

Guidance on answering the discussion questions in the book

Para 3.7

Can ‘4 Minutes 33 Seconds’, by the composer John Cage, be held to be a work? In this composition, an orchestra is on stage at the outset, but does not start to play any of its instruments. Instead, the members of the orchestra silently sit on the platform for a period of just over four and a half minutes. If it is a work, does the fact that its author is generally regarded as a composer of music make the work musical? Are there any other possibilities? See further Cheng Lim Saw, ‘Protecting the sound of silence in 4’33’’: a timely revisit of basic principles in copyright law’ [2005] EIPR 467.

It seems clear that this is a work. There is something substantial here which can be identified, and distinguished from other works (paras 3.6-3.7). If it is right to suppose that music must consist of sounds (para 3.53), however, then “4 Minutes 33 Seconds” may not be a musical work. It may instead be a dramatic work, since it has sufficient unity to be capable of performance before an audience (para 3.51).

Para 3.16

How exact or good must a recording be to confer copyright on unscripted speech (e.g. a lecture), drama, or music? Do a student’s non-verbatim lecture notes make the lecturer’s extempore words protectable? Or a bootlegger’s poor-quality and unauthorised recording of a live ‘jamming’ session by a musician?

The requirement of fixation involves making a ‘recording’; but CDPA does not require that the recording be of high quality. Presumably the recording has to be sufficient to enable the author’s work to be identifiable, so if it was partial, interrupted or overlaid by other matter (e.g. audience noise drowning out the music, static, etc.), that might not be enough. With regard to the student's lecture notes: mere jottings of occasional phrases, perhaps in highly abbreviated form, would not, it is suggested, be a 'recording' of the lecturer's work (as distinct from his or her ideas) in the manner required by the CDPA.

Para 3.30

Consider whether *Walter v Lane*, *Interlego v Tyco*, and *Sawkins v Hyperion Records* are correctly decided on the originality point. See further J Pila, ‘An intentional view of the copyright work’ (2008) 71 MLR 535 and NP Gravells, ‘Authorship and originality: the persistent influence of *Walter v Lane*’ [2007] IPQ 267.

Pila and Gravells both criticise the decision in *Walter v Lane* and think it wrong. Pila however accepts that the case for seeing the editorial reconstruction work of Sawkins (and by implication that of Qimron in the *Dead Sea Scrolls* case) as that of an author is stronger than that of the shorthand reporter in *Walter v Lane*.

Para 3.31

Is this decision a correct application of the concept of originality? Compare with

***Eisenman v Qimron*, described previously (para 3.30). See further K Garnett ‘Copyright in photographs’ [2000] EIPR 229; R Deazley, ‘Photographing paintings in the public domain: a response to Garnett’ [2001] EIPR 229; S Stokes, ‘Photographing paintings in the public domain: a response to Garnett’ [2001] EIPR 354; and R Arnold, ‘Copyright in photographs: a case for reform’ [2005] EIPR 303.**

As the article references suggest, *Bridgeman* is a controversial case. It is suggested that the judge was too much influenced by the US concept of originality as requiring a spark of creativity and not just sweat of the brow (see paras 3.34 - 3.36). There is skill and labour in what the photographer does in transforming a painting to a photographic medium which arguably goes beyond the example in the *Interlego* case of the ‘well-executed tracing’ (para 3.22); it is not just skill and labour but skill and labour of the kind required to produce a photograph as distinct from a painting, involving artistic judgement (see the *Antiquesportfolio* case below). Consider also if the decision would be a correct application of originality in light of recent guidance on the meaning of ‘author’s own intellectual creation’ for photographs (para 3.60) – and particularly, whether the photographer had the ability in the *Bridgeman* case to make free and creative choices in the production of the photographs and stamps their ‘personal touch’.

Para 3.31

Do the auto-focus, portrait, landscape, and action shot functions in a digital camera mean that there is insufficient input from the user of the camera to make his or her photographs with the camera original for copyright purposes?

Probably not, because the photographer still has to exercise personal judgement in relation to the subject-matter of the photograph in order to stamp his ‘personal touch’ (see para 3.60).

Para 3.50

Imagine a compilation which is not a database for legal purposes, that is, is not a collection of independent works or items of information, systematically arranged and individually accessible. Would the work you have thus imagined be protectable by copyright?

A mere jumble of material would probably lack the coherence and substance needed to make a work (see paras 3.6-3.7). If there is no work, there is no copyright.

Para 3.52

Discussion Point 1

Is a television commercial a dramatic work?

In principle it could be a dramatic work and/or a film (see the *Norowzian* case in paras 3.16 and 3.52).

Discussion Point 2

How should works which contain a musical element but are intended for stage

performance or to be made as a film—for example, an opera, a ballet, or the type of entertainment known as a ‘musical’—be characterised for the purposes of copyright?

In these works the musical element will normally attract its own copyright as a musical work while libretto, choreography, song lyrics and other script will have the dramatic copyright.

Para 3.60

Does the definition of a photograph cover the case whereby the camera records the image digitally and the photographer then adjusts the result electronically, for example to insert other images, as by putting the head of the prime minister on what is otherwise an image of a footballer; or merely editing out unwanted parts of the image captured? Is there still a photograph where the image has been digitally enhanced, for example by sharpening contrasts, or heightening/lowering colours?

Such works would be caught by the idea that there had been a recording and an image had been produced or may be produced (see the definition at para 3.55), albeit possibly not the image originally recorded. Note the *Temple Island* case (para 3.60) where Judge Birss QC uses the term ‘photographic work’ to denote something distinct from a ‘mere photograph’, and which includes changes made after that basic image has been recorded.

Para 3.62

Discussion Point 1

Should ice sculptures be protected as sculptures? Is the snowman you make during a

white Christmas so protected?

If a sculpture is merely the three-dimensional expression of its creator's idea, then the answer to these questions might seem to be Yes, always assuming that the other prerequisites such as originality were met. Similarly if a sculpture is more narrowly defined as the product of a process of modelling and carving representations using natural materials. However, the inherent impermanence of the product – it will melt – might lead some judges to say that they were not sculptures (see Whitford J in *J & S Davis (Holdings) Ltd v Wright Health Group* [1988] RPC 403).

Discussion Point 2

Kinetic sculptures are sculptures with moving parts, or in which motion is incorporated as part of the design, so that the form or colour of the work may change continuously or from time to time. Does mobility or motion within the sculpture take it out of the dictionary definition of 'sculpture'? See also the case of *Komesaroff v Mickle* [1988] RPC 204, discussed later (para 3.70) for a similar issue with works of artistic craftsmanship.

Nothing within the CDPA or the dictionary seems to prevent a sculpture incorporating moving parts or motion. In ordinary English usage it is common to speak of kinetic sculptures. *Komesaroff* appears to be a very special case within the category of artistic craftsmanship, where the presence of the possibility of motion within the object did not convert what was otherwise an un-copyright object into one.

Para 3.71

Discussion Point 1

Are the designer and the hand-knitters in the *Bonz Group* case joint authors? See paras 3.85–3.92.

Authorship of a work is joint when the product is produced by the collaboration of two or more authors in which the contribution of each is not distinct from the contribution of the other author or authors (CDPA s 10(1)). There is a single work here in which two authors have been involved: but the contribution of designing seems quite distinct and distinguishable from the contribution of knitting the product. It is suggested that this is not a case of joint authorship.

Discussion Point 2

Could and should a recipe constitute a work of artistic craftsmanship? See TSL Cheng, ‘Copyright protection of haute cuisine: recipe for disaster?’ [2008] EIPR 93.

Cheng argues that the non-textual form of a recipe might be protectable as a work of artistic craftsmanship in UK copyright law, relying on *Komesaroff v Mickle*. She also argues that chefs deserve better and more certain copyright protection than the law currently gives them.

Para 3.79

Discussion Point 1

Consider ‘podcasting’, a method of distributing audio or audio visual material on the Internet, for playback on personal computers or mobile devices at a time chosen by the user. This technique is increasingly being used by broadcasting companies to allow viewers/listeners to see/hear programmes or other material at a time convenient to them. Is a ‘podcast’ a broadcast for copyright purposes?

No, because the transmission is neither for simultaneous reception by members of the public, nor is the time of transmission determined solely by the person making the transmission (see para 3.76).

Discussion Point 2

Consider also the possibility increasingly deployed in digital broadcasting, where the viewer may ‘pause and record’ a programme as it is transmitted, thereby allowing him to answer the doorbell or telephone without missing any part of the programme. What are the implications for the distinction between broadcasts and other forms of transmission?

This possibility undermines the concept of simultaneous reception and the time of transmission being determined solely by the person making the transmission (see para 3.76).

The distinction between broadcasts and other forms of electronic transmission thus increasingly breaks down thanks to technological development.

Para 3.90

Discussion Point 1

Is this book a work of joint authorship? What do you need to know to answer this question?

There are four authors involved. Is there anything on the title page or in the preface to indicate that each has made a distinct contribution? Note the presumption of authorship in this situation (para 3.85). But presumptions can be rebutted by contrary proof: for example, evidence that in fact each of the four authors contributed particular chapters individually and played little or no role in each other's output.

Discussion Point 2

The novel *Swan* , published in 1994, is said on its dust jacket and title page to be by the supermodel, Naomi Campbell. However, on the catalogue page it is said to be 'Copyright© Naomi Campbell and Caroline Upcher: The Author and the Writer have asserted their moral rights.' Who would have been the first owner of the copyright in the text of *Swan* ? Who has the moral right to be identified as the author of the novel? See further at para 3.91, *Najma Heptulla v Orient Longman Ltd* [1989] 1 FSR 598.

The implication of the catalogue page is that Caroline Upcher wrote the text of *Swan* while Naomi Campbell provided the ideas. In that case, Upcher would be the author for copyright purposes (para 3.84) and have the moral right to be identified as such in the work (para 6.8-6.11). The *Heptulla* case shows, however, that if the provider of ideas engages also in the literary production by making corrections and ordering deletions, then that contribution may

be enough to make that person a joint author with the main writer (para 3.91). This may have happened in the Campbell-Upcher collaboration.

Para 3.93

Discussion Point

What is the position where a work is produced as apparently one of joint authorship within the meaning of the CDPA 1988, but the authors indicate, perhaps in a prefatory statement, that responsibility has in fact been divided along certain lines?

The presumption of joint authorship (para 3.85) is displaced by the contrary evidence provided by the authors concerned. The work is not one of joint authorship.

Para 3.102

What advice would you give to someone who wished to include in an anthology of verse a poem published in a student magazine in 1900 under the name ‘John Smith’, but who had no idea who John Smith was?

It would be prudent to make a reasonable inquiry to locate ‘John Smith’ (eg through the publishers of the student magazine, which may be a student group or association, or their successors) notwithstanding the name being a common one and as such the inquiry posing some difficulty. The year of death of the author would allow ascertaining the duration of copyright in literary, dramatic, musical and artistic works. For the duration to be determined

by other means (see s.12(3) CDPA) or an exception to be applicable (s.57(1) CDPA) the work would have to be of unknown authorship (see meaning of anonymous and pseudonymous works in para 3.101 and duration at 3.116). If the duration of copyright hasn't expired and an exception does not apply then it would be prudent to consider the UK orphan works licensing scheme administered through the IPO (para 6.348).

Para 3.105

Discuss whether a schoolteacher who writes and publishes a text for use in schools would have the copyright in it. Is there any difference in the position of the university lecturer who writes a book or articles? What about the composition of a database or a computer program by the same lecturer?

It is probably not in the course of a schoolteacher's employment to write or publish texts for use in schools; but, given the regular assessment of the quality of research produced in UK higher education institutions (under the Research Excellence Framework), it probably is increasingly in the course of a university lecturer's employment unless the contract of employment excludes research from the lecturer's duties. This is despite what was said in the Stephenson Jordan case (para 3.105), decided at a time when universities were rather different kinds of place from what they are today. It is sometimes said that there is a difference between what the lecturer writes for teaching purposes and what is done for research, since the university can direct what is to be taught by whom; it remains to be seen what a court will make of such an argument. It is common now for universities to claim

copyright as employers in lecture recordings (now a common practice in many universities in the UK through deployment of lecture capture technology); but, universities have not customarily claimed copyright in their lecturers' written research productions, and this may bar them from asserting it, whatever their strict rights may be (see para 3.104); but if claims began to be made, then works created after that might well fall under the copyright employment rules. It is quite common now for universities to claim copyright as employers in lecturers' databases and computer programs, especially where these have commercial value.

Para 3.116

A person is copying and collecting with a view to publication the verses engraved on tombstones in local churchyards, most of which appear to have been erected in the 19th or early 20th centuries. The verses are otherwise unpublished and of unknown authorship. What steps should the collector take to avoid any danger of being sued for copyright infringement?

- Check whether the tombstones appear to have been set up more than 70 years ago (para 3.116);
- Make inquiries locally as to possible authorship candidates at the relevant time – priests/ministers of the church, stone-masons, local poets, relatives of the deceased – and their dates of death (see further paras 3.113-3.114, 3.116);
- Advertise locally for copyright-holders to identify themselves;

- Consider making an application under the UK Orphan works licensing scheme administered through the IPO (para 6.48).

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Para 3.118

Why is Crown copyright in literary, dramatic, musical, and artistic works not subject to the usual rules on duration?

The length of Crown copyright is not really justified by anything in the Berne Convention. It might be thought to be just a little longer than the career length of a Crown servant (say 40 years) plus the 70-year post-mortem period; but the term was 125 years when the post-mortem period was only 50 years. The justification may be to support the confidentiality or secrecy of Crown business; but the blanket nature of the term cuts an increasingly odd figure in a world of freedom of information and requirements to permit, indeed encourage, public sector information re-use (see further the Re-Use of Public Sector Information Directive 2013/37/EU).

Para 3.125

Why is the publisher's copyright in its typographical arrangement so much shorter than other copyrights?

The publisher's copyright is designed to protect 'lead time' in the market place rather than

the personal achievement of having produced a work as an author. It is still a little difficult to see why the copyright should be half or, less than half, the length of that for other media copyrights such as those for sound recordings and broadcasts. But perhaps that should be put the other way round: why are the latter copyright terms twice as long as the publisher's?