

MORAL RIGHTS: INTEGRITY

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1. Introduction

When undertaking a digitisation initiative, it is important to have a clear idea as to when the right of integrity is relevant or not to works held within a collection, as well as when your use of a work might trigger liability. This guidance note explains the protection which UK law provides for the moral right of integrity – the right to object to the derogatory treatment of a work. It considers the implications of this right for non-commercial digitisation initiatives, explores the definition of ‘derogatory treatment’ and addresses a number of related questions.

2. In Practice

Given the professional and ethical standards that archivists and other cultural heritage custodians bring to bear on the preservation and public dissemination of the material in their collections, breaching the right of integrity in a qualifying work will rarely pose any problems. Although, as we have seen, simply possessing an infringing article might constitute infringement.

To help understand whether the right of integrity is relevant to works within your collection, consider section 7.

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 (sections 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 (attribution)
- the right to object to the derogatory treatment of a work (integrity)

The moral rights of attribution and integrity are intended to protect an author’s non-economic and non-proprietary interests in her work. In this note, we identify a number of features common to both the right of attribution and the right of integrity, before considering how the moral right of integrity might impact the digitisation of material held in archive and other cultural heritage collections. Details about the right of integrity are set out in sections 80-83 and 86-89 of the CDPA.

4. Attribution and Integrity: common features

The right of attribution and the right of integrity share a number of common features.

First, they only extend to certain types of copyright-protected work: literary, dramatic, musical and artistic works, and films. They do not apply to sound recordings, broadcasts or the typographical arrangements of published editions.

Second, each right lasts for as long as copyright subsists in the work. That is, both rights last for the life of the author plus 70 years from the end of the year in which the author died. When copyright expires so too do the author’s moral rights.

Third, while neither right can be assigned to another person (that is, the rights cannot be transferred from the author to a third party) the rights can be *waived* in certain circumstances (CDPA s.87). In effect, this means the author can agree not to assert their rights of attribution and integrity. So, if you think that your use of a work might contravene either of the moral rights for some reason (perhaps you are cropping an image of an artistic work to post it online and are concerned that cropping might constitute a derogatory treatment) then you could always ask permission of the author and they might waive their moral right of integrity in relation to your use.

Fourth, there are specific rules to bear in mind regarding the existence of these rights when dealing with works created before 1 August 1989 (when the CDPA came into force). We deal with these rules in the next section.

4.1. Works made before 1 August 1989

Both the right to be identified as the author of a work (CDPA, s.77) and the right to object to derogatory treatment of the work (CDPA, s.80) apply to all relevant works created on or after the CDPA came into force, that is: 1 August 1989. In relation to works created *before* 1 August 1989, however, the rights do not apply to the following:

- literary, dramatic, musical or artistic works created by an author who died before 1 August 1989
- any film made before 1 August 1989, regardless of whether the author is alive or dead

So, when dealing with films, what matters is *when the film was created*: if it was created before 1 August 1989 the attribution and integrity rights do not apply. In relation to the other types of protected work – that is, literary, dramatic, musical and artistic works – what matters is *when the author died*. If the author died before 1 August 1989 the attribution and integrity rights do not apply. We can summarise this as follows:

WHEN DO MORAL RIGHTS APPLY?	AUTHOR DIED BEFORE 1 AUGUST 1989	AUTHOR ALIVE ON 1 AUGUST 1989 BUT WORK CREATED BEFORE THAT DATE	WORK CREATED ON OR AFTER 1 AUGUST 1989
LITERARY	No Moral Rights	Moral Rights May Apply*	Moral Rights May Apply*
DRAMATIC	No Moral Rights	Moral Rights May Apply*	Moral Rights May Apply*
MUSICAL	No Moral Rights	Moral Rights May Apply*	Moral Rights May Apply*
ARTISTIC	No Moral Rights	Moral Rights May Apply*	Moral Rights May Apply*
FILM	No Moral Rights	No Moral Rights	Moral Rights May Apply*

* The right of attribution only applies to these works in certain circumstances: see section 4.1 below for further discussion.

5. The Moral Right of Integrity

The moral right of integrity allows an author to object to the derogatory treatment of their work whenever the treatment would be prejudicial to the honour or reputation of the author.

5.1. Excluded material

The right of integrity applies to literary, dramatic, musical and artistic works, as well as films, but even in relation to these categories of work there are a number of exceptions to keep in mind. For example, the right does not apply to:

- computer programs and computer-generated works (s.81(2))
- any work that was made for the purpose of reporting current events (s.81(3))
- literary, dramatic, musical or artistic works made for the purpose of publication in a newspaper, magazine or similar periodical (s.81(4))
- literary, dramatic, musical or artistic works made for publication in an encyclopaedia, dictionary, yearbook or other collective work or reference (s.81(4))

Unlike the moral right of attribution, an author does not need to assert their claim to the moral right of integrity: that is, if the work qualifies for protection then the right of integrity applies.

5.2. Scope of protection

If the work qualifies for protection, the right applies in relation to the use of the work in its entirety *or to any part of the work* (s.89(2)). So, even subjecting a part of the work – however small or insubstantial – to a treatment that could be regarded as derogatory might infringe.

5.3. Infringement

If the right of integrity exists in relation to a particular work, what constitutes infringement of the right?

Infringement is only triggered by subjecting the work (or any part of the work) to a derogatory treatment in certain circumstances. Moreover, the types of activity that trigger infringement will vary depending on the type of work you are dealing with. The following table provides an overview of when an offence might be committed, although you should refer to the provisions set out in s.80 for further details.

POTENTIALLY INFRINGING ACTS *

	LITERARY	DRAMATIC	MUSICAL	ARTISTIC	FILM
PUBLISH COMMERCIALY	Y	Y	Y	Y	-
ISSUE COPIES TO THE PUBLIC	-	-	-	-	Y
ISSUE TO THE PUBLIC AS PART OF A FILM OR SOUND RECORDING	-	-	-	Y	-
EXHIBIT IN PUBLIC	-	-	-	Y	-
PERFORM IN PUBLIC	Y	Y	Y	-	-
SHOW IN PUBLIC	-	-	-	-	Y
INCLUDE IN A FILM SHOWN IN PUBLIC	-	-	-	Y	-
COMMUNICATE TO THE PUBLIC	Y	Y	Y	Y	Y
BROADCAST	Y	Y	Y	Y	Y
MAKE AVAILABLE ONLINE	Y	Y	Y	Y	Y

*You should refer to the provisions set out in s.80 for further details.

See 7.2 for further guidance.

5.4. Qualification of the Right

The CDPA qualifies the application of the right of integrity in relation to three categories of work:

- work created by employees where copyright originally vested in the employer (that is, work created in the course of employment)
- works in which Crown or Parliamentary copyright subsists
- works in which copyright vests in certain international organisations¹

For most UK-based collections, the third of these categories will be of little relevance.

In relation to all three categories the CDPA provides that the right of integrity *does not* apply to anything done in relation to the work by or with the authority of the copyright owner. This qualification is subject to two provisos:

¹ See CDPA s.168 and the *Copyright (International Organisations) Order 1989* for further details of the relevant international organisations.

- where the author or director is identified at the time of the relevant act (that is, at the time of the allegedly derogatory treatment)
- where the author or director has previously been identified in or on published copies of the work

The Act also continues, however, that if the right *does* apply, the treatment will *not* constitute an infringement if there is a *sufficient disclaimer* (s.82(2)). A ‘sufficient disclaimer’ is further defined as follows: ‘a clear and reasonably prominent indication (a) given at the time of the act, and (b) if the author or director is then identified, appearing along with the identification, that the work has been subjected to treatment to which the author or director has not consented’ (s.178).

5.5. What constitutes a derogatory treatment of a work?

The treatment of a work is defined in the legislation as any ‘addition to, deletion from, alteration to or adaptation of the work’, however, this does not include the translation of literary or dramatic works, or arrangement or transcribing a musical work involving no more than a change of key or register (s.80(2)).

The treatment of the work will be derogatory if it amounts to ‘distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director’ (s.80(2)(b)). There is no simple test that can be applied to determine whether a work has been treated in a derogatory manner, although the courts have indicated that this should be determined objectively. That is, it is not sufficient that the author thinks the work has been subjected to a derogatory treatment (a subjective perspective); rather, one should ask whether a reasonable person would regard the treatment as derogatory (an objective perspective).

Given the professional and ethical standards that archivists and other cultural heritage custodians bring to bear on the preservation and use of the material in their collections, breaching the right of integrity in a qualifying work will rarely pose any problems. There are, however, two situations that warrant further consideration: altering or cropping a digital surrogate for some reason; and, the destruction of work that is not to be accessioned to a collection. We discuss these in sections 5.6 and 5.7 below.

5.6. Is the treatment prejudicial to the honour or reputation of the author?

Even if the treatment distorts or mutilates the work, this does not necessarily mean an offence has been committed. In *Confetti Records v. Warner Music* (2003) the argument was presented that a distortion or mutilation of a work that was not prejudicial to the honour or reputation of the author might nevertheless infringe an author’s right of integrity. This argument was rejected by the court. Mr Justice Lewison specifically set out that ‘the author can only object to distortion, mutilation or modification of his work *if it is prejudicial to his honour or reputation*’ (emphasis added). That is, simply distorting or altering a work *per se* will not trigger liability unless that distortion is objectively prejudicial to the author’s reputation.

By way of illustration: in *Tidy v. Trustees of the Natural History Museum* (1996) the cartoonist Bill Tidy granted the Natural History Museum permission to exhibit and reproduce a number of his black-and-white cartoons of dinosaurs. The gallery reproduced the cartoons in a smaller size and added colour backgrounds to the original

drawings without the artist's permission. Mr Tidy complained that his right of integrity had been infringed. The court decided that, while the drawings had been altered in a material way, no evidence had been presented as to how the public perceived the Museum's actions, and without appropriate evidence of *actual prejudice* to Mr Tidy's reputation no offence had been committed.

5.7. Digital copies, alterations and cropping

Creating a digital copy of a work will be considered to be a treatment of that work although it is unlikely to constitute a derogatory treatment of the work unless the digital image is manipulated or altered in a manner that would be regarded as prejudicial to the honour or reputation of the author. Moreover, within the context of a digitisation initiative it is unlikely that the digital surrogate will represent anything other than a faithful reproduction of the underlying work. But what about cropping an image for use on a website or for promotional purposes?

In *Delves-Broughton v. House of Harlot Ltd* (2012) a specialist clothing company was held liable for breach of a photographer's moral right of integrity by making use of a cropped version of her photograph on their website. The original photograph was of a model taken in a forest wearing an article of clothing provided to the photographer by the company; the company reversed the image and cropped it to remove the forest background before reproducing it on their website. It was decided that cropping the image amounted to a distortion of the original work that, while not prejudicial to the author's reputation, did nevertheless constitute an infringement of her moral right of integrity.

The correctness of this decision has been questioned on the grounds that the court should not have found a breach of the right of integrity without *also* finding that the cropped image was prejudicial to the author's reputation (as discussed in section 5.5). However, the *House of Harlot* decision does illustrate that simply cropping an image of a relevant work *might* give rise to an action for infringement of the right of integrity.

5.8. Destruction of a work

The work of archivists and other information professionals may involve the destruction of copyright-protected works, including destroying the only known copy of a document or record. Does this constitute an infringement of the right of integrity? That is, does the destruction of a unique document or record amount to the 'distortion or mutilation of the work'? Or do the concepts of distortion and mutilation suggest the need for the continued existence of the work?

This issue has never been authoritatively resolved by the courts although whether destruction might fall within the concept of 'treatment' has been discussed in passing. Indeed, in *Harrison v. Harrison* (2010) Mr Justice Fysh QC suggested that destruction of a work might well fall within the concept of treatment:

"Treatment" of a work is I think, a broad, general concept; *de minimis* acts apart, it implies a spectrum of possible acts carried out on a work, from the addition of say, a single word to a poem to the destruction of the entire work. Where does one draw the line otherwise?"

What we can say, however, is that the destruction of a work by an archivist is unlikely to trigger liability under the Act because every instance of primary infringement outlined above (see section 5.2.) requires that the allegedly derogatory treatment of the work is brought to the attention of the public in some way (eg, by *publishing* the work commercially, exhibiting *in public*, and so on). So, even if the destruction of a work does amount to a 'treatment' under the Act, the destruction would likely have to take place in public before liability would attach.

5.9. Possessing or dealing with an infringing article

It is also worth noting that, in relation to the right of integrity, the CDPA states infringement can occur by simply possessing or dealing a work that has been subjected to a derogatory treatment. These offences are set out in s.83 of the Act. Of particular relevance to cultural heritage institutions is that liability might be triggered by:

- possessing an infringing article in the course of a business
- exhibiting the infringing article in public in the course of a business

Moreover, a business is defined as including 'a trade or profession' (s.178) which will almost certainly encompass the work of an archive, a library or museum. Here, however, the *knowledge* of the alleged infringer is relevant to the commission of an offence. That is, liability turns on 'knowing or having reason to believe' that the article in question has been subjected to a derogatory treatment (what is generally referred to as *actual or constructive knowledge*).

What about the images or texts that have been cropped for the purpose of inclusion in the Morgan scrapbooks? Obviously these works were all created before 1 August 1989, but the authors in question may well have been alive when the CDPA came into force and so the right of integrity might apply. But even if the authors were alive at the relevant time, the vast majority of material in the scrapbook was originally created for the purpose of reporting current events, or for publication in a newspaper, magazine or other similar periodical. As such, this material is excluded from the right of integrity in accordance with s.81(3)(4) (see section 5.1). So, simply possessing texts and images in a scrapbook that have been cropped from newspapers and magazines will not pose any problems.

In relation to material within the scrapbook that is not excluded, then the relevant question to ask is, objectively considered, have they been subjected to a derogatory treatment such that the honour or reputation of the author has been impugned?



Example 1



Example 2

We can present two examples of the way in which material has appeared in the Scrapbook in a potentially infringing manner. Example 1 shows a photograph by Edward Saxe (dates unknown) which has been drastically cropped by Morgan from its original state, which shows the artist Yves Tanguy and his wife Kay Sage standing within a large frame, with some of Tanguy's paintings behind them. Example 2 shows how a portrait photograph by Bernard Poinssot (1922-1965) has been included in a page, surrounded by other cuttings. Unfortunately we were unable to find information on the rightsholder of the Saxe photograph to confirm that they were happy for us to use this very cropped version of Saxe's image but it is included here as an example of the type of drastic cropping that is commonplace in the Scrapbooks and which would potentially be unacceptable for rightsholders. The rightsholder of the Poinssot photograph was contacted regarding this work, and although the portrait has not been significantly cropped, the rightsholder was unhappy by the presentation of the image alongside a selection of diverse collage of cuttings, which he described as "far from representing the meticulous and studied work" of Poinssot. In this instance, the rightsholder still granted permission for the photograph to be shown as part of the page, with a specifically-worded disclaimer:

© The Estate of Bernard Poinssot. The condition and presentation of this image are not representative of the photographic skill of Bernard Poinssot.

5.10. Exceptions to the right

The CDPA sets out a number of exceptions to the right of integrity. For example, under s.81(5) the right is not infringed by anything done for the purpose of:

- avoiding the commission of an offence (for example, redacting material to comply with data protection obligations, or perhaps to comply with the *Obscene Publications Act*), or
- complying with a duty imposed by or under an enactment

These exceptions apply, where the author or director is identified at the time of the relevant act (or has previously been identified in or on published copies of the work), provided your use carries a sufficient disclaimer (see section 5.3. for discussion of the concept of a 'sufficient disclaimer').

The CDPA also states the right of integrity is not infringed by any use which by virtue of s.57 or s.66A would not infringe copyright in the work. In effect, this simply means the right of integrity does not apply when making use of work for whenever it is reasonable to assume that the copyright has expired, or when the relevant author of the work (if known) has been dead for 70 years or more. But, given that the right does not apply at all to work created by an author who died before 1 August 1989, these exceptions have very limited relevance at the present time.

6. Legal References

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

Confetti Records v. Warner Music [2003] ECDR 31

Delves-Broughton v. House of Harlot Ltd [2012] EWPC 29

Tidy v. Trustees of the Natural History Museum [1996] EIPR D-81

Harrison v. Harrison [2010] EWPC 3

7. Do I need to be concerned about this right?

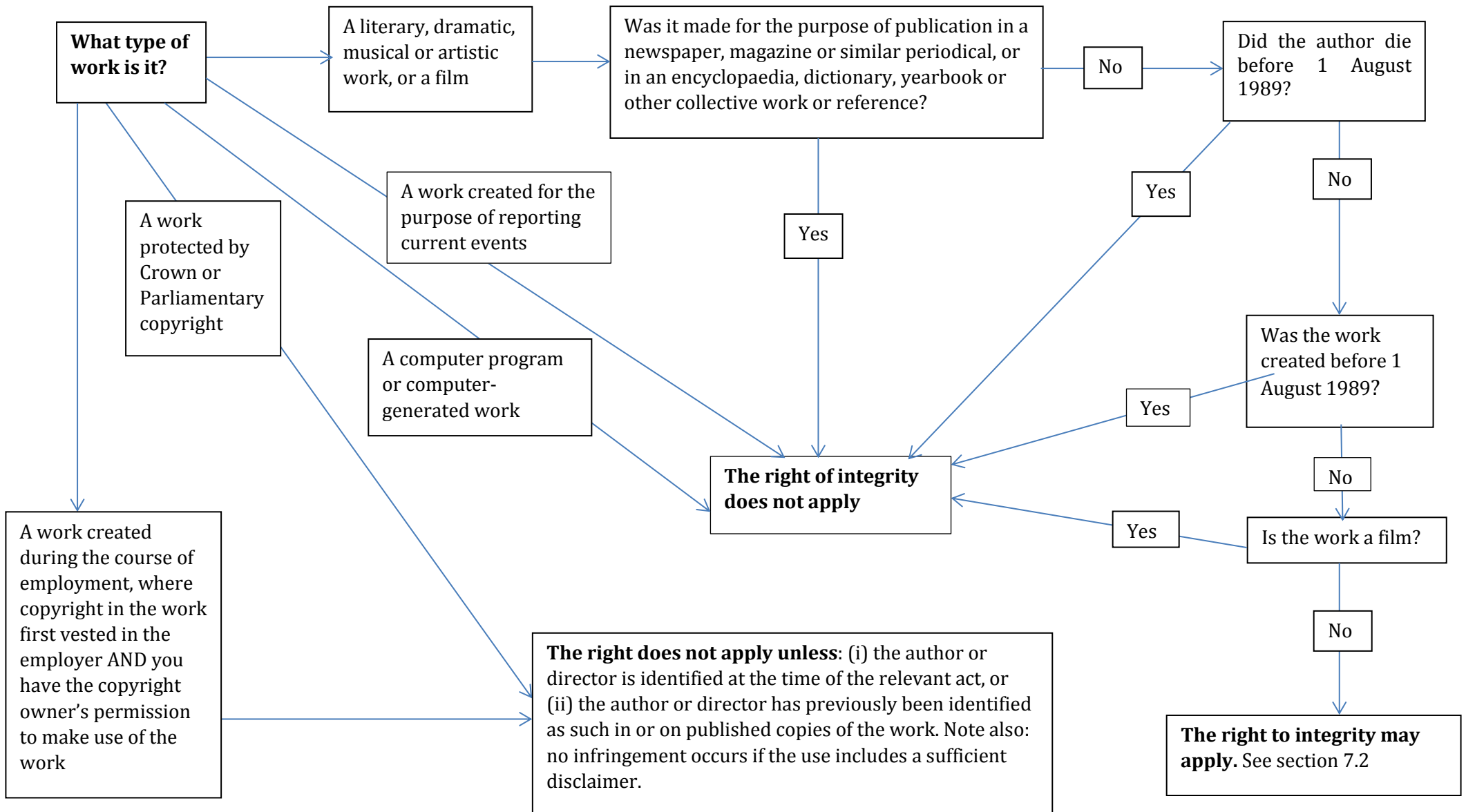
The charts in 7.1 and 7.2 can help you to determine if you need to consider this right.

This is one in a series of notes on aspects of UK Copyright law that may affect digitisation projects. It was created as part of *Digitising the Edwin Morgan Scrapbooks*, through support by the RCUK funded Centre for Copyright and New Business Models in the Creative Economy (CREATE), AHRC Grant Number AH/K000179/1. This note has been edited by K. Patterson and is included in the CREATE Working Paper: *Digitising the Edwin Morgan Scrapbooks: Copyright Guidance Notes (2nd Edition)*. The first version of this note is part of R. Deazley, K. Patterson & P. Torremans, *Copyright Guidance Notes (1st Edition)* (2017), available at: www.digitisingmorgan.org/resources

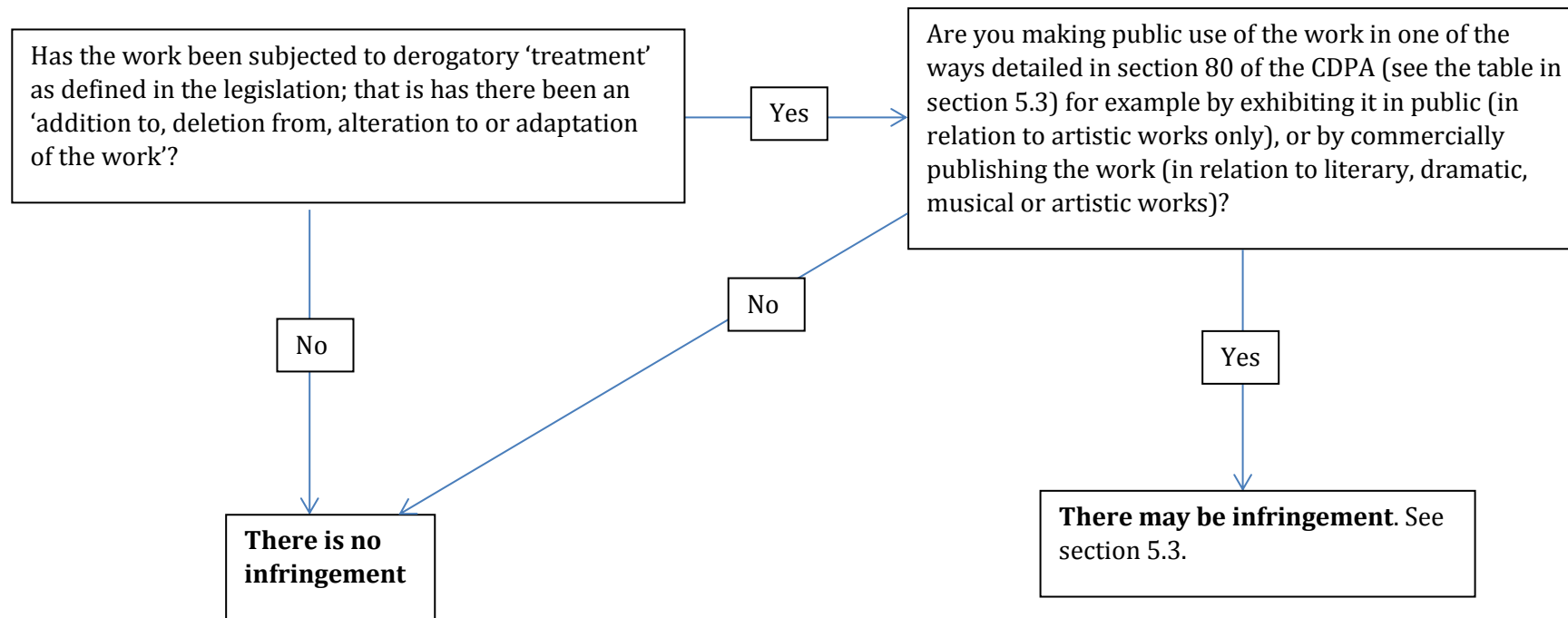
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7.1 Type of work & date of creation



7.2 Infringement



7.2.1 Do you possess a work that has been subjected to a potentially infringing derogatory treatment?

If you suspect that a work in your collection has been subjected to a derogatory treatment then simply possessing the infringing article may constitute an offence under section 83 of the CDPA. You should discuss with your line manager or Board of Trustees whether to retain the potentially infringing article in the collection or look to the appropriate guidance for your sector, if available. For example, general guidance on disposal for Museums can be found in the Museums Association's Code of Ethics and the Disposal Toolkit, however this does not currently include reference to disposal on the grounds of violating the CDPA.