

## **PART I: COPYRIGHT AND RELATED RIGHTS**



## Chapter 1

---

# Subsistence of Copyright, Authorship, Duration and Enforcement

### Introduction

[1.01] Copyright is a trade-off: it encourages the public good of creativity by permitting the public bad of allowing authors and artists to monopolise the reproduction and exploitation of their work. As Macaulay said:

‘It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good’.<sup>1</sup>

[1.02] Copyright is a far from perfect system for encouraging the development of new works. *It’s a Wonderful Life* is the classic example of what can happen to a work that escapes the confines of copyright protection. The film disappointed its audience upon release and, although nominated for an Oscar was quickly forgotten. Thanks to the vagaries of the US copyright process and a failure to renew its copyright, the film moved into the public domain in the 1970s. This gave *It’s a Wonderful Life* a quality that overrode any of the original doubts about its artistic merit: *It’s a Wonderful Life* could be shown by US television stations for free. As a result it became a staple of the schedules of US television, and through repeated showings attained the ‘classic’ status that it now holds. Whatever its faults, copyright exists and there is no question that it has been very successful in generating the cornucopia of fresh copyright works that surround us today. Hence the significance of copyright law and the significance of the rights that flow from it. Copyright may be unsatisfactory, but a successful system has yet to be designed that will reward the activities of authors and artists adequately or at all.<sup>2</sup>

### The subsistence of copyright

[1.03] Section 17(1) of the CRRA 2000–2004 provide a concise summary of the essentials of copyright law:

‘Copyright is a property right whereby, subject to this Act, the owner of the copyright in any work may undertake or authorise other persons in relation to that work to undertake certain acts in the State being acts which are designated by this Act as acts restricted by copyright in a work of that description.’

---

<sup>1</sup> Macaulay, House of Commons, 5 February 1841. Macaulay was speaking in a debate on a Bill to extend copyright to sixty years. Quoted in p 8, para 33 of Houses of Parliament (UK) All Party Parliamentary Internet Group, ‘Digital Rights Management’, June 2006.

<sup>2</sup> ‘only one in forty digital songs are being paid for, digital music is ... essentially free’, Keen, *The Cult of the Amateur* (Nicholas Brealey Publishing, 2007), p 108.

Copyright subsists in—

- (a) Original literary, dramatic, musical or artistic works,<sup>3</sup>
- (b) Sound recordings, films, broadcasts or cable programmes,
- (c) The typographical arrangement of published editions, and
- (d) Original databases.<sup>4</sup>

[1.04] Although the term ‘works’ only appears in the first of the above categories, this is the term used to refer to anything which is protected by copyright. This position is made clear by the CRRA 2000–2004 which provide that ‘work’ means:

‘a literary, dramatic, musical or artistic work, sound recording, film, broadcast, cable programme, typographical arrangement of a published edition or an original database and includes a computer program except ... where ‘work’ means ‘literary, dramatic, musical or artistic work or film’.<sup>5</sup>

These categories may not be exclusive; for example, a film such as *The Sound of Music* contains a large number of musical works in the form of songs. There may also be considerable overlap between the components of the above categories so a film or sound recording might become the principle component of a broadcast or cable programme. The Act stipulates that certain works can only belong to a particular category. A literary work cannot be a dramatic or musical work or an original database and a photograph cannot be part of a film.<sup>6</sup> But different types of work may co-exist on the one page. However, once you can be certain that something is protected by copyright, it may not matter which of the above categories it falls into. Of course, this is not strictly true in every situation. One important difference is that while literary, dramatic, musical and artistic works and databases must be ‘original’ there is no similar requirement for sound recordings, films, broadcasts, cable programmes and typographical arrangements.

### Originality

[1.05] Literary, dramatic, musical or artistic works and databases are only protected if they are original. The CRRA 2000–2004 contain no general definition as to what constitutes originality. In *University of London Press v University Tutorial Press*,<sup>7</sup> Peterson J stated that:

‘The word original does not ... mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of ‘literary work’, with the expression of thought in print or writing. The originality which is required relates to the expression of

<sup>3</sup> Somewhat confusingly all categories of copyright are described as ‘works’, a term which is defined as: ‘a literary, dramatic, musical or artistic work, sound recording, film, broadcast, cable programme, typographical arrangement of a published edition or an original database and includes a computer program except in CRRA 2000–2004, Part II, Chapter 7 where ‘work’ means “literary, dramatic, musical or artistic work or film”.

<sup>4</sup> CRRA 2000–2004, s 17(2).

<sup>5</sup> CRRA 2000–2004, s 2(1).

<sup>6</sup> CRRA 2000–2004, s 2(1).

<sup>7</sup> *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.

thought. But the Act does not require that the expression be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author’.<sup>8</sup>

*University of London Press v University Tutorial Press* involved the copying of mathematic questions, which were held to be original for the purposes of copyright law. At its most basic level, originality means that a work has not been copied and it is open to question whether the term has any meaning greater than this for the purposes of copyright law. The leading Irish case on this point is the decision of the Supreme Court in *Gormley v EMI Records (Ire) Ltd*,<sup>9</sup> in which Barron J came to the conclusion that:

‘originality does not require the work to be unique, merely that there should have been original thought. Where there is treatment of materials already in existence it is necessary to show some new approach. It cannot be copied directly. The work must truly belong to the person claiming to be the author.’<sup>10</sup>

[1.06] In *Gormley v EMI Records (Ire) Ltd* the plaintiff had been a pupil in a Dublin national school in the 1960s. Her teacher, Mrs Cunningham, told her pupils many Bible stories and her pupils would recount various stories into a tape recording machine. She created a large number of such tapes containing literally hundreds of stories retold by her pupils. The plaintiff told the story ‘And then there were twelve’ in 1961. Many years later, the defendants gained access to Mrs Cunningham’s material and selected stories were made into a tape called ‘Give Up Yer Aul Sins’. The plaintiff’s story was included as one of these, but while the defendants received the permission of Mrs Cunningham, they did not seek the permission of the children. The plaintiff lost in the High Court, and appealed that decision to the Supreme Court. The question that arose on appeal was whether ‘the words of the story as recited by the plaintiff on the tape constitute an original literary work’.<sup>11</sup>

The Supreme Court dismissed the appeal stating that:

‘It is not the words used which make the work original nor create the copyright. Where, as here material was copied it is necessary to show the necessary skill, labour and judgement to create a truly new work. It is this for which the plaintiff contends. None of this is apparent in what occurred. The plaintiff was not seeking to produce a new work but to show that she knew the story by reproducing what she had been told as faithfully as possible. It is clear that much skill, judgment and labour had been used by Mrs. Cunningham to reduce these stories to the level where they would be understood by children.’<sup>12</sup>

[1.07] In assessing the originality of a copied work, the Supreme Court took the view that notice must be taken of the skill, labour and judgment used to create a truly new

---

<sup>8</sup> [1916] 2 Ch 601 at 608–609, cited by Reid LJ in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 277. Cited by Barron J in *Gormley v EMI Records (Ire) Ltd* [2000] 1 IR 74 at 90 together with *Interlego AG v Tyco Industries Inc* [1989] 1 AC 217 and *Joy Music Ltd v Sunday Pictorial Newspapers (1920) Ltd* [1960] 2 QB 60.

<sup>9</sup> *Gormley v EMI Records (Ire) Ltd* [2000] 1 IR 74, [1999] 1 ILRM 178.

<sup>10</sup> [2000] 1 IR 74 at 93.

<sup>11</sup> [2000] 1 IR 74 at 86.

<sup>12</sup> [2000] 1 IR 74 at 93.

work and not the actual work itself. The court also viewed the motivation and intention of a person as being important, since it looked at why the plaintiff recited the work and her desire to show that she knew it.

‘It seems to me unlikely that a six-year-old would be in a position to exercise any original thought capable of being expressed when her sole purpose was to repeat the story which had been told to her by her teacher ... I do not suggest that a six-year-old can never have independent thought nor exercise sufficient skill or judgment for the purposes of obtaining a copyright. If the purpose is to copy, then a six-year-old would never have had sufficient independent originality to realise or to intend to give a different slant to the particular story which she had been told so as to make it a different thing.’<sup>13</sup>

The above should not be read as depriving every six-year old of the possibility that they might author a work in which copyright may subsist. But every case depends upon its facts and in this case Barron J was satisfied that the plaintiff did not have the necessary capacity for creative thought.

‘It is not the language which creates the copyright, it is the creativity. In general originality would relate to the story rather than to the words in which it is expressed. Yet reducing words to a language which can be understood by the readers can be original: so the manner in which the language of the Bible was explained by Mrs Cunningham can be original.’<sup>14</sup>

This view that it is creativity which is important is consistent with decisions in England relating to disputes between possible joint authors. In *Flyde Microsystems v Key Radio Systems Ltd*<sup>15</sup> which concerned computer software, Laddie J held that the author must have contributed ‘the right kind of skill and labour’.<sup>16</sup>

[1.08] Although skill and labour must be expended to produce a work, it is not necessary for a work to be ‘novel’ or absolutely new and it is important not to confuse the Copyright Act’s requirement of originality with the Patent Act’s requirement of novelty. In *Sands v McDougall Proprietary Ltd*,<sup>17</sup> the Australian High Court held that the word ‘original’ does not imply inventive originality when used in the context of copyright. It was held to be sufficient that the work be the production of something in a new form as a result of the skill, labour and judgement of the author.<sup>18</sup> Similarly, just writing down a note of somebody else’s speech can be sufficient to give rise to copyright.<sup>19</sup> However, the fact that skill and labour has been expended may not be sufficient. In *Exxon Corp v*

---

<sup>13</sup> [2000] 1 IR 74 at 93.

<sup>14</sup> [2000] 1 IR 74 at 94.

<sup>15</sup> *Flyde Microsystems v Key Radio Systems Ltd* [1998] FSR 449.

<sup>16</sup> *Flyde Microsystems v Key Radio Systems Ltd* was followed in *Hadley v Kemp* [1999] EMLR 589. Park J stated that: ‘contributions by the plaintiffs, however significant and skillful to the performance of the musical works are not the right kind of contributions to give them shares in the copyrights. The contributions need to be the creation of the musical works, not to the performance or interpretation of them’.

<sup>17</sup> *Sands v McDougall Proprietary Ltd* [1917] 23 CLR 49.

<sup>18</sup> Approved in *Express Newspapers v News (UK) Plc* [1991] FSR 36. See also *Radio Telefís Éireann v Magill TV Guide Ltd (No 2)* [1989] IR 554, [1990] ILRM 534 and *Allied Discount Card Ltd v Bord Fáilte Éireann* [1991] 2 IR 185, [1990] ILRM 811.

<sup>19</sup> *Walter v Lane* [1900] AC 539.

*Exxon Insurance Consultants*<sup>20</sup> the Court of Appeal held that although a considerable amount of research had gone into selecting the name 'Exxon' it still was not protected as a literary work.

### **The fixation requirement**

[1.09] The CRRA 2000–2004 provide that 'Copyright shall not subsist ... until that work is recorded in writing or otherwise'.<sup>21</sup>

Copyright law will only apply to one of these works if it has been recorded or fixed in some way. Therefore, if you simply think of a poem or hum a tune it will not receive the protection of copyright law, it must be recorded. The requirement of fixation is necessitated by the need for evidence, so that the existence of a particular work at a particular time can be proven. Copyright law confers a monopoly and 'there must be certainty in the subject matter of such monopoly in order to avoid injustice to the rest of the world'.<sup>22</sup> As was stated by Barron J in *Gormley v EMI Records (Ire) Ltd* 'the work must be recorded in order to determine the date on which it is made'.<sup>23</sup>

The requirement of fixation caused the Supreme Court some difficulty in *Gormley v EMI Records (Ire) Ltd*. That case considered the fixation requirement under the Copyright Act 1963, which required that a literary work be 'recorded, in writing or otherwise'.<sup>24</sup> The court had to decide whether a tape recording, which was basically a magnetic trace on a metal strip, could amount to 'writing' for those purposes. The court concluded that:

'proper construction of the provision must allow other material form to apply also to literary work. Nor is there any distinction in principle between taking down speech in shorthand and recording it on tape. Yet, in my view, the symbol which comprises the notation must be capable, without more, of being understood. This is not so with a magnetic trace. As a result, it is not entitled to protection as a literary work'.<sup>25</sup>

[1.10] It has to be doubtful that the Supreme Court's view of literary work in *Gormley* could apply to the CRRA 2000–2004. By the year 2000 the Oireachtas would have been well aware of the existence of information technology and indeed makes the text available electronically itself. A work dictated to a stenographer will acquire protection from the time the shorthand note is taken down<sup>26</sup> and the protection available to a speech taken down in shorthand was acknowledged in *Gormley*. Copyright will subsist in a lecture given by a professor or a judgment given in court but only if it is recorded with the consent of the author. Consent may be implied: the professor will assume that his students will take notes; the judge will similarly assume that counsel will note his

---

<sup>20</sup> *Exxon Corp'n v Exxon Insurance Consultants* [1982] RPC 69.

<sup>21</sup> CRRA 2000–2004, s 18(1).

<sup>22</sup> Per Farwell LJ in *Tate v Fullbrook* [1908] 1 KB 821 at 832–833, approved in *Green v Broadcasting Corporation of New Zealand* [1989] 2 All ER 1056 and [1989] RPC 700.

<sup>23</sup> *Gormley v EMI Records (Ire) Ltd* [2000] 1 IR 74 at 89. This does create a problem for works of folklore, which may only exist in an oral tradition; see CRRA 2000–2004, s 92.

<sup>24</sup> Copyright Act 1963, s 3(2).

<sup>25</sup> *Gormley v EMI Records (Ire) Ltd* [2000] 1 IR 74 at 89–90.

<sup>26</sup> *Donoghue v Allied Newspapers Ltd* [1938] Ch 106.

judgment. There may be limits to this consent: a student will not have the right to publish his class notes regardless of whether they are summaries<sup>27</sup> or verbatim transcripts.<sup>28</sup>

[1.11] The status of works which are recorded for the first time without the consent of the author may give rise to an interesting question as to whether they are protected under the CRRA 2000–2004.<sup>29</sup> This view is strengthened by the fact that although this provision of the Act is very similar to that in the UK’s 1988 legislation there is no equivalent of the UK provision<sup>30</sup> which provides that copyright will apply to a recording of a work regardless of whether the recording was carried out with the permission of the author.<sup>31</sup> The introduction of a specific requirement of fixation is a change from the situation which existed under the 1963 Act, but it was a requirement of the Berne Convention<sup>32</sup> and the Rome Convention.<sup>33</sup> A performer will have the protection of copyright law, but professors and judges may not come within the Act’s definition of performers as ‘actors, singers, musicians, dancers or other persons who act, sing, deliver, declaim, play in, interpret or otherwise perform ... works’.<sup>34</sup> This question may be resolved if it is kept in mind that original works are mental creations and are only recorded in a physical form. The fact that the Act will not protect something until it is recorded suggests that works can exist prior to the point at which they are recorded. This view is consistent with the provision that copyright protects expression and not ideas; until a work is recorded it exists as an idea. So the author or creator of a work will have the right to control such unauthorised first-time recordings and the copying or other dealings with them. However, their rights with regard to the term of copyright or indeed ultimate ownership of the work will not be prejudiced by this unauthorised recording. At the same time the person who does the recording of a work will be entitled to copyright in that recording. The CRRA 2000–2004 provide that copyright may subsist in a work that is recorded and also subsist in the recording of that work,<sup>35</sup> which may suggest that these two rights can subsist simultaneously. In *Walter v Lane*,<sup>36</sup> it was held that a journalist who transcribed a public speech was entitled to copyright in his record of that speech and he was successful in his action against the defendant who had given the original speech and who had copied the plaintiff’s report.<sup>37</sup>

---

<sup>27</sup> *Caird v Sime* [1887] 12 App Cas 327.

<sup>28</sup> *Nichols v Pitman* [1884] 24 Ch 274.

<sup>29</sup> CRRA 2000–2004, s 18(1).

<sup>30</sup> UK Copyright, Designs and Patents Act 1988, s 3(2).

<sup>31</sup> UK’s CDPA 1988, s 3(3) reads ‘it is immaterial for the purposes of sub-s 2 whether the work is recorded by or with the permission of the author and where it is not recorded by the author, nothing in that subsection affects the question of whether copyright subsists in the record as distinct from the work recorded.’

<sup>32</sup> Berne Convention, art 2(2).

<sup>33</sup> Rome Convention. For example arts 13 and 14.

<sup>34</sup> CRRA 2000–2004, s 202(1). Section 202(2) states that a performance of a literary work includes a reading or recitation.

<sup>35</sup> CRRA 2000–2004, s 18(3).

<sup>36</sup> *Walter v Lane* [1990] AC 539.

<sup>37</sup> The decision was endorsed in *Express Newspapers Plc v News (UK) Ltd* [1990] FSR 359. See also *Sands McDougall v Robinson* [1917] 23 CLR 49.

### Literary works

[1.12] Copyright will subsist in a literary work, the CRRRA 2000–2004 define a literary work as ‘a work, including a computer program, but does not include a dramatic or musical work or an original database, which is written, spoken or sung.’

This definition would appear to be deliberately vague; its application will vary from case to case depending upon the individual facts. It may be tempting to try and formulate some concise definition of what exactly constitutes a literary work, but this would be inappropriate and unwise. The Oireachtas has never given a clear definition and courts appear unwilling to give anything more than direction limited by the facts of any individual case. In *Exxon Corp v Exxon Insurance Consultants International*, the English Court of Appeal approved the following quotation ‘a literary work is intended to afford either information or instruction or pleasure in the form of literary enjoyment.’<sup>38</sup>

[1.13] In *RTÉ & Ors v Magill TV Guide Ltd & Ors*,<sup>39</sup> Lardner J offered the following definition:

‘Literary work cannot in my judgment be confined to a work exhibiting literary art or style. Rather it has the broad sense of any written or printed composition’.<sup>40</sup>

[1.14] This definition is consistent with the view that the quality of a literary work is not important. In *University of London Press v University Tutorial Press*<sup>41</sup> Peterson J stated:

‘the words ‘literary work’ cover work which is expressed in print or writing, irrespective of the question of whether the quality or style is high. The word literary seems to be used in a sense somewhat similar to the use of the word ‘literature’ in political or electioneering literature and refers to printed matter’.<sup>42</sup>

[1.15] A wide variety of material has been held to be a literary work for the purposes of copyright law, including the law list,<sup>43</sup> tallies for bridge parties,<sup>44</sup> stud books<sup>45</sup> and telegraph codes.<sup>46</sup> In *Hodges v Walsh*,<sup>47</sup> it was held that law digests and reports were protected and in *RTÉ and Ors v Magill TV Guide Ltd & Ors*<sup>48</sup> the Supreme Court held that RTÉ’s radio and television schedules were literary works for the purposes of the Copyright Act 1963.

---

<sup>38</sup> *Hollinrake v Truswell* [1894] 3 Ch 420, per Davy LJ. But this definition is too wide to be conclusive or useful, see Laddie, p 34 and *Apple Computer v Computer Edge* [1984] FSR 496.

<sup>39</sup> *RTE and ors v Magill TV Guide Ltd & Ors* [1989] IR 554.

<sup>40</sup> *RTE and ors v Magill TV Guide Ltd & Ors* [1989] IR 554 at 563.

<sup>41</sup> *University of London Press v University Tutorial Press* [1916] 2 Ch 601.

<sup>42</sup> [1916] 2 Ch 601 at 608–609. Approved by the House of Lords in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 277.

<sup>43</sup> *Stevens & Sons v Waterlow Sons Ltd* [1877] 41 JP 37.

<sup>44</sup> *Stevenson v Crook* [1938] Ex (Can) 299.

<sup>45</sup> *Weatherby & Sons v International Horse Agency* [1910] 2 Ch 297.

<sup>46</sup> *Anderson & Co v Lieber Code Co* [1917] 2 KB 469.

<sup>47</sup> *Hodges v Walsh* [1840] 2 IR Eq R 266.

<sup>48</sup> *RTÉ & ors v Magill TV Guide Ltd & Ors* [1989] IR 554, [1990] ILRM 534.

[1.16] One good reason for rejecting qualitative tests is that standards change with the passage of time.<sup>49</sup> The European Union rejected efforts to introduce the qualitative standards into copyright law with the passing of the Directive on the Legal protection of Computer programs.<sup>50</sup> One motivation for this enactment was that German courts had started to develop what they termed the ‘average programmer test’<sup>51</sup> under which a software program would only receive copyright protection if it was of a standard higher than that which might be produced by the average programmer. So the Directive on the Legal protection of Computer programs provides that ‘no tests as to the qualitative or aesthetic merits of the program should be applied’.<sup>52</sup> However, *Fornet v Pearson*<sup>53</sup> suggests that a literary work must at least be the product of some rational mental process and not just a drunken scrawl. On the other hand, the meaning of a work does not have to be apparent to everyone. In *DP Anderson & Co v Lieber Code Co*<sup>54</sup> it was held that a complex code for sending telegrams was protected by copyright as a literary work although the code would have appeared as a meaningless collection of letters to anyone but those who had access to the means to decipher it.<sup>55</sup>

### Descriptive titles and advertising slogans

[1.17] One important limitation on the application of copyright law is that a single word or a very short sequence of words will not be protected by copyright. The leading case on this point is the English Court of Appeal in *Exxon Corp v Exxon Insurance Consultants* where it was held that the single word ‘Exxon’ was not a literary work. The English courts have also refused applications to protect the titles of books, newspapers and other works as copyright works themselves.<sup>56</sup> So newspaper titles using words such as ‘Times’,<sup>57</sup> ‘Star’,<sup>58</sup> and ‘Herald’<sup>59</sup> have all been refused copyright protection. Although in *News Group Newspapers Ltd v Mirror Group Newspapers*<sup>60</sup> it was assumed that the mast head of *The Sun* tabloid could be protected as an artistic work. Of course, the newspaper owners could all have had other remedies available to them under the laws of passing off and trademarks. The reason for rejecting the applications in respect of

<sup>49</sup> *Sinanide v La Maison Kosmeo* [1928] 139 LT 365, CA is a relatively obscure example of a case where a judge came close to refusing copyright protection on qualitative grounds.

<sup>50</sup> Directive 250/91 on the Legal protection of Computer programs [1991] OJ L122/42.

<sup>51</sup> Hoeren, *Copyright, Software Protection in the EC*, Jongen and Meijboom (eds) (Kluwer Law and Taxation Publishers), p. 76.

<sup>52</sup> Directive 250/91, Recital 8.

<sup>53</sup> *Fornet v Pearson* [1897] 14 TLR 82.

<sup>54</sup> *DP Anderson & Co v Lieber Code Co* (1917) 2 KB 469.

<sup>55</sup> Similarly, in *Express Newspapers v Liverpool Daily Post and Echo Plc* [1985] 3 All ER 680 cards which were distributed with a newspaper contained letters which were arranged in a 5 X 5 pattern were held to be literary works.

<sup>56</sup> See *Coppinger on Copyright* p 970. Of course, protection may well be available under the law of passing-off and trademarks if the owner has been prudent in registering their title.

<sup>57</sup> *George Outram & Co Ltd v The London Evening Newspapers Co Ltd* [1911] 27 TLR 231.

<sup>58</sup> *Morning Star Co-Operative Society Ltd v Express Newspapers Ltd* [1979] FSR 113.

<sup>59</sup> *Tamworth Herald Co Ltd v Thomson Free Newspapers Ltd* [1991] FSR 337.

<sup>60</sup> *News Group Newspapers Ltd v Mirror Group Newspapers* [1989] FSR 126.

these titles was they were all wholly or partially descriptive. Similarly, the title of a television or radio programme cannot be copyrighted<sup>61</sup> or the title of a book<sup>62</sup> or song<sup>63</sup> although issues of misrepresentation may arise.<sup>64</sup>

[1.18] The copying of advertising slogans is probably better dealt with by the law of passing off and trademarks. Those who have tried to protect such slogans by way of copyright law appear to have met with little success. The slogan ‘youthful appear is a social necessity not a luxury’<sup>65</sup> was refused the protection of copyright law and it has been argued that the courts appear to be denying protection on the grounds that the slogans and titles at issue are too short.<sup>66</sup> However, in *Kirk v Fleming*<sup>67</sup> a slogan containing four sentences and 28 words did not qualify for copyright protection.<sup>68</sup> A further issue here is that courts may reject protection for short phrases as they lack the necessary skill and judgment. This may be unfair as advertising copyrighters may put extraordinary amounts of work, research and creativity into selecting and drafting a particular slogan; however, in the *Exxon* case the plaintiffs had also done a large amount of research but still failed to qualify for protection.<sup>69</sup>

### **Computer programs<sup>70</sup>**

#### *Musical works*

[1.19] The CRRRA 2000–2004 define a musical work as ‘a work consisting of music, but (that) does not include any words, or action, intended to be sung, spoken or performed with the music’.<sup>71</sup> So the melody of a song will be protected but not the lyrics or the choreography which accompanies it. The Act contains no requirement that music be recorded in writing or other notation, although it must be fixed in some form. It would seem that how music is heard is more important than how it is recorded or stored. In

---

<sup>61</sup> *Green v Broadcasting Corp of New Zealand* [1989] RPC 469.

<sup>62</sup> *Dicks v Yates* [1881] 18 Ch 76.

<sup>63</sup> *Francis Day & Hunter Ltd v Twentieth Century Fox* [1940] AC 112.

<sup>64</sup> *Chappell v Sheard* [1885] 2 K & J 117 and *Willard King Organisation v United Telecasters (Sydney) Ltd* [1981] 2 NSWLR 547.

<sup>65</sup> *Sinanide v La Maison Kosmeo* [1928] 139 LT 365.

<sup>66</sup> *Laddie*, p 51.

<sup>67</sup> *Kirk v Fleming* [1928–35] MCC 44.

<sup>68</sup> See also *Noah v Shuba* [1991] FSR 14.

<sup>69</sup> The Misleading Advertising Directive 84/450 (1984) OJ L250/17 as amended by Directive 97/55 (1997) OJ L 290/18 appears to create an exception from intellectual property law for comparative advertising. Recital 15 states that ‘...such use of another’s trademark, tradename or other distinguishing marks does not breach this exclusive right in cases where it complies with the conditions laid down by this Directive, the intended target being solely to distinguish between them and thus to highlight differences objectively. Therefore, the imitation of a title or slogan for the purposes of the comparative advertising under the Directive is exempted by this Directive. This exemption applies not just to trademarks but also to ‘trade names’ which might be protected by copyright.’

<sup>70</sup> See Chapter 4.

<sup>71</sup> CRRRA 2000–2004, s 2(1).

*Austin v Columbia*<sup>72</sup> new arrangements in an opera were created by the plaintiff, which proved very popular. The defendant employed a composer to make his own arrangements from old tunes, which sounded similar to the plaintiff's work. In view of the fact that the defendant's piece had been derived from the plaintiff's and sounded similar, the fact that the notes used were not precisely the same was no defence.<sup>73</sup> The use of what might be termed the 'hearing' test may serve to resolve a potential difficulty in distinguishing between the protection afforded to computer programs and musical works stored on a computer in formats such as MP3. A computer program can be written which will create sounds in the same way as an MP3 file and it would appear to be inconsistent to protect one work as a program because it is written in JAVA and protect another as a musical work because it is saved as an MP3 file. Both types of work are stored electronically as a stream of 0s and 1s, however, the program may operate to cause figures to appear on the computer's VDU and the music file will cause a song to be played on its speakers. It is true that the MP3 file cannot be played without the intervention of a computer program but application programs such as Microsoft Word will not run unless an operating system such as Windows 98 is also in use. The difference between the protection of computer programs (which are protected as literary works) and musical works is significant. Distinguishing between musical files and computer programs by converting them into their human readable form, some musical works should be capable of being reduced to a form of musical notation such as sheet music, which the computer program cannot. But that distinction might not apply in the case of music that was formulated exclusively on a computer, to which the conventional rules of composition and notation may not be applicable.

### **Artistic works**

#### ***Photographs***

[1.20] The copyright protection of photographs is discussed in Chapter 5.

#### ***Painting***

[1.21] The Act contains no definition of the term 'painting', in view of the various modern schools of art; the courts would have to take a very broad view of what constitutes a painting. Although it would appear that some form of paint and canvas is necessary, the courts have been unwilling to stretch this definition to the application of make-up to the human face. In *Merchandising Corpn of America Inc v Harpbond Inc*<sup>74</sup> a pop singer<sup>75</sup> had created what he termed his 'Prince Charming' style. This particularly involved the application of make-up to his face to create a blue band between two red bands on one of his cheeks. The defendants had produced a poster which showed the plaintiff made up in this style; the plaintiff then sought an injunction claiming that the

---

<sup>72</sup> *Austin v Columbia* (1917–1923) MCC 398.

<sup>73</sup> See also *Francis Day Hunter v Bron* (1963) Ch 587.

<sup>74</sup> *Merchandising Corpn of America Inc v Harpbond Inc* [1983] FSR 32.

<sup>75</sup> Adam Goddard whose stage name was 'Adam Ant'.

application of make-up to his face was a ‘painting’. His application failed, the court stating that:

‘A painting must be on a surface of some kind. The surface upon which the startling make-up was put was Mr Goddard’s face and, if there was a painting, it must be the marks plus Mr Goddard’s face. If the marks are taken off the face there cannot be a painting. A painting is not an idea: it is an object; and paint without a surface is not a painting. Make-up, as such, however, idiosyncratic it may be as an idea cannot possibly be a painting for the purpose of the Copyright Act 1956.’

The apparent breadth of this statement has been criticised and it has been suggested that the proper grounds for this decision should have been that three coloured lines on a face were too trite to be an original painting and that the plaintiff should have failed because his alleged work lacked the necessary originality.<sup>76</sup> Still, if the above quotation were to be adopted by the Irish courts in relation to art work generated on a computer, it would support the proposition that a work generated exclusively in a computer’s memory is not a painting as it lacks a ‘surface’. But as suggested above to hold that paintings could not be generated on a computer would give rise to an anachronistic result.

#### ***Drawings, diagrams, maps, charts, plans***

[1.22] The above terms are probably interchangeable as a map could also be a drawing or a plan or chart. A conflict has occurred between the protection available to design material and that available to drawings of designs. In the UK copyright protection had been extended to drawings for standard vehicle parts such as exhausts<sup>77</sup> and gear boxes.<sup>78</sup> However, the Oireachtas rejected this extension in the Copyright (Amendment) Act 1987 and s 79 of the 2000 Act now provides that commercially reproducing a three dimensional object from ‘a work in two dimensions (other than a work relating to a work of architecture)’ will not generally amount to an infringement in the copyright of the two dimensional work.

#### ***Engravings, etchings, lithographs, woodcuts, prints or similar works***

[1.23] Engraving means to inscribe, cut or carve on a hard surface using a sharp implement whereas etching uses acid and a lithograph uses ink-rejecting substances to the same end.<sup>79</sup> A woodcut is an engraved wooden block. In the context of this section, prints may be simply the product of these now relatively obsolete printing processes. But there is no reason why the section should be read in this limited way and prints could be generated in any way such as using a laser or bubble jet printer. The use of the term ‘similar works’ should ensure that this section is interpreted broadly and it could be argued that a file of electronic data held on a computer which can instruct an attached printer to produce a print depicting a dog or other image has the same function as woodcuts, engravings or lithographs. But caution should be applied before taking this

---

<sup>76</sup> Laddie, p. 196.

<sup>77</sup> *British Leyland Motor Corporation v Armstrong Patents Co Ltd* [1982] FSR 481.

<sup>78</sup> *Nichols v Rees* [1979] RPC 127.

<sup>79</sup> The *Concise Oxford English Dictionary* (8th edn, 1990). See also the protection of currency engravings under Chapter 24 of the CRR 2000–2004 .

sort of analogy too far. In *Wham-O Manufacturing Co v Lincoln Industries*<sup>80</sup> the New Zealand Court of Appeal held that a mould for a Frisbee was an engraving and the actual Frisbee was a print. This approach was rejected by the Australian courts in *Greenfield Products v Rover-Scott Bonnar Ltd*<sup>81</sup> and it has been suggested that the English courts would concur.

### *Collages*

[1.24] The copyright protection of collages is discussed in Chapter 4.

### *Sculptures*

[1.25] The Act simply defines a sculpture as ‘including any cast or model made for the purposes of sculpture. It should come as no surprise that this category of work has been expanded far beyond the product of sculptors such as Henry Moore. Although, it has been held that toy soldiers<sup>82</sup> and the plaster shapes used to produce the mould of sandwich maker parts were held to be sculptures,<sup>83</sup> the Irish courts might be unwilling to hold that something of this nature could truly be described as an artistic work. These interpretations of the term may be contrasted with the dictionary definition of sculpture as ‘the art of making forms, often representational, in the round or in relief by chiselling stone, carving wood, modelling wood, casting metal etc’.<sup>84</sup> Computer Assisted Design (CAD) programs that can be used to design three dimensional objects within a computers memory are now commonplace. If such a program is connected to an appropriate device such as a saw it may be used to produce an object such as an artistic sculpture. It may be anachronistic to extend protection to wooden casts or mouldings<sup>85</sup> and refuse it to data which is kept for the purpose of producing a sculpture when both processes have the same object. It will depend on the facts of any particular case as to whether the products of such a process are the product of the creative process necessary to make them artistic.<sup>86</sup>

### **Works of architecture**

[1.26] Works of architecture can be either ‘buildings or models for buildings’<sup>87</sup> and ‘building’ includes ‘any structure’.<sup>88</sup> Although it has been held that a building means a block of brick or stone work covered in by a roof,<sup>89</sup> a garden has also been held to be a structure.<sup>90</sup> The question of creativity may be at issue in deciding eligibility for

---

<sup>80</sup> *Wham-O Manufacturing Co v Lincoln Industries* [1985]RPC 127.

<sup>81</sup> *Greenfield Products v Rover-Scott Bonnar Ltd* [1990] 17 IPR 417.

<sup>82</sup> *Britain v Hanks Bros* [1902] 86 LT 764.

<sup>83</sup> *Breville Europe plc & ors v Thorn EMI Domestic Appliances Ltd* [1995] FSR 77.

<sup>84</sup> *The Concise Oxford English Dictionary* (8th edn, 1990).

<sup>85</sup> As occurred in *Wham-O Manufacturing Co v Lincoln Industries* [1985]RPC 127 and *Greenfield Products v Rover-Scott Bonnar Ltd* [1990] 17 IPR 417.

<sup>86</sup> Laddie, p 204.

<sup>87</sup> CRR 2000–2004, s 2(1).

<sup>88</sup> CRR 2000–2004, s 2(1).

<sup>89</sup> *Moir v Williams* [1892] 1 QB 264.

<sup>90</sup> *Vincent v Universal* [1928–35] MCC 275.

protection and the broad definition of building as any structure means that some forms of sculpture might alternatively qualify for protection under this heading. Note that models are only protected where they are for buildings.

#### ***Works of artistic craftsmanship***

[1.27] This category would appear to be a catch-all to protect works such as embroidery and pottery which might not be protected otherwise.<sup>91</sup> One type of art work which might come into this category is ‘installation art’ such as ‘Carl Andre’s bricks, in Stone Circles created by Richard Long, in Rachel Whiteread’s house, in the living sculptures of Gilbert and George’<sup>92</sup> The definition of artistic craftsmanship is highly problematic, which means that creators of such works may prefer to rely upon categories such as collages and sculptures.

#### **Dramatic works**

[1.28] This term is defined as including ‘a choreographic work or a work of mime’.<sup>93</sup> It is not necessary for any words to be spoken in order to qualify for protection but it is essential for the protection that the work be written down or recorded in some form. So improvisational comedy will not be protected unless it is video taped or recorded by taking notes.<sup>94</sup> Dramatic works are a separate category of works distinct from literary works and once a play is written down or otherwise recorded, that writing will be protected as a literary work. It is the performance that is protected as a dramatic work and converting the work from a dramatic work to a literary work and vice versa would give rise to a claim for infringement for adaptation.<sup>95</sup> In *Fuller v Blackpool Winter Gardens*,<sup>96</sup> it was held that singing ‘Daisy, Daisy’ while dressed as a cyclist was not a dramatic piece because no acting was required to present it. Television programs give rise to problems. In *Television NZ v Newsmonitor Services*<sup>97</sup> it was held that the news and current affairs programmes comprising video and discuss lacked the choreography to make them a dramatic work. In *Green v Broadcasting Corp of New Zealand*,<sup>98</sup> the Privy Council stated that ‘a dramatic work must have sufficient unity to be capable of performance and that the features claimed ... being unrelated to each other ... lack that essential characteristic In this case, the format of *Opportunity Knocks* which included using a clapometer, did not qualify as a dramatic work. In the Canadian case of *FWS*

---

<sup>91</sup> *Coppinger on Copyright* p 85.

<sup>92</sup> *Creation Records v News Group Newspapers* [1997] EMLR 444.

<sup>93</sup> CRRA 2000–2004, s 2(1). The 1963 Act defined dramatic works as including ‘a choreographic work or entertainment in dumb show if reduced to writing in the form in which the work or entertainment is to be presented, but does not include a cinematograph film, as distinct from a scenario or script for a cinematograph film Section 2.

<sup>94</sup> See *Tate v Thomas* [1921] 1 Ch 503 where the creator of the scenes characters and some lines of a play was held not to be an author of the play as others had composed the major part of the lines, lyrics and music of the play. Also see *Tate v Fullbrooke* [1908] 1 KB 821.

<sup>95</sup> CRRA 2000–2004, s 43(2) (a)(ii).

<sup>96</sup> *Fuller v Blackpool Winter Gardens* [1895] 2 QB 429.

<sup>97</sup> *Television NZ v Newsmonitor Services* [1994] 2 NZLR 91.

<sup>98</sup> *Green v Broadcasting Corp of New Zealand* [1989] 2 All ER 1056.

*Joint Sports v Copyright Board*,<sup>99</sup> a sports game was not protected as a dramatic work even though it contained choreographic elements.<sup>100</sup>

[1.29] In *Norowzian v Arks Ltd (No 2)*<sup>101</sup> it was held that ‘a work of dance or mime must be capable of being danced or mimed’. This case related to the Guinness advertisement, *Anticipation*, which involved an actor dancing to music. At the time of hearing the case, the plaintiff had become a successful director of advertising films but in 1992 in an effort to get work he had created a show reel, entitled *Joy*, which he sent to advertising agencies. This film is ‘a striking film which made a big impression on those to whom a copy of it was sent’. The defendants produced their own film using similar techniques including the ‘jump cutting’ editing technique employed by the plaintiff in producing their advertisement. The plaintiff sued for infringement of his dramatic work but failed, Rattee J stating:

‘I accept that, had the finished film been a recording of the dance routine performed by the actor in *Joy* in front of the camera, it might well have presented a recording of a work of dance or mime and therefore, a dramatic work. It does not. A large, probably the major, part of the effect of the film is the ‘quirky’ or surreal effect produced by the editing techniques used by Mr Norowzian in the cutting room after shooting of the film was complete, and in particular, the technique of jump cutting. The finished result is something very different from a recording on film of the dance or mime routine performed by the actor. The result is that, when the film is known to the viewer, what he sees is a sequence of movements apparently performed by the actor, but which in reality was not, and could not physically have been, performed by any actor. For the effect of the editing techniques used by Mr Norowzian has been to excise certain parts of the sequence of movements performed by the actor and to join together the parts immediately preceding and immediately following the parts excised. The result is striking, but unreal. No human performer could have performed the routine displayed by the film. It would be a physical impossibility’.<sup>102</sup>

Although Rattee J concluded that this film did not constitute a dramatic work, he went on to examine whether it was possible that there had been copying between the two works. Having viewed the two films, he noted that although, the two dancers did employ similar individual movements, they were performed in different sequences in each film. But he found that ‘what are much more strikingly similar between the two films, are the filming and editing styles used by the respective directors’.<sup>103</sup> Since these styles were not protected by copyright, there was no infringement.

---

<sup>99</sup> *FWS Joint Sports v Copyright Board* [1991] 22 IPR 429.

<sup>100</sup> Also *Seltzer v Sunbrook* 22 F Supp 622.

<sup>101</sup> *Norowzian v Arks Ltd (No 2)* [1999] EMLR 67.

<sup>102</sup> The decision of Rattee J was appealed, but the appeal was dismissed see 143 SJ LB 279, (1999) *The Times* 14 November.

<sup>103</sup> ‘Both use a fixed or ‘locked off’ camera position. Both use varying camera speeds and, in editing, both use jump cutting techniques which, together with the varying speeds and the sepia tinted, colourless settings produce an effect of somewhat disturbing unreality or quirkiness

### **Films**

[1.30] The CRRA 2000–2004 make it clear that all films are protected, not just original films.<sup>104</sup> It would appear that this has the effect of actually limiting the protection available since the creative process which may be a vital part of creating film is not protected. However, protection might be available for the script of the film. This limitation can be compared to the very broad protection available to computer programs and the preparatory work and design materials used to create them. The limitations of this protection are illustrated by the case of *Norowzian v Arks Ltd (No 1)*<sup>105</sup> where Steinfeld QC<sup>106</sup> held that ‘you either copy the film or you do not’. These facts are the same as in *Norowzian v Arks Ltd (No 2)* above. The difference is that in the first case the plaintiff claimed copyright infringement in his film as opposed to his dramatic work. The allegation was that ‘what the defendants have commissioned to be made is what I think called in the vernacular a re-shoot of the plaintiffs film but not copying a single frame Steinfeld QC considered that:

‘a re-shooting of a film sequence in which not a single frame of the original copyright film has been included as is the case here, cannot in my judgement be said to be a copy of the film.’

[1.31] The defendants had been inspired by elements of the plaintiff’s work, but had not copied it directly. Therefore the claim failed.<sup>107</sup> The CRRA 2000–2004 would appear to suggest that copyright may subsist separately in at least the screenplay, the dialogue and the music of the film as well as the film itself.

[1.32] Films are broadly defined as ‘a fixation on any medium from which a moving image may, by any means, be produced, perceived or communicated through a device’.<sup>108</sup> So the definition is not limited to films shot on chemical film and would extend to a magnetic video tape or digital images stored on a computers hard drive. Computer games are now frequently of such high quality that they are indistinguishable from films or cartoons; an allegation that the defendant had infringed the plaintiff’s film copyright in a computer game was made, but not argued, in *Nova Productions v Mazooma Games*.<sup>109</sup>

### **Sound recordings**

[1.33] Copyright will not subsist in a sound recording until the first fixation of the sound recording is made.<sup>110</sup> The term ‘sound recording’ is defined as meaning ‘a fixation of sounds, or of the representations thereof, from which the sounds are capable of being reproduced, regardless of the medium on which the recording is made, or the method by

---

<sup>104</sup> CRRA 2000–2004, s 17(1).

<sup>105</sup> *Norowzian v Arks Ltd (No 1)* [1998] FSR 394.

<sup>106</sup> Sitting as a deputy Judge in the English High Court.

<sup>107</sup> See also *Telmak Teleproducts Australia Pty Ltd v Bond International Pty Ltd* [1985] 5 IPR 203.

<sup>108</sup> CRRA 2000–2004, s 2(1).

<sup>109</sup> *Nova Productions v Mazooma Games* [2006] EWHC 24 (Ch), [2006] All ER (D) 131 (Jan).

<sup>110</sup> CRRA 2000–2004, s 19.

which the sounds are reproduced'.<sup>111</sup> This protection will be in addition to the protections available for musical works and performances although it does not extend to 'sound-alike' records.<sup>112</sup> The development of digital technologies has created a market for 'cleaned up' versions of old records without the hiss and static of the original recording medium. Such a cleaned up record would be protected by this provision.

#### *Typographical arrangements*

[1.34] The CRRA 2000–2004 provide that copyright subsists in 'the typographical arrangement of published editions'.<sup>113</sup> In *The Newspaper Licensing Agency Ltd v Marks & Spencer Plc*<sup>114</sup> the plaintiff owned the copyright in the typographical arrangements in a large number of newspapers. The defendants subscribed to a newspaper cutting agency which would provide it with copies of articles of interest from a wide variety of newspapers. The plaintiff sued claiming that these copies infringed their copyright. However the House of Lords held that since none of the cuttings copied by the defendant sufficiently reproduced the layout of any page to amount to a substantial part of its typographical arrangement, there was no breach of that copyright.

#### *Databases*

[1.35] The copyright protection of databases is discussed in Chapter 14.

#### *Performers' rights*

[1.36] The CRRA 2000–2004 creates rights for performers. The Act defines a performance as meaning:

'a performance of any actors, singers, musicians, dancers or other persons who act, sing, deliver, declaim, play in, interpret or otherwise perform literary, dramatic, musical or artistic works or expressions of works of folklore, which is a live performance given by one or more individuals, and shall include a performance of a variety act or any similar presentation.'<sup>115</sup>

A performance of a literary work will include 'a reading or recitation'<sup>116</sup> and the performance of a dramatic work includes a 'a choreographic work or a work of mime'.<sup>117</sup> A recording of a performance means any fixation 'made directly or indirectly from the live performance ... made from a broadcast of, or cable programme including, the performance, or ... made directly or indirectly from another recording of the performance'.<sup>118</sup>

<sup>111</sup> CRRA 2000–2004, s 2(1).

<sup>112</sup> *Records Australia v Telmark Teleproducts (Aust) Pty Ltd* (1987) 9 IPR 440.

<sup>113</sup> CRRA 2000–2004, s 17(1), s 2(1), defines published edition in this context as meaning a published edition of the whole or any part of one or more literary, dramatic or musical works or original databases See *Machinery Market v Sheen publishing* [1983] FSR 431.

<sup>114</sup> *The Newspaper Licensing Agency Ltd v Marks & Spencer Plc* [2001] UKHL 38, [2003] 1 AC 551.

<sup>115</sup> CRRA 2000–2004, s 202(1).

<sup>116</sup> CRRA 2000–2004, s 202(2).

<sup>117</sup> CRRA 2000–2004, s 202(3).

<sup>118</sup> CRRA 2000–2004, s 202(4).

## Authorship

[1.37] The whole purpose of copyright law is to encourage the creativity of authors. This makes the identification of the author a key function of copyright law. In general, the author of a copyright work will be the first owner and any subsequent owners will take their title from him or her.<sup>119</sup> The whole function of copyright is to confer certain rights, such as the ability to control copying or adaptation, on that owner. Even if the author does not retain ownership, his or her identity is important, as the date of their death will determine the date on which the copyright term expires.<sup>120</sup> The inclusion of moral rights in the Act means that the author will retain certain rights even if they do not retain ownership.<sup>121</sup> The CRRA 2000–2004 state that the term ‘author’ means ‘the person who creates a work’.<sup>122</sup>

[1.38] Under the CRRA 2000–2004 the term author will include the following:

- (a) in the case of a sound recording, the producer;
- (b) in the case of a film, the producer and the principal director;
- (c) in the case of a broadcast, the person making the broadcast or in the case of a broadcast which relays another broadcast by reception and immediate retransmission, without alteration, the person making that other broadcast;
- (d) in the case of a cable programme, the person providing the cable programme service in which the programme is included;
- (e) in the case of a typographical arrangement of a published edition, the publisher;
- (f) in the case of a work which is computer-generated, the person by whom the arrangements necessary for the creation of the work are undertaken;
- (g) in the case of an original database, the individual or group of individuals who made the database; and
- (h) in the case of a photograph, the photographer.<sup>123</sup>

[1.39] As noted above, creativity is not novelty: a person can create a work through the expenditure of skill and labour as opposed to novel thought. The identification of the author of a work may not be straightforward. In *Cummins v Bond*,<sup>124</sup> a psychic medium wrote a work called *The Chronicles of Cleo Phas* during a séance. The defendant edited the work and then sought to publish it. The resulting litigation was complicated by the fact that ‘the plaintiff and her witness and the defendant are all of opinion, and I do not doubt that the opinion is an honest one – that the true originator of all that is to be found in these documents is some being no longer inhabiting this world’.

However, Eve J held that he could only decide authorship with regard to those alive when the work first came into existence and held that the plaintiff was the author. This

---

<sup>119</sup> CRRA 2000–2004, s 17(4) provides that copyright will not subsist in a work unless the requirements for copyright protection specified in chapter 18 (sections 182-190) of Part II with respect to qualification are complied with.

<sup>120</sup> CRRA 2000–2004, Pt II Ch 3.

<sup>121</sup> CRRA 2000–2004, Pt II Ch 7.

<sup>122</sup> CRRA 2000–2004, s 21.

<sup>123</sup> *A & M Records Ltd v Video Collection International Ltd*.

<sup>124</sup> *Cummins v Bond* [1927] 1 Ch 167.

decision can be contrasted with the normal position that the person who merely takes down a work, such as a secretary, dictated by another will not be the author.<sup>125</sup> On the other hand, where a public speech is given, a reporter who takes down a note of the speech will be the author of his own work<sup>126</sup> and the speaker will be the author of his speech. This is acknowledged by the CRRA 2000–2004 which state that ‘copyright may subsist in a work that is recorded and may subsist in the recording of a work’.<sup>127</sup>

[1.40] The reporter will have to do something more than merely taking dictation and would have to exercise some skill and judgment in creating his work. In some circumstances, a reporter could even become the entire author of a work. In *Donoghue v Allied Newspapers*,<sup>128</sup> a racehorse jockey recounted various stories to a journalist who then wrote a series of articles for the *News of the World*. In subsequent litigation it was held that the jockey was not the author of the articles, as the journalist had given the articles their literary form. In *Gormley v EMI Records (Ire) Ltd*, it was suggested that certain people might not have the capacity to be authors. Barron J stated

‘It seems to me unlikely that a six-year-old would be in a position to exercise any original thought capable of being expressed when her sole purpose was to repeat the story which had been told to her by her teacher ... I do not suggest that a six-year-old can never have independent thought nor exercise sufficient skill or judgment for the purposes of obtaining a copyright. If the purpose is to copy, then a six-year-old would never have had sufficient independent originality to realise or to intend to give a different slant to the particular story which she had been told so as to make it a different thing.’<sup>129</sup>

It may seem unfair to refuse copyright protection to a six-year-old girl and grant it to computer-generated works in the 2000 Act. But the CRRA 2000–2004 state that the author of a computer-generated work is the ‘person by whom the arrangements necessary for the creation of the work are undertaken’.<sup>130</sup> In *Gormley*, the Supreme Court appeared to view the plaintiff’s teacher as being this person and the plaintiff as simply an automaton who reproduced her teacher’s work.

---

<sup>125</sup> See *Donoghue v Allied Newspapers Ltd* [1938] Ch 106.

<sup>126</sup> *Walter v Lane* [1990] AC 539; *Express Newspapers Plc v News (UK) Plc* [1991] FSR 36.

<sup>127</sup> CRRA 2000–2004, s 18(3).

<sup>128</sup> *Donoghue v Allied Newspapers* [1938] Ch 106.

<sup>129</sup> *Gormley v EMI Records (Ire) Ltd* [2000] 1 IR 74 at 93. A cautious approach should be taken before applying this dictum to other cases. The events, which gave rise to the work, had occurred in 1961, the Supreme Court was trying to assess authorship in 1998. After 37 years the plaintiff must have had difficulty recollecting a school day when she was a six-year-old. The view of the Supreme Court would be consistent with the view that young children are *doli incapax* (Children’s Act 2001, s 52) that is incapable of committing crime. It is also consistent with the decision in *Fornet v Pearson* [1897] 14 TLR 82 where it was held that a drunken scrawl was not protected by copyright, as the author’s rational faculties were virtually non-existent at the time the writing was made.

<sup>130</sup> CRRA 2000–2004, s 21.

### ***Sound recordings***

[1.41] The CRRA 2000–2004 make it clear that where a sound recording is produced, it is the producer who is the author of the work.<sup>131</sup> This definition is consistent with the view of the Supreme Court in *Gormley v EMI Records (Ire) Ltd*.<sup>132</sup> Since the Act provides that copyright may subsist in a work that is recorded and in the recording of that work, it may be necessary to distinguish between the two. In this case, ‘much of the emphasis placed on the plaintiff’s work is the charm in the way the story is recited. Emphasis was placed on the Dublin pronunciation of the word ‘certainly’. But that charm belongs to the sound recording and not to the literary work.’

### ***Films***

[1.42] Films are works of joint authorship by definition. The CRRA 2000–2004 state that the author of a film is the producer and principle director.<sup>133</sup> The producer is defined as ‘the person by whom the arrangements necessary for the making of the ... film ... are undertaken’.<sup>134</sup> The Act does not define ‘principle director’ and of course they may be the same person. In *Adventure Film v Tulley*,<sup>135</sup> it was held that a person who had been engaged as cameraman and who might have contributed some element to the direction of the film was not an author. It is very expensive to make a film and copyright law may follow the money to identify the author of a film, as opposed to examining the creative

---

<sup>131</sup> The Acts define a producer of a sound recording as ‘the person by whom the arrangements necessary for the making of the ... sound recording, ... are undertaken CRRA 2000–2004, s 2(1). The producer of the sound recording for copyright purposes may be a different person from the individual who is might be termed ‘Producer’ by the industry. In *A & M Records Ltd v Video Collection International Ltd* [1995] EMLR 25, a pair of ice skaters, wished to have two musical works recorded to accompany their ice-skating. A conductor was employed to produce this and he then employed an arranger, a dispute arose over which of these two men was in fact the person who had made the arrangements necessary for the making the recording. The conductor had done the following work:

Commissioned and paid for the musical arrangements of the arranger.

Booked and paid for the studio.

Engaged and paid for the musicians.

Engaged and paid for the scoring, a sound engineer and the fixer.

Paid for all incidental expenses such as taxis and food.

However, he was held not be the producer. Rather it was the agent of the ice skater’s production company who had originally arranged for the conductor carry out the above work. Of course, the copyrights in the performance recorded and the musical work performed may also exist in parallel with the copyright in the sound recording.

<sup>132</sup> *Gormley v EMI Records (Ire) Ltd* [1999] 1 ILRM 178.

<sup>133</sup> Minimum Notice and Terms of Employment Act 1973-2001, s 21(b).

<sup>134</sup> CRRA 2000–2004, s 2(1) in *Century Communications v Mayfair* [1993] EMLR 376, it was held that a company, which had initiated a film, organised and paid for it was the author and not a Chinese company which had helped in the shooting of the film.

<sup>135</sup> *Adventure Film v Tulley* (1982) *The Times*, 14 October 1982.

inputs. So *In re FG (Films) Ltd*,<sup>136</sup> the company which actually provided the finance, and not a shell company under its control, was held to be the author.<sup>137</sup>

#### **Broadcasts and cable programmes**

[1.43] The author of a broadcast is the person making the broadcast. In the case of a broadcast that relays another broadcast by reception and immediate retransmission, without alteration, then it will be the person making the first broadcast.<sup>138</sup> The CRRA 2000–2004 define the person making the broadcast as:

‘the person transmitting the programme, where he or she has responsibility to any extent for its contents, and ... any person providing the programme who makes the arrangements necessary for its transmission with the person transmitting that programme’.<sup>139</sup>

The author of a cable programme will be the person providing the cable programme service in which the programme is included.<sup>140</sup>

#### **Photographs**

[1.44] The CRRA 2000–2004 states that the photographer will be the author of a photograph.<sup>141</sup>

#### **Computer-generated works**

[1.45] A great number of works are generated by computer, which can range from literary works written on a word processing package to complex designs produced by CAD programs. Although the Act makes provisions for computer generated works it will not recognise an inanimate object as being the author. Instead, the Act states that where a work is computer-generated, the author will be the person by whom the

---

<sup>136</sup> *Re FG (Films) Ltd* [1953] 1 WLR 383.

<sup>137</sup> See also: *Beggars Banquet Records v Carlton Television* [1993] EMLR 349; *Secretary of State v Central Broadcasting* [1993] EMLR 253; but note that as these are interlocutory decisions both are somewhat unsatisfactory.

<sup>138</sup> CRRA 2000–2004, s 21(c).

<sup>139</sup> CRRA 2000–2004, s 6(1).

<sup>140</sup> CRRA 2000–2004, s 21(d).

<sup>141</sup> CRRA 2000–2004, s 21(h). See Garnett, *Copyright in Photographs*, EIPR, Vol 22 Issue 5. In *Creation Records v News Group Newspapers* [1997] EMLR 444 the scene for a photograph had been set or arranged by a member of the band Oasis and it was argued that therefore he was the author of a photograph taken without his or the bands consent and not the photographer. This was rejected by Lloyd J who stated that: ‘it seems to be that ordinarily the creator of the photograph is the person who takes it. There may be cases where one person sets up the scene to be photographed (the position and angle of the camera and all the necessary settings) and directs a second person to press the shutter release button at a moment chosen by the first, in which case it would be the first, not the second, who creates the photograph. There may also be cases of collaboration between the person behind the camera and one or more others in which the actual photographer has greater input, although no complete control of the creation of the photograph, in which case it may be a work of joint creation and joint authorship In the present case it seems to be me unarguable that anyone other than [the photographer] is the creator of his photograph.’

arrangements necessary for the creation of the work are undertaken.<sup>142</sup> This would not necessarily be the programmer who wrote a program to generate works, but might be a person who bought a copy of that program and initiated the ‘run’ command. Presumably, the person who makes the arrangements to create a computer-generated work can be compared to the producer of a film or sound recording. This must be reconciled with s 2(1) of the CRRA 2000–2004 which defines computer-generated works as meaning ‘that the work is generated by computer in circumstances where the author of the work is not an individual’.<sup>143</sup>

This appears to anticipate that the skill, labour and judgment used to create a work would be provided directly by a computer but that it will only be a tool of a living person. This point was at issue in *Express Newspapers Plc v Liverpool Daily Post & Echo Plc*<sup>144</sup> where the plaintiff ran a competition in which a reader could match letters in the paper with those on a card to win a prize. The defendants copied these letters and when sued argued that because the letters were generated by a computer program, neither the plaintiffs nor their employees were the authors. However, the court held that the computer program was merely a tool of the plaintiff’s employee who had written it and who was the author of the work.

#### **Databases**

[1.46] Where an original database is created, then the individual, or group of individuals, who made the database will be the author.<sup>145</sup> The distinction between a database and its contents which may have separate authors, must be kept in mind.

#### **Joint authorship**

[1.47] The Act states that a work of joint authorship means ‘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’.<sup>146</sup> It is important to distinguish between works of joint authors, such as songs created by a band together, and collective works such as encyclopaedias or any work written in distinct parts by different authors or in which works or parts of works of different authors are incorporated.<sup>147</sup> In *Navitaire Inc v*

---

<sup>142</sup> CRRA 2000–2004, s 21(f).

<sup>143</sup> CRRA 2000–2004, s 2(1).

<sup>144</sup> *Express Newspapers Plc v Liverpool Daily Post & Echo Plc* [1985] FSR 306.

<sup>145</sup> CRRA 2000–2004, s 21(g).

<sup>146</sup> CRRA 2000–2004, s 22(1).

<sup>147</sup> CRRA 2000–2004, s 16(5). A work of joint authorship cannot be a collective work see *Redwood Music Ltd v Feldman & Co Ltd* [1979] RPC 385. The CRRA 2000–2004 further state that a film will be treated as a work of joint authorship by the producer and principal director, unless they are the same person (s 22(2)). Similarly a broadcast will be treated as a work of joint authorship if more than one person makes the broadcast and the contribution of each person is not distinct from that of any of the others involved in making that broadcast (s 22(3)). Finally, it is made clear that references to the author of a work will, unless otherwise provided, be construed, in relation to a work of joint authorship, as references to all of the authors of the work (s 22(4)).

*Easyjet Airline Co Bulletproof Technologies*,<sup>148</sup> Pumfrey J ruled that a computer program ‘did not have joint authors, since it is perfectly possible to distinguish the contributions of the various authors’.<sup>149</sup>

[1.48] There have been several English decisions on the issue of joint authorship and these are particularly useful as the UK Copyright Designs and Patents Act 1988 contains a provision that is identical to that in the CRRA 2000–2004. In *Ray v Classic FM*,<sup>150</sup> the plaintiff was very well known in the UK for his encyclopaedic knowledge of classical music, and had been engaged as a consultant music advisor. He advised on the categorisation of the defendant’s catalogue and database of classical music. At the time of judgment this included some 50,000 tracks. The plaintiff maintained that he was the sole author of the music catalogue, which was then used to create an electronic database. Lightman J stated that:

‘A joint author is accordingly a person (1) who collaborates with another author in the production of a work; (2) who (as an author) provides a significant creative input; and (3) whose contribution is not distinct from that of the other author. He must contribute to the ‘production’ of the work and create something protected by copyright, which finds its way into the finished work ... A joint author must participate in the writing and share responsibility for the form of expression in the literary work. He must accordingly do more than contribute ideas to an author: he must be an author (or creator) of the work in question.’

[1.49] Lightman J adopted the view of Laddie J in *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd*<sup>151</sup> that there is no restriction on the manner in which a joint authors’ contribution may be funnelled and in particular there is no requirement that each of the authors must have exercised penmanship.<sup>152</sup> But in Lightman J’s opinion what is required is ‘something which approximates to penmanship. What is essential is a direct responsibility for what actually appears on the paper.’ He distinguished the *Cala* case because in that case a director of the plaintiffs had provided a very detailed input including many of the design features in which architects were instructed to prepare plans. These were regularly vetted to ensure that they concurred with the director’s image and in this exceptional case Lightman J suggested that the architects were functioning as ‘scribes’ for the director. In *Ray v Classic FM* Lightman J rejected the suggestion of the defendants that the plaintiff was functioning as a scribe for the defendant’s team and held that the defendant’s input was insufficient to make the defendant a joint author. To merely contribute ideas is not sufficient to become a joint author and this is plain from s 17(3) which provides that copyright does not protect the

---

<sup>148</sup> *Navitaire Inc v Easyjet Airline Co Bulletproof Technologies* [2004] EWHC 1725 (Ch), [2006] RPC 111.

<sup>149</sup> [2004] EWHC 1725 (Ch), [2006] RPC 111, para 92.

<sup>150</sup> *Ray v Classic FM* [1998] FSR 622.

<sup>151</sup> *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] FSR 818.

<sup>152</sup> *Flyde Microsystems v Key Radio Systems* [1998] FSR 449 ‘First it is necessary to determine whether the putative author has contributed the right kind of skill and labour. If he has then it is necessary to decide whether his contribution was big enough. The latter issue in particular is a matter of fact and degree.’

ideas and principles that underlie any element of a work. It is not enough to think up the plot of a play or suggest a comic routine<sup>153</sup> or to reminisce to a ghostwriter.<sup>154</sup>

[1.50] Jamming or spontaneously devising songs on stage or in a recording studio may be creatively productive but legally inadvisable. In *Stuart v Barrett*<sup>155</sup>:

‘someone started to play and the rest joined in and improvised and improved the original idea. The final piece was indeed the product of the joint compositional skills of the members of the group present at the time.’

However, caution is advised when analysing the authorship of works created in this way; Morison QC stated that it would not be sensible to lay down any general rules to apply to all group compositions. He said that it must depend entirely on the individual circumstances of the band and that ultimately ‘the question of whether a person is a joint author ... is a question of fact and degree.’ A similar creative process was claimed by the unsuccessful plaintiffs in *Hadley & ors v Kemp & Another*,<sup>156</sup> in which the parties were members of the 1980’s pop group *Spandau Ballet*. The plaintiffs claimed that that the first-named defendant would show up with the bare bones of a song but that each member of the band would then contribute creatively and collectively to changes, which would give rise to a new song of which they were all joint authors. On the facts however, Park J held that the first-named defendant would present a complete song to the band, few changes would be made prior to its recording and he would have the last word on those changes. He stated the law to be that there must be ‘a significant and original contribution to the creation of the work’. He continued:

‘There are four elements: (1) The claimant must have made a contribution of some sort. (2) It must have been significant. (3) It must have been original. (4) It must have been a contribution to the creation of the musical work. The last point is important ... The putative author must have contributed ‘the right kind of skill and labour. In the present case, contributions by the plaintiffs, however, significant and skillful, to the performance of the musical works are not the right kind of contributions to give them shares in the copyrights. The contributions need to be to the creation of the musical works, not to the performance or interpretation of them.’<sup>157</sup>

This is consistent with the Supreme Court decision in *Gormley v EMI Records (Ire) Ltd* where the plaintiff’s claim failed because as a six-year-old girl she did not have the creative capacity to create a work.

### ***The consequences of joint authorship***

[1.51] The CRRA 2000–2004 state that references to the author of a work means a reference to all joint authors of a work; each of the authors will jointly hold the exclusive rights, such as copying or adapting a work, set out in Chapter 4 of the Acts.<sup>158</sup> However,

---

<sup>153</sup> *Tate v Thomas* [1921] Ch 503.

<sup>154</sup> *Evans v E Hulton & Co Ltd* [1923-8] MCC 51.

<sup>155</sup> *Stuart v Barrett* [1994] EMLR 448.

<sup>156</sup> *Hadley & ors v Kemp & Another* [1999] EMLR 589.

<sup>157</sup> The fact that the plaintiffs did not object to the defendant being listed as sole composer at the time did not help their case.

<sup>158</sup> CRRA 2000–2004, s 22(4).

joint authors need to be careful how they treat their rights. In *Godfrey v Lees*,<sup>159</sup> the plaintiff was a classically trained musician who worked closely with a pop group on several songs which used an orchestral accompaniment. He provided the arrangements and conducted the orchestra as well as contributing other ideas and material. The plaintiff succeeded in his claim to be a joint author of six recorded tracks but it did him no good. This was because he was regarded as having impliedly licenced the group to exploit his copyright; the licence was gratuitous and in principle was revocable. Since he did nothing for fourteen years he was estopped from revoking it. On the other hand, if rights have not been impliedly licenced or given up in this way, merely because someone is a joint author does not give them the unilateral right to reproduce works. In *Ray v Classic FM*, the court held that the defendant was not a joint author and also that ‘it is quite clear that even if the defendant was a joint author ... joint ownership could not without the consent of the plaintiff justify the making of copies for the purposes of exploitation of the copyright abroad’.<sup>160</sup>

### Works created during employment

[1.52] The CRRRA 2000–2004 provides that, in general, employees will not be the authors of works that they produce in the course of their employment.

‘The author of a work shall be the first owner of the copyright unless ... the work is made by an employee in the course of employment, in which case the employer is the first owner of any copyright in the work, subject to any agreement to the contrary’.<sup>161</sup>

[1.53] This exception is quite limited. Firstly it must be shown that the author was an employee at the time the work was created and secondly, it must be shown that the work was created during the course of employment. This may be quite difficult since many creators and authors of works tend not to be tied into a lasting contract of employment but may work freelance or on short-term contracts for services. This makes it very important that those who commission works or who hire individuals such as record producers to produce works should include in their contracts clear terms setting out the ownership of any works that are created and the assignment of individual’s copyright ownership if such exists.

### *The definition of an employee*

[1.54] The Act offers no definition of the term employee,<sup>162</sup> but there are generally three categories of worker.

<sup>159</sup> *Godfrey v Lees* [1995] EMLR 307.

<sup>160</sup> See *Cescinsky v George Routledge* [1916] 2 KB 325. See also Marchese, ‘Joint Ownership of Intellectual Property’ [1999] EIPR 364. See also Simcoe and Ingram, ‘Joint authorship – a question of joint effort or intent’ *Copyright World*, March 2000, p 18 for a discussion on the position of joint authors in Canada following the decision in *Darryl Neudorf v Nettwerk Productions Ltd* (10 December 1999) Vancouver C950847 (BCSC).

<sup>161</sup> CRRRA 2000–2004, s 23(1)(a).

<sup>162</sup> Irish legislation contains no satisfactory definition of an ‘employee Under the Minimum Notice and Terms of Employment Acts 1973–2001 it is defined as ‘an individual who has entered into or works under a contract with an employer, whether the contract be for manual labour, clerical work or otherwise, (contd/)

These are:

- (a) a person employed under a contract of employment or service (an employee or servant);
- (b) a person working under a contract for services (an independent contractor); and
- (c) office holders (such as a company director or judge).

[1.55] The Supreme Court distinguished between an employee and an independent contractor in *Denny v The Minister for Social Welfare*.<sup>163</sup> This involved an issue of social welfare law, as to whether the appellant was liable to pay employee contributions for a shop demonstrator (Sandra Mahon). She had a written contract with the appellants which stated *inter alia* that she was responsible for her own tax affairs and was not an employee but rather an independent contractor. Although Keane J held that ‘the written agreement was undoubtedly drafted with understandable care with a view to ensuring, as far as possible, that Ms. Mahon was regarded in law as an independent contractor’, he found that this was ‘by no means decisive of the issue’.<sup>164</sup> Keane J was of the view that it was:

‘clear that, while each case must be determined in the light of its particular facts and circumstances, in general a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. The inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employ others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her’.<sup>165</sup>

Keane J held that although there was no continuous supervision of Ms Mahon this was not a decisive factor. He held that on the other hand the appellants provided Ms Mahon with clothing and equipment necessary to do her work and Ms Mahon’s income was dependant on her complying with the instructions of the appellant. Ms Mahon was not in a position to by better management and employment of resources to ensure a higher profit from her activities, she could not routine engage assistants and if she was unable to work she would have to arrange for a substitute herself but the substitute would have to be approved by the appellant. Keane J held that Ms Mahon was an employee. Murphy J stated in his concurring opinion that the provisions of her contract which dealt

---

<sup>162</sup> (contd) whether it be expressed or implied, oral or in writing, and whether it be a contract of service or of apprenticeship or otherwise, and cognate expressions shall be construed accordingly’ and under the Employment Equality Acts employee is defined as a person who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment

<sup>163</sup> *Denny v The Minister for Social Welfare* [1998] 1 IR 34.

<sup>164</sup> [1998] 1 IR 34 at 51.

<sup>165</sup> [1998] 1 IR 34 at 50.

with taxation, unfair dismissals law and the relationship between the appellant and Ms Mahon were of marginal importance.<sup>166</sup>

[1.56] When a work is created by an office holder such as the director of a company, then *prima facie* as they are not an employee of the company the copyright should vest in themselves. Again the decision of ownership will depend on the facts of the case and merely because a person is called a director may not mean that they are also an employee.<sup>167</sup> Even if a work is created by a director in his function as a director of a company, the director will still be bound by his duties to the company<sup>168</sup> and the company may prove to be the equitable owner of the work. Similarly, the issue of whether or not property created by members of a partnership belongs to the individual partner or is the property of the partnership as a whole may arise.

#### *In the course of employment*

[1.57] Works created ‘in the course of employment’ are works which are created by an employee pursuant to his contract of employment or ‘within the scope of his duties’ as an employee. In *Stephenson, Jordan and Harrison Ltd v Macdonald and Evans*,<sup>169</sup> a management consultant wrote a book on what he termed management engineering. The plaintiffs submitted that they were the owners of copyright as the consultant had drawn up notes whilst visiting the premises of the plaintiff’s clients and, subsequently, he had created reports which were sent to the clients. All this work was done while working for the plaintiffs and one entire section of his book was taken from a report he had written as an employee. The court of appeal held that these notes and reports were created in the course of employment and therefore the copyright in them belonged to the plaintiff. Different rules may apply to different occupations; for example the Code of Conduct for the Bar of Ireland provides that the copyright in an opinion belongs to the lay client.<sup>170</sup>

#### *Lecturers and researchers*

[1.58] In *Stephenson, Jordan and Harrison Ltd v Macdonald and Evans*<sup>171</sup> a portion of a book written by an ex-employee was based upon lectures which were delivered by the ex-employee while he was employed as a management consultant by the plaintiffs. These lectures were held not to be created or delivered in the course of his employment and therefore the plaintiffs did not own the copyright. The Court of Appeal took the view that lecturers are employed to deliver lectures and not to create copyright works. The fact

---

<sup>166</sup> ‘These terms are included in the contract but they are not contractual terms in the sense of imposing obligations on one party in favour of the other. They purport to express a conclusion of law as to the consequences of the contract between the parties. Whether Ms Mahon was retained under a contract of services depends essentially on the totality of the contractual relationship express or implied between her and the appellant and not upon any statement as to the consequence of the bargain’ [1998] 1 IR 34 at 53.

<sup>167</sup> *Lee v Lee Air Farming Ltd* [1961] AC 12.

<sup>168</sup> See Keane, *Company Law* (4th edn, Tottel Publishing 2007).

<sup>169</sup> *Stephenson, Jordan and Harrison Ltd v Macdonald and Evans* [1952] 69 RPC 10.

<sup>170</sup> Bar Council, *Code of Conduct for the Bar of Ireland*, 13 March 2006, para. 3.5.

<sup>171</sup> *Stephenson, Jordan and Harrison Ltd v Macdonald and Evans* [1952] 69 RPC 10.

that a lecturer may type out his notes or lecture is ancillary to the main purpose of his employment, which is to deliver the lecture.

‘Prima facie I should have thought that a man engaged on terms which include that he is called upon to compose and deliver public lectures or lectures to some specified class of persons, would in the absence of clear terms in the contract of employment to the contrary, be entitled to the copyright in those lectures. That seems to me to be both just and commonsense.’

As in any other contract of employment or service, attention will have to be paid to the actual terms of the contract to see what exactly any individual was paid to do.<sup>172</sup>

### ***Employees and officers of the State***

[1.59] A very large number of copyright works are created under the aegis of the state. Where a work is created by an officer or employee of the government or of the state in the course of his or her duties, the government will be first owner of copyright.<sup>173</sup> This copyright is known as ‘government copyright’.<sup>174</sup> ‘Oireachtas Copyright’ also exists.<sup>175</sup>

### ***Journalists***

[1.60] The Acts provide that:

‘Where a work, other than a computer program, is made by an author in the course of employment by the proprietor of a newspaper or periodical, the author may use the work for any purpose, other than for the purposes of making available that work to newspapers or periodicals, without infringing the copyright in the work’.<sup>176</sup>

As in all other cases it would be a matter of evidence whether a work is created in the course of a journalist’s employment or not. If it is so created, then the proprietor of the newspaper will be first owner of copyright but the journalist will retain significant rights as the author. If he wishes to bring out a collection of the articles he has published in a newspaper, he will be able to do so. The sole limitation placed on employees of newspapers is that they cannot submit that work to other newspapers. Virtually all the major Irish newspapers and many if not all of the provincial newspapers have a significant online presence. This means that ‘newspaper’ would have to be interpreted as including those exclusively online and the online editions of existing newspapers. A significant issue is whether a newspaper has the right to include a journalist’s articles in a database other than its own online newspaper. In *Tasini and ors v The New York Times Co, Newsday Inc and ors*,<sup>177</sup> it was held that newspapers could not licence articles

---

<sup>172</sup> So in *Goswami v Hammons* (29 October 1982, unreported) HC (Eng), it was held that where the plaintiff had been employed to do research by a university and where he submitted results of his research as a PhD thesis with the consent of the university, the plaintiff was entitled to copyright in the thesis as it was not created in the course of his employment.

<sup>173</sup> CRRA 2000–2004, s 191(1).

<sup>174</sup> CRRA 2000–2004, s 191(2).

<sup>175</sup> CRRA 2000–2004, ss 193 & 194.

<sup>176</sup> CRRA 2000–2004, s 23(2).

<sup>177</sup> *New York Times Co v Tasini* (00-201) 533 US 48 3 (2001) 206 F3d 161, affirmed.

submitted by freelance journalists and published in the newspapers to searchable databases such as NEXIS. A significant feature of this section is that the authors of computer programs do not benefit from this provision. Programmers hired to write a proprietary program for a newspaper such as that which created the grids of numbers which were the subject of litigation in *Express Newspapers v Liverpool Daily Post and Echo Plc*<sup>178</sup> will not be able to use the program themselves unless permitted by their employer in the normal way. However, there is no equivalent exception for those who create databases on behalf of newspapers, such as searchable archives.

### International organisations

[1.61] The author of a work will not be the first owner if it is subject to the copyright of a prescribed international organisation.<sup>179</sup> These organisations may be prescribed by the government pursuant to s 196 of the Act.

### Other enactments

[1.62] The author of a work will not be the first owner if the copyright in the work is conferred on some other person, such as his employer, by an enactment.<sup>180</sup>

### Dealings: assignments and licences

[1.63] The transfer of copyright in a work must be distinguished from the sale of copies of a work. Buying a copy of a work entitles the purchaser to do no more than use the work as the owner intended. These uses will usually be set out in the contract of sale or licence agreement and often are quite restrictive. Although, copies of works may be sold frequently, assignments of the copyright or a partial copyright in a work are more infrequent. It should be kept in mind that the authors' moral rights cannot be alienated or assigned,<sup>181</sup> although, some can be transmitted on death.<sup>182</sup> The CRRA 2000–2004 provide 'The copyright in a work is transmissible by assignment, by testamentary disposition or by operation of law, as personal or moveable property.'<sup>183</sup>

[1.64] Assignment is a transmission of ownership by a contract or other agreement. A testamentary disposition is a will and operation of law might encompass the transfer of title from a bankrupt to his trustee. Not all the copyright in a work must be transferred at the same time. The CRRA 2000–2004 provide that:

'A transmission of the copyright in a work by assignment, by testamentary disposition or by operation of law may be partial, so as to apply—

- (a) to one or more but not all of the acts<sup>184</sup> the copyright owner has the right to undertake or authorise, and

<sup>178</sup> *Express Newspapers v Liverpool Daily Post and Echo Plc* [1985] 3 All ER 680.

<sup>179</sup> CRRA 2000–2004, s 23(1)(c).

<sup>180</sup> CRRA 2000–2004, s 23(1)(d).

<sup>181</sup> CRRA 2000–2004, s 118.

<sup>182</sup> CRRA 2000–2004, s 119.

<sup>183</sup> CRRA 2000–2004, s 120(1).

<sup>184</sup> Unlike the UK CDPA 1988, the Act refers to the transmission of 'the acts, the copyright owner has the right to undertake', (contd/)

- (b) to part but not the whole of the period for which the copyright in the work is to subsist'.<sup>185</sup>

[1.65] A typical example of a partial transmission would be to assign the rights to adapt a novel as a film while retaining the right to reproduce the novel itself. Rights so assigned include the right to perform a work professionally<sup>186</sup> and to publish a work in volumes.<sup>187</sup> The New Zealand courts have held that 'the combination of ways in which [an author] may assign his rights is almost endless' and may include the assignment of rights in geographical areas.<sup>188</sup>

### **Transmission by assignment**

[1.66] The difference between assignments and the other forms of transmission is that an assignment must be in writing. The CRRA 2000–2004 state that 'An assignment of the copyright in a work, whether in whole or in part, is not effective unless it is in writing and signed by or on behalf of the assignor'.<sup>189</sup>

Although the assignment must be in writing, it would appear that there is no particular need to mention the transfer of copyright specifically. This is a question of construction and will depend upon the facts in any particular case. In *Murray v King*,<sup>190</sup> the sale of 'all the right, title and interest' in a magazine publisher was held to be sufficient to assign the copyright. In contrast in *Wilden Pump Engineering v Fufeld*<sup>191</sup> the sale of all the assets on a balance sheet was not sufficient to assign copyrights which did not appear on that balance sheet. The motivation for an assignment would appear to be unimportant. It was held in *Beloff v Pressdram*,<sup>192</sup> that the fact that an assignment was made purely to enable an action for infringement to be brought did not mean that it should be set aside.

[1.67] The Electronic Commerce Act 2000 makes it clear that electronic writing is to be legally recognised. It provides that 'If by law or otherwise a person ... is required ... to give information in writing ... then ... the person ... may give the information in electronic form, whether as an electronic communication or otherwise.'<sup>193</sup>

The CRRA 2000–2004 define information as including 'all forms of writing and other text'.<sup>194</sup> Although it is not necessary for an assignment to be an actual contract, the Electronic Commerce Act 2000 provides that electronic contracts cannot be denied

---

<sup>184</sup> (contd) in the UK, the equivalent and similar section refers to the transmission of 'the things, the copyright owner has the exclusive right to do. When the UK CDPA 1988 was passing through Parliament the reference to 'things' was included to as to make it clear that classes of rights such as hardback and paperback rights could be assigned separately. The UK legislature feared that use of the term 'acts' would not make this clear.

<sup>185</sup> CRRA 2000–2004, s 120(2).

<sup>186</sup> *British Actors Film Co v Glover* [1918] 1KB 299.

<sup>187</sup> *Johnathan Cape v Consolidated Press* [1954] 1 WLR 1313.

<sup>188</sup> *J Albert & Sons Pty Ltd v Fletcher Construction* [1976] RPC 615.

<sup>189</sup> CRRA 2000–2004, s 120(3).

<sup>190</sup> *Murray v King* [1983-85] 3 IPR 525.

<sup>191</sup> *Wilden Pump Engineering v Fufeld* [1985-87] 8 IPR 250.

<sup>192</sup> *Beloff v Pressdram* [1973] 1 All ER 241.

<sup>193</sup> The Electronic Commerce Act 2000, s 12.

<sup>194</sup> The Electronic Commerce Act 2000, s 2(1).

solely because they have been concluded by way of an electronic communication<sup>195</sup> and ‘Information ... shall not be denied legal effect, validity or enforceability solely on the grounds that it is wholly or partly in electronic form, whether as an electronic communication or otherwise’.<sup>196</sup>

Therefore an email that accompanies<sup>197</sup> the submission of a manuscript or other work may well fulfil the requirement of writing under the CRRA 2000–2004.<sup>198</sup> The remaining question is whether an email can be said to be signed by the author. Most emails will contain the author’s name and this may be sufficient for the Act. The courts do not insist that a signature should be in copper plate handwriting and have interpreted the word ‘signature’ very loosely. Again the Electronic Commerce Act 2000 has clarified the position as it provides that if ‘by law or otherwise the signature of a person ... is required ... then ... an electronic signature may be used’.<sup>199</sup>

This is subject to the proviso that the author should consent to the use of an electronic signature.<sup>200</sup> An electronic signature is defined by the Electronic Commerce Act 2000<sup>201</sup> as meaning ‘data in electronic form attached to, incorporated in or logically associated with other electronic data and which serves as a method of authenticating the purported originator.’<sup>202</sup>

#### ***Assignments of the rental right***

[1.68] The term of copyright is quite lengthy. On average a 30-year old author can anticipate that copyright in his work will endure for at least a century assuming he lives to age 60 (of course he may live a lot longer than that). During this period, technological changes may render copyrights that were previously inconsequential, very valuable. In *Peggy Lee v Disney Corporation*<sup>203</sup> the plaintiff had performed and written certain songs for the defendant’s film, *Lady and the Tramp*, in the mid-1950s and assigned her copyright to the defendants. Several decades later the film became a huge success when it was released on video. The court accepted that the singer could not and had not assigned her rights in these video sales and awarded her several million dollars.

#### ***Future copyright***

[1.69] It is not uncommon for an agreement to be made for the commissioning or creation of a new copyright work. Such an agreement will have to deal with a copyright

---

<sup>195</sup> The Electronic Commerce Act 2000, s 19.

<sup>196</sup> The Electronic Commerce Act 2000, s 9.

<sup>197</sup> The Electronic Commerce Act 2000 came into force on the 10 July 2000.

<sup>198</sup> CRRA 2000–2004, s 120.

<sup>199</sup> Electronic Commerce Act 2000, s 13(2)(b).

<sup>200</sup> These provisions clearly apply to copyright property which is defined by the CRRA 2000–2004 as personal and moveable property as s 10(1)(b) states that ss 12–23 of the Electronic Commerce Act 2000 are without prejudice to the laws governing real property. Therefore, it would seem that the Oireachtas intended these provisions to apply to personal and moveable property such as copyright.

<sup>201</sup> Electronic Commerce Act 2000, s 2(1).

<sup>202</sup> The Electronic Commerce Act 2000, s 2(1).

<sup>203</sup> Sackers, *Licensing and Exploiting Right in Multimedia Products* 11 CLSR 1995.

which has yet to be created and this is termed ‘future copyright’.<sup>204</sup> The Act provides for agreements made in relation to future copyright and signed by or on behalf of the prospective owner<sup>205</sup> of the copyright where the prospective owner purports to assign the future copyright, whether in whole or in part, to another person. Where this is done then when copyright comes into existence, the assignee or his or her successor in title, or another person claiming under him or her would be entitled as against all other persons to require the copyright to be vested in him or her. The copyright will therefore vest in the assignee or his or her successor in title and any other person claiming under him or her.<sup>206</sup> This means that the Act recognises the validity of assignments of future copyright. The Act also makes provision for the situation where the person who would be entitled to the copyright dies before it comes into existence. Here the copyright will devolve as if it had subsisted immediately before death and that person had then been the owner of the copyright.<sup>207</sup> If no such agreement is signed, it may still be the case that the equitable ownership of future copyright may be transferred.

### **Equitable ownership**

[1.70] As is made clear by the CRRA 2000–2004, copyright is a form of personal or moveable property. As such, the legal and beneficial ownership of it can vest separately in different people. Typically this happens when a purchaser has paid for the property but the vendor has yet to assign it. So in *Richardson v Flanders*,<sup>208</sup> a computer programmer was paid by the plaintiff to rewrite and improve the plaintiff’s computer program. Ferris J, in the English High Court, held that the copyright in any work carried out by the programmer was held on trust by the programmer, for the plaintiff.<sup>209</sup> Ferris J relied on the dicta of the Court of Appeal in *Massine v De Basil*<sup>210</sup> in which the plaintiff had choreographed a ballet for the defendant while in their employment:

‘the court was of the opinion that it ought to be implied as a term of the agreement that any work done by the plaintiff would be done on the basis that the defendant who had paid for the work should be entitled to such rights as might arise from that payment, and he should not be deprived of the benefit merely on the ground that the person whom he paid was an independent contractor.’

---

<sup>204</sup> “future copyright” is defined by the act as meaning copyright which will or may come into existence in respect of a future work or class of works or on the occurrence of a future event; CRRA 2000–2004, s 121(4).

<sup>205</sup> “prospective owner” is defined as including ‘a person who is prospectively entitled to copyright by virtue of an agreement made in relation to future copyright CRRA 2000–2004, s 121(4).

<sup>206</sup> CRRA 2000–2004, s 121(1).

<sup>207</sup> Copyright and Related Rights Acts 2000 – 2004, s 121(2).

<sup>208</sup> *Richardson v Flanders* [1993] FSR 497.

<sup>209</sup> See the unreported judgment of Morris J in *Inter Finance Group Ltd v KPMG Peat Marwick t/ a KPMG Management Consulting* [1998] IEHC 217 (29 June, 1998).

<sup>210</sup> *Massine v De Basil* [1936] 45 MCC 223.

Where a work is commissioned, the equitable title may be transferred from the author to the person who commissions the work even though the legal title in the copyright will not have been assigned.

[1.71] Where a work is created in breach of some fiduciary duty, then it may be argued that the fiduciary holds it on trust for the party to whom he owes the duty. This is termed a constructive trust. So, in some limited circumstances it may be argued that beneficial title in a work created by an employee but outside the scope of his employment, will be held on trust by the employee for his employer. In *Missing Link Software v Magee*<sup>211</sup> it was held to be arguable that the defendant had breached his fiduciary duty to the plaintiffs by writing a program to compete with their principle product while he was employed by them. It was suggested that if this were so, two conclusions might be drawn as to the copyright. Firstly, it might be argued that the copyright in the program written by the defendant while in the employment of the plaintiffs was held on constructive trust on behalf of the plaintiffs or secondly, it could be held that the defendant should not be able to assert his own breach of fiduciary duty to deny that the program was written within the course of his employment. This judgement should be treated with caution as it was decided at the interlocutory stage and there was good evidence that the defendant had copied at least some sections of his employer's product.<sup>212</sup> In other circumstances where the employer was acting in an unsavoury manner, the English courts have been unwilling to consider that equitable ownership might arise. In *Service Corporation International v Channel 4 Television*,<sup>213</sup> a reporter for the defendants worked undercover as a trainee in the plaintiff's funeral home. He covertly filmed events at the home including disrespectful and abusive treatment of corpses, such as coffins with corpses in them being used as rubbish bins. The plaintiffs tried to restrain the defendants from showing the film; one of their claims was that they were entitled to the equitable ownership of the copyright in the film. This claim relied on the allegation that the trainee was the maker of the film which he had created in his working hours and in breach of his duty to the defendant. However, Lightman J could see no breach of fiduciary duty in this case and he felt it was clear that the trainee was not a trustee for the plaintiffs of his account of what happened in the funeral home regardless of whether that account was written during the hours of his employment by the plaintiffs or later. Similarly, he did not hold the film on trust for the plaintiffs regardless of when that film was made.

[1.72] Comparisons between copyright cases elsewhere and Irish equity cases are easier to make in this situation than with regard to resulting trusts. As was stated in the old Irish case of *Gabett v Lawder*<sup>214</sup>: 'The fundamental principle upon which the doctrine of constructive trusts proceeds is, that no person in a fiduciary capacity shall be allowed to retain any advantage gained by him in his character as trustee.' Whether such trusts should be constructed in relation to all work created by all employees is very doubtful.

---

<sup>211</sup> *Missing Link Software v Magee* (9 August 1998, unreported) HC.

<sup>212</sup> Such as evidence given at an interlocutory hearing that during his farewell party, the defendant was overheard to say that he had taken all the software he needed before he left the plaintiffs employment.

<sup>213</sup> *Service Corporation International v Channel 4 Television* [1999] EMLR 83.

<sup>214</sup> *Gabett v Lawder* (1883) 11 LR Ir 295 (Chancery Division).

Section 15 of the Organisation of Working Time Act 1997 provides that an employee cannot be permitted to work more than an average of 48 hours a week.<sup>215</sup> So, an employer might find it difficult to assert that works created outside these 48 hours could be created in the course of employment. In *Missing Link Software v Magee*<sup>216</sup> much of the evidence turned on whether the defendant could have in fact produced the offending computer program in his own time. The employer failed in the American case of *Avtec Systems v Peiffer*.<sup>217</sup> The plaintiff supplied computer services to the USA's space programme and the defendant was employed by it as a computer programmer. The plaintiff independently wrote a program to control orbiting satellites, which he demonstrated to his employers and NASA. However, the employee continued to develop it on his own and the program was successfully marketed commercially. The employer sued but its action failed as it was unable to prove that the program was written 'within Avtec authorized time and space limits.'

### **The duration of copyright**

[1.73] The CRRA 2000–2004 implement The Term of Protection of Copyright Directive.<sup>218</sup> The term of protection for a work is dependant upon what category a particular work falls into. Deciding whether a work is a sound recording or a musical work will determine whether it has a protection lasting 50 years or 70 years. This is important for deciding when a work has entered the public domain and for how long it will be necessary to pay the author's descendant's royalties.<sup>219</sup> The term of copyright is calculated from the first day of January of the year following the event that gives rise to that term.<sup>220</sup> So if the author of a literary work died on 21 July 2007, the term of his copyright would be calculated from 1 January 2008 and would therefore expire on 1 January 2078.

### ***Literary, dramatic, musical or artistic works and original databases***

[1.74] The copyright in a literary, dramatic, musical or artistic work or an original database will expire 70 years after the death of the author. This is irrespective of the date

---

<sup>215</sup> Organisation of Working Time Act, 1997, s 15 provides: '...An employer shall not permit an employee to work, in each period of 7 days, more than an average of 48 hours, that is to say an average of 48 hours calculated over a period (hereafter in this section referred to as a 'reference period') that does not exceed...4 months, or...6 months...'

<sup>216</sup> *Missing Link Software v Magee* (9 August 1998, unreported).

<sup>217</sup> *Avtec Systems v Peiffer* 805 F Supp 1312.

<sup>218</sup> EC Directive no. 93/98/EEC of 29 October 1993 OJ L 248 6/10/1993 p 13.

<sup>219</sup> Cynics might attribute Hollywood's fondness for long dead authors such as Jane Austen or William Shakespeare, not to Hollywood's anglophilia but rather to its phobia of paying these royalties, see the discussion of *It's a wonderful life* above. *Gowers Review of Intellectual Property* also cites the following example: 'The book *The Secret Garden*, since copyright has expired, has been made into a movie, a musical, a cookbook, a CD-ROM version, and two sequels', *Gowers Review of Intellectual Property*, HM Treasury, December 2006, p 70, para 4.95

<sup>220</sup> CRRA 2000–2004, s 35.

on which the work is first lawfully made available to the public.<sup>221</sup> If the work is anonymous or pseudonymous, copyright will expire 70 years after the date on which the work is first lawfully made available to the public. In relation to works of joint authorship, the death of the author will be construed as a reference to the death of the last of the joint authors where the identity of all of the authors is known.<sup>222</sup> Copyright will not subsist in an anonymous or pseudonymous literary, dramatic, musical or artistic work, or original database where it is reasonable to presume that the author has been dead for 70 years or more.<sup>223</sup>

### ***Films***

[1.75] The copyright in a film expires 70 years after the last of the directors or authors of the film dies.<sup>224</sup>

### ***Sound recordings, broadcasts and cable programmes***

[1.76] The copyright in a sound recording will expire 50 years after the sound recording is made, or if it is first lawfully made available to the public during that period, then copyright will expire 50 years after the date on which it is made available.<sup>225</sup> The copyright in a broadcast will expire 50 years after the broadcast is first lawfully transmitted.<sup>226</sup> Similarly, the copyright in a cable programme will expire 50 years after the cable programme is first lawfully included in a cable programme service.<sup>227</sup> The repeat of a broadcast or cable programme<sup>228</sup> is irrelevant for the purposes of copyright.<sup>229</sup>

### ***Computer generated works***

[1.77] The copyright in a computer-generated work will expire 70 years after the date on which the work is first lawfully made available to the public.<sup>230</sup>

### ***Towards eternal copyright?***

[1.78] At least one American author has advocated an eternal copyright term, arguing that it would be ‘just and fair for those who try to extract a living from the uncertain arts of writing and composing to be freed from a form of confiscation not visited upon anyone else’.<sup>231</sup>

---

<sup>221</sup> CRRA 2000–2004, s 24(1).

<sup>222</sup> CRRA 2000–2004, s 31(4).

<sup>223</sup> CRRA 2000–2004, s 32(2).

<sup>224</sup> CRRA 2000–2004, s 25(1) and s 31(3).

<sup>225</sup> CRRA 2000–2004, s 26.

<sup>226</sup> CRRA 2000–2004, s 27(1).

<sup>227</sup> CRRA 2000–2004, s 28(1).

<sup>228</sup> A repeat broadcast is defined as ‘a repeat of a broadcast which has been previously transmitted’ and a repeat cable program means ‘a repeat of a cable programme which has been previously included in a cable programme service Copyright and Related Rights Acts 2000 – 2004, s 2(1).

<sup>229</sup> Copyright and Related Rights Acts 2000-2004, s 27(2) and s 28(2).

<sup>230</sup> Copyright and Related Rights Acts 2000-2004, s 30.

<sup>231</sup> Helprin, ‘A Great Idea Lives Forever. Shouldn’t Its Copyright?’ (2007) New York Times, 20 May 2007.

The expiry of copyright 70 years after the death of the author is not actually that unfair on authors. This can be shown through a straightforward calculation.<sup>232</sup> At one extreme, assuming that an author lives for 40 years after the publication of his work, copyright would expire 110 years after publication. The author and his estate would then receive 99.997% of what it would have received if the term was unlimited.<sup>233</sup> If copyright terms were to be drastically restricted, to 25 years after publication, an author would still receive almost 92% of what he would receive if his copyright endured for all eternity. There are disadvantages to lengthy copyright terms, not least the problem of orphan works discussed below. Given these problems, and the relatively small benefits that accrue to author's estates, further extension of copyright terms would not seem to be beneficial.

### ***Orphan works***

[1.79] As works fall out of print and cease to generate income, their owners may lose interest in them but will still retain copyright. If somebody new wishes to utilise the work, say by incorporating it in a database, they may find identifying the owner very difficult. The problem was explained by *Gowers Review of Intellectual Property* 'The term "orphan work" is used to describe a situation where the owner of a copyright work cannot be identified by someone else who wishes to use the work'.<sup>234</sup> The British library estimates that about 40% of all works fall into this category.<sup>235</sup> *Gowers Review of Intellectual Property* recommended that an amendment should be made to the Directive on the Harmonisation of Copyright to deal with this problem.<sup>236</sup>

---

<sup>232</sup> 'Suppose a copyright on a particular work would yield \$1 per year in perpetuity at a discount rate of 10 percent. Under a system of perpetual copyright, the present value of this infinite stream of income would equal  $10 (=1/r)$ . Under a limited copyright term ( $=t$ ) the present value would be  $(1-e^{-rt})/r$  Landes & Posner, *The Economic Structure of Intellectual Property Law* (The Belknap Press of Harvard University Press, 2003) p 214 fn 12.

<sup>233</sup> Landes & Posner, *The Economic Structure of Intellectual Property Law* (The Belknap Press of Harvard University Press, 2003), p 296.

<sup>234</sup> *Gowers Review of Intellectual Property* HM Treasury, December 2006, p 69, para 4.91.

<sup>235</sup> The US Copyright Office has also issued a report on this problem: <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

<sup>236</sup> *Gowers Review of Intellectual Property* HM Treasury, December 2006, p 69, para 4.91, Recommendation 13, p 6.

