

Copyright, Trademarks and Design Rights

How does copyright work?

Duncan Clark:

Welcome to our second video in the series on copyright, trademarks and design rights. This series of videos is presented by Dr Hayleigh Boshier of Brunel University, London. This video, "How does copyright work?", will cover the following:

- *What types of work are covered by copyright?*
- *How does copyright apply to organizations?*
- *Who owns copyright?*
- *What is the level of protection provided by copyright?*
- *How do you get copyright protection?*
- *Is copyright an international right?*
- *What do you need to understand about copyright at an international level?*
- *How can people protect themselves from infringement, what should they do?*
- *What should small businesses or freelancers do if their copyright is infringed?*

Hayleigh Boshier:

What types of work are protected by copyright?

So, copyright protects literary, artist and dramatic works, things like that. So that would be books, anything written actually is a literary work, films, music, photographs, artistic work. It's quite broad but we have a closed list in this country. Our law only protects things that fall within these categories, it's not an open list.

How does copyright apply to organizations?

I think for businesses it's really important to recognize what copyright is for two reasons. Firstly, to really benefit from their creative outputs that could be protected by copyright, and secondly, to avoid infringing other people's copyright. So it's important to understand what is protected by copyright and what's freely available to use. If you are borrowing or using, for example, most companies nowadays have a website and have social media, their copyright becomes really important, because those things use copyright protected material like photographs or a written passage, that kind of thing.

Who owns copyright?

If you work for a company under a contract of employment, the usual starting point in the law is that it's usually the company that own the intellectual property, and particularly the copyright, rather than the individual. That might however seem quite harsh, but actually if you think about

a big company like Apple, if they allowed all of their employees to retain the copyright and stuff that they created for Apple, every single time they wanted to amend it or put it to market they would have to go back to that individual and get their permission. So, it's really a practical thing above anything else.

If you are a freelancer, which is a little bit different, you write your own contract usually, then you can retain the copyright for yourself. Things get a little bit complicated if you have more than one creator making something. So, you can have joint ownership where you both own the whole thing. Or, for example, in a song there are different aspects of copyright, for example: the lyrics or the melody, even the sound recording. You have different people who own different parts of the copyright. So, you might have the lyricist owning the lyrics and the performer owns the performance and it's usually the producer that owns the sound recording.

There's a famous case that you might have heard of about this "Monkey Selfie". There was a photographer, he's a UK photographer, and he took his camera to the zoo and set it up and gave the camera to a monkey, who then took a picture of himself. David Slater, the photographer, was then licensing the use of that photograph for money. However, Wikipedia have this particular site called *WikiComments* where they upload material that they believe is in the public domain and they uploaded this photograph. The photographer was then unable to make any money from the license and so a dispute arose. He argued that he owned the photograph because he was the creator and Wikipedia argued that he wasn't the creator, the monkey was, and so it all went to court. It was a really long, on-going case that went back and forth, it was in America. The court did, at one point, say that a monkey can't have copyright, but then it got even more complicated because the charity PETA got involved and they said they keep the monkeys, so they should have the ownership. It went on and on and on, and eventually they settled out of court and poor David Slater has to give any royalties from the photograph to [PETA], so he's not making any money out of it.

So, the point is: ownership is not always clear. From a business perspective you must always decide at the beginning who owns what share. If it's joint ownership and you both own the whole, a bit like how you would own a house, then you have to pre-empt that maybe at the end of the project if you want to sell or license, you're going to need both people's agreement to do that.

If, like the song, you own different aspects it might be slightly different because you could maybe license the sound recording if you were the producer, but then you might need permission from the other people, does that make sense? It's something to be aware of that ownership is not clear cut.

What is the level of protection provided by copyright?

Copyright, as I was saying, protects different types of things. The criteria for having copyright in the first place is that it must be original, in the UK we explain that as using "you own skill, labor and effort". At EU level, they used the words "intellectual creation", but they really mean the same thing. Once you've put your own skill, labor and effort, so you've exerted your own creativity to make something, that's the threshold for originality and you've reached that

criteria. The second thing, it just needs to be recorded. So, either written down or filmed, it has to be in a fixed form. So, once you have those things, and it fits within the categories I mentioned before, then you have copyright.

Once you have copyright, as a copyright holder, you have a range of different things that you can then stop other people from doing without your permission. That includes things like copying your work without your permission, communicating the work to the public without your permission, performing the work, basically using the work in any different way (but we have all these different ways of explaining that in the law that are quite specific). The most common use is copying or communicating to the public, but there's also things like renting, lending.

How do you get copyright protection?

In order for copyright to arise, it is pretty straight forward that you just have to create something that reaches the criteria that is 'copyrightable', and it's fixed in form, copyright is there. That's all you need to do for copyright to exist. In order to enforce your copyright or protect your copyright, there are other steps that you can take. You don't have to take them, because technically it's arisen, but if there was ever a dispute in the future there are steps you can take to protect yourself there.

For example, people often say to me: *"If I send it to myself in the post, then does that mean I have copyright protection?"*. So that's a little bit of a myth, but it's not completely untrue. Firstly, you don't actually need to send it to yourself in the post, you could just email it to yourself. But all that proves is that the thing existed on that day. It could be used in court to show that it was in existence on that day, but it doesn't necessarily prove that you were the one that created it. It could be useful. I always say to clients that it's a really good idea to keep a record of the creative process, should anything ever happen where anybody disputes that you might have copied them, you can then prove that you created it yourself.

One thing that people often do that is very useful is that they put the 'C in a circle' (©) and then their name and the date. That's called asserting your copyright. As I said, copyright is arisen, it doesn't mean that you don't have copyright if you don't put the [©], but does assert your copyright. It lets people know that you own copyright in that particular material and it helps them to know whether they can use it and when it was created any who by.

Is copyright and international right?

Copyright is a territorial right, and what that means is that the law of this country applies to this country. There are copyright laws in almost all countries and if you were in that country that is the law that would apply. We have an international hierarchy of laws. We have international agreements, where lots of countries around the world have signed this agreement to say that they will respect the copyright of people from other countries in their country and that is for the purpose of trade. So that's really useful, but what's important to be aware of is that if you have copyright in this country it might not be the same as the copyright in, for example, France because their laws are slightly different to ours. We also have EU level directives which harmonize on some level, but they differ even in Europe. So, France, as I mentioned, would

even have different laws to here. So, for business it's important to know the laws of the country that they operate in, or maybe where their customers are, where they're accessing the website, that kind of thing, it all becomes relevant. But, UK law only applies in the UK.

What do you need to understand about copyright at an international level?

The hierarchy of law is something that probably wouldn't necessarily be one of the most important things for a company to understand because that's more of like a legislative aspect of the law. We have at the top things like the Bern Convention and the TRIPS agreement, and these are the international agreement that recognize a very basic level of copyright for all the countries that sign up to it, and then you have the same with all the EU directives. But that's transposed into UK law, so the first thing if you were in this country would be to look at the local law and see how that applies to you. And yes, if you are then operating in another country it would be important to understand the law of that country. That would probably be the most relevant thing for them to look at, rather than: "what does the Bern convention say?", because that's more of an academic debate maybe, a legislative argument and the only time that would really become an issue is if someone believed the UK law was in conflict with the high law. So, they set the minimum boundaries of what is required, and we create our law which is much more complex.

How can people protect themselves from infringement, what should they do?

I think it depends again in industry, because you have to kind of know the field that you're in. There's not a 'one size fits all' answer to how to stop infringement. It also depends on what kind of infringement it is you're defending yourself against. In the digital age it's important to recognize that once you put something online it's likely to be shared and so often the answer is not necessarily a legal one, it's a strategic one, maybe a technological resolution. If you know that, for example, an image is going to be shared online then having a watermark or some kind of data behind the photograph that enables people to trace it back to you. With clients I usually advise then, for example a photographer or fashion designer, something like that, is just to be more strategic about what they put online knowing that's the world we live in.

So, it's just about being street smart and not thinking if you put something online and then try and hold it back from being shared. But again, it depends entirely on the type of industry because different industries have different threats.

What should small businesses or freelancers do if their copyright is infringed?

I think if you are a small business, company or individual then it's important to have that knowledge about what copyright is and what infringement is and how not to infringe other people's. If they do think that their copyright has been infringed then first of all the need to understand, as I mentioned, about ownership. Is it theirs to enforce? Once it's established who owns it it's also important to know who can actually bring an action or bring a claim for infringement. Because sometimes it can be somebody who has an exclusive license, not necessarily the creator, or you can join together to bring an action. So, it's important to know who owns and who can bring a claim. And then, as we've been talking about, what is

infringement? Before knocking on the door of the court, understand what is infringement? Has the whole thing been taken?

The way we describe copyright is the 'whole or substantial part' of the work has been taken, so that would be an important aspect to understand. There are also copyright exceptions, so is the work being used within those exceptions? In which case, somebody doesn't need your permission to use it. Step three would be: is there actually infringement?

If the first three steps you're like "yes, it's definitely me that owns it. I can bring an action or at least I think it's infringement", then there's lots of different routes available to somebody. They might, as I mentioned earlier, seek some pro-bono advice, which is just free legal advice. There are IP centers that offer that. They might seek a consultant, or have a look on the UKIPO website, that kind of thing. There's also organizations that support different industries in enforcing their copyright for them. If you're an author, for example, there's an author's society that would help you, and musicians have the same thing.

Also, the UK we have this thing called the intellectual property enterprise court (we call it the IPEC) and that is kind of like a small claims court for IP disputes. It's something that's very useful for small companies because it's much cheaper and faster than going to the high court, you can represent yourself if you feel that you can and the damages etc. are capped at the end and how much you're going to get back. So, that would be another avenue to explore.

Before you do that, it's important to also know about what's called 'preliminary action'. So that is things like just writing a letter to the person and saying "excuse me! This is mine, I think you might be infringing it.". More often than not, if you do that, if you just write a letter, a formal letter, the person will be like "oh so sorry, I didn't realize!". Then you can come to some kind of agreement. Maybe take the thing down if it's something online, maybe pay the license fee of what they would have paid, you can come to a natural agreement and you don't have to go straight to court. If that doesn't work initially there's also what we call 'dispute resolution'.

So, you might try mediation, which is just an informal way to resolve an issue that is not the same as going to court. It's a little bit cheaper, parties just agree to have a discussion and try to work it out between themselves with an independent mediator in between. At the end of that you agree a contract, so it's a bit more formal than the first option of just deciding between yourselves, but it's not quite the court action. That's a really good option, especially for small businesses, because it's cheaper and because you're restricted by only the remedies that the court can give. If you do go to court, you're likely (if you win) to get damages, maybe an injunction, which means it stops the person from doing something.

If you go through mediation you can agree anything. So, for example we mentioned social media earlier, there was a dispute recently between one of the Kardashians, Khloé I think it was. She posted a picture of herself on her Instagram. So, to the average person who doesn't know much about copyright, they might think that there's nothing wrong with that. But actually, as we talked about with ownership, the owner of the photograph is the photographer. He licensed that photograph to a newspaper and was making money from that. When she posted

it on her social media, the value of the license is gone. So, the photographer, together with his society, as I mentioned that you can go to within the industry, sued her for posting the picture.

If they'd gone through mediation, they might have instead of just asking for damages, they could have come up with some more innovative solutions. For example, she currently charges something like a million dollars to post an advert on her Instagram. So maybe she could have credited him, which might sound less appealing than an injunction or damages, but actually in the modern world that might be more helpful for the photographer.

Duncan Clark:

Thanks to there to Dr Hayleigh Boshier. Join us video three when we take a look at examples of copyright in practice. Thanks for watching and see you next time.