



A Copyright Guide for Artists' Union England Members

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This guide provides a brief introduction to the complex universe of the UK copyright law for the members of Artists' Union England. The aim of the guide is not to provide a 'legal advice' but to enlarge the artists' knowledge on the protection of their works. It is strongly recommended to seek professional advice in the face of a copyright-related problem. However, I hope this document will be useful for the members of Artists' Union England.

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Introduction:

1. What is copyright?

Copyright is a property right on certain types of original works of authorship. It allows the copyright holder to prevent others from exploiting the work without authorization. It is referred to as a 'bundle' of rights as it allows the copyright holder to prevent others from:

- copying the work
- distributing the copies, whether free of charge or for sale
- renting/lending copies
- performing, showing or playing the work to the public
- making an adaptation of the work
- putting it on the internet

Unlike some other countries, copyright is granted only on certain types of works in the UK, which is referred to as the 'closed-list' approach. The listed works in the Copyright, Designs and Patents Act 1988 (CDPA) are as follows:

- Original literary, dramatic, musical and artistic works (authorial works), including sculptures, collages and works of artistic craftsmanship
- Original non-literary written works
- Sound and music recordings
- Film and television recordings
- Broadcasts

In some examples there may be several elements of an *end product* that are copyright protected. The most conventional example of this is a song. While the song itself is copyright protected as a sound recording, the composition of the song is also copyright protected as a literary work. Some examples for artistic works in this regard are provided below. Artistic works is further explored in detail below since it is probably the most relevant category for AUE members' works.

2. Ownership

Copyright is a property right. Therefore, it can be sold, assigned or transferred. This is the reason why the copyright holder and the creator of the work may be two different people.

While copyright grants certain rights to the right holder, the rights are not attached to the physical work. For example, the owner of a Picasso painting is not necessarily the owner of the copyright in that painting. In such cases, the copyright owner's authorization is necessary for the distribution of the copies of the work.

The first owner of copyright, as a rule, is the creator of the work, who is referred to as the 'author' in CDPA. However, there are two exceptions to this rule:

- If a work is made by an employee in the course of her employment, copyright would usually rest with the employer.
- Similarly, copyright may rest with a third party if there is a contractual relationship between the creator of the work and the third party. For example, the commissioner of a sculpture may be the first copyright owner of the sculpture, depending on the agreement between the parties.

3. Joint Authorship

If a single copyright-protected work is a work of two or more people, whose contributions are not distinct from that of the other(s), the work may be considered to be a work of joint authorship. Some important differences are there for the works of joint authorship. If the author is a single person, her authorization is enough for a third party to copy and/or use the work. However, the authorization of all owners would be necessary for the exploitation of the work in the case of joint authorship. On the other hand, a joint author can bring a copyright infringement suit independently from other joint authors.

As stated in the previous chapter, copyright can be sold, assigned or transferred. Therefore, the collaborators can come to an agreement in advance that a single person would be the sole owner of copyright in the to-be-produced work. This would potentially make the distribution of the work easier. Similarly, the collaborators may agree on a licensing method in advance of the creation of the work.

It is important to note that not all contributions would make the contributor a joint author. There are three requirements developed by the UK case law for a work to be a work of Joint authorship:

- **Contribution:** The contribution of the joint author should be ‘significant’ (i.e. ‘substantial’, ‘considerable, or ‘non-trivial’) and ‘original’. The originality requirement is low, as further explained below. For the contribution to be significant, it should be more than trivial.¹ Furthermore, the contribution should be of the ‘right kind’. Regarding the ‘right kind’ condition, Bently and Sherman provide the following example: While the contribution to the lyrics of a song would give rise to a joint authorship in the musical composition, the contribution to the ‘performance’ of a musical work would not make the performer a co-author.²
- **Collaboration:** There should be a collaboration between the joint authors. This is not the intention of the authors to create a work of joint authorship, but designing the work via utilizing a joint labour, skill and judgment. One person’s ‘authority’ throughout the process of creating the work may give rise to an opposite result. Comparing the following two scenarios might be illustrative to understand the difference: While

¹ However, it is important to note that the significance of the contribution is not subject to an aesthetical judgment.

² Lionel Bently and Brad Sherman, *Intellectual Property Law* (OUP, 4th ed, 2014), at 131

composing a musical work via ‘collective jamming’ would give rise to a work of joint-authorship,³ a musical work that is created by following only one musician’s musical vision throughout the rehearsals and recording would not.⁴

- **Integrated wholeness:** The final condition is that the contributions should not be ‘distinct’ or ‘separate’ from each other. To put it another way, if the authors’ contributions have merged into an ‘integrated whole’,⁵ if their contributions could not be distinguished as separate tangible materials, the work would be a work of joint authorship.

4. Start of the Copyright Protection – No Need for Registration

Copyright protection starts when a work is created. Although it is common to mark the work with the copyright symbol (©), it is not a requisite for copyright protection. Unlike a patent or trademark, a registration or a notice is not required for the copyright protection to arise. However, there is a minor exception to this general rule under the UK law. It is related to moral right of attribution, which is further explained below.

5. Duration of the Protection

The length of copyright protection depends on the type of the work and the country where the protection is sought. Following is a list that shows the duration of copyright protection for the protected types of works in the UK:

- Literary, dramatic, musical and artistic works: 70 years after the author’s death
- Sound and music recordings: 70 years from the date of first publishing
- Films: 70 years after the death of the director, screenplay author and composer
- Broadcasts: 50 years from the date of first broadcasting

The Eligibility for Copyright Protection

There are a number of criteria for a work to be copyright protected that change from one country to another. Although a work that is protected by copyright in one country would often be copyright protected in another country, there certainly are opposite cases. Following are the criteria that is required in the UK:

1. Originality

Originality is the central requisite for copyright protection for authorial works. A work is protected by copyright as long as it is an original expression of its creator. The requirement does not look for the work to be novel or unique. It requires the work to be ‘originated’ from its creator.

³ Stuart v. Barrett, EMLR 449, 458, (Ch. 1994) per Morison QC.

⁴ Hadley v. Kemp, EMLR 589, 646 (Ch. 1999).

⁵ Bently (n. 2) at 131

'Originality' as a legal term is not defined by the legislators. However, it is possible to set the characteristics of the criterion in the light of the judicial and academic considerations of the term. The originality threshold is set at a low level. However, a 'slavish copy' would not be able to pass the requirement. At the minimum, the originality requirement seeks for the author's contribution to the work. Hence, it may be said that a mere display of ready-mades, natural objects or found images would not satisfy the standard of originality.

2. The Closed-List of Protected Works

For a work to be copyright protected in the UK, it should be one of the types of the works listed in the CDPA:

- Original literary, dramatic, musical and artistic works (authorial works), including sculptures and works of artistic craftsmanship
- Original non-literary written works
- Sound and music recordings
- Film and television recordings
- Broadcasts

Out of the stated lists, a closer look at the 'artistic works' would be helpful for the purpose of this guide since it is likely to be the closest category for the AUE members' works. However, it should be noted that some elements of certain installations may qualify for copyright protection as literary, dramatic or musical works. Following three examples may be illustrative:⁶

- Barbara Kruger's *past/present/future (2010)* may be protected as a literary work as well. In the work the artist wrapped the floor and the walls of a room with printed texts.
- Kelly Mark's *All in a Day's Work (2009)* may be protected as a dramatic work. *All in a Day's Work* is a performance art that consists of its artists' talk from 9 a.m. to 5 p.m. with two fifteen minute breaks and a one hour lunch.
- Bill Fontana's *White Sound (2011)* may be protected as a musical work. The work features the noise of a Dorset beach to London's Euston Road.

Nevertheless, where an artwork features an object or a composition of objects, it is more likely for the work to be classified as an artistic work. CDPA provides a closed-list of mediums that would be categorized as an 'artistic work':

- (a) a graphic work, photograph, sculpture or collage,
- (b) a work of architecture being a building or a model for a building, or
- (c) a work of artistic craftsmanship.

⁶The examples are provided by David Tan and Chan Yong Neng in an illustrative essay on copyright protection for contemporary artworks: David Tan and Chan Yong Neng, 'Copyright Subsistence in Contemporary Times: A Dead Shark, an Unmade Bed and Bright Lights in an Empty Room' (2013) *Sing. J. Legal Study* 402, at 408

A graphic work includes the following:

- any painting, drawing, diagram, map, chart or plan, and
- any engraving, etching, lithograph, woodcut or similar work;

If a work could not be categorized as one of the listed types, copyright protection could not be obtained. While the requirement is easy to meet for works that are arguably more conventional, it may be challenging for certain artworks. Additional information on the categories of sculpture, collage and works of artistic craftsmanship has been provided below.

a. Sculpture

The concept of sculpture has been comprehensively examined in the case of *Lucasfilm Ltd v Ainsworth*.⁷ Following are the criteria Mann J. has stated to be relevant in deciding if a work is a sculpture:⁸

- The normal use of the word should be regarded.
- However, untraditional works could be classified as a sculpture as well.
- No judgment is to be made about artistic worth.
- Not every three-dimensional representation of a concept can be regarded as a sculpture.
- There should be an artistic purpose in the creation of the work.
- There should be a purpose to achieve a visual appeal.

Following is an example stated by Mann J. in deciding the sculpture-status of a work:

A pile of bricks, temporarily on display at the Tate Modern for two weeks, is plainly capable of being a sculpture. The identical pile of bricks dumped at the end of my driveway for two weeks preparatory to a building project is equally plainly not. One asks why there is that difference and the answer lies, in my view, in having regard to its purpose. One is created by the hand of an artist, for artistic purposes, and the other is created by a builder, for building purposes.⁹

b. Collage

Although there is no further clarification regarding the term in CDPA, Lloyd J. has provided a guidance in the case of *Records Ltd v News Group Newspapers Ltd*.¹⁰ The judgment concerns the composition of a number of found objects, situated around a swimming pool for Oasis' *Be Here Now* album cover. Lloyd J. rejects the claim that the work is a collage on two grounds: First of them is related to fixation requirement, which is explained below. Second, he states that a collage should 'involve as an essential element [of] sticking of two or more things

⁷ [2008] EWHC 1878

⁸ *Lucasfilm Ltd v. Ainsworth*, [2008] EWHC 1878 (Ch) 118

⁹ *Lucasfilm Ltd v. Ainsworth*, [2008] EWHC 1878 (Ch) 118 (viii);

¹⁰ [1997] EMLR 445

together.¹¹ However, this conceptualization of collage may be challenged. In the very same judgment, Lloyd J. provides a definition of collage from *The Concise Oxford Dictionary* (9th ed.) as follows: ‘A collection of unrelated things.’¹² Even though the definition did not change his final judgment, one might expect a different outcome in a future conflict.

c. Works of Artistic Craftsmanship

It is hard to provide a guidance for works of artistic craftsmanship since there is not a consensus regarding the definition of this category in the UK case law. The lack of consensus is visible in the leading judgment regarding the works of artistic craftsmanship, *Hensher*,¹³ as it contains nine different approaches toward the concept. However, it may be said that the category includes products such as ‘handcrafted jewellery, tiles, pots, stained-glass windows, wrought iron gates, hand-knitted jumpers, crocheted doilies.’¹⁴

3. Being Recorded in a Material Form

A literary, dramatic or musical work could not be copyright protected in the UK, ‘unless and until it is recorded, in writing or otherwise’.¹⁵ Even though there is not a corresponding provision for the artistic works, it is largely accepted that there is an *implicit* requirement.¹⁶ Also known as the *fixation* requirement, this requirement is sought in the UK, the USA, and Australia, while there is not such a requirement in France, Germany or Netherlands. Following example may provide clearance for the difference: While oral works like lectures that have not written down or recorded in any way would fail to be eligible for copyright protection in the UK, same works would gain copyright in countries with no fixation requirement.

The case law suggests that a degree of fixation is sought for the work in question to be classified as one of the listed type of artistic works under Section 4 in the UK. In light of the UK case law, three interrelated characteristics could be put for the requirement: (1) A material form,¹⁷ (2) A static feature,¹⁸ (3) A degree of permanence.¹⁹ For example, Adam Ant’s face painting was found not fixed to be a painting. Lawton L.J. stated: ‘A painting is not an idea: it is an object; and paint without a surface is not a painting.’²⁰ Thus, the lack of a material form and the limited permanence of the work led the work to be found not fixed.

¹¹ *Ibid.* at 450

¹² *Ibid.* at 449

¹³ *George Hensher Ltd. v Restawile Upholstery (Lancs) Ltd*, [1975] RPC 31

¹⁴ Lionel Bently and Brad Sherman, *Intellectual Property Law* (OUP, 4th ed, 2014), at 80

¹⁵ CDPA s. 3(2)

¹⁶ *Abraham Moon & Sons Ltd v Andrew Thornber*, [2012] EWPC 37, at [104]

¹⁷ *Abraham Moon & Sons Ltd v Andrew Thornber*, [2012] EWPC 37, at [104]

¹⁸ *Komesaroff v Mickle*, [1988] RPC 204, at 210

¹⁹ *Metix v Maughan*, [1997] FSR 718, at 721

²⁰ *Merchandising Corp of America Inc v Harpbond*, [1983] FSR 32 at 46

Similarly, a work defined as a ‘sand picture’ was found not fixed in the Australian case of *Komesaroff*.²¹ The work composed of liquid, colored sands and a layer of air bubbles placed between two glass panels. The plaintiff’s argument was that the work was a work of artistic craftsmanship. However, the court stated that the work lacked ‘a static feature for any length of time’, thus unfixed. On the other hand, an ice-sculpture was found fixed enough to be classified as a sculpture with the following judgment: ‘[A] sculpture made from ice is no less a sculpture because it may melt as soon as the temperature rises.’²²

Another case concerned a number of found objects, situated around a swimming pool for Oasis’ *Be Here Now* album cover. In the case, Lloyd J. found the composition of *objet trouvés* unsatisfactory to be a collage due to its *intrinsically ephemeral* status.²³ The composition stood in the given arrangement for a few hours, “indeed less than ephemeral” as Lloyd J. put it,²⁴ with an intention to exist only to survive photo shooting.

However, it should be stated that a photograph of Adam Ant’s face painting or the photograph of found objects in the Oasis case would be copyright protected. Therefore, even though a work itself is not copyright protected, its recordings may be. The lecture example would fit well here. While the lecture itself would not be copyright protected in the UK, a video-recording or a transcript of it would be.

Limitations and Exceptions

1. Fair Dealing

While copyright allows the copyright owner to prevent others from exploiting the work, there are a number of exceptions to that general rule. It means, while you would be able to use others’ works without authorization in certain ways, others would be able to use your works in the same regard as well.

Among the exceptions, the most significant ones are the ones called ‘fair dealing exceptions’. The fair dealing exceptions permit the unauthorized use of a copyright work for the following purposes:

- Criticism, review or reporting current events
- Non-commercial research and private study
- Parody, caricature, and pastiche
- Quotation

For the use to be a fair dealing with the work, it should be in compliance with the following:²⁵

²¹ *Komesaroff v Mickle*, [1988] RPC 204

²² *Metix v Maughan*, [1997] FSR 718, at 721

²³ *Records Ltd v News Group Newspapers Ltd*, [1997] EMLR 445, at 450

²⁴ *Ibid.*

²⁵ Intellectual Property Office, *Exceptions to Copyright* (18 November 2014), available at <<https://www.gov.uk/guidance/exceptions-to-copyright>> (Last visited 14 June 2018)

- i. Falling under one of the categories above
- ii. Being 'fair' in the use of the work
- iii. Giving 'sufficient acknowledgement' (unless it is impossible for reasons of practicality)

It is accepted that fair dealing is a matter of degree and impression. The UK courts give significant importance to the following criteria in terms of fairness of a use:²⁶

- i. Whether the use was commercially competing with the original work,
- ii. Whether the used work was already been published or otherwise exposed to the public,
- iii. Whether the amount and importance of the work taken were too much for being fair.

2. Representation of a Work on Public Display

Section 62 of CDPA 1988 provides an exception for the representation of certain artistic works that are permanently on public display.²⁷ According to the provision, it is allowed to represent (a) buildings, and (b) sculptures, and works of artistic craftsmanship in a graphic work such as a painting, a photograph or a film if those works are "permanently situated in a public place or in premises open to the public."²⁸ Therefore, photographing a sculpture permanently located in the Trafalgar Square and selling its copies as postcards without an authorization is permitted under CDPA.

3. Incidental Uses

Similarly, there is not a copyright infringement if an artistic work, sound recording, film or a broadcast is incidentally used in a work.²⁹ The logic behind the exception is to make it easier for the works that take place in the urban area, a place that is full of copyright protected works (like murals, sculptures, architectural works). For example, a documentary that is recorded in an urban place would most likely catch a number of copyright protected works. Without the exception it would be extremely hard to make such a document since a license for each featured copyright protected material would be required.

4. Advertisement of Sale of Artistic Work

Section 63 of CDPA states that it is permissible to copy an artistic work or issue copies to the public for the purpose of advertising the sale of the work.³⁰ Thus, including a photograph of a sculpture into a catalogue is a permissible act. The exception is there to provide clarity for the situations that the owner of the

²⁶ *Ashdown v. Telegraph Group Ltd*, [2001] EWCA Civ 1142 at [70]

²⁷ CDPA s. 62

²⁸ CDPA s. 62(1)(b)

²⁹ CDPA s. 31

³⁰ CDPA s. 63

physical copy and the owner of the copyright are different entities. However, the exception does not cover the subsequent uses of the copy that is used for advertising.³¹ Thus, selling the copy of a work that is used for advertising is a copyright infringement.³²

5. Reconstruction of a Building

Section 65 of CDPA clarifies that there is no copyright infringement in ‘anything done for the purposes of reconstructing a building’. Therefore, the owner of the building may carry out a reconstruction project without having an authorization from the copyright owner of:³³

- i. the copyright in the building, or
- ii. in any drawings or plans in accordance with which the building was, by or with the licence of the copyright owner, constructed.

Moral Rights

Copyright is, as stated before, a property right. However, for many artists, their works are something more than a property. Their interest in the work may go beyond the economical concerns. Moral rights protect artists’ non-economic interests in the work.

There are certain differences between economic rights and moral rights:

Closed list of works: Moral rights only apply to the literary, dramatic, musical and artistic works, films, and some performances.

Transferring the rights: Unlike the economic rights, moral rights cannot be sold, licensed or otherwise transferred. It may, however, be waived.

Duration: While the duration is same for economic and moral rights in the UK, there are countries like France where moral rights are perpetual.

There are four types of moral rights under the UK law:

1. The Right of Attribution

This right allows the creator of a work to be recognized as the author of it. For example, the author may enforce her right of attribution in a case where her sculpture is located in a public or private place upon commission without a sufficient acknowledgement stating that she is the sculptor.

For this right to be enforceable, however, the creator needs to assert it in writing. The right can be asserted as a statement on the work itself, in the agreement

³¹ CDPA s. 63 (2)

³² Lionel Bently and Brad Sherman, *Intellectual Property Law* (OUP, 4th ed, 2014), at 266

³³ CDPA s. 65

with a publisher or another third party that is going to display or distribute the work, or by a letter to the person who will be dealing with the copyright in the work. The right may be asserted with the following sentence:

‘The author of *X work* asserts his/her moral right in accordance with section 77 of Copyright, Designs and Patents Act 1988.’

2. The Right to Object to Derogatory Treatment of a Work

Also known as ‘the right of integrity’, this right allows the author to object to any derogatory treatments of her work. The derogatory treatment is defined as ‘any addition to, deletion from or alteration to or adaptation of the work’. The treatment is objectionable if it ‘amounts to distortion or mutilation of the work’. However, the treatment would also be objectionable if it is ‘prejudicial to the honour or reputation of the author’. The following acts are specifically stated not to be derogatory treatment in CDPA:

- i. a translation of a literary or dramatic work, or
- ii. an arrangement or transcription of a musical work involving no more than a change of key or register.

3. The Right to Object to False Attribution

This right allows the author not to be named as the creator of a work that she did not create. Unlike the right of attribution, there is no need for an assertion here.

4. The right to privacy of certain photographs and films

This right allows someone who has commissioned a photograph or film for private purposes to prevent the photograph or the film from being published without the commissioner’s permission.

The Artist’s Resale Right (*Droite De Suite*)

The Artist’s Resale Right (ARR) is a copyright-related right granted to the creators of original works of art – that is ‘works of graphic or plastic art’ – such as paintings, engravings, sculptures and ceramics. ARR entitles the creator of such works to a royalty for every resale of their works through an auction house, a gallery or art market professional. ARR only applies to the sales of an artwork that reaches or exceeds sterling equivalent of €1,000. The royalty depends on the sale price of the artwork. The higher the sale price gets, the lower the royalty becomes.

Royalty	Resale price
4%	up to €50,000
3%	between €50,000.01 and €200,000
1%	between €200,000.01 and €350,000
0.5%	between €350,000.01 and €500,000

Royalty	Resale price
0.25%	in excess of €500,000

ARR does not cover all resales of a work of art. If the work that is being resold was bought from the artist herself within the last three years and if it is being resold for €10,000 or less, an ARR would not be raised.

Individual artists are not able to collect the royalty directly from the art market professionals. There are two bodies of collecting societies in the UK who collect the royalties and then distribute it to the artists. They are, Design and Artists Copyright Society (DACS) and Artists Collecting Society (ACS).

Further Reading	
Berkman Klein Center & Harvard Law School	<p>Berkman Klein Center & Harvard Law School has a three-months-long online course called CopyrightX. Although the main focus of the course is on the US copyright law, it is useful to have an understanding on the international copyright law.</p> <ul style="list-style-type: none"> • http://copyx.org/
Blogs	<p>There are a number of great copyright blogs that would be helpful to develop an understanding on the UK copyright law.</p> <ul style="list-style-type: none"> • The IPKAT - http://ipkitten.blogspot.com/ • The 1709 Blog - http://the1709blog.blogspot.com/ • Kluwer - http://copyrightblog.kluweriplaw.com/
Copyrightuser.org	<p>An academic initiative, Copyrightuser.org provides an user-friendly way of learning about copyright law:</p> <ul style="list-style-type: none"> • http://www.copyrightuser.org/
Design and Artists Collecting Society (DACS)	<p>DACS' website provides a further information on the frequently asked questions on the Artist's Resale Right:</p> <ul style="list-style-type: none"> • https://www.dacs.org.uk/for-artists/artists-resale-right/frequently-asked-questions
Intellectual Property Office (IPO)	<p>IPO is the official government body regarding the UK intellectual property law. Their website contains a number of useful information, definition and explanations.</p> <ul style="list-style-type: none"> • https://www.gov.uk/topic/intellectual-property/copyright
Tate	<p>Tate's <i>A Brief Guide to Copyright</i> (2016) is a good resource for the UK copyright law.</p> <ul style="list-style-type: none"> • http://www.tate.org.uk/download/file/fid/102893
World Intellectual Property Organisation (WIPO)	<p>WIPO provides a number of online resources on various issues related to intellectual property law.</p> <ul style="list-style-type: none"> • http://www.wipo.int/

	<ul style="list-style-type: none"> • http://www.wipo.int/copyright/en/museums_ip/
Books	<p>Following is a list of books that may be useful for obtaining further information in detail:</p> <ul style="list-style-type: none"> • Art and Copyright (2nd ed), Simon Stokes, Hart Publishing, 2012, ISBN 9781849461627 • Artists' Resale Right (Droite De Suite): UK Law and Practice (3rd ed), Simon Stokes, IAL, 2017, ISBN 9781903987407 • Dear Images: Art, Copyright and Culture, Daniel McClean and Karsten Schubert (ed), Ridinghouse, 2002, ISBN 0954171020 • Intellectual Property Law (4th Ed) Lionel Bently and Brad Sherman, OUP, 2014, ISBN 9780199645558
Useful Statutes & EU Regulations	<p>Following statutes and EU directives may be of use to further examine the legal regime of the UK copyright law:</p> <ul style="list-style-type: none"> • Copyright, Designs and Patents Act 1988 https://www.legislation.gov.uk/ukpga/1988/48/contents • EU, Information Society Directive 2001/29/EC https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML • EU, Resale Right Directive 2001/84/EC https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001L0084&from=EN