

MORAL RIGHTS: ATTRIBUTION

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1. Introduction

When undertaking a digitisation initiative, it is important to understand when attribution of authorship is required. This briefing note explains the protection which UK law provides for the moral right of attribution – the right to be identified as the author of a work. It considers the implications of this right for non-commercial digitisation initiatives and addresses a number of related questions.

2. In Practice

To help determine whether you need to be concerned about this right, consider the charts at the end of the document in section 8.

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 their 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 right of attribution might impact the digitisation of material held in archive and other cultural heritage collections. Details about the moral right of attribution are set out in sections 77-79 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.

5.1. Works made before 1 August 1989

Both the right to be identified as the author of a work (s.77) and the right to object to derogatory treatment of the work (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.

6. The Moral Right of Attribution

6.1. Excluded material

The right of attribution 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.79(2))
- any work that was made for the purpose of reporting current events (s.79(5))
- any literary, dramatic, musical or artistic work made for the purpose of publication in a newspaper, magazine or similar periodical, or in an encyclopaedia, dictionary, yearbook or other collective work or reference (s.79(6))
- Crown and Parliamentary copyright material, unless the author or director has previously been identified as such in or on published copies of the work (s.79(7))
- works in which copyright vests in certain international organisations,¹ unless the author or director has previously been identified as such in or on published copies of the work (s.79(7))

So, for example, making a newspaper article available online as part of a digitisation project but without attribution details (perhaps you have not been able to identify who wrote the article) will not trigger any liability under this moral right on the basis that the work was both created for reporting current events (s.79(5)) and/or for publication in a newspaper (s.79(6)).

Within the Edwin Morgan Scrapbooks, examples of excluded material include cuttings from newspaper articles (s.79(5)) and artistic works such as cartoons that were created for publication in a newspaper, magazine or periodical (s.79(6)).

6.2. No infringement unless the right has been asserted

The CDPA states that while the author of a relevant work may enjoy the moral right of attribution in that work, the right is not infringed unless the author has *asserted* her right of attribution (s.77(1)). That is, without asserting the right the author cannot complain of a breach of that right.

Typically, assertion involves the author creating a signed, written document which states they are asserting their moral right. Alternatively, a provision asserting the attribution right might be written into a contract when the author is contracting with a publisher, producer, and so on. In relation to artistic works, this might involve providing details about the author on the work itself whenever it is being publicly exhibited (e.g., on the work, or on the frame, mount or other thing to which it is attached).

The fact that the right of attribution must be expressly asserted by the author is an important consideration when dealing with the types of work that are typically held in archive and other heritage collections. Think, for example, of the number of copyright works that you create in the course of an ordinary day: a letter drafted for work purposes, an email written to a friend, or a photograph taken on your phone and posted to a social media site. These are all likely to be protected by copyright, but the moral

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

right of attribution is never likely to arise as you are unlikely ever to assert your moral right in relation to this type of everyday ephemera, none of which is created with commercial exploitation in mind. And so it will be with the records and documents typically held in archives and other heritage collections: they are accessioned to a collection because of their evidential value – they speak to the fact that something happened in the world, information that is worth preserving for future generations – but rarely were these records created with the possibility of commercial or other forms of public exploitation in mind, and rarely will author have expressly asserted their moral right of attribution.

6.3. Scope of protection

If the work qualifies for protection, and the author has asserted their right of attribution, the right applies in relation to the use of the work in its entirety or to any substantial part of the work (s.89(1)). So, even a partial reproduction of the work, if substantial, will require attribution under the right.

6.4. Infringement

If the right of attribution can exist in relation to a particular work, and that right has been asserted by the author, then what constitutes infringement of the right?

Infringement is only triggered by making use of the work in certain circumstances without properly identifying the author. Moreover, the types of activity that trigger infringement will vary depending on the type of work you are dealing with. So, whereas doing something with a literary work without attribution might constitute infringement, doing the same thing with a musical work may not. The following table provides an overview of when an offence might be committed, although you should refer to the provisions set out in s.77 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	Y	Y	Y	-
EXHIBIT IN PUBLIC	-	-	-	Y	-
PERFORM IN PUBLIC	Y	Y	-	-	-
SHOW IN PUBLIC	-	-	-	-	Y
INCLUDE IN A FILM SHOWN IN PUBLIC	-	-	Y	Y	-

COMMUNICATE TO THE PUBLIC	Y	Y	-	Y	Y
BROADCAST	Y	Y	-	Y	Y
MAKE AVAILABLE ONLINE	Y	Y	-	Y	Y

*Refer to the provisions set out in s.77 for further details.

In relation to the table above, it is important to note that the lyrics that accompany a song (that is, any literary work ‘intended to be sung or spoken with music’) are treated *as if they were a musical work*. So, whereas broadcasting or performing a literary work in public (for example, reciting a poem) should be accompanied by an appropriate attribution, when broadcasting or playing a song in public it is not necessary to attribute the author of either the music or the lyrics of that song.

In addition, in relation to musical works (including songs and song lyrics), it is worth noting that authorial attribution is not required when communicating the work to the public, which involves making the work available online.

6.5. Qualification of the right: work created by employees

The CDPA qualifies the application of the right of attribution in relation to work created by employees where copyright originally vested in the employer (that is, work created in the course of employment) (s.79(3)). So, as long as you have the permission of the copyright owner (rather than the author) to make use of the work, then the right of attribution does not apply.

For example, if the author was an employee at the time she created the relevant work the copyright in that work may well have first vested in her employer: in this situation, as long as you are using the work with the employer’s permission, the author cannot complain of any potential breach of her moral rights (whether attribution or integrity). This would be of particular significance when dealing with corporate or other business archives.

6.6. Exceptions to the right

Even if the moral right of attribution exists in relation to a work, and you are making use of the work in a manner that triggers the need for attribution (as set out in the table above), the CDPA also provides for a number of exceptional circumstances in which attribution is not required.

The right does not apply to anything done by or with the authority of the copyright owner where copyright in the work originally vested in the author’s or director’s employer (as discussed in 2.1. above).

In addition, attribution is not required when the use of the work relates to the reporting of current events (as defined by s.30 of the CPDA), or when the work has been incidentally included in an artistic work, sound recording, film or broadcast (as defined

by s.31 of the CDPA), neither of which are likely to be of great relevance when digitising archive material to make it available online.

7. Legal References

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

Copyright (International Organisations) Order 1989 SI 1989/989

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

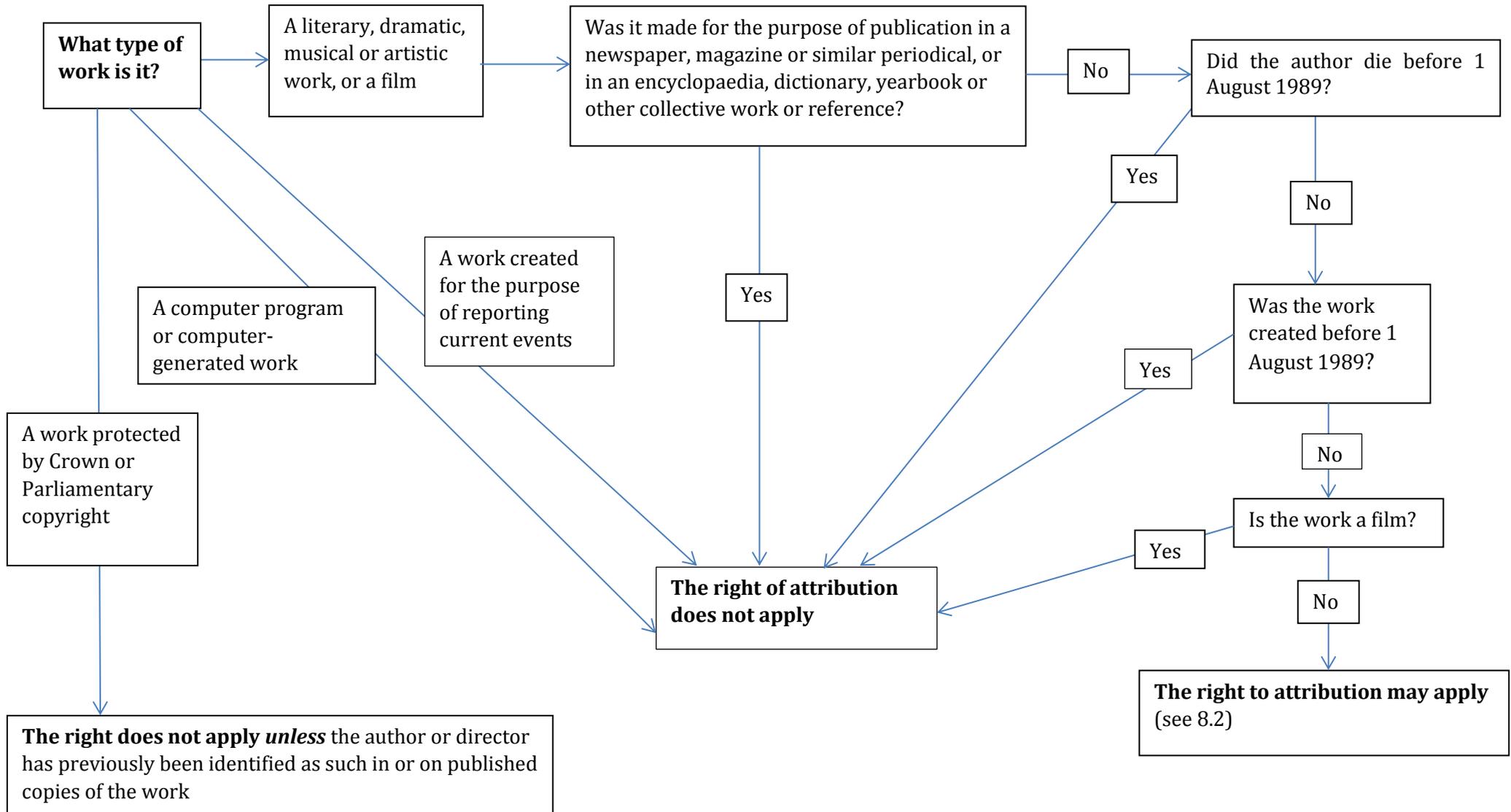
The charts in 8.1 and 8.2 can help you to determine if you need to consider the right to attribution in your project

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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8.1 Type of work & date of creation



8.2 Asserting Rights, Exceptions & Permissions

