

MORAL RIGHTS: FALSE ATTRIBUTION

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1. Introduction

UK law provides against the false attribution of authorship of a copyright protected work. This guidance considers the implications of this right for non-commercial digitisation initiatives.

2. Practical implications

Archivists and other information professionals strive to provide the fullest and most accurate information about documents, records and other objects, and in particular about the authorship of the work in question (when known). As such, the implications of the moral right of false attribution will rarely if ever be an issue of concern.

However, mistakes can be made, and innocent misattribution can occur. But, when considering the relevance of this particular moral right to digitisation initiatives, there are two important points to keep in mind.

First, when communicating a work to the public (that is, when making work available online) the moral right only relates to literary, dramatic and musical works, as well as films. It *does not apply to artistic works*, such as photographs, drawings, maps and plans. So, if the material you are digitising is artistic in nature, the potential consequences of false attribution are entirely redundant: you do not need to worry about them at all.

Second, an allegation of false attribution when making relevant works available online will only bite when the person making the work available knows that the attribution is false, or has reason to believe that the attribution is false. That is, liability is fault-based. Put another way, an innocent misattribution will not trigger liability.

3. Legislative Context

In addition to the bundle of economic rights that make up the scope of copyright protection, the *Copyright Designs and Patents Act 1988* (the CDPA) also provides for certain moral rights in relation to certain types of work (ss.77-89). There are four types of moral right to be aware of:

- the right to the privacy of privately commissioned photographs or films
- the right to object to false attribution of the work
- the right to be identified as the author of the work
- the right to object to the derogatory treatment of a work

In this note we consider the moral right to object to false attribution might impact the digitisation of these types of material held in archive and other cultural heritage collections. Details about the right to object to false attribution of a work are set out in sections 84 and 86-89 of the CDPA.

4. False attribution of authorship

The right to object to false attribution of a work predates the CDPA. Its roots lie in the *Fine Art Copyright Act 1862* which included a number of provisions concerning the fraudulent production and sale of works of art. Similarly, the 1956 *Copyright Act* – which preceded the CDPA – specifically addressed situations of false attribution of authorship (s.43 of the 1956 Act).

Within the CDPA, s.84 states that the false attribution right applies to persons wrongly named as the author of literary, dramatic, musical and artistic works, as well as the director of a film. It does not apply to the other categories of copyright-protected work: to sound recordings, broadcasts or the typographical arrangement of published editions.

Only certain activities will trigger liability in relation to certain types of work. For example, putting an artistic work on exhibition in public with a false attribution will trigger liability; but exhibiting a literary work (such as a manuscript letter) in public falsely attributed will not. The following table provides an overview of when an offence might be committed.

POTENTIALLY INFRINGING ACTS

	LITERARY	DRAMATIC	MUSICAL	ARTISTIC	FILM
ISSUE COPIES	Y	Y	Y	Y	Y
EXHIBIT IN PUBLIC	-	-	-	Y	-
PERFORM IN PUBLIC	Y	Y	Y	-	-
SHOW IN PUBLIC	-	-	-	-	Y
COMMUNICATE TO THE PUBLIC	Y	Y	Y	-	Y

Moreover, depending on the type of activity involved, infringement will turn on whether the person making the false attribution knows – or should have reason to believe – that the attribution is false. So, in some situations false attribution – even when innocent – constitutes an offence. We can refer to these as situations of *strict liability*. That is: the innocence of the person making the false attribution is irrelevant; ignorance is no defence. Strict liability applies in relation to the following types of activity:

	LITERARY	DRAMATIC	MUSICAL	ARTISTIC	FILM
ISSUE COPIES	Y	Y	Y	Y	Y
EXHIBIT IN PUBLIC	-	-	-	Y	-

In other situations, infringement will only occur when there is an element of fault or blame on the part of the person making the false attribution. That is: the person will only be liable for infringement when they know that the attribution is false, or when

they have reason to believe that the attribution is false. Fault-based liability applies in relation to the following types of activity:

	LITERARY	DRAMATIC	MUSICAL	ARTISTIC	FILM
PERFORM IN PUBLIC	Y	Y	Y	-	-
SHOW IN PUBLIC	-	-	-	-	Y
COMMUNICATE TO THE PUBLIC	Y	Y	Y	-	Y

Section 84 also sets out a number of offences that concern claims of false attribution made in the course of a business. They have limited relevance for cultural heritage institutions engaging in non-commercial digitisation initiatives.

If false attribution has occurred in relation to a particular work in a relevant situation then infringement will have occurred: that is, there is no need for the complainant to establish that they have actually suffered any damage; so long as the attribution is false, the moral right has been infringed.

Finally, in terms of duration of protection, the right of false attribution last for the life of the author plus 20 years after their death. Thereafter, one no longer needs to worry about the potential implications of false attribution.

5. Legal References

Copyright Designs and Patents Act 1988 c.48 (www.legislation.gov.uk/ukpga/1988/48/)

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