

BCC/WIPO COURSE ON COPYRIGHT AND RELATED RIGHTS 2021

Rights in Practice: Musical Works Legal Basis and Law

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Overview

- “Musical works” in UK copyright law and practice
 - As subject-matter protected by copyright law
 - Words associated with music
- When does UK copyright arise in a musical work
 - fixation and qualification
 - originality;
 - Musicality
 - “work”
- Arrangements, adaptations and translations
- Authorship and Ownership
 - authorship; joint authorship; co-authorship;
 - Ownership; “first ownership” and “future copyright”
 - Duration of copyright
 - Implications for exploitation and collective licensing in UK
- Q&A



Sources of Copyright Protection for Musical Works (1)

International Copyright Treaties

Berne Convention – Article 2

“literary and artistic works” shall include.... “musical compositions with or without words”

Universal Copyright Convention – Article 1

“literary, scientific and artistic works, including ...musical works”.



Source of Copyright Protection for Musical Works (2)

UK Legislation : Copyright, Designs and Patents Act 1988, as amended (CDPA)

*“Copyright is a property right which subsists in the following descriptions of work – (a) **original literary, dramatic, musical or artistic works**” (s. 1(1))*

“Musical work”

“a work consisting **of music, exclusive of any words** or action **intended to be sung, spoken or performed with the music**” (s.3(1))

“Literary work”

“**any work, other than a dramatic or musical work, which is written, spoken or sung,** and includes a table or compilation and a computer programme” (s.3(1))



Copyright Protection for Musical Works (UK)

Implications of distinction between musical works and literary works:

- musical composition for which words are subsequently written
- literary works (e.g. poem) for which music is subsequently written
- musical composition with words intended to be sung with the music (lyrics) = song?

Law: In all three examples, UK copyright law treats music and lyrics as having a completely separate copyright identity BUT in relation to music and lyrics that are “works of co-authorship” UK position is less rigid when calculating duration of copyright in each of the musical and lyrical parts.

Practice: PRS repertoire consists of musical and literary works as set out above, but licensing follows the music.



When does UK copyright arise in a musical work?

For UK copyright protection to subsist in a musical work as such, the work must: -

- be **recorded in writing or otherwise** (s 3(2) CDPA)
- **qualify** for protection (s1(3), 153 CDPA) by reference to the author (s.154 CDPA) or first publication (155 CDPA)
- be **original** (s1(1) CDPA)
- be a **musical work/ literary work** (s1(1)CDPA)
- a **“work”**



“Recorded in writing or otherwise”

CDPA 1988, Section 3(2)

“Copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise...”

- “...or otherwise” includes a musical work captured on tape or other device
- Consent of author to recording is irrelevant to question of subsistence of copyright in the work
- Person who records a work may himself acquire copyright in the record as distinct from what is recorded:
 - Sound recordings
 - Transcriptions



“Qualifying Work”

- written by a UK resident or national or first published in the UK (s.154, 155 CDPA)
- written by a resident or national of or first published in a country to which provisions of copyright law have been extended or applied (s.154, 155 CDPA)
- residence/ nationality requirement must have been satisfied (and only need to have been satisfied) at “the material time”, which means:
 - in the case of an unpublished work, when the work was made; or
 - in the case of a published work, when the work first published (s.154 CDPA)
- UK protection is applied to works originating from outside of the UK by a form of secondary legislation known as an Order in Council (s.159 CDPA)



Originality (1)

- Copyright protects forms of expression, not the ideas expressed
- Originality relates to “skill and labour” of author in creating the work in question; the making of the work as “*expression of the intellectual creation of the author of the work*” .
- Work created need not be inventive or novel
- Case law:
 - *Walter v Lane* [1900] AC 539
 - *Francis Day & Hunter Ltd –v- Bron* [1963] Ch 587; [1963] 2 All E.R. 16
 - *Sawkins v Hyperion Records Limited* [2004] 4 ALL E.R. 418, [2005] EWCA Civ 565
 - *Infopaq International A/S v Danske Dagblades Forening* (ECJ C-5/08)(2009);
 - *NLA & Otrs v Meltwater Holdings BV & Otrs* [2011] EWCA Civ 890
 - *Kogan & Otrs v Martin & Aor* [2019] EWCA 1645 (C/A)
 - *Smith v Dryden & Otrs* [2021] EWHC 2277 (IPEC)



Originality (2)

How much original skill and labour is required?

- A “significant” amount
 - *Minder Music Limited & Adamson -v- Sharples* [2015] EWHC 1454 (IPEC)
 - *Kogan & Otrs v Martin & Aor* [2019] EWCA 1645 (C/A)
- “A not insubstantial amount”
 - *Sawkins –v- Hyperion Records Limited* (2004)
- “skill and labour of the right kind”
 - *Hadley and Others v Kemp* [1999] EMLR 589
 - *Sawkins v Hyperion Records Limited* (2004)
 - *Minder Music Limited & Adamson -v- Sharples* [2015]
 - *Martin & Aor v Kogan & Otrs* [2019]
 - *Smith v Dryden & Otrs* [2021] EWHC 2277 (IPEC)



“Musical-ity”

- CDPA 1988, Section 3(1)

“a work consisting of music, exclusive of any words....intended to be sung, spoken or performed with the music”

- No statutory definition of music
- Case law:
 - *Austin –v- Columbia Gramophone Co (1923) 67 S.J. 790*
 - *Francis Day & Hunter Ltd–v- Bron [1963] Ch 587; [1963] 2 All E.R. 16*
 - *“4.33 minutes” by US composer John Cage*
 - *Sawkins v Hyperion Records Limited (2004)*
 - *Pelham GmbH & Otrs -v- Hütter & Aor (Case C-476/17, 29 July 2019 (CJEU, A-G))*



“Work”

- *Coffey v Warner Chappell Music Limited* [2006] EWHC(Ch)449 - what is a work is a matter of objective factors, not what the claimant asserts
- Drafts: *Martin & Aor v Kogan & Otrs* [2019] EWCA 1645 (C/A)
- see also: *Hadley & Otrs v Kemp* [1999] EMLR 589



Adaptations and arrangements of musical works (1)

Berne Convention Art. 2

“adaptations of music ...shall be protected as original works without prejudice to the copyright in the original work;

“translations of ...a literary work...shall be protected as original works without prejudice to the copyright in the original work;

CDPA, section 21

“The making of an adaptation of the work is an act restricted by the copyright in a literary...or musical work”

“The doing of [an act restricted by copyright] in relation to an adaptation is also an act restricted by copyright in a literary...or musical work”



Adaptations and arrangements of musical works (2)

Definition of “adaption”: CDPA, section 21 (3)

Under UK law the definition is exhaustive.

Adaptation of a:

- literary work means.. “a translation” (s21(3)(a)(i))
- musical work means an “arrangement or transcription” (s23(3)(b))

Music copyright is therefore concerned with translations of lyrics and arrangements and transcriptions of musical works; setting new words to music in place of an existing lyric is not in copyright terms an adaptation of the original lyric or music but if done without authorisation it may infringe other rights, including moral rights.

In practice PRS licenses, if done with consent of copyright owner:-

- adaptations in so far as they are also original musical works or literary works
- new lyrics set to existing music



Authorship of Work (1)

Authorship – CDPA 1988, s.9

- Author in relation to a musical or literary work is the person who creates it (including composer, lyricist, arranger, translator).
- If work is “computer-generated”, author will be “*the person by whom the arrangements necessary for the creation of the work are undertaken*”.

Work of joint authorship - CDPA 1988, s.10

“ a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors”



Authorship of Work(2)

Three requirements in UK law:-

- (i) collaboration to create a work
- (ii) significant and original contribution from each author;
- (iii) neither contribution should be distinct from the other in how it manifests itself in the resulting work

Case law on joint authorship:

- *Fisher v Brooker & Otrs* [2009] UKHL 41
- *Beckingham -v- Hodgens* [2003] EMLR 18
- *Hadley -v- Kemp* [1999] EMLR 589
- *Stuart -v- Barrett & Others* [1994] EMLR 448
- *Minder Music Limited & Adamson-v-Sharples* [2015] EWHC 1454 IPEC
- *Martin & Aor v Kogan & Otrs*[2019] EWCA 1645 (C/A)



Authorship of Work (3)

Work of Co-authorship :-

1. Song to which melody was composed by A and the lyrics by B is not a work of joint authorship under UK law but two separate works of sole authorship;
2. Song to which melody was composed by A and B and the lyrics by B consists of two separate works of which:
 - the musical work is a work of joint authorship;
 - the literary work is a work of sole authorship.

Both 1 and 2 are also examples of a “work of co-authorship”.

“work of co-authorship” s:10A CDPA 1988

“musical work with words intended to be spoken or sung with the music and produced by the collaboration of two or more authors in which the contribution of an author consists of a musical work and the contribution of another author consists of a literary work comprising the words to sung or spoken”.

“WCA” is relevant to calculating duration of copyright.

Duration of Copyright (1)

- Literary and musical works
 - UK: life of the author plus 70 years
 - Non-UK: country of origin subject to life plus 70 years maximum

Works of joint authorship

Term is calculated by reference to last surviving author.

Example: A and B jointly composed a musical work. A died 1980 and B died 1985.

Copyright in musical work expires 31.12.2055

Works of co-authorship

Term of copyright in each of musical work and lyrics to be calculated by reference to the last survivor of the composer and lyricist.

Example: A composed music and B wrote lyrics to song. A died 1980; B died 1985.

In the example cited above, copyright in the *music* (as well as the lyrics) will expire on 31.12.2055

Duration of Copyright (2)

Music and words: with separate authors

Term of copyright protection in each work calculated by reference to death of each author

Example: A composed a musical work in 1975; died in 1980

B wrote words to be set to A's music in 1978 ; died in 1985

The music and words are two separate works of sole authorship (no collaboration between A & B). Therefore, copyright in A's musical work expires 31.12.2050; copyright in B's literary work expires 31.12.55.



Ownership of Copyright (1)

Ownership - s.11 CDPA

- The author of the work is the “first owner” of copyright in the work BUT if work created in course of employment, the employer is regarded as the first owner, subject to agreement to the contrary
- Implications of [first] ownership
 - Owner can exercise exclusive rights in the UK (s16 CDPA)
 - Owner can assign or otherwise deal with rights comprised within copyright wholly or partially i.e. as to the things that the copyright owner is entitled to do; as to the period (s90(2) CDPA)
- Joint ownership and infringement of copyright (s173 CDPA)



Ownership (2)

- Future copyright and prospective ownership (s.91 CDPA)
 - “future copyright” – copyright which “*may come into existence in respect of a future work ...or on the occurrence of a future event*”;
 - “prospective ownership” = owner of future copyright, and includes any person who is prospectively entitled to copyright by virtue of an agreement in relation to future copyright signed by prospective owner, in which that prospective owner purports to assign the future copyright (wholly or in part) to another person”.
- PRS and assignments of future copyright – transfer of rights “*which belong to writer on date of [assignment...or which you may acquire or own whilst you remain our member*”.
- *B4U (Europe) Limited v PRS [2013] EWCA Civ 1236 (C/A 2013)* : writer-member’s assignment of future copyright to PRS held to defeat subsequent purported assignment of musical work by writer to film producer

Licensing of musical copyrights in UK

Collective rights management

Well established in the UK – is central to ability of rights holders to generate value and remuneration from their works through aggregation. Best suited to non-exclusive licensing and mass/repeat usage.

Individual rights licensing

Prevails where exclusivity is necessary or desirable (e.g. operas, ballets and grand rights) and/or sensitive or premium usage (e.g. commercial advertisements; synchronisation licences for specially commissioned works)

Collecting societies and their members strike a balance between the interests of the individual and the collective by either allowing members to reserve or withdraw rights generally or in relation to specific works.



Membership of PRS

PRS

- Authors (composers; lyricists; translators; arrangers)
- Publishers/proprietors
- Assignment
 - Performing Rights (authors generally as first owner of the copyright even where published; and proprietors if e.g. employer of the author)
 - Income (publishers – typically take assignment of copyright from author subject to the rights of PRS)
- Distribution – contractual right split between authors (not less than 50%) and publisher/proprietor irrespective of publishing agreement terms) based on usage reports.



Membership of MCPS

MCPS members consist of persons who own, control or administer the mechanical right in copyright musical works – generally publishers but include writers whose works are unpublished and who therefore retain the mechanical copyright in their works.

MCPS is an agent in relation to its members. Unlike PRS it does not own the mechanical rights in its members' works but is appointed to grant licences as agent on their behalf.

Distributions of royalties – contractual: in the UK 100% of distributable royalty is paid to member who owns or controls the mechanical right in the work. There is no “writer’s share” as such but depending on terms of publishing contract, publisher may be obliged to account for a share to writer (or if a sub-publisher, to original publisher). (MCPS/UK is outlier in Europe where writer assigns mechanical right to collecting society and receives a writer’s share).



Thank You



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