exceptions to copyright

You may be allowed to use short extracts, taking advantage of what are called "exceptions to copyright". Examples include:

- quotes for the purposes of reporting news and current affairs
- quotes for the purposes of criticism and review; and
- incidental inclusion – as when a street scene includes a poster.

Since 2014 there have been exceptions for "quotation" in general and for "caricature, parody or pastiche", although there is currently no case law or such incidents that can illustrate what this looks like in practice.

There is no hard-and-fast rule about how much you can quote. You should seek a licence to use as little as one absolutely iconic line of a poem or bar of music. Two or three sentences of an essay or paper should be OK. In law, whether a quotation is a "substantial part" of the work quoted is decided by the court on the facts of each case. There is no way to *guarantee* that no-one will sue you: but following good practice can massively shift the odds in your favour.

You should give credit to all authors whose works you quote. In many cases, since 2014 the law has said that you must credit them when taking advantage of an exception, unless this "would be impossible for reasons of practicality or otherwise".

The exception for "reporting news and current affairs" does not allow you to use photographs. No-one knows what "quoting" a photograph means.

To give a more concrete example: say you are a costume designer, and you want to use pictures of your work on your own website. You have, immediately, at least three things to consider:

1. **Copyright and design right in the design:** if you made the design in the course of employment or have assigned all rights to a film production company. you have to ask it for permission to reproduce it, even though it is your own work.
2. **Copyright in the photo of the design:** you need a licence from the photographer – or, if they have assigned all rights in it, from the owner; and
3. There is one additional matter, which is not about copyright. If there's a human wearing your design in the photo, consider whether you need a **model release**

form signed by them – since your use of the image is, strictly, advertising.

It's not entirely clear what rights the people depicted in the photo do have in law – they certainly do not have "copyright" in their own image. But it is standard advertising industry practice to get people to sign a document stating that using a picture of them is OK.

This example emphasises the point that when considering what permissions you need to use a work, your first question is "how many copyrights are there here?" Further, if the costume is made from a patterned fabric, then that pattern is very likely to be protected by copyright. A photograph of a costume made from it is likely to be allowed under the exception to copyright for "incidental use". But if the pattern is the stand-out feature of the photograph, this may not apply.

Now consider the case in which you print that photograph of your design and hang it on your studio wall; and then someone shoots footage of your studio for a documentary about you. Very likely this is a canonical example of the "incidental use" exception to copyright – unless, perhaps, it is a lingering full-frame shot, in which case the documentary producers would be well advised to get clearance.

Consider what you need to do if you film a busker in the street and want to use the footage in a documentary, once more, the first question is: how many copyrights are there? The answer is: several.

The busker as the performer has the right to say whether or not you can use the recording you have made of their performance. As with your rights in your work, that right is in effect the right to ask for payment.

The author of the lyrics of the song has copyright in them.

The composer of the music has copyright in it.

Strictly, the busker should probably have a licence from both the composer and the lyricist, but we leave that between them.

If you are going to release your documentary in the US you need to check whether you need to pay the owner of the "mechanical right" in the first-released version of the song – for which it is worth checking with the Harry Fox Agency. The "mechanical right" is the ownership of the actual recording of music and is another of those "neighbouring rights" to copyright. (You need to clear the mechanical right as well as the composers', lyricists' and performers' rights if you use a straight-up recording of a song or tune.)

Then you need to think laterally about any other rights. If an advertising poster appears in the distant background, that is likely "incidental inclusion"; but if you film the busker right in front of it, or if your edit otherwise makes it central to the scene, you need to think again.

This is why rights clearance is a profession in itself.

Creative Commons

You should also be aware of the "Creative Commons" licences. These are a means for people to give their work away so that it *stays* given and is not "privatised" by someone else claiming payment for it.

Creative Commons licences are an *application* of copyright law to achieve that end. If for example you find a work issued under a "CC BY-NC" licence, you have permission to use it for non-commercial purposes ("NC") with credit to the author ("BY") – and you are required

to link to the licence itself.[11] If you go ahead and use it for commercial purposes, or fail to give credit, you are in breach of the author's copyright.

What can I do when my copyright is infringed?

You need to decide what you want as soon as you discover what you believe to be an infringement of your copyright. For most cases, this will be a financial settlement. You may, though, for example, decide that what you want is for something to be removed from the internet.

You can do a lot yourself, without a lawyer, though you may need to seek legal assistance for more complex or high-value cases. Bectu can offer some limited advice on how to avoid copyright disputes but the union's legal support is mainly focussed on employment law and anyone anticipating a copyright issue is urged to seek advice from a union official about what Bectu can, and can't help with.

Consider whether you should simply send an invoice. You may double what you would have charged if the culprit had asked – as a bargaining position. It would be rational for them to accept this and pay up, rather than going to all the trouble and expense and uncertainty of having a court decide what they actually have to pay you.

Consider asking for extra payment on top of that if there is a breach of your moral rights or if the breach is flagrant. A prime case of a major breach of moral rights would be a publication that gives the appearance that you endorse a product.

One Bectu official has observed that some members who were still not paid have taken the culprits to the small claims track of the Intellectual Property Enterprise Court – set up just to deal with such cases, generally when the claim is for less than £10,000.

Case filing fees start at £25 for claims up to £300. You can represent yourself. A company that you are pursuing will need to engage lawyers. If you win you can claim a rather limited amount of your costs in bringing the case.

Cases are now heard in person in Manchester but can be conducted remotely.[12]

What can I do if someone accuses me of breaching their copyright?

There are companies that scour the internet for apparent copyright infringements and issue threatening letters. Some call these "copyright trolls" – and while this is sometimes a fair description, the term is also widely abused by those who are outraged to discover that the law they have made up in their heads is not the law of the real world and, yes, copyright exists.

Often, the targets of these letters are people who – perhaps in ignorance of copyright law – have reproduced a photograph on a website of some kind.

Usually, these letters demand a large sum of money that's just on or a bit over the boundary of what it's worth to you to avoid a court case. Stepping back to look at this dispassionately, it is capitalist rationality. The share going to the actual holder of copyright may not be very large.

Sometimes these companies make mistakes and there is no breach of copyright.

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11 See https://creativecommons.org/licenses/by-nc/4.0/ and other possible CC licences linked from there.

12 For more information: www.gov.uk/guidance/take-a-case-to-the-intellectual-property-enterprise-court

Sometimes, though, a demand for payment comes from an actual photographer or other author with a legitimate claim.

Bectu recommends that all members obtain licenses every time they use another author's work, and the use is not securely covered by an "exception" – see "Exceptions to copyright" above. And do not just have a chat with, for example, a production company to get them to say it is OK for you to use a photograph of your work that the company owns; send them an email and keep their response saying "yes".

What counts as a breach of copyright – not just copying

Obviously, copying an entire book or article or photograph or musical track without permission is a breach of copyright.

Perhaps less obviously, so are these acts, when done without a licence:

- translating a work into another language;
- adapting a book into a stage or film script;
- reproducing the "typographical arrangement" – that is, broadly, the layout and design – of a publication;[13]
- playing music in public;
- orchestrating a musical composition;
- producing a graphic novel of another author's text;
- producing other kinds of "derivative work" – such as a painting of a photograph or of another painting.

This last category of act leads to some of the interesting cases that keep lawyers busy and give copyright law its reputation for being difficult in general.

For example, in the case *Temple Island Collections Ltd v New English Teas Ltd and another*[14] Judge Colin Birss considered a re-staging of a manipulated photo of a London bus, picked out in red against the Houses of Parliament in greyscale. Temple Island Collections won: Judge Birss held that the new photo was an infringement of rights in the original image. In this case the defendants had earlier used the original image without permission, settled for breach of copyright, and then re-created an almost identical image. Another notable case was a 2002 small claims court case against the Natural History Museum, which had re-created a photograph by building the scene it depicted in the aftermath of the 1995 Kobe earthquake in Japan.[15] This was probably the first case of copyright theft in which the illegal reproduction demands an art-gallery label a piece of work, reading "Earthquake, 1995. Mixed media: marine plywood, oils, 4-inch rolled steel joists and a wrecked car".

The case was not defended, and the photographer collected a tidy sum when costs and five years of interest were added by the judge to the £5000 claimed. Being in the small claims track it did not, however, set a precedent binding future courts.

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13 The "typographical arrangement" right expires at the end of the period of 25 years from the end of the calendar year in which the edition was first published.

14 *Temple Island Collections Ltd v New English Teas Ltd and another* EWPCC 1, 12 January 2012 – summarised at https://swarb.co.uk/temple-island-collections-ltd-v-new-english-teas-ltd-and-another-pcc-12-jan-2012/

15 "Grand theft auto", the *Freelance* December 2002 – www.londonfreelance.org/fl/0212nhm.html

There has not yet been a precedent-setting case that defines what UK law means by permitting derivative works that are “parody or pastiche”.

Perhaps unfortunately, we are not aware of anyone successfully claiming that any television series is a “derivative work” of the document in which it was proposed. To protect such a proposal, you need to invoke confidentiality. See the following section.

2. Confidentiality and contracts

As we said in the introduction, **confidentiality** is generally the legal tool you use to protect ideas, such as programme proposals.

The reason is that, as we noted in the introduction, copyright does not protect ideas; and it does not protect very short texts such as titles.

You make a **contract** with those who want to see your proposal, and this specifies that they will keep your work "in confidence" and not spread it around.

You should also check whether any company to which you are sending a proposal is a signatory to the Code of Practice of the Alliance for the Protection of Copyright – see the section on it below.

In essence you are asking the target of your proposal to enter into a contract – a legal agreement with you – not to abuse your proposal.

It may be worth setting out what constitutes a contract in law. There are four ingredients:

- Offer;
- Acceptance;
- Consideration (there must be value involved); and
- Intent.

Each of these must be present to be certain that a court will find that a contract exists. There is no special requirement for how they are expressed or laid out, so long as the meaning is clear.

In this instance, you offer to show them your proposal; you state your intent to form a contract; you give them the "consideration" of sight of your valuable proposal; and once they have accepted there is a contract between you.

In the case that you are hired for a day's set-painting, the client offers you work; it states its intent to form a contract to cover the work; it offers you the "consideration" of cash; and once you accept there is a contract between you.

You enforce a contract by suing for damages in the civil courts. If your claim is for less than £10,000 you should be able to use the normal small claims court.[16] [17]

See "How the law has treated proposals" below for brief summaries of some relevant cases.

Formats

A "format" is a plan, a blueprint: it could be a detailed description of any type of TV or radio programme, in which the episodes may be written or produced by parties other than the originator. Ownership of a format should entitle you to royalty payments for the right to use your detailed programme idea. These payments are quite separate from payment for any other work required, for instance if you also produce, direct, present or write episodes for

16 See https://www.gov.uk/make-court-claim-for-money

17 See also https://www.moneysavingexpert.com/reclaim/small-claims-court/

the programme. See the APC Code of Practice and consider when is the right time to engage a specialist lawyer.

Make your own format idea as detailed and distinct as possible. Because the word “format” is not clearly defined in UK law, each contract in which format rights are dealt with should detail the format and identify the format as being your own original work.

Adaptations

To propose adapting a book or play can be one of the least secure “ideas” there is. If the work is out of copyright, anyone can adapt that work, even if you “thought of it first”. However, if you take the care to produce a detailed outline of your proposal, presented in a specific and individual way, this outline may be defended. It cannot stop anyone else adapting the work, but it will help to prevent them from using your own work on the *specifics* of the adaptation in so doing.

If the work is in copyright, you may seek to negotiate with the author or other copyright owner for an exclusive licence (often here called an “option”) to adapt the work, your payment to the copyright owner protects you from anyone else using the work for the same purpose within a specified time.

If you are hoping to “adapt” a copyright work without payment, by making lots of changes, be warned. There may be no copyright in a theme, a type of character, or a given plot device. But as noted above, you need the permission of the owner to make an adaptation as a “derivative work” – as others do for your work.

Always write it down

It is natural that people in the business get talking together, out of mutual interest as well as in setting up work. If you give out an idea orally – over lunch or over the phone – it may be difficult to enforce what was discussed unless you also keep a written record.

To be clear: you can form a contract orally. The issue is in *proving* what was agreed.

One remedy is to write everything down as soon as possible after the conversation. If you get the chance to pitch an idea to someone, without time for preparation, it is worth sending them a note of the time, place, people present, and subjects discussed. The existence of such a “contemporaneous note”, in the jargon, can help in the event of later conflict, whether or not you receive a response.

Instead of discussing ideas informally, try to arrange a meeting so that you can present your ideas in writing, possibly in advance. Doing so with a pitch that has been registered using the Script Registration Scheme (see below) would add a further layer of protection. Keep records of any meetings and read the next section.

Collaborations

Collaboration in a general sense is common to many working situations. We offer some notes on collaboration giving rise to shared authorship or shared origination of an idea.

- If the work has been commissioned and paid for, the commissioning party will probably want to have the right to develop the work further without any or all of the collaborators, subject to contract.
- If the work is produced “on spec”, the copyright may be owned not by one person, but jointly by all of those stated to be authors of the work. If these parties fall out, it may become impossible to market the work.
- It follows that joint credits should be agreed only when justified by the actual collaboration that has taken place. To grant joint authorship for minor input may be storing up problems for the future.
- If you have written something yourself, the credit should say so. You can then add

"based on a story by', or whatever accurately describes the actual working relationship. You may agree your own payment for the contribution received.

- If you have co-written something or provided a sufficiently realised story or idea to the writer, do not rely on verbal assurances to secure your credit. If your name is not on it, and you have not been paid, you are being cut out.
- If you are about to collaborate, exchange letters with your collaborators setting out the terms including the credit you will each receive if your work is used.
- Ownership should be clearly stated, and whether or not the development may continue if one party drops out. Agreement should be put in writing at the very start.
- If you accept money without a written agreement, you may be deemed to have been paid for your whole input, whatever happens to the work later.

Keep a record of all meetings and discussions. But be realistic. The law will normally protect the actual writers of a work because it is they who create the concrete form. Without this the idea has no market value.

Script registration

In order to protect your programme proposals and other ideas you will need to prove that you originated them before anyone else did.

To help, Bectu operates a script and document registration service for all its members.[18] Registration with Bectu provides clear evidence of the existence of the work at the time of registration. Documents are date-stamped and stored securely by Bectu. There is no charge for the service to members.

Bectu will register all documents. If work is produced in collaboration with non-members, their signed consent must be provided.

Documents may be sent to the Script and Document Registration Service at Bectu's Head Office. An acknowledgement letter with a registration number is sent to the member. Documents can then be accessed by the registration number, by title or by member's name or membership number. Offering something that has been though Bectu's Script Registration Scheme will communicate the obligations that commissioners have when reading your pitch.

Alternatively, you can also consider posting it to yourself using the Royal Mail Signed For service[19] and file it away unopened, with the tracking slip, when it arrives. Open it only when legally advised to do so.

Sending your proposal

It is essential that you include a covering letter whenever you send work out. This should be signed and dated, confirming the title and author of the work, and indicating the purpose for which the work is being offered.

If you send the work to someone in confidence, your covering letter should say so. If there is a restricted number of people or job titles to whom you allow it to be forwarded, name them. State that opening the document constitutes acceptance of these terms. You could consider sending the work in a physical envelope with a note on it saying that whoever opens it consents to keep it in confidence.

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18 https://library.prospect.org.uk/id/2023/December/1/Bectu-copyright-information-sheet-A-script-registration-service-2023

19 https://www.royalmail.com/sending/uk/signed-for-1st-class

Thus you establish a contractual agreement that the document – your proposal – is sent in confidence. If the recipient is a signatory to the Association for the Protection of Copyright Code of Practice (see below) for the protection of programme proposals, note this.

A phone call or making some form of personal contact before sending the document out, is preferable to the unsolicited submission of material. Keep a detailed record of phone calls as well as any letters requesting sight of the material or acknowledging receipt.

You should also add your address and phone number and/or that of your agent. Details should appear on both the top page and the last page of the document. In some cases – such as drawings or discontinuous text – it may be best to put the information on every page using the 'footer' function of your word-processing programme. Phrases such as "by', "written by" or "created by" can also be used to indicate authorship, but for indicating ownership the international UCC formula ("**Copyright © 2024 Mo Smart**") is the standard.

Authorship details should appear on every copy of your work. Always keep a copy of your work.

The Code for the protection of programme proposals

The Alliance for the Protection of Copyright has agreed a code of conduct for handling programme proposals. See the Code and the list of signatories in the Appendix below.

Things to watch out for in contracts that you are offered

Contracts that you are offered can often contain copyright traps. These are not necessarily malicious. A medium-sized client may well use a template or be advised by a lawyer who is not necessarily fully conversant with the norms of the industry. A lawyer asked to do that will often issue a lengthy contract full of contractual 'boilerplate' in it, most of which hands all rights to the lawyer's clients to cover their own back.

- Are you being asked to "assign" copyright in the work to the client? Why? What rights do they actually need?
- If you are licensing the work, is the licence unnecessarily broad? What do they need to do with your work, when and where?
- Are they asking you to "waive" your "moral rights" to be identified as author and to defend the integrity of the work? Why?
- If you are licensing the work, are they asking for an exclusive licence? For how long?
- Are they attempting to impose a "non-compete" clause? For example, do they want you to agree not to licence similar work to anyone else? For how long?
- Are you being asked to "indemnify" your client against legal costs arising from their use of your work?

All contracts can be negotiated, and specific clauses can be removed if both sides agree. Licences should allow the company to do what it needs, and no more.

The last point about "indemnification" is particularly worrying – especially when combined with a waiver of the right of integrity that allows the company to change your work at will. If they accidentally introduce a statement that is libellous, you could end up being legally obliged to pay the costs of defending in court something that you didn't write.

Some writers have managed to negotiate replacement of an "indemnity" clause with an undertaking to something resembling:

> *"...all statements in the Work purporting to be factual are true to the best of the Author's knowledge having undertaken proper and diligent research with respect hereto..."*

However, wording alone is unlikely to offer full protection against this. If you end up signing any such contract, consider taking out insurance against legal costs.

Checklist for drafting a contract

If you are drafting a contract – including a licence to use your work – you should consider each of the following points.

- What is the name and position of the person you are dealing with?
- What have you agreed to do or supply?
- When is the deadline?
- In what form must the work be delivered?
- What rights are you licensing, for how much? For what territories are you licensing them?
- Is there a time limit on the licence?
- Is it exclusive? If so, you should be paid more.
- How many hours or days are you being commissioned for (if you're working on that basis)?
- What expenses will be paid? And how will they be claimed?
- When will you be paid? The default is 30 days after they know how much they owe but an explicit set of payment terms – ideally shorter than 30 days – should be agreed contractually and included on all invoices.
- Should you, the freelancer, invoice? When? To whom?
- Do you need to quote a purchase order number or other reference to get paid? (A failure to agree this early in the arrangement can delay payments).
- Have you dealt with all relevant insurance issues? Is there specific cover that is required?
- If it's an old-school job and you are supplying physical materials such as transparencies or sketches, when will they be returned to you? Are they insured?

...and all this before you consider how much you should be paid!

How the law has treated proposals

As noted above, to enforce a duty of confidentiality on someone to whom you supply a programme proposal or something similar, you need to sue them in the civil courts. It is not easy to generalise because each court will decide each case on its particular facts. That also means that such cases are not cheap, as the following examples suggest.

The rock bottom of reality television

Back in 1973 three actors – Gaye Brown, Diane Langton and Annabel Leventon – and composer and manager Donald Fraser formed a rock group named "Rock Bottom". In January 1974 Fraser discussed in confidence with scriptwriter Howard Schuman the idea for what would now be known as a "reality television" series. Schuman, with Fraser's permission, discussed the idea with Thames Television. The group reached an oral agreement, only partly confirmed in writing, under which Thames optioned the idea, without specifying that the actors were to keep themselves available. One of the actors was cast in a stage musical. In 1976 Thames produced and broadcast the show as "*Rock Follies*", using other actors.

The group sued.[20] The Court of Appeal ruled that:

> "where the oral communication of an idea was made in confidence, the recipient of the information was under an obligation not to use the idea without the maker's permission, provided that the idea was original, clearly identifiable, of potential commercial value and sufficiently well developed to be capable of realisation; that in the circumstances the scriptwriter owed to the plaintiffs an obligation of confidence in relation to their idea since it satisfied those criteria and had been communicated to him in confidence and, since the producer and Thames knew that the idea belonged to the plaintiffs and had been imparted to the scriptwriter in confidence, they were also under an obligation of confidence; that each of the defendants was in breach of his obligation respectively, in making and transmitting, writing, and producing the series based on the plaintiffs' idea without obtaining the plaintiffs' consent."

This case is widely cited. In 1988, another UK action for breach of confidence concerning a television series was successful and the court quoted the *Fraser* judgment almost verbatim: "the idea in question was original, clearly identifiable, of potential commercial value and sufficiently well developed to be capable of realisation, and that the defending television company knew the idea belonged to the plaintiff and was communicated in confidence."[21]

But the power of the "Rock Bottom" case as a precedent which binds future courts is weakened by the fact that the current law, the 1988 CDPA, was not in force when it was decided.

Opportunity Knocks us back.

On 18 July 1989 – the Law Lords of the Judicial Committee of the Privy Council, acting as the ultimate court of appeal for New Zealand, delivered judgment[22] in a case brought by the late TV presenter Hughie Green against the Broadcasting Corporation of New Zealand alleging that it had breached copyright in the format for the programme *Opportunity Knocks*. Their Lordships agreed with the New Zealand Court of Appeal that Green had failed to show that there were actual scripts for the programme that could be protected by copyright. Green claimed that the "dramatic format" of the show, embodied partly in catchphrases such as "for [competitor], opportunity knocks", was protected by copyright.

It seemed to their Lordships that "a dramatic work must have sufficient unity, to be capable of performance and that the features claimed as constituting the 'format' of a television show, being unrelated to each other except as accessories to be used in the presentation of some other dramatic or musical performance, lack that essential characteristic."

In short: a "format" is not itself protected by copyright (except for copying of the literal document that sets it out).

I'm a lawyer, get me out of here

Courts in many parts of the US are more amenable to finding that formats and characters are protected. But in 2003 Charlie Parsons and Castaway Productions Limited took the Granada Media Group to court in the US claiming that the show *I'm a Celebrity... Get Me Out of Here!* was a clone of another show, *Survivor*. They lost, the judge declaring that *I'm*

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20 *Fraser v Thames Television Ltd* [1984] QB 44; [1983] W.L.R. 917; [1983] 2 All E.R. 101. discussed at https://vlex.co.uk/vid/fraser-v-thames-television-802584753

21 Reported in the *EBU Review*, Vol. 39, No. 1, January 1988 and quoted in *International Media Law: A Monthly Bulletin on Rights, Clearances and Legal Practice*, Volume 7, London: Oyez Longman.

22 *Hugh Huges Green (Appeal No. 18 of 1989) v Broadcasting Corporation of New Zealand (New Zealand)* [1989] UKPC 26 (18 July 1989) http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKPC/1989/1989_26.html

a Celebrity... borrowed no more from *Survivor* than did shows such as *I Love Lucy* or *Bewitched* or *I Dream of Jeannie*.[23]

Who wants to be a litigant?

On 21 October 2004 the High Court declined to strike out[24] claims by Alan Melville and John Baccini that the format of *Who wants to be a Millionaire?* – first shown by ITV on 4 September 1998 – was based on several different proposals they had developed. It declared claims by Timothy Boone to be "an abuse of the process of the court". Celador was in fact suing Melville, seeking a declaration that it was not in breach of UK law after proceedings in the US. Celador then reached confidential out-of-court settlements with Melville and Baccini.[25]

When the real deal falls through

In *Wade and another v British Sky Broadcasting Ltd*, the claimants worked in the music industry and had pitched their TV programme format to BSkyB in June 2009; the TV company kept the PowerPoint slides they used in their pitch. They proposed a music talent show in which singer-songwriters would perform their own material to a panel of judges; one would be booted out in each live show. The contestants' songs would be made available for internet download the day after the show.

Though the broadcast show was similar to the proposal, BSkyB was able to produce evidence on how each of the duplicated elements came to be included in their programme and was also able to explain how the programme had come to be developed in just a year after hearing the claimants' pitch.

This particular case was won by BSkyB in 2014, and again on appeal in 2016.[26]

Can you use trademarks?

In 2016 Love Productions was able to sell the format of *The Great British Bake Off* to Channel 4, cancelling a deal with the BBC – not least, say lawyers at Pinsent Masons, because it had registered trademarks for the name and logo of the show. They advise:

> "Creators of TV formats should consider registering trademarks for names and logos in multiple countries if their programme is to be marketed and sold globally."[27]

In principle, it is indeed possible to register a title as a trademark. Trademarks typically protect brands and package designs and are a quite separate branch of the law to copyright.

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23 Discussed at https://www.theguardian.com/media/2003/jan/14/broadcasting.realitytv and at https://swanturton.com/the-real-lessons-concerning-format-rights-from-the-celebritysurvivor-proceedings/

24 [2004] EWHC 2362 (Ch) http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Ch/2004/2362.html

25 "Who wants to sue a millionaire" by Tom Wells, Birmingham: *Sunday Mercury* 28 August 2005 – archived at https://web.archive.org/web/20070127115920/http://icbirmingham.icnetwork.co.uk/sundaymercury/news/tm_objectid=15908484&method=full&siteid=50002&headline=who-wants-to-sue-a-millionaire-name_page.html

26 Discussed at https://www.rpc.co.uk/snapshots/intellectual-property/intellectual-property-confidential-information-wade-and-others-v-british-sky-broadcasting-ltd/

27 https://www.pinsentmasons.com/out-law/analysis/great-british-bake-off-an-example-of-the-legal-challenges-in-protecting-tv-formats-say-experts

Each trademark registration protects the use of a phrase or an image for certain specified purposes, called “classes” of business activity. It would likely be possible for different people or companies to register “Duck Soup” for a film and for a food.

Registration for the UK costs from £170 for 10 years’ protection, if you do not engage a trademark lawyer.[28] Trademarks can be renewed indefinitely. In 2023 the cost was £200 for 10 years plus £50 for each additional “class” covered.

However, we note that registration of a word or phrase as a trademark is most useful to protect the *exact wording* – arguing in court that a similar show name is an infringement of your trademark could be expensive. Registration appears to be more useful once a project is in production than it is for protecting a proposal.

Minute to lose it, with a glimmer of hope

In 2017 Banner Universal Motion Pictures Ltd lost a case against Endemol Shine Group Ltd concerning its show *Minute to Win It*. They claimed to have proposed a format called *Minute Winner* – which the defendant denied. The High Court ruled that Banner had no prospect of success in claims of breach of confidence or copyright infringement and granted Endemol’s application to dismiss the case (without a full hearing on the facts). But Mr Justice Snowden did make some interesting observations:

> “…it is at least arguable, as a matter of concept, that the format of a television game show or quiz show can be the subject of copyright protection as a dramatic work. This is so, even though it is inherent in the concept of a genuine game or quiz that the playing and outcome of the game, and the questions posed, and answers given in the quiz, are not known or prescribed in advance; and hence that the show will contain elements of spontaneity and events that change from episode to episode.”

For a claim to succeed, the Court suggested, several conditions must be met:

> “… (i) there are a number of clearly identified features which, taken together, distinguish the show in question from others of a similar type; and (ii) that those distinguishing features are connected with each other in a coherent framework which can be repeatedly applied so as to enable the show to be reproduced in recognisable form.”29 30

This last case does offer a glimmer of hope for protection of formats. But the *Green* case remains a valid precedent on protection of formats in UK law.

As Burges Salmon solicitors observe in a note on the *BUMP* case:[31] “format owners should... be aware that, while a format claim is possible in principle, in practice it will remain difficult to pursue successfully under UK law... the case also highlights the importance of ensuring that robust confidentiality provisions (such as a signed non-disclosure agreement) are in place before commencing negotiations, to ensure that information disclosed is not subsequently misused.”

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28 See https://www.gov.uk/how-to-register-a-trade-mark

29 *Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd & Anor* [2017] EWHC 2600, http://www.bailii.org/ew/cases/EWHC/Ch/2017/2600.html

30 Discussed at https://www.iptechblog.com/2017/11/minute-winner-loses-out-in-tv-format-copyright-claim/

31 https://www.burges-salmon.com/news-and-insight/legal-updates/copyright-protection-for-tv-formats-new-guidance-from-uk-high-court

Appendix: The APC Code of Practice for the submission of film and programme proposals for the UK film, radio, podcast, digital and television industry

Introduction

The purpose of the APC Code of Practice ('the Code') are:

- To encourage the free flow of ideas and proposals within the film, radio, podcast, television, digital and the broadcasting sectors and provide confidence for those submitting such proposals.
- To provide practical guidelines on how to submit film, radio, television, podcast, digital programme proposals (including for interactive and on-line content) to film, broadcasting and production companies.
- To set out the obligations of those submitting and receiving film, radio, podcast, television and digital programme proposals.
- To explain what to do when a dispute arises.

What is covered by the Code?

- Any film, radio, podcast, television and/or digital programme proposal which may include formats, treatments, scripts, outlines, development documents, tender submissions, storylines, artwork and synopses which is sent to a broadcaster, film or production company with the purpose of seeking to have the proposal developed and/or made into a film or programme.
- The proposal must be in permanent form whether electronic or hard copy. The Code does not apply to ideas or submissions offered in any other form e.g. verbally.
- Any proposal must be a substantially original work owned and/or controlled by the person submitting it. The proposal must not amount to a copyright infringement of another's work or be sent in breach of any confidence.

To whom does the Code apply?

- Those participating organisations which receive film, radio, podcast digital and television proposals in the UK including the principal UK broadcasters, Pact members and other film, radio, podcast, digital and television production companies which have adopted or acknowledge the principles and best practice contained in the Code.
- Any individual or company that creates or originates film, radio, podcast, digital and television programme proposals and who wishes to offer such proposals to a broadcaster or film, radio, podcast, digital and television production company. The Code extends beyond professional persons or companies and applies to anyone submitting proposals in order to establish a fair and consistent approach and best practice throughout the industry.

The Code

Objectives

The principal objectives of the Code are as follows:

1) ensure that film, radio, podcast, digital and television programme proposals are treated in a fair and transparent manner; and

2) minimise the likelihood of disputes arising as to the ownership and development of any film, radio, podcast, digital and television programme proposal.

Obligations of those submitting proposals

2.1 Those submitting a proposal should follow any published submission procedures of the relevant recipient(s), or in the absence of any published procedures, should submit their proposal in writing in a permanent or electronic form with any original features clearly identified.

2.2 Wherever possible, those submitting a proposal should also undertake the following:

> **2.2.1** Provide as much detail as possible of each proposal to assist those receiving it to review the proposal as objectively and fairly as possible.
>
> **2.2.2** State in writing that the proposal is being submitted in confidence.
>
> **2.2.3** Retain an exact copy of the proposal together with the date submitted, the name and any other relevant details of the person to whom the proposal was submitted.

2.3 In addition to the obligations set out above, it would be desirable for the party submitting a proposal to state in writing whether it has been sent to any other broadcaster or film, radio, podcast, digital production company.

2.4 It is recognised that similar and on occasion, identical proposals will be submitted by different individuals or companies and sometimes simultaneously. As far as practicable, proposals should be submitted with as much detail as possible in each case so that it can be differentiated from any other proposals submitted, appropriately assessed and treated fairly.

Obligations of those receiving proposals

3.1 Those who adopt the Code and receive proposals will undertake the following:

> **3.1.1** Adopt and maintain internal procedures that ensure as far as reasonably possible appropriate confidentiality for the proposal submitted. It is recognised that proposals may need to be copied and circulated by an organisation to those responsible for approving or commissioning proposals. Such dissemination in confidence is acceptable unless any specific restriction on who can review the proposal is imposed by the person submitting the proposal and this is subject to agreement by the receiving party. The proposal may not be passed or copied to other persons other than for the consideration of that proposal.
>
> **3.1.2** Adopt and maintain internal procedures for receipt of proposals to ensure that such proposals are logged and/or otherwise recorded which are reasonable and practical given the nature of the proposal and organisation receiving it). The logging should include reference to the title of the proposal, date of receipt, the sender’s details and, where appropriate, a short description of the proposal.

3.2 A response to the proposal whether by way of rejection or to indicate interest should be provided ideally in writing (although by email is acceptable) within a reasonable time following receipt and in accordance with any published timetable issued from time to time by individual broadcasters, film, radio, podcast, digital and television production companies. Where a proposal is submitted in response to a particular invitation to tender, any decision in relation to that proposal will be undertaken fairly in accordance with any published tender criteria and any response will be provided pursuant to the published timetable (if there is one).

3.3 Where a proposal is rejected, the recipient will upon request use reasonable endeavours to return any original or other non-digital material submitted for consideration. The costs of returning a proposal may have to be met by those seeking its return.

3.4 Where it is stated on a website, or made available/notified, by any other clear and accessible means that a party does not accept unsolicited material, information and/or

proposals submitted on this basis will not be used or accepted, the obligations set out at clause 3.1 to 3.3 will not apply and any material destroyed in line with the organisation's policy or processes. In the event a proposal is accepted, the Code applies.

In-house proposals

4.1 Where a film, radio, podcast, digital or television production company or broadcaster originates its own proposals, it must ensure that internal procedures are established which distinguish between proposals submitted from an internal or external source.

4.2 On receipt of a proposal, reasonable procedures should be in place to safeguard confidentiality and protect the proposal from dissemination to third parties to avoid a conflict of interest and differentiate between connected parties in case there are identical or similar proposals.

Development of a proposal

5.1 Where a proposal is the subject of further development or is commissioned to be made into a film or programme, specific contractual and commercial terms will be agreed between the parties which should deal, amongst other matters, with the ownership of any intellectual property in the proposal and the subsequent film or programme. Once a contractual relationship has been established, the Code will be superseded by the relevant contract terms.

Dispute procedures

6.1 A key objective of the Code is to minimise the likelihood of disputes concerning the ownership and development of any film radio, podcast, digital or programme proposal.

6.2 Each participating organisation will have (as part of its dispute procedure), a mechanism to appoint a senior person within their organisation to review any complaints concerning the submission of a proposal that cannot be resolved. This procedure encourages all complainants to seek to resolve any complaint or dispute as above. However, nothing contained in the Code shall affect or restrict the legal rights of the parties.

6.3 If anyone submitting a proposal has a complaint concerning the unauthorised use, development of any proposal or any substantial part or element of that proposal, it should be raised with the recipient of the proposal. The complaint should be set out in writing with any supporting evidence including:

- The date the proposal was submitted.
- To whom it was submitted.
- Any correspondence between the parties.
- The grounds of the complaint.

6.4 The parties should use reasonable endeavours to resolve the complaint without further referral.

6.5 In the event that a resolution cannot be reached, the person submitting the proposal (either directly or through their representative association or trade union) should contact the person nominated by the recipient of the proposal to review the complaint (see clause 6.2). The nominated person will undertake a fair review of the complaint and any supporting evidence and provide a written response to the complaint.

6.6 If an individual is not a member of a representative association, trade union or other organisation, they may contact the Chair of the APC to receive advice on the relevant dispute resolution procedures of the recipient organisation. The Chair of the APC can be contacted via ChairofAPC@gmail.com

Review

7.1 Representatives of the participating organisations shall meet periodically to review and assess the practical implementation of the Code and consider any amendments to the Code.

The Alliance for the Protection of Copyright

Participating organisations which have adopted the APC Code of Practice:

- Bectu
- British Broadcasting Corporation
- Channel Four Television
- Channel 5 Broadcasting Limited
- Directors UK
- ITV Network Limited
- Musicians' Union
- National Union of Journalists
- Pact
- AudioUK
- The Society of Authors
- Writers' Guild of Great Britain
- S4C

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