

Suggested Answers to the Questions in Chapter 6

1. Which are the main criticisms against the assertion requirement of the paternity right?

The good answer will:

- Offer an overview of the protection afforded by the paternity right (s.78 CDPA);
- Explain that, according to s. 78(2), assertion is a requirement for the right to take effect and it can either be general or in relation to specific (restricted) acts. It *has* to be made in writing, either when the copyright is assigned to a third party, or by any other written instrument. No guidance is given in the Act as to what sort of wording suffices;
- Indicate that in the case of the public exhibition of an artistic work, s. 78(3) provides for two methods of assertion. First, the assertion can be made when the artist parts with possession of the original by ensuring that their name appears on the work or its frame (the CDPA has a somewhat narrow view of what constitutes an artistic work). Second, the right can be asserted when the right to reproduce the work is licensed;
- Explain that the requirement to assert the right of paternity has been the subject of considerable criticism. First, as Ginsburg points out, the drafters of the CDPA appear to have misunderstood Art. 6*bis* which simply states that ‘the author shall have the right to claim authorship of the work’. Further, such obligation to assert an author’s basic right may well breach the requirement in Art. 5*bis* that Contracting States may not impose any formality as a precondition for protection under the Convention;
- Indicate that, to make matters worse, s. 79 CDPA provides for a number of instances of when the right to be identified as author does not arise. Under s. 79(2), certain categories of work, namely computer programs, typefaces and computer-generated works, are excepted. Under s. 79(3), works created in the course of employment do not receive protection if the employer consents to the relevant infringing act, and likewise, any work made for the purpose of reporting current events does not attract the right (s. 79(5)) nor does the right apply where a literary, dramatic, musical or artistic work is published with the author’s consent in a newspaper, magazine or other periodical or in a reference work (s. 79(6)). Certain categories of author, therefore, particularly employees and journalists, receive harsh treatment. There are also exceptions for works which are Crown or Parliamentary copyright, or where the copyright was originally vested in an international organization;
- Finally, under s. 79(4), the right is excluded where a number of defences to copyright infringement apply, in particular those of fair dealing and incidental inclusion. Since these exceptions appear in the Berne Convention in relation to copyright rather than moral rights, one may only assume that Parliament was more concerned with the interests of those who exploit copyrights than with those of copyright creators.

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2. How is the concept of derogatory treatment understood under UK copyright law? Which are the leading cases that have determined its scope? How does the UK test for assessing whether integrity of the work has been violated differ from other jurisdictions?

The good answer will:

- Start by explaining that the author of a literary, dramatic, musical or artistic work or film has the right to object to its derogatory treatment (s. 80);
- Explain that the problem lies in s. 80(2) which defines both ‘treatment’ and ‘derogatory’. ‘Treatment’ means any addition to, deletion from, alteration to, or adaptation of the work. However, it does not include the translation of a literary or dramatic work, nor the arrangement or transcription of a musical work if this involves no more than a change of key. According to s. 80(2), ‘derogatory’ means that the treatment amounts to a distortion or mutilation of the work, or is otherwise prejudicial to the honour or reputation of the author or director;
- It is not clear whether the concept of derogatory treatment requires a distortion or mutilation of the work and/or a prejudice to the honour or reputation of the author or director. A number of cases has addressed the issue, such as *Tidy v Trustees of the Natural History Museum*, 29 March 1995, unreported; *Pasterfield v Denham* [1999] FSR 168; *Confetti Records v Warner Music UK Ltd* [2003] EMLR 790; *Delves-Broughton v House of Harlot Ltd* [2012] EWPC 29; *Morrison Leahy Music Ltd v Lightbond Ltd* [1993] EMLR, 144, etc.;
- The UK approach should be contrasted to that available in other jurisdictions, e.g. the Canadian case of *Snow v The Eaton Centre Ltd* 70 CPR 2d 105 where the temporary festooning of Christmas decorations on sculptures of Canada geese hanging in a shopping mall amounted to a breach of the artist’s right of integrity.