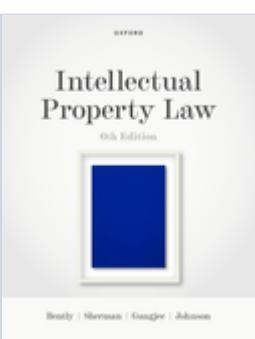


Intellectual Property Law (6th edn)
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p. 242 **9. Defences**

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<https://doi.org/10.1093/he/9780198869917.003.0009>

Published in print: 31 October 2022

Published online: October 2022

Abstract

This chapter deals with the exceptions that a person may invoke in defence when sued for copyright infringement. Most of these exceptions are referred to as 'permitted acts' in Chapter III of Part 1 of the Copyright, Designs and Patents Act 1988 (CDPA 1988). The chapter begins by introducing six concepts that feature in many of the exceptions set out in the CDPA 1988: fair dealing, non-commercial use and not-for-profit users, lawful use, sufficient acknowledgement, relationship with contract, and dealings with copies made under exceptions. It then discusses the exceptions relating to non-commercial research or private study; text and data analysis; criticism or review; quotation and parody; disclosure in the public interest; uses of works for people with disabilities; public administration; databases, computer programs, and electronic programs; and artistic works and broadcasts.

Keywords: exceptions to copyright infringement, permitted acts, defences, fair dealing, criticism or review, research, parody, educational uses, libraries, non-commercial use

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1 Introduction

This chapter considers the exceptions on which a defendant may rely when sued for infringement of copyright. Most of these exceptions are found in Chapter III of Part 1 of the Copyright, Designs and Patents Act 1988 (CDPA 1988), as amended, where they are referred to as 'permitted acts'. The exceptions come into play only once a claimant has established that copyright has been infringed. Where this occurs, the onus of proof falls on the defendant to prove that one of the exceptions applies.¹

At the most abstract level, the exceptions in the CDPA 1988 attempt to 'balance' the rights of copyright owners with a multiplicity of other rights, freedoms, and interests. The resulting body of legislation appears as anything but a rational scheme;² rather, it is a strange collection of exceptions, many defined with 'extraordinary precision and rigidity'.³ This remains the case, despite two reviews and their implementation by the addition of a number of further exceptions in 2014.⁴

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One reason that the form of the Act remains as it is can be found in the restricted legislative freedom that has hitherto existed at a national level. As we have observed, the Information Society Directive harmonizes the rights of reproduction, communication, and distribution, but it also regulates the circumstances in which exceptions to such rights may be recognized.⁵ The Directive provides 'for numerous exceptions',⁶ the aim being to provide 'a fair balance' between right holders and 'users'.⁷ More precisely, the Directive contains one mandatory exception as regards transient or incidental acts of reproduction,⁸ and a list of optional 'exceptions or limitations', many covering the analogue environment.⁹ On the whole, member states have the choice not only whether to implement the optional exceptions, but also in relation to how the exception is implemented.¹⁰ The list is exhaustive: member states may not maintain any other exceptions or limitations,¹¹ nor may they develop new ones in response to changes in the technological environment and cultural practices.

Prior to Brexit, the interpretation of exceptions permitted under the Directive was a matter for the Court of Justice. In a number of cases, which constitute retained case law, the Court has indicated a preference for a ‘narrow’ interpretation,¹² primarily on the basis that these are derogations from general rules.¹³ However, in many of the same cases, the Court has also embraced a ‘purposive’ interpretation,¹⁴ and emphasized the need to ensure a ‘fair balance’ between the rights and interests of authors and those of users.¹⁵ In one Opinion, Advocate-General Szpunar has observed that ‘dialogue, inspiration and reformulation are inherent in intellectual creation and copyright is not meant to hinder them’,¹⁶ and the Court, sitting as a Grand Chamber, itself has now referred to the exceptions and limitations recognized in Article 5 of the Information Society Directive as ‘user’s rights’. In *Funke Medien*, the Court stated:

[A]lthough Article 5 of Directive 2001/29 is expressly entitled ‘Exceptions and limitations’, it should be noted that those exceptions or limitations *do themselves confer rights on the users* of works or of other subject matter ... In addition, that article is specifically intended ... to ensure a fair balance between, on the one hand, the rights and interests of rightholders, which must themselves be given a broad interpretation ... and, on the other hand, the rights and interests of users of works or other subject matter.¹⁷

This conception of exceptions in terms of ‘user’s rights’ is linked to the importance of ensuring the observance of ‘fundamental rights’.¹⁸ The defences listed in the Directive are also additionally declared subject to the so-called ‘three-step test’, which has been described as one of the ‘most infamous’ as well as the ‘most mysterious’ norms in copyright.¹⁹ This requires that exceptions must be ‘applied’ only to ‘certain special cases’, must not interfere with the ‘normal exploitation’ of the work/subject matter, and must not prejudice the ‘legitimate interests’ of authors/right holders.²⁰ In the jurisprudence of the CJEU, the three-step test seems to bite at the time of implementation of an exception in national law as well as in relation to its application.²¹ In the post-Brexit environment, its status is complicated. While it has not been implemented expressly into UK law, most if not all the defences in Chapter IV of the CDPA are ‘retained EU law’ and the three-step test is necessarily part of the retained case-law. Moreover, the three-step test is part of the international *acquis* and is explicitly incorporated in free trade agreements including Article 233 on the UK-EU Trade and Cooperation Agreement. There is an obvious tension between the ‘three-step test’ (with its focus directly purely on the effect of exceptions on right holders) and the idea that exceptions are to fairly balance the fundamental rights and interests of owners and users.²²

Before examining the exceptions contained in the CDPA 1988 individually, we begin by outlining some concepts that feature in many of the exceptions—fair dealing, non-commercial use, lawful use, and sufficient acknowledgment—as well as the rule, applicable to certain exceptions, that seeks to ensure that users’ freedoms are not limited by contractual agreement.

2 Basic Concepts

In this section, we want to introduce six basic concepts that are frequently deployed in the specific exceptions.

2.1 ‘Fair Dealing’

Perhaps the most significant concept in Chapter III is the concept of ‘fair dealing’.²³ This requirement limits the operation of six defences:

- (i) fair dealing for the purposes of research or private study (s. 29(1) and (1C));
- (ii) fair dealing for the purposes of criticism or review (s. 30(1));
- p. 246 (iii) ↗ fair dealing exceptions will be available for ‘quotation’ (s. 30(1ZA), introduced in 2014);
- (iv) fair dealing for the purpose of reporting current events (s. 30(2));
- (v) fair dealing for purposes of ‘parody, caricature or pastiche’ (s. 30A(1), also added in 2014); and
- (vi) fair dealing for the purposes of illustration for instruction (s. 32).

In this context, all that is meant by ‘dealing’ is that the defendant has made use of the work. Dealing does not imply that there has to be some sort of transaction between the parties. Under these provisions (with the exception of fair dealing by quotation), ‘fair dealing’ is permitted only for the purposes specifically listed in the 1988 Act. This means that the dealing must be fair for the purpose of research or private study, criticism or review, quotation, the reporting of current events, parody,²⁴ or ‘illustration for instruction’. As such, it is irrelevant that the use might be fair for a purpose not specified in the Act, or that it is fair in general. The restricted approach adopted in the United Kingdom should be contrasted with US copyright law, which has a general defence of *fair use* such that if the court is satisfied that the use is fair, then there will be no infringement.²⁵

In deciding the purpose for which the work was used, traditionally the test does not depend on the subjective intentions of the alleged infringer;²⁶ rather, a more objective approach is adopted, so that the question is whether the dealing is ‘in the context of’ research, criticism, instruction, parody, or reporting.²⁷ However, a number of decisions of the Court of Justice imply that subjective intention might be relevant.²⁸

If a dealing falls within one of the specified purposes, it needs to be considered whether the dealing is fair.²⁹ ‘Fairness’ is said to be a question of degree and impression.³⁰ The courts have sometimes adopted the perspective of whether a ‘fair-minded and honest person’ would regard the dealing as ‘fair’, but whether this takes the analysis very far might be doubted.³¹ As Lord Phillips MR stated: ‘It is ... essential not to apply inflexibly tests based on precedent, but to bear in mind that considerations of public interest are paramount.³² A number of factors might influence the way in which this question is ↗ answered,³³ although the relative importance of each of these factors will vary according to the case in hand and the type of dealing in question.³⁴

2.1.1 The nature of the work

The nature of the claimant’s work may play an important rôle in the appraisal of whether a dealing is fair. Apart from the fact that fair dealing by way of private study does not apply to musical scores, and fair dealing for purpose of reporting current events does not apply to photographs, it seems clear that the degree of originality of a work can be relevant in other ways: it may be fair to take more from a work that has a low

level of originality, for example, a work that purports to be largely factual. In the *Duchess of Sussex v. Associated Newspapers*,³⁵ the Court of Appeal approved the observation that ‘the nature and degree of the originality involved in a work can affect the availability of defences such as fair dealing, public interest, and ... freedom of expression’, while finding that the Judge had included this consideration in his assessment that there was no arguable case that the newspaper’s reproduction of ‘a large and important proportion’ of Meghan Markle’s letter to her father had been fair.³⁶

The nature of the work may be relevant in other ways. Where the dealing takes place in relation to a work that has not been published or made widely available to the public, this will weigh against the dealing being fair.³⁷ In fact, in the case of fair dealing for criticism or review, and fair dealing by quotation, the defence is specified to be unavailable if the work has not been previously ‘made available’ to the public.³⁸ In other cases, particularly that of reporting current events, the fact that a work has not been published will certainly stand against a defendant.³⁹ In this respect, it is likely that the weight that a court gives to the fact that a work is unpublished will vary according to the nature of the work in question, giving more weight in relation to private letters than it would for official reports that revealed matters of public importance.

2.1.2 The amount and substantiality of the portion used

The quantity and quality of what is taken will be a crucial factor in deciding whether a dealing is fair.⁴⁰ As Lord Denning MR said in *Hubbard v. Vosper*,⁴¹ you ‘must consider ... the number and extent of the extracts’ and ask: are ‘they altogether too many and too long to be fair?’ This is because lengthy and numerous extracts, or extracts of the most important parts of a work, will reduce the expected returns to the copyright owner. By focusing on the quantity and quality of what is taken, the courts have recognized that fair dealing should not undermine the role that copyright plays in encouraging creativity. In general, therefore, the defence will apply only where part of a work is taken. Nevertheless, the courts have acknowledged that, in some cases, such as where the work itself is short, it may be fair to reproduce the whole work.⁴²

2.1.3 The purpose and character of the use made of the work

Another factor that may influence the decisions as to whether a dealing is fair is the use that is made of the work in question. In some instances, it may be ‘fair’ merely to reproduce someone else’s work without comment or analysis (e.g. for research or instruction). However, in many cases, a use is more likely to be fair if the defendant can show that they have added to or recontextualized the part taken—that is, a defendant will have a stronger case if they can show that the dealing was transformative.⁴³ This is particularly the case with fair dealing for criticism or review, quotation, or parody.

It seems that the fact that a defendant derives a commercial benefit from the dealing will weigh against them when attempting to show that the dealing was fair.⁴⁴ As Chadwick LJ said in the Court of Appeal decision of *Newspaper Licensing Agency v. Marks & Spencer*:

[A] dealing by a person with a copyright work for his own commercial advantage—and to the actual or potential commercial disadvantage of the copyright owner—is not to be regarded as a ‘fair dealing’ unless there is some overriding element of public advantage which justifies the subordination of the rights of the copyright owner.⁴⁵

2.1.4 The effect of the use on the market for the work

Another factor that will influence the decision as to whether a dealing is fair relates to the impact that the dealing will have upon the market for the work. This is particularly important where the parties are in competition and the defendant’s use of the work acts as a substitute for the purchase of the original work.⁴⁶ This would be the case, for example, if, in criticizing it, a defendant were to show all of a film.

2.1.5 How the work was obtained

The method by which the copyright material has been obtained has also been a factor in determining whether the dealing is fair.⁴⁷ It is less likely for a dealing to be fair if the dealing relates to a work that is leaked or stolen, or obtained by unauthorized access to a database, than to a work that is obtained legitimately.⁴⁸

p. 249 **2.1.6 Motives for the dealing**

Another factor that may influence the decision as to whether a use is fair relates to the motive of the alleged infringer.⁴⁹ For example, where a person acts dishonestly or for a motive that the court finds questionable (such as being primarily motivated by financial gain), it is likely to weigh against them. In contrast, if an alleged infringer can show that they were acting benevolently or were motivated by some altruistic or noble cause, this will increase the chances of their establishing that the dealing was fair.

2.1.7 Could the purpose have been achieved by different means?

In some cases, the courts have asked whether the purpose could have been achieved in a manner that is less intrusive on the copyright holder’s rights.⁵⁰ While there can be few objections to this test being used to determine whether a dealing is fair, problems may arise in the way in which it is applied by the courts. This can be seen in *Hyde Park Residence v. Yelland*.⁵¹ This case concerned an application for summary judgment against *The Sun* newspaper for publishing stills of Dodi Fayed and Diana, Princess of Wales, taken from security film, the copyright in which was owned by the claimant. The defendant argued that the stills revealed the times when Fayed and Diana were present at Villa Windsor and therefore exposed the falsehood of statements made by Mohammed Al Fayed. The Court of Appeal held that it was not necessary for *The Sun* to have published the images taken from the video; the same result could have been achieved via written word. As Aldous LJ said:

The information as to the timing of arrival and departure of Dodi and Princess Diana could have been given in the articles by the reporter in *The Sun* stating that he had seen the photographs which proved the Princess and Mr Dodi only stayed at the Villa for 28 minutes.⁵²

2.2 Non-Commercial Use and Not-For-Profit Users

Many of the exceptions depend on the use being ‘non-commercial’.⁵³ What counts as ‘commercial’ is said to cover not only uses that are directly commercial, but also uses that are indirectly commercial. The notion of ‘commerce’ here is almost certainly similar to the concept of ‘trade’ in trade mark law, which has been said to refer to ‘economic activity’.⁵⁴ In these contexts, commerce is understood as more than a few one-off sales.⁵⁵

- p. 250 ↵ Recital 42 of the Information Society Directive indicates that the test of non-commerciality relates to ‘the activity as such’. The organizational structure and means of funding ‘are not the decisive factors in this respect’. It is worth observing that Recital 42 does not say that organizational structure and means of funding are not relevant: many activities by public sector and/or charitable and not-for-profit organizations will be ‘non-commercial’, and most activities of private sector, profit-making businesses will be *per se* commercial. Rather, the implication of Recital 42 is that an activity (such as in-house education) can be non-commercial even if it takes place in a for-profit, private sector organization, or in an environment in which students pay fees. Conversely, a not-for-profit organization might be involved in commercial use, for example where a university publisher makes and sells copies of a work.

Further problems exist in determining whether a use is to be regarded as ‘indirectly commercial’: how remote can the commercial benefit be and still be relevant? In our view, the answer is that the use must be closely integrated with a commercial activity before a use can be categorized as ‘indirectly’ commercial. For example, if a public house attracts customers by showing copyright films, this could be said to be indirectly commercial even if the pub does not charge directly, because it hopes to make money from the sale of food and drinks.⁵⁶ But if a person is studying law with a view to becoming a commercial lawyer, or researching a topic in the hope of publishing a book for which they might receive substantial royalties, we think that the commercial benefit is too remote for it to be said that the use is for a ‘commercial purpose’, even indirectly.

Other exceptions, such as that relating to making and supplying accessible copies to persons with a disability, are limited to not-for-profit organizations.⁵⁷ In many cases, this limitation replaced former requirements on the Secretary of State to designate or certify the scheme, and the reform is aimed at reducing bureaucracy.

2.3 Lawful User

A number of exceptions depend on the user being regarded as a ‘lawful user’ or ‘lawful acquirer’ or having ‘lawful access’.⁵⁸ Whether there was meant to be any distinction between these concepts may be regarded as doubtful.⁵⁹ The term ‘lawful acquirer’ covers a purchaser of a work, a subsequent recipient (such as a second-hand purchaser or borrower), and a licensee.⁶⁰ In *UsedSoft GmbH v. Oracle International Corp.*,⁶¹ the Court of Justice held that a transferee of software from an original purchaser is a ‘lawful acquirer’ (even though a licence term affecting the original purchaser purported to prevent such transfer).⁶² This is so even in the case of sale of software in intangible form and even after it has been subsequently patched or updated.⁶³

- p. 251 ↵ Some of the UK provisions use other terms in the same ‘family’: the text and data analytics defence is available only to a person who has ‘lawful access’;⁶⁴ the exceptions for persons with disabilities, which formerly required ‘lawful possession or lawful use’,⁶⁵ now similarly require ‘lawful access’. The differences, if they exist, between lawful acquisition, possession, access, and use, seem very subtle and such differentiation makes for an unnecessarily complex set of rules.

2.4 Sufficient Acknowledgement

In certain situations, for a defence to apply, the use must be accompanied by a ‘sufficient acknowledgement’.⁶⁶ In essence, this means that the author and the work must be identified. It should be noted that even where sufficient acknowledgement is required as a general matter, the defence will still usually be available if ‘this turns out to be impossible for reasons of practicality or otherwise’.⁶⁷ Moreover, section 178 of the CDPA 1988 indicates that there is no need for the author to be identified where a work is published anonymously or, in the case of an unpublished work, where it is not possible for a person to ascertain the identity of the author by reasonable inquiry.⁶⁸

Where required, the defendant must show that they have identified both the work *and* the author of the work.⁶⁹ A work can be identified by its title or by some other description.⁷⁰ The author can be identified by name, pseudonym, or by other means, such as a photograph or a logo.⁷¹ Whatever method is chosen, it must convey ‘to a reasonably alert member of the relevant audience that the identified person is the author’.⁷² It is important to note that it is the author and not the owner of the copyright work who must be identified.⁷³

2.5 Relationship with Contract

As the CDPA 1988 reminds us, the mere fact that an activity falls within one of the permitted acts does not mean that it does not contravene some other legal right,⁷⁴ an obvious example being breach of contract. p. 252 With the increasing use of digital means to make works available, users are often confronted by attempts to limit their freedoms under the Act. In some situations, European law has specified that particular exceptions may not be prevented by contract;⁷⁵ in other cases, it has left the matter to member states.⁷⁶ The 1988 Act goes beyond the EU requirements and, in a number of other situations, applies restrictions to contractual provisions that seek to override exceptions.⁷⁷

The Act uses two different techniques. Sometimes, contractual provisions are declared to be ‘void’.⁷⁸ In other cases, the same goal is achieved by stating that the relevant terms are ‘unenforceable’ (rather than void) insofar as they purport to restrict the availability of the particular exception.⁷⁹

A related problem is that raised by the interface between the exceptions to copyright and technological measures of protection. If a person cannot take advantage of a defence because of the application of access or copy control mechanisms, can that person legally circumvent the measure in order to do so? So far, the UK legislature has answered this question with a clear ‘no’, leaving users deprived of the ability to utilize some of the exceptions, with the possibility of applying to the Secretary of State.⁸⁰ These provisions are reviewed in Chapter 13.

2.6 Dealings with Copies Made Under Exceptions

Because many of the permitted acts allow for the making of copies by particular people in specific circumstances and for particular purposes, the legislature has frequently sought to indicate that subsequent use beyond the purpose,⁸¹ or dealing that places the copy in the hands of another person,⁸² renders the copy an ‘infringing copy’.⁸³ In other words, just because a copy has been made under an exception does not mean that the copy is able to circulate freely in the market. The precise language by which the legislature has sought to achieve this result is not always consistent.⁸⁴

p. 253 **3 Temporary Technology-Dictated Copies**

In extending the notion of ‘reproduction’ to encompass transient copying,⁸⁵ the European legislature inevitably extended the remit of copyright into just about every corner of the digital world. This is because digital communication—and digital tools generally—function through the generation of temporary copies. For example, digital networks operate processes of ‘caching’—that is, the temporary storage of information in the user’s computer or server, which allows for speedier access to websites.⁸⁶ Such activities are positively desirable, since they enable the Internet to function speedily and efficiently and seem to have no obvious impact on the economic interests of content holders.

Recognizing this, the European legislature sought to exclude from copyright liability certain temporary copies that are transient or incidental to other activities.⁸⁷ Importantly, this was the only exception that was regarded as so significant that all member states were obliged to implement it. Nevertheless, the exception is subject to a number of conditions, so that its precise remit is uncertain. According to Article 5(1) of the Information Society Directive (implemented in the United Kingdom by section 28A of the 1988 Act⁸⁸), a person making a temporary copy will escape liability only if:

- (i) the copy is transient or incidental;
- (ii) the making of the copy is an ‘an integral and essential part of a technological process’;
- (iii) the copying either occurs to enable either transmission of the work in a network between third parties and an intermediary, or to enable a lawful use of the work; and
- (iv) the temporary copy has ‘no independent economic significance’.

The conditions have made it difficult to predict when temporary acts of reproduction will be legitimate. Perhaps not surprisingly, the meaning of Article 5(1) has been considered a number of times already by the Court of Justice. The first three cases were *Infopaq I* and *Infopaq II*, and *Football Association Premier League (FAPL) v. QC Leisure*.⁸⁹ The first two concerned temporary copies made at various stages in an electronic news-clippings service (scanning; undertaking optical character recognition, or OCR; searching; and printing out), whereas FAPL related to copies created in the buffer of a satellite broadcast receiver. Importantly, the Court of Justice indicated that the goal of Article 5(1) was to ‘ensure the development and operation of new technologies’.⁹⁰ The conditions thus need to be interpreted to ensure that the goal is achieved.

p. 254 ↵ The first requirement—that the copy be transient or incidental⁹¹—was considered in *Infopaq I*. In that case, the Court indicated that, to be transient, the duration of an act must be limited to that necessary for completion of the process, and the copy must subsequently be deleted automatically and without human intervention.⁹² A printout would clearly not be a transient copy, nor would making a digital copy for access on the terminals of a library,⁹³ but a scan might (depending on the details of the process).⁹⁴

The second requirement—that the reproduction be an ‘integral and essential’ part of a technological process—was considered in *Infopaq II*, in which the Court of Justice said that this ‘requires the temporary acts of reproduction to be carried out entirely in the context of the implementation of the technological process and, therefore, not to be carried out, fully or partially, outside of such a process’.⁹⁵ Despite this language, the Court indicated that the condition could be satisfied even though the process is initiated by a human being, such as the scanning of the newspapers.⁹⁶ The copies so created could fall within the defence if the other requirements were met.⁹⁷

The third requirement—that the purpose must be to enable a transmission in a network between third parties and an intermediary or to enable a ‘lawful use’—was considered in *FAPL* and *Infopaq II*.⁹⁸ Both indicated a broad construction of lawful use. In *FAPL*, it was held that receipt of a satellite broadcast was lawful and thus the creation of the buffer copies did not give rise to liability.⁹⁹ In *Infopaq II*, it was suggested that the making of a summary of a newspaper article, being a use that the copyright owner could not prevent, might justify the making of temporary copies by a technological process that facilitated that use.¹⁰⁰

The fourth requirement—that the acts be of no ‘independent economic significance’—was also considered in both *FAPL* and *Infopaq II*. In *FAPL*, the Court of Justice indicated that, for a copy to have such significance, it must be attributable to the copy itself rather than the lawful use (in the case, the reception of the broadcast). Because the buffer copies had no such value, the Court indicated that they fell within the exception.¹⁰¹ In *Infopaq II*, the Court elaborated on the reasoning in *FAPL*, stating that the defence would not apply if there were any economic benefit that was either distinct or separable from the economic advantage derived from the lawful use of the work concerned, or went beyond that derived from that use of the protected work.¹⁰² Efficiency gains, for example that it was quicker or easier to search newspapers by digitizing them, were not relevant.¹⁰³

The question of whether the exception allows for electronic copies that facilitate acts of browsing was considered by the UK Supreme Court and the CJEU in *Newspaper Licensing Agency (NLA) v. Public Relations Consultants Association (PRCA)*.¹⁰⁴ In that case, an ↵ electronic news-monitoring service used sophisticated search engines to identify stories contained in online versions of newspapers relating to particular search topics. The news-monitoring service sent its clients links to the relevant stories, accompanied by the titles and brief extracts surrounding the search term. In addition to raising controversial questions as to whether newspaper titles were original works,¹⁰⁵ the courts were asked to rule on whether the recipient of links infringed when they clicked on the links and visited the sites. In turn, this raised the issue, in effect, of whether browsing websites might infringe copyright. Given the way in which digital technologies operate, browsing inevitably involves making temporary copies, in an Internet cache and on a browser’s hard drive. The NLA argued that the browsing did not comply with the conditions of Article 5(1) and the Court of Appeal agreed. Relying heavily on *Infopaq I*, the Court stated that the copies in question met none of the conditions.¹⁰⁶

The Supreme Court recognized that the case raised an issue of general public importance, Lord Sumption explaining that:

[T]he ... question potentially affects millions of non-commercial users of the internet who may, no doubt unwittingly, be incurring civil liability by viewing copyright material on the internet without the authority of the rights owner, for example because it has been unlawfully uploaded by a third party.¹⁰⁷

Not insignificantly, by the time the case was heard by the Supreme Court, the Court of Justice had issued its decisions in *Infopaq II* and *FAPL*, both of which seemed to indicate a trend towards flexible purposive interpretation of Article 5(1). In light of these, the Supreme Court held that the acts of members of the PRCA in clicking on the links were not infringing. Giving judgment, Lord Sumption reasoned that the various components of Article 5(1) were overlapping and needed to be read together, rather than merely ticked off like separate items on a shopping list.¹⁰⁸ Having regard in particular to Recital 33 and also to *FAPL*, it was clear to the Supreme Court that Article 5(1) was intended to cover the making of copies to enable end-user acts of viewing content on the Internet (and was not confined, as NLA suggested, to copies created in transmission networks). Accordingly ‘the various conditions laid down by that Article must be construed so far as possible in a manner consistent with that purpose’.¹⁰⁹ Lord Sumption said that it was beyond argument that the temporary copies were created as an integral part of a technological process and that they had no economic significance beyond that from the lawful act of viewing; the key question was whether they were temporary and ‘transient or incidental’.¹¹⁰ He explained that he thought there was no difference between a temporary and a transient copy.¹¹¹ Given that the copy could remain in the cache for a considerable length of time, the Court recognized that it was difficult to fit the circumstances within the literal term ‘transient’. Nevertheless, because the cache copies are eventually, in the normal course of affairs, destroyed automatically, the Court found them to be transient in the sense (stated in *Infopaq I*) that the copies would be deleted without human intervention. Lord Sumption argued that, looked at in the round, the jurisprudence of the Court of Justice sought to elaborate a distinction between ‘the use of a computer or other equipment simply to view ← the relevant material, and its use to record it’.¹¹² In his view, the case concerned the former not the latter. He also indicated that even if the copy was not transient, it was incidental to the technological process;¹¹³ therefore the copies all fell within the exception.

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The Court of Justice affirmed the conclusion of the Supreme Court as to the first two conditions—no questions were referred on the issue of lawful use or independent economic significance¹¹⁴—finding temporary screen copies to be both transient and incidental to the process of viewing the material which had been placed on the Internet with the right holder’s assent,¹¹⁵ and the cache copies, though not transient, were incidental to that process.¹¹⁶ Both acts, too, were an essential part of a technological process, because they were ‘created and deleted by the technological process used for viewing websites, with the result that they are made entirely in the context of that process’.¹¹⁷ It did not matter that the user, a human being, activated and terminated that process. Moreover, the process could not work ‘correctly and efficiently’ without the creation of these copies.

The Court conducted an additional analysis in which it found the conclusion consistent with the ‘three-step test’: the use in browsing websites was regarded as self-evidently a ‘special case’,¹¹⁸ and was part of—rather than in conflict with—the normal exploitation of a work that had been placed on the Internet with the right holder’s consent.¹¹⁹

However sensible the outcome in the *Meltwater* case,¹²⁰ it left a critical issue unanswered: would Article 5(1) also offer a defence to an end user who viewed, for example, an unauthorized stream? The CJEU later answered that question, perhaps not surprisingly, with a categorical ‘no’. In *Stichting Brein v. Jack Frederik Wullems*,¹²¹ the question arose in the context of sale of a multimedia device (akin to a so-called ‘Kodi Box’) that was pre-programmed with add-ons that gave users access to unlawful streaming of broadcasts. If the user operated the device, inevitably, they would produce a transient copy of the stream. The Court indicated that this reproduction would fall outside Article 5(1), when read with Article 5(5). This was because the end user would access, for free and deliberately,¹²² the protected work and the effect would be to reduce the number of lawful, paid, transactions.¹²³ Consequently, such access would conflict with normal exploitation of the work and/or prejudice the legitimate interests of the author.¹²⁴ The distinction between these circumstances and those in FAPL and *Meltwater*, where unauthorized reception/browsing of an authorized communication was treated as ‘lawful’ use, is not completely clear; though the holding is consistent with the CJEU’s categorical position that exceptions and limitations do not justify acts with pirated or illegal material.¹²⁵

p. 257 **4 Personal Copying for Private Use**

Apart from the exceptions relating to private study,¹²⁶ back-up copies of computer programs,¹²⁷ and time shifting of broadcasts,¹²⁸ UK law contains no exception permitting private or personal use. Consequently, acts such as making a copy of legally purchased, copyright-protected CDs for use on a portable device, such as an mp3 player, iPhone, or iPod, constitute illegal acts of ‘copying’ the recording (and possibly the musical and literary works performed and recorded therein). This is so even though it is clear that the record industry neither offers licences to make such copies, nor would enforce the rights that exist in the recordings against such uses.

Relying on the freedom provided by Article 5(2)(b) of the Information Society Directive,¹²⁹ the CDPA was amended so as to permit the making of personal copies of a work (other than a computer program) by an individual in certain restricted circumstances. Section 28B allowed an individual to copy content that they own and which they acquired lawfully to another medium or device for their own private use.¹³⁰ However, while Article 5(2)(b) requires that ‘right holders receive fair compensation’, section 28B made no provision for ‘compensation’. The UK government claimed that no compensation was required, given the narrowness of the exception. Recital 35 of the Information Society Directive states that ‘where the prejudice to the rightholder would be minimal, no obligation for payment may arise’. The United Kingdom claimed that these acts are already ‘priced into the purchase’ and so entail no loss requiring compensation. When right-holder groups brought proceedings for judicial review,¹³¹ Green J examined the evidence upon which the government had determined that the economic impact of the exception would be minimal. The Court found the ‘pricing in’ evidence established that harm was diminished to some extent, but did not answer the ‘specific legal question’ whether it was so extensive as to render the harm minimal or non-existent.¹³² While

accepting that objective proof might not be possible, and emphasizing that the government was entitled to rely on a ‘proper combination of quantitative and qualitative analyses (for instance surveys) in order then to draw inferences’ of minimal harm, the government’s conclusion was ‘not remotely supported’ by the evidence offered, especially given potentially contradictory evidence submitted to the government by the film industry. As a result, the exception was held to be unlawful,¹³³ and subsequently (prospectively) quashed.¹³⁴ The UK private copying exception had survived from October 2014 until July 2015. Now that the United Kingdom is no longer bound by EU law, the only legal constraint on re-enacting the defence would be the potential invocation of the three-step test (e.g. under the UK-EU Trade and Cooperation Agreement). The real stumbling block to re-enactment is political will.

p. 258 **5 Research or Private Study**

Section 29(1) of the CDPA 1988 provides that fair dealing with a work for the purpose of non-commercial research or private study does not infringe copyright in the work.¹³⁵ The defence is of limited application to computer programs.¹³⁶ Contracts that attempt to exclude the operation of the defence are unenforceable.¹³⁷

The rationale for this defence lies in the belief that research and study is necessary to generate new works. It also recognizes that non-commercial research and study does not normally interfere with the incentives and rewards that copyright provides to creators and owners. In effect, the defence helps to achieve copyright’s goal of maximizing the production of works. The defence also takes account of the fact that dealings of this kind would often be difficult to detect.

In order for a defendant to rely upon the research or private study defence, they must show that the use made of the copyright work was either (i) for the purpose of non-commercial research or (ii) for private study, that (iii) the purpose was ‘non-commercial’, and that (iv) the dealing was ‘fair’. In the case of research, the work and the author must be sufficiently acknowledged (with certain exceptions).

5.1 Is the Dealing for the ‘Purpose of Research’?

To fall within section 29(1), the defendant must show that the dealing was for the purpose of research.

An Australian case suggested that ‘research’ meant a systematic inquiry into a question.¹³⁸ This would certainly cover photocopying documents for the purposes of an academic research project, whether by a professor, doctoral student, or undergraduate researching an essay. It would also cover the acts of independent researchers investigating topics, as well as people researching their family history. There seems no reason why a research assistant, or designated agent, might not benefit from the exception when acting on behalf of the researcher (and a person who requests such copying will not be liable for authorization).

5.2 Is the Dealing for ‘Private Study’?

Although the ‘private study’ exception has existed since 1911,¹³⁹ its meaning has yet to be elaborated upon judicially. Giving the words ‘private study’ their normal meaning, the exception could cover any copying by a student when preparing for a seminar, or to assist in the writing of an essay, or even to help them to decide

p. 259 what type of stove to buy. However, as a general rule, in order to come within the defence, the dealing must be for a person's own study. Consequently, a publisher cannot rely on the exception to justify reproducing parts of copyright-protected works in 'study guides' for students.¹⁴⁰ Although it is possible for an agent to do the copying on behalf of the student, an important limitation to this possibility is imposed by section 29(3)(b).¹⁴¹ This provides that copying by a person other than a researcher or student is not a fair dealing if the person doing the copying knows that it will result in 'copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose'.¹⁴² This means that lecturers are unable to use the research or private study defence where they make multiple copies of a work for their students.

5.3 Is the Purpose of the Activity 'Non-Commercial'?

Both provisions are limited to 'non-commercial' activities. Private study is defined, in section 178, as not including any study that is directly or indirectly for a commercial purpose. The exceptions cover most research or private study for academic purposes or personal edification. In contrast, where a work (such as a database) is used in the market-testing of new drugs or for a commercial training course, the defence would not apply. Much research, however, will occupy a difficult middle ground.¹⁴³ In a recent case, the High Court appears to have approved the test of whether it is contemplated that the research will ultimately be used for a purpose that has some commercial value.¹⁴⁴

5.4 Dealing Must be 'Fair'

The mere fact that a defendant can show that the work was used for private study or non-commercial research does not necessarily mean that the dealing will be exempt from liability; it is also necessary to show that the dealing was fair. As explained earlier, a number of different factors will influence the decision as to whether a particular dealing is fair. In this context, the most important are likely to be the amount taken,¹⁴⁵ whether the work is readily available, and the effect that the dealing has on the market for the original work.

5.5 Sufficient Acknowledgement

Where a dealing is for purposes of non-commercial research, it can benefit from the exception only if there is 'sufficient acknowledgement'.¹⁴⁶ However, this can be dispensed with where the acknowledgement is impossible for reasons of practicality or otherwise. This requirement for sufficient acknowledgement seems to take account of the fact that research output, whether papers or articles, is often circulated. No such requirement must be satisfied as regards 'private study'.

p. 260 6 Text and Data Analysis

Following the Hargreaves Review, UK law was amended to introduce an exception for 'text and data mining'. Broadly speaking, text and data mining practices have been made possible by digital tools that can scan massive amounts of data (more than a human being could read in a lifetime) and identify hitherto

unrecognized relationships between different pieces of data. A classic example would be a search tool that identifies a relationship between a particular trait or symptom and a disease.¹⁴⁷ But text and data mining is not solely a technique used in scientific research: it is also necessary to develop and train ‘artificial intelligence’ algorithms,¹⁴⁸ and is a method used in attempts to improve consumer protection through so-called ‘smart disclosure systems’ that enhance understanding of contractual terms and privacy policies.¹⁴⁹ However, the use of such research tools implicates copyright, insofar as they may require digitization of text, involve the generation of temporary copies, and breach the terms of licences with publishers.

From June 2014, a new section 29A has permitted the copying of a work for the purposes of carrying out a ‘computational analysis of anything recorded in the work’, as long as it is done ‘for the sole purpose of non-commercial research’.¹⁵⁰ The exception is subject to two further qualifications: first, the person must have ‘lawful access’ to a copy of the work; and second, any copy must be accompanied by sufficient acknowledgement. Although the exception is said to have proved valuable,¹⁵¹ its role is limited, in part because of the then-existing constraints of the Information Society Directive, to non-commercial research. This has restricted the value of the defence considerably. The IPO is now consulting, in the context of developing strategies to promote artificial intelligence, as to whether that constraint should be removed. The Consultation also considers whether the defence should extend to databases.¹⁵²

Section 29A(5) contains a contractual override, which will be of particular significance to those in research institutes who have acquired the right to use databases of material, but subject to restrictions that do not allow data mining.¹⁵³ However, licences may still impose conditions of access to the licensor’s computer system, for example to maintain security or stability.

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← Although the IPO is looking into reform of the existing text and data mining exception, it has been suggested by some that it would be preferable if such activities were facilitated by a purposive interpretation of the reproduction right. Drawing on academic writing, the European Copyright Society (a group of university professors) has argued that ‘text and data mining’ is an example of ‘non-expressive use which should not fall within the scope of copyright at all’ (because it does not use the copyright work as a work, but as a dataset).¹⁵⁴

7 Criticism, Review; Quotation

Section 30(1) of the CDPA 1988 provides that fair dealing with any work for the purpose of criticism or review does not infringe the copyright in the work; section 30(1ZA) adds that copyright is not infringed by the use of a quotation from the work, whether for criticism, review, or otherwise.¹⁵⁵ The defences no doubt overlap significantly. Both defences apply to all works, including not just textual works but also criticism/review/quotation, both of and in, photographs and musical works.¹⁵⁶ Both defences only apply where (i) the work has previously been made available to the public; (ii) the dealing is ‘fair’; and (iii) the dealing is accompanied by sufficient acknowledgement. However, the (old) criticism of review defence is only available if the dealing is for the purpose of criticism or review, whereas the quotation defence is, in principle, available whatever the purpose.¹⁵⁷ However, quotation is only permissible where it goes no further than is necessary to achieve the specific purpose for which the user requires the quotation.

According to the Court of Justice, the quotation right ‘is intended to strike a fair balance between the right to freedom of expression of users of a work or other subject matter and the reproduction right conferred on authors’.¹⁵⁸ The Advocate-General has emphasized that this is ‘to facilitate dialogue and artistic confrontation’¹⁵⁹ This ‘user right’ is underpinned by the fundamental right of freedom of expression.¹⁶⁰

7.1 Is the Dealing of an Appropriate Type?

To fall within the exception provided by section 30(1), the dealing must be for the purpose of ‘criticism or review’ of the work, or of another work,¹⁶¹ or the performance of a work. Although the courts have also said p. 262 that criticism and review should be construed liberally,¹⁶² it has been understood as requiring identification of a work or performance as the focus of the criticism or review. Thus it has been held to exclude criticism at large, for example of behaviour or political activity,¹⁶³ unless that can be connected plausibly to a work or performance.¹⁶⁴ This seemed unduly narrow given the international *acquis*.¹⁶⁵

In contrast, section 30(1ZA), added in 2014, permits ‘quotation’ and is not limited by purpose.¹⁶⁶ What, then, counts as ‘quotation’? In *Spiegel Online* and *Pelham*, the Court of Justice has suggested that the term be given its ‘usual meaning in everyday language’, and that ‘the essential characteristics of a quotation are the use, ... of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user’.¹⁶⁷ In *Pelham*, the Court generalized these to situations in which the user of a protected work wishing to rely on the quotation exception must therefore have ‘the intention of entering into “dialogue” with the quoted work’,¹⁶⁸ and stated that such an intention might exist in the case of musical sampling.¹⁶⁹ In the very different context of a newspaper article criticizing a politician for his claim that significant differences existed between a manuscript he had written and the book chapter that was actually published, the Court indicated that ‘the user of a protected work wishing to rely on the exception for quotations must ... establish a direct and close link between the quoted work and his own reflections, thereby allowing for an intellectual comparison to be made with the work of another’.¹⁷⁰

Three other points are worth highlighting from the *Pelham* and *Spiegel Online* decisions. First, as *Pelham* makes clear, the quoted element must be identifiable.¹⁷¹ Such identifiability will often come through p. 263 quotation marks, but the CJEU, recognizing that the exception applies outside the textual field, has not limited the mechanisms by which such identification is achieved. It is unclear whether ‘identifiability’ is regarded by the CJEU as the opposite of ‘unrecognizability’ (which the CJEU treated as relevant to deciding whether ‘a part’ had been reproduced) or whether identifiability and recognizability are overlapping concepts. On one reading, incorporating an element that is not recognizable escapes liability as not involving copying (see p. 228), while incorporating a part which is recognizable might count as a quotation.

Secondly, in *Spiegel Online*, the Court indicated that the quoted material must be ‘secondary’.¹⁷² It is not quite clear what this means, but most likely the Court is referring to a requirement of ‘proportionality’ that is commonly part of a fairness analysis. In so stating the Court referenced the three-step test. We think caution should be exercised before elevating the ‘secondary’ status of the quoted work into a necessary requirement in all cases. The factor is better regarded as part of the fairness analysis which is meant to be carried out by the national tribunal and which, knowing the context, can best incorporate freedom of expression into the analysis. Thirdly, the Court indicated in *Spiegel Online* that a quotation need not be ‘inextricably integrated’

into a quoting text, but could be achieved in other ways, including by way of hyperlink.¹⁷³ Indeed, the Court thus accepted the possibility that publishing a file containing a whole manuscript alongside a file containing a whole article, each accessible by hyperlink, might constitute a ‘quotation’.

7.2 Work Must Have Been Made Available

Both the criticism or review and quotation exceptions are available only where the work has been made available to the public.¹⁷⁴ ‘Making available’ is broadly defined to include the issuing of copies; making the work available by an electronic retrieval system, rental, or lending of copies to the public; the performance, exhibition, playing, or showing of the work; and the communication to the public.¹⁷⁵ The Court of Justice has indicated that to have been ‘lawfully’ made available, this must have occurred ‘with the authorization of the copyright holder or in accordance with a non-contractual licence or a statutory authorization’.¹⁷⁶ Moreover, it appears that the ‘specific form’ of the work must have been authorized. Thus publication of a version of a manuscript with a statement of ‘dissociation’ on every page is regarded by the court as not a making available of the manuscript without that statement of association.¹⁷⁷

While broader than the concept of publication,¹⁷⁸ the requirement that a work have been ‘lawfully made available’ limits the potential operation of the defence in relation to ‘leaked’ material. For example, in *HRH p. 264 The Prince of Wales v. Associated Newspapers*,¹⁷⁹ it was held that Prince Charles’s ‘Hong Kong journals’ had not been made available to the public, even though they had been distributed to as many as 75 people, because the recipients understood that the work was being disclosed in confidence.

7.3 Was the Dealing Fair?

Once a defendant has shown that the dealing was for the purpose of criticism or review, or was by way of quotation, they must then show that the dealing was fair.¹⁸⁰ The Court of Justice has indicated that the assessment of fairness is a matter for national tribunals.¹⁸¹ As we explained earlier, a number of different factors will influence the decision as to whether a particular dealing is fair. In this context, the most important of these are likely to be the amount taken, the effect on the market,¹⁸² and the nature of the dealing.¹⁸³

When deciding whether dealing for the purpose of criticism or review is fair, the courts have not tended to consider whether the criticism itself is fair;¹⁸⁴ rather, they take account of whether the extent of the copying is fair to illustrate or support the criticism. As such, the criticism may be malicious, unbalanced, or motivated by insecurity without forfeiting the defence.¹⁸⁵ Although a ‘quotation’ is usually understood as the use of a part of a work, as with the ‘criticism or review’ defence, in some cases it might be fair to reproduce or make available the whole work (most obviously, perhaps, with visual works).¹⁸⁶

Over and above the fairness requirement, a key limitation on the fair dealing for quotation exception is that the defence will operate only if the quotation is no more than required for the specific purpose for which it is used. Thus in the context of fair dealing for the purpose of quotation the issue of proportionality is explicitly addressed independently from the requirement that the dealing be ‘fair’. In *Spiegel Online*, the Court indicated that the national tribunal would need to decide whether the posting of the claimant’s manuscript and book

chapter, as published, went ‘beyond the confines of what is necessary to achieve the informative purpose of that particular quotation’.¹⁸⁷ The reference to ‘informative purpose’ should here be understood as relating to the context of the quotation, which was intended to be evidence by which the audience could appreciate the plausibility of a politician’s assertion that there were significant differences between the text he wrote and p. 265 the amended form published by the editor.¹⁸⁸ The Court was not suggesting that every quotation must have an ‘informative purpose’ against which its proportionality might be judged.¹⁸⁹

In considering the ‘fairness’ of a quotation, it is likely that the ‘specific purposes’ will be relevant. This is because different expressive purposes carry different weight (political and artistic purposes weighing heavier than mere commercial ones). If a given use provides some social, cultural, or informational benefit, that is likely to make a proportionate quotation automatically fair. Aggregating quotations, as with a ‘book of quotations’, might also be regarded as a fair purpose, particularly if the effect is to highlight the different opinions of a collection of people on similar topics.¹⁹⁰

Although ‘fairness’ may well come to play an important part in ensuring that the quotation defence applies primarily to quotation for purposes that provide some social, cultural, or informational benefit, the fairness condition might also have a role in regulating the manner in which the quotations are presented. In the context of literary works, ‘fair’ dealing for the purpose of ‘quotation’ will be easier to establish through the use of grammatical conventions such as quotation marks, or, if quotation is by paraphrase, a marker such as a footnote.

7.4 Sufficient Acknowledgement

To fall within the exception, criticism or review must be accompanied by ‘sufficient acknowledgement’ unless this would be impossible for reasons of practicality or otherwise.¹⁹¹ The same condition applies to the quotation defence.¹⁹² The issue of sufficient acknowledgement was discussed in section 2.4, p. 251.

Contracts are unenforceable to the extent to which they purport to restrict the freedom to quote provided under the section.¹⁹³ For reasons of history rather than logic, no such rule applies to contracts excluding the criticism or review defence. No provision is made in relation to technological measures.

8 Parody, Caricature, and Pastiche

Where parodies breach the rule against substantial taking,¹⁹⁴ it is necessary to consider whether such uses avoid liability through the ‘fair dealing’ exception. Prior to 1 October 2014, this involved assessing whether parody could count as criticism or review of a work, whether it is fair for that purpose, and whether implicit acknowledgement that is a prerequisite of effective parody is sufficient to comply with the sufficient acknowledgement requirement.¹⁹⁵ Meeting these conditions was anything but straightforward,¹⁹⁶ and

p. 266 commentators had long complained that the resulting legal position was unsatisfactory (and in tension with freedom of expression).¹⁹⁷

Following the recommendations of both the Gowers and Hargreaves Reviews,¹⁹⁸ a new fair dealing exception for ‘caricature, parody, or pastiche’ has been introduced.¹⁹⁹ This takes advantage of the freedom provided by Article 5(3)(k) of the Information Society Directive,²⁰⁰ but (presciently, as we explain) qualifies the breadth of that freedom by adding a requirement of fairness.²⁰¹ To benefit from this defence, there is no express requirement that a parodist acknowledge the work that is parodied or its authorship.

The meaning of ‘parody’ has been considered by the Court of Justice in *Deckmyn*.²⁰² The reference concerned a modified version of a comic book that caricatures the behaviour of a politician. The publisher of a Belgian comic book, *Spike and Suzy* (Fig. 9.1), brought an action against a member of a Flemish nationalist party, p. 267 Johan Deckmyn, for copyright infringement, in relation to a calendar and brochure that were based on the cover of an issue of the comic entitled ‘De Wilde Weldoener’ (meaning ‘The Wild Benefactor’). The defendant’s image (Fig. 9.2) replaced the central figure from the comic, a man in a bowler hat scattering money, with the face of the mayor of Ghent, highlighting his wastefulness with public funds (which he distributes to a multi-ethnic public). Deckmyn claimed that this fell within the Belgian parody defence. The Court, sitting in Grand Chamber, found that parody is an autonomous concept of European law,²⁰³ and that its meaning was that which the term had in ‘everyday language’. The Court defined the ‘essential characteristics’ of parody as being, first, to evoke an existing work while being noticeably different from it, p. 268 and, second, to constitute an expression of humour or mockery.²⁰⁴ As a result it was neither necessary that the parody should display an original character of its own; nor that it should refer to the original source; nor that it could reasonably be attributed to a person other than the author of the original work itself.²⁰⁵ In adopting this definition, the Court has clarified that parody is not limited to uses that parody the work itself (so-called ‘target parody’) but potentially extends to situations in which the work is used to target something else (sometimes called ‘weapon parody’).²⁰⁶ On the other hand, the Court has left unclear whether the requirement of ‘humour’ is met if there is evidence of an intention to be ‘humorous’, or whether such ‘humour’ must be appreciated by the audience (and, if so, how that audience is identified). Probably the preferable conclusion is that ‘humour’ should be determined by reference to the reasonable audience, but that the particular character of the audience must depend on the type of work in issue.²⁰⁷

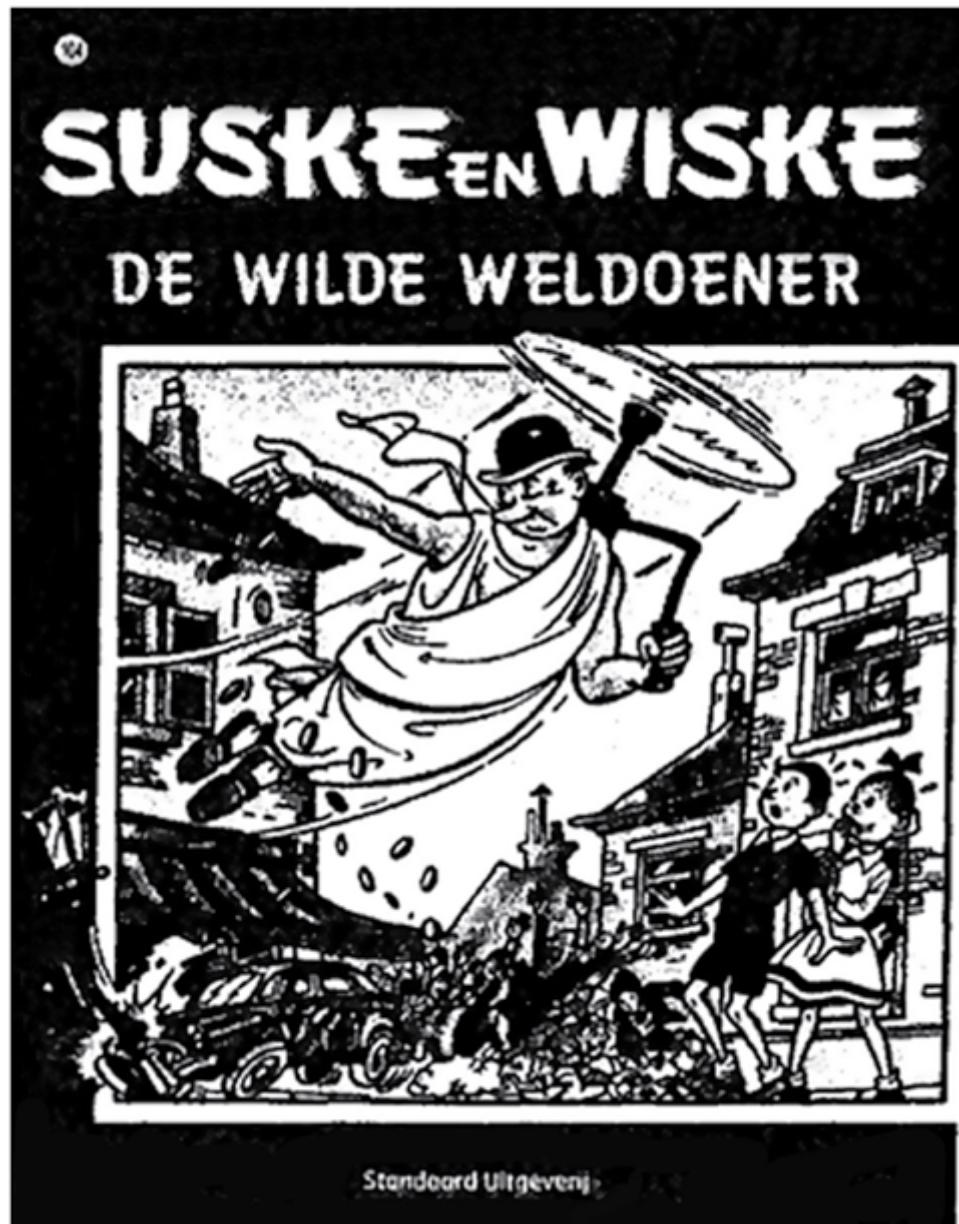


Fig. 9.1 The Wild Benefactor cover of the Spike and Suzy comic

Source: © 2013 Standaard Uitgeverij/WPG Uitgevers België nv



Fig. 9.2 Deckmyn's alleged parody

Source: *Deckmyn and Vrijheidsfonds v. Vandersteen*, Case C-201/13

While offering a broad definition of parody, the Court introduced an additional condition that is not present in the wording of the Directive: fairness.²⁰⁸ Identifying the policy aim of striking a balance between the rights of the copyright owner and the freedom of expression of the user, the Court observed that ‘the application, in a particular case, of the exception for parody, ... must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that Directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody’.²⁰⁹ This ‘fair balance’ required an assessment of all the relevant circumstances, which in the Court’s view included the

'discriminatory message' communicated by the defendant's reworking of the cartoon. In the light of Article 21 of the Charter, the Court suggested that 'holders of rights ... have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message'.²¹⁰

p. 269 ↵ The question as to when 'caricature, parody, and pastiche' must be regarded as 'fair' is unelaborated in the UK legislation.²¹¹ It might have been expected that the courts would rely on jurisprudence from other areas of 'fair dealing',²¹² but the CJEU's adoption of a parallel requirement suggests that a different methodology will be appropriate—that of 'balancing interests'. Probably the considerations that are relevant are no different (and indeed the outcomes are likely similar).²¹³ On either basis, it seems unlikely that use in commercial advertising would be regarded as fair, but likely that a liberal approach will be taken with much user-generated content. It should be noted, however, that the Court's reference to the 'discriminatory message' adds an unexpected factor into play. How far these considerations of third party interests are relevant is, as yet, unclear: if a person uses a copyright-protected photograph as a basis to parody the person portrayed, would fairness require consideration of those persons?²¹⁴ Would that depend on whether the use breached their fundamental rights under the Charter (or perhaps national constitutional law)?²¹⁵ Or does it depend on whether the use in some way tarnishes the reputation of the copyright owner (or author) of the used work?

There has as yet been no clarification of the concepts of 'caricature' or 'pastiche'. Some of the submissions from member states suggested that the Court should not differentiate between the three terms,²¹⁶ a position that has been supported by one study of the exception. The definition of 'parody' adopted by the Court in *Deckmyn* certainly seems broad enough to capture that of 'caricature'. However, the Advocate-General in *Pelham* offered a separate definition, namely 'the imitation of the style of a work or an author'.²¹⁷ Certainly, 'pastiche' is a term that does not normally require humour, probably best being seen as a recognizable stylistic practice;²¹⁸ as such, it may offer considerable scope to render lawful a range of artistic practices that might otherwise prove difficult to encompass within the list of exceptions.²¹⁹

p. 270 9 Reporting of Current Events

Section 30(2) of the CDPA 1988 provides that fair dealing with any work (other than a photograph)²²⁰ for the purpose of reporting current events does not infringe the copyright in the work, provided that it is accompanied by a sufficient acknowledgement.²²¹ No acknowledgement is required, however, in connection with the reporting of current events by means of a sound recording, film, or broadcast where this would be impossible by reason of practicality or otherwise.²²²

As Gibson LJ has explained, the reporting of current events defence aims to strike a 'balance between protection of rights of creative authors and the wider public interest (of which free speech is a very important ingredient).'²²³ In *Funke Medien* and *Spiegel Online*, the Court of Justice also recognized that the defence is 'specifically aimed at favouring the exercise of the right to freedom of expression by the users of protected subject matter and to freedom of the press, which is of particular importance when protected as a fundamental right, over the interest of the author in being able to prevent the use of his or her work'.²²⁴ The CJEU highlighted that the exception should be interpreted in a way that ensures both its effectiveness and that its purpose is fulfilled, given its importance in preserving those fundamental freedoms.²²⁵ In *Spiegel*

Online, the Court also held that it would not be consistent with EU law for a member state to limit the availability of the defence to circumstances where it would be unreasonable for the user to have to seek consent.²²⁶

In order to rely upon the defence, a defendant must show that (i) the dealing was for the purpose of reporting current events; (ii) the dealing was ‘fair’; and (iii) there was sufficient acknowledgement.²²⁷ Contractual restrictions on what would otherwise fall within the defence of fair dealing for the purpose of reporting current events are void insofar as the restriction relates to the inclusion of visual images taken from a broadcast in another communication to the public.²²⁸

p. 271 9.1 Was the Dealing for the Purpose of Reporting a Current Event?

To fall within the defence, the dealing must take place (i) in relation to an event, (ii) which is *current*, and the dealing must be (iii) for the purpose of reporting such an event.²²⁹

It seems that certain matters, by their very nature, will be treated as events. Thus matters of national or political importance,²³⁰ as well as major sporting contests, such as the World Cup, are likely to be events.²³¹ In contrast, matters that are trivial, ephemeral, or immaterial will not be treated as events. For example, it has been said that comparisons of food products,²³² articles on clothing, and the times of television programmes are not ‘events’.²³³ The fact that a matter is currently of interest or in the press does not mean that it is a current event.²³⁴ The mere fact that a fashion editor of a journal featured a Marks & Spencer garment did not make it a current event.²³⁵ Occasionally, a trivial matter may be transformed into an ‘event’ through media coverage. This can be seen in *Pro Sieben Media v. Carlton UK Television*,²³⁶ in which the sale to German television by a member of the public of an interview about a woman pregnant with octuplets was nonetheless treated as an ‘event’. On this occasion, the volume and intensity of the media coverage was such as to justify its treatment as an ‘event’.

The Court of Justice has stated that ‘a current event is an event that, at the time at which it is reported, is of informative interest to the public’.²³⁷ An event will be *current* if it deals with a contemporary issue. The older the issue, the less likely it is that it will be treated as having any currency. An event that took place some time ago may, however, be current if it is still under discussion and thus of ‘informative interest’. For example, in *Hyde Park*, it was accepted, both at first instance and by the Court of Appeal (albeit grudgingly), that although the stills in *The Sun* were published more than a year after the visit by Dodi Fayed and Princess Diana to Villa Windsor, the events still had some currency.²³⁸ As Jacob J said: ‘[A]t the time of publication the events were still very much under discussion that it would be pedantic to regard them as anything other than current.’²³⁹ In the *Spiegel Online* case, it seems the content of the politician’s manuscript, even though it dated from 1988, was relevant because its publication was likely to throw light on its author’s suitability to be elected in 2013.²⁴⁰

p. 272 ↵ The dealing must be concerned with ‘reporting’ the event. In *Spiegel Online*, the Court of Justice stated that ‘the action of “reporting”, ... must be understood as that of providing information on a current event. Although merely announcing that such an event has occurred does not amount to reporting it, the word “reporting”, according to its usual meaning, does not, however, require the user to analyse such an event in detail.’²⁴¹ How little is required can be seen from the Court of Justice’s decision in *Funke Medien*.²⁴² There the

Court of Justice stated that the publication on Funke Medien's website of 'military status reports' prepared by the German Ministry of Defence, for circulation only to members of the German Parliament,²⁴³ qualified as reporting because the site 'presented them in a structured form in conjunction with an introductory note, further links and a space for comments'. The German Federal Supreme Court agreed.²⁴⁴ This can be contrasted with the English High Court decision in *England & Wales Cricket Board & Sky UK v. Tixdaq & Fanatix*.²⁴⁵ Although decided before *Funke Medien*, Arnold J correctly anticipated that what was distinctive about reporting was its 'informatory purpose'.²⁴⁶ This led him to the view that 'reporting' is not confined to traditional news media, but encompasses so-called 'citizen journalism'.²⁴⁷ For example, if a member of the public captures images of a 'newsworthy event' using their mobile phone and uploads them to a social media site, they may be reporting current events. However, on the facts of the case, which concerned whether a platform that hosted and made public clips of cricket matches was 'reporting current events', Arnold J thought there was no such reporting.²⁴⁸ This was because the clips were not used in order to inform the audience about a current event, but 'presented for consumption because of their intrinsic interest and value'.²⁴⁹ It seems that important factors distinguishing *Fanatix* from *Funke Medien* are the nature of the material being published and the context of the website.

A related question is whether the collection of information for private parties can count as 'reporting'. In *Newspaper Licensing Agency v. Marks & Spencer*,²⁵⁰ the Court of Appeal held that private circulation of articles selected from newspapers within a private company (albeit a large one) was not reporting of a current event. Similarly, in the more recent Court of Appeal decision in *Newspaper Licensing Agency v. Meltwater Holding*,²⁵¹ it was held that the distribution to commercial organizations of electronic links and text extracts from news websites was outside the defence, either because there was no reporting or because the passage might not relate to current events. However, neither decision gives much useful guidance as to what counts as 'reporting'.²⁵²

The material dealt with by the defendant must relate to or be relevant to the current event in question. Thus it was held that the *Daily Mail* newspaper was unable to rely on the death of the Duchess of Windsor to justify the republication of correspondence between the Duchess and her husband.²⁵³ Similarly, in *Hyde Park*, the Court of Appeal held that the publication of the driveway stills that showed the arrival and departure times of Dodi Fayed and Princess Diana did not fall within the current events defence. This was because the material in question (the driveway stills) did not correlate with the event in question (the purpose being to expose the lies of Mohammed Al Fayed).²⁵⁴ However, in other circumstances in which historical material is pertinent to current events,²⁵⁵ its use would clearly fall within the defence.²⁵⁶

9.2 Was the Dealing Fair?

Once a defendant has shown that their dealing was for the purpose of reporting current events, they must then show that the dealing was fair. According to the Court of Appeal, the defence should be available 'where the public interest in learning of the very words written by the owner of the copyright is such that publication should not be inhibited by the chilling factor of having to pay damages or account of profits'.²⁵⁷ Although a number of different factors will influence the decision as to whether a particular dealing is fair, including whether the work is published or unpublished,²⁵⁸ and the motive for the dealing,²⁵⁹ the most important are likely to be the amount taken (in particular whether the effect is to damage the normal exploitation of the

copyright owner's work),²⁶⁰ and whether the use of the work was necessary to efficiently inform the public about the events in question.²⁶¹ It also seems that the courts will be influenced by what is taken to be normal behaviour in the circumstances. Thus, in the *World Cup* case, it was fair for the defendant to reshew the goals and match highlights, typically 30 seconds of a 90-minute match, even though these were clearly the most important extracts. This was because the sequences were the normal and obvious means of illustrating the news report.²⁶²

Reporting current events is frequently carried out by commercial operators, most obviously newspaper publishers and news broadcasters. Despite occasional suggestions to the contrary,²⁶³ the commercial nature of a reporting organization rarely is a relevant factor against a finding of 'fair dealing'.²⁶⁴ As Jacob J has noted, when newspapers publish stories, 'they will always expect to make money. They are not philanthropists'.²⁶⁵

p. 274 9.3 Sufficient Acknowledgement

In order to benefit from the exception, the dealing must be accompanied by 'sufficient acknowledgement' (which was discussed earlier).²⁶⁶ However, no acknowledgement is required in connection with the reporting of current events *by means* of a sound recording, film, or broadcast, where this would be 'impossible for reasons of practicality or otherwise'.²⁶⁷

10 Incidental Uses

The urban landscape is full of works that are protected by copyright (such as murals, buildings, sculptures, and advertisements).²⁶⁸ This creates a potential problem for those who wish to represent that landscape. For example, if a movie is filmed in a public place, it is highly likely that the final product will include a number of different copyright works. This gives rise to a potential problem in that the recording of these works is on its face an infringement of copyright.

To minimize such problems, section 31(1) of the CDPA 1988 provides that copyright in a work is not infringed by its 'incidental inclusion' in an artistic work, sound recording, film, or broadcast.²⁶⁹ This means that a defence is available where a copyright work, such as a painting, is incidentally included in the background of another work, such as a film. Section 31(2) extends the defence to include the exploitation of works that incidentally include other works. This ensures that the showing, as distinct to the making, of a film does not infringe.

The question of when a work is 'incidentally included' in another work was considered in *Football Association Premier League v. Panini UK*.²⁷⁰ In that case, the FAPL, its members, and Topps brought an action alleging that Panini had infringed copyright in their club emblems and the Premiership heraldic lion emblem by distributing stickers depicting well-known footballers, for purchase and collection in a book. Topps had obtained an exclusive licence from the claimant to use the emblems in this way and Panini had lost out in the tendering process for the licence but had nevertheless gone ahead and produced an 'unofficial' product. In Panini's product, most players were in club strip, with their club emblems and the Premiership heraldic lion emblem often visible. The defendant argued that the emblems were artistic works that were incidentally included in other artistic works (photographs). Smith J rejected the defence and this was affirmed by the

Court of Appeal. Mummery LJ declined to define the term ‘incidental’, stating that the term is ‘sufficiently clear to enable the courts to apply it to the ascertainable objective context of the particular infringing act in question’.²⁷¹ The question of whether the uses were incidental did not have to be determined at the time that the photograph was taken, but rather when the sticker was created. The question was why one work was included in another, and the court could take account of commercial as well as artistic or aesthetic reasons.

p. 275 Given ↗ that a player in authentic club strip was ‘something which would be attractive to a collector’, the Court concluded that the inclusion of the emblem was ‘essential to the object for which the image ... was created’ rather than incidental.²⁷² In an earlier case, the High Court held that, by featuring the claimant’s magazine, *Woman*, in a television advertising campaign run for the defendant’s own magazine, the defendant had infringed the claimant’s artistic copyright in the masthead, the layout, and the photographs on the magazine cover. The defendant’s argument that the use was incidental was rejected:

since the impact of the advertisement would be lost entirely if the front cover of *Woman* was not used. The inclusion of the copy of *Woman* was an essential and important feature of the advertisement. The impact could not be more obvious.²⁷³

The defence will apply irrespective of whether a work is accidentally or deliberately included.²⁷⁴ This is not the case, however, with musical works or lyrics (as well as a sound recording, or broadcast of a musical work or lyrics). The reason for this is that section 31(3) says that musical works or lyrics shall not be regarded as being incidentally included if they are deliberately included. This means that the defence is not available where a song is chosen for the background of a film, or a song from a radio is deliberately played in the background to a broadcast. Thus if the makers of television soap opera *Eastenders* decide to have a scene in which a character is listening to a radio playing a Rolling Stones song, this is not an incidental inclusion. However, if a musical work is accidentally included in a live broadcast, this is within the defence. Thus a broadcast of a football match that accidentally includes a sound recording played over the public address system falls squarely within the defence.

11 Disclosure in the Public Interest

Despite the lack of any statutory provision on point,²⁷⁵ a defendant may resist an action for copyright infringement—probably, though, only in very rare instances—on the grounds that the use is justified ‘in the public interest’. Although such a defence was recognized by the High Court in the 1970s and the Court of Appeal in the 1980s, the existence and scope of this defence has been heavily debated.²⁷⁶ There are three key Court of Appeal decisions: *Lion Laboratories v. Evans*,²⁷⁷ *Hyde Park Residence v. Yelland*,²⁷⁸ and *Ashdown v. Telegraph Group*.²⁷⁹

In *Lion Laboratories v. Evans*, the manufacturers of a breathalyser sought to prevent the defendant newspaper from publishing extracts of a confidential internal memorandum that cast doubt on the accuracy of the device. The defendant claimed that the public had an interest in knowing that the breathalyser might be faulty. All three members of the Court of Appeal accepted that the public interest defence was available in an action for infringement of copyright. According to the Court of Appeal, if the alleged fault with the

p. 276 ↵ breathalyser were not investigated, a significant number of motorists could have been wrongly convicted of driving with excess alcohol. On the basis that there was a seriously arguable case that the disclosure was justified in the public interest, the Court refused to grant interim relief.

It will be recalled that *Hyde Park Residence v. Yelland* concerned an application for summary judgment against *The Sun* newspaper for publishing stills of Dodi Fayed and Diana, Princess of Wales, taken from security film, the copyright in which was owned by the claimant. The defendant argued that the stills revealed the times when Dodi Fayed and the Princess were present at Villa Windsor, and therefore exposed the falsehood of statements made by Mohammed Al Fayed; as such, the publication was in the public interest. The Court of Appeal found that there was no arguable defence. The Court did not consider that it was in the public interest to publish the stills to prove that Fayed's statements were false: the information could easily have been made available by *The Sun* without infringing the claimant's copyright. While the Court could have argued that the public interest defence did not succeed on the facts, the majority (Aldous LJ, with whom Stuart-Smith LJ agreed) said that there is no general public interest defence to an action for infringement of copyright in the United Kingdom (although this was not how *Ashdown*, a later case at which we look next, interpreted him). Aldous LJ gave three reasons: (i) on the basis that the statutory regime was exhaustive, he observed that no such defence is recognized in the code; (ii) he said that the defence of disclosure of information in the public interest was inappropriate, because copyright restricts reproduction of the form of a work, not the information that it contains; and (iii) he argued that the defence was incompatible with the Berne Convention.²⁸⁰ In addition, Aldous LJ held that the reasoning in *Lion Laboratories* lacked any substantial basis in precedent.²⁸¹ In contrast, Mance LJ accepted that Parliament had intended, via section 171(3), that the courts should retain some discretion to refuse to enforce copyright on public interest grounds.

In *Ashdown v. Telegraph*, a differently constituted Court of Appeal²⁸² rejected the approach of the majority in *Hyde Park*, preferring that of Mance LJ and referring with approval to *Lion Laboratories*. The *Ashdown* case concerned the publication in the *Sunday Telegraph* of sections of a secret memorandum written by Paddy Ashdown, leader of the Liberal Party, about a meeting that had taken place with Tony Blair concerning a possible pact between the Liberal Party and the Labour Party. Ashdown sought summary judgment and the newspaper sought to justify its infringement on the basis of the public interest defence (the criticism defence having failed because there was no criticism of a work and the current events reporting defence had failed because the use was not fair). Although the Court of Appeal rejected the *Sunday Telegraph*'s arguments on the facts, it reviewed the law relating to the 'public interest defence' in the light of the Human Rights Act 1998. While the Court explained that copyright was not normally in conflict with freedom of expression, because copyright does not prevent the publication of information,²⁸³ there could be such a conflict where expression required reproduction of specific text or images.²⁸⁴ In such cases, if fair dealing and refusal of discretionary

p. 277 ↵ not protect the public interest, a defendant could invoke the public interest defence, as developed by the common law and acknowledged by section 171(3) of the CDPA 1988.²⁸⁵

In the absence of a decision of the House of Lords on this issue, the view favoured by the majority of the Court of Appeal over the three cases thus seems to be that a 'public interest' defence might justify an act otherwise infringing copyright—but in what circumstances? The Court of Appeal in *Lion Laboratories* failed to draw any distinction between the application of the public interest defence to a case of breach of confidence and one based upon copyright. The Court was clear that the defence was not confined to cases of iniquity, but covered

situations in which there was ‘just cause or excuse’ for breaking confidence.²⁸⁶ In *Hyde Park*, Mance LJ had declined to define the exact circumstances in which the defence would be available but said that this discretion is much more limited than the defence recognized in breach of confidence cases. According to Mance LJ, the countervailing public interest was of more limited scope in the case of copyright, given that it is a property right and regulated by statute.²⁸⁷ The Court of Appeal in *Ashdown* said that it agreed with Mance LJ that the circumstances in which the public interest may override copyright are not capable of precise categorization or definition, but indicated that the defence would succeed only in ‘very rare’ circumstances.²⁸⁸ The more recent decisions therefore offer little assistance as to when the ‘public interest defence’ would apply, except to indicate that the circumstances are more limited than in cases of breach of confidence.²⁸⁹

Professor Jonathan Griffiths has suggested a different role for section 171 of the CDPA 1988: to regulate the relationship between copyright and other norms.²⁹⁰ Thus where copyright and other intellectual property rights overlap, exceptions to those other rights may take precedence over, or ‘pre-empt’, copyright: for example, the repair exception to design rights, or the comparative advertising defence to use of trade marks, might be treated as equally applicable to copyright (even though no such exceptions are provided for in relevant national or EU regimes). Some basis for this approach might be found in Article 13 of the Database Directive and Article 9 of the Information Society Directive. Griffiths identifies a body of cases in which he claims copyright is ‘disapplied’ because the action is, in essence, one for breach of confidence, and in which the disclosure is not to be regarded as an actionable breach of confidence because the public interest in disclosure outweighs that of protecting confidentiality. From this basis, he suggests further situations in which the public interest defence might, in future, play a role in permitting the pre-emption of copyright law, for example where disclosure is required under the Freedom of Information Act 2000, but might involve the making and distribution of copies.²⁹¹

p. 278 12 Access to Works by/for People with Disabilities

People with disabilities have been poorly served by copyright law. While the markets provided by such groups are rarely sufficient to attract private, market-based, suppliers, copyright law significantly impedes the capacity of others to provide access to works that are commercially available to the fully able. The CDPA 1988, as enacted, contained only one exception designed to help people with disabilities to gain access to copyright-protected material—a provision relating to subtitling or modifying broadcasts.²⁹² Further exceptions were added in 2002 for the benefit of the visually impaired.²⁹³ The Information Society Directive allows for the adoption of exceptions to the three harmonized rights for ‘uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability’.²⁹⁴ In 2014, the Hargreaves reforms sought to ‘broaden and simplify the disability exceptions’, with a view to giving ‘more people equal access to cultural materials’.²⁹⁵ However, as in the case of educational exceptions, it had been thought desirable to leave space for profit-making efforts to supply these markets, so the 2014 exceptions were subject to qualifications.²⁹⁶ More recently, in order to implement the Marrakesh Directive,²⁹⁷ these qualifications were removed with effect from October 2018.²⁹⁸ Although that Directive, and the Treaty which it sought to implement,²⁹⁹ are in terms limited to visual impairment,³⁰⁰ the UK government maintained its preference for a set of rules applicable to all disabilities.³⁰¹

Section 31A, as amended, seeks to allow the making of modified versions of publicly available works that enable persons with a physical or mental impairment ('disabled persons') to have improved level of access to the work.³⁰² The provision applies to all disabilities that prevent a person from enjoying a copyright work to substantially the same degree as a person who does not have the impairment,³⁰³ and so would justify the making of Braille or sound versions of works for those with some impairment that makes reading print problematic ('the print-disabled'), or the making of subtitled versions of audiovisual works for those with impaired hearing. It contains one provision that allows for 'personal use' by a disabled person, and another that allows third parties to make and supply copies to such disabled persons.

12.1 Personal Use by Persons with Disabilities

Section 31A(1) deals with the creation of versions of works (of all types) for personal use. This is permitted where a person is disabled and that disability substantially impairs access to a work that is lawfully in the possession of the disabled person (or of which they have lawful use).³⁰⁴ Any creation of a copy of such a work that improves access is permitted, as long as three conditions are met: (i) the copy is for personal use;³⁰⁵ (ii) it is derived from a copy of which the disabled person has lawful access;³⁰⁶ (iii) the copy is made by the disabled person or by a person acting on behalf of the disabled person.³⁰⁷

12.2 Making Accessible Copies for People with Disabilities

In addition, an 'authorised body'—an educational establishment, or a body not conducted for profit,³⁰⁸—is permitted to make and communicate, distribute, make available, or lend to a disabled person, other than for profit, accessible copies of commercially published works for the personal use of disabled persons.³⁰⁹ An 'accessible copy' is a version of the work which enables disabled persons to access the work, including accessing it as feasibly and comfortably as a person who is not a disabled person;³¹⁰ but an 'accessible copy' must not include any changes to the work which are not necessary to overcome the problems suffered by the disabled persons for whom the accessible copy is intended.³¹¹ The making and supply of accessible copies is subject to two principal conditions: the body must have 'lawful access' to a copy of the work;³¹² and the body must comply with certain behavioural conditions.³¹³ The authorized body is also permitted to make intermediate copies and supply accessible copies or intermediate copies to other authorized bodies.³¹⁴

Although the exceptions for disabled persons apply generally to all disability, specific provisions, which seek to implement the Marrakesh Treaty, apply only to visual impairments.³¹⁵ Under these provisions, now in the form of a UK-amended retained EU regulation,³¹⁶ an authorized body is permitted to export of accessible copies made under section 31B to authorized entities or beneficiaries in another Marrakesh signatory;³¹⁷ and to import into the United Kingdom such copies from authorized entities in another Marrakesh signatory.³¹⁸

An authorized body is required to respond to requests for information, including from right holders, about the list of works for which it has accessible copies and the available formats, as well as the other authorized bodies from which it has sourced, or to whom it has provided, accessible copies.³¹⁹ Presumably, this provision is enforced by proceedings for breach of statutory duty.

13 Educational Uses

Education constitutes a particularly complex environment for copyright regulation.³²⁰ On the one hand, it is an environment in which the transmission and use of information is at the very heart of what goes on. Access to relevant materials—in fact to as much material as possible for all concerned—is critical to the success of the process. For example, law students need to be able to read, examine, and appraise all relevant cases, legislation, statutory instruments, and commentaries. On the other hand, educational activities are served by a host of tailored services, such as those provided by educational publishers (offering textbooks, journals, and so forth) and those who broadcast educational programmes. These providers need to be able to stay in business and, without them, the information environment would likely be poorer.³²¹ One challenge is to establish a set of arrangements that allows for as much access as possible without jeopardizing the involvement of private interests in providing information services; another is to do so in a way that allows flexibility for individual instructors and is responsive to new technological opportunities. Right holders tend to favour ‘licensing’ solutions, while those representing educational interests argue for broad, flexible, exceptions. The UK government has stated that ‘educational exceptions are intended both to complement and underpin educational licensing schemes’.³²² It rejects proposals for wide exceptions permitting mass copying as ‘likely to cause unreasonable damage to right holders and to undermine incentives, while at the same time attempting to offer flexibility to educators to use material in ways that ‘modern technology allows’.³²³

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Individual student activities are facilitated by the fair dealing for research and private study defences and the defences for library copying. Our concern here is with the activities of individual teachers and the institutions. These are governed by a complex web of provisions (although they are somewhat simpler after the Hargreaves reforms of 2014 than they were before):

- (i) a general provision permitting fair dealing for purposes of illustration for instruction (s. 32);
- (ii) a narrow, virtually pointless, provision relating to educational anthologies (s. 33);
- (iii) a provision allowing performances at educational establishments (s. 34);
- (iv) an exception allowing for the recording and showing of educational broadcasts, but which gives way to various licensing schemes (s. 35);
- (v) an exception allowing for reprographic copying, but which underpins various licensing arrangements (s. 36); and
- (vi) an exception allowing for lending of copies by an educational establishment (s. 36A).

Sections 34–36A apply only in relation to ‘educational establishments’ (which includes universities and colleges of further education).³²⁴

13.1 Fair Dealing for Instruction and Examination

Section 32 gives a ‘fair dealing’ exemption to those involved in ‘instruction’ and ‘examination’.³²⁵ The defence is applicable to all types of work and to all possible restricted acts.³²⁶ On a literal reading, the defence applies to dealings by the person giving instruction (the teacher or lecturer) and the person receiving

instruction (the pupil or lecturer), but the term ‘person’ must also include the educational institution (and thus exempt, for example, a university’s exam office or librarians as well as the university itself).³²⁷ Contracts that purport to exclude acts within the scope of the exception are unenforceable.

A key limitation is that the dealing must be ‘for the sole purpose of illustration for instruction’.³²⁸ Both the term ‘instruction’ and ‘illustration’ are awkward. ‘Instruction’ ↗ suggests a rather outdated understanding of learning, in which the student is a passive recipient of information or guidance. In turn, this might indicate that the defence is limited to use by the teacher of copyright-protected material to ‘illustrate a point’, such as use of the materials in handouts and slides.³²⁹ We suggest that this would be too narrow a view. First, the statutory provisions themselves acknowledge that the exemption includes the acts of the person ‘receiving instruction’ and preparing to receive instruction, as well as pupils’ answers to exam questions. Thus some broader idea of ‘illustration for instruction’ seems intended. Second, the language in fact reflects the terms of the Information Society Directive and, in turn, Article 10(2) of the Berne Convention.³³⁰ In the latter, the permitted exception is ‘by way of illustration in publications, broadcasts or sound or visual recordings for teaching’.³³¹ Immediately, it can be seen that the scope is much broader than offering examples ‘in class’. Moreover, the legislative history of Article 10(2) of Berne supports a broad interpretation, so that the terms should be read to mean ‘any reasonable use for the purpose of education or teaching’.³³² Although the EU’s Copyright in the Digital Single Market Directive is not binding on the United Kingdom, a recital in it clarifies the interpretation of ‘illustration for teaching’ indicating that this means that the use supports, enriches, or complements the teaching.³³³ We think this usefully articulates the nexus required to satisfy section 32.

The defence permits any ‘fair dealing’ by the instructor in preparing to teach or carrying out the act.³³⁴ Thus making copies of materials with a view to deciding what to teach, and how to teach it, are covered. The defence also encompasses any fair dealing by the person receiving instruction,³³⁵ for example, taking down notes, recording a lecture, singing a song, or playing a piece of music. The exception also permits fair dealing in preparation to receive instruction, for example making a copy of a document to take to class.³³⁶ Some have even suggested that it might justify university libraries lending works from their collections to students electronically (while acknowledging that such lending would have to be appropriately controlled for it to be capable of being fair).³³⁷ The ‘fair dealing’ exemption also covers examinations and indicates that there is no infringement in either setting or answering exam questions.³³⁸

→ The key qualification for the defence is ‘fairness’, a concept that is not elaborated.³³⁹ The criteria explained already will likely be relevant.³⁴⁰ The most important issue in assessing fairness will be whether the relevant act was proportionate to the use for instruction.³⁴¹ In addition, the exception will not apply unless the dealing is for a non-commercial purpose³⁴² and accompanied by a sufficient acknowledgement (where this is possible).³⁴³ No acknowledgement is required where this would be impossible for reasons of practicality or otherwise.³⁴⁴

13.2 Copying Short Passages in Anthologies and Collections

Section 33 provides that copyright is not infringed where a ‘short passage’ from a published literary or dramatic work is included in a collection that is intended for use in an educational establishment.³⁴⁵ This is subject to the proviso that (i) the collection consists mainly of material in which no copyright subsists; (ii)

the inclusion is acknowledged; and (iii) the inclusion does not involve more than two excerpts from copyright works of the same author in collections published by the same publisher over any period of five years. These restrictions greatly restrict the utility of the defence.³⁴⁶ The defence could be used, for example, to compile a collection of cases, many of which were out of copyright.

13.3 Performing, Playing, or Showing Works

A special defence exists to protect the performing, playing, or showing of literary, dramatic, or musical works before an audience consisting of teachers and pupils at an educational establishment.³⁴⁷ Section 34(1) operates by deeming certain performances not to be public performances and hence not to be infringements of the performing right. To fall within the defence, the performance must be before an audience consisting of teachers and pupils at an educational establishment. The performance must be carried out either by a teacher or a pupil, or by any other person for the purposes of instruction. This will exempt performances, whether by students or outsiders, before students in a drama class. It does not cover pupil performances to audiences of parents.³⁴⁸

A similar defence exists with regard to the showing of films and broadcasts and the playing of sound recordings before an audience of teachers and pupils for the purposes of instruction.³⁴⁹ While this would cover the showing of a documentary about the first moon landing to a primary school class, it presumably would not cover school film societies, since they are for pleasure and not instruction. Both provisions appear to permit the use of material in (computer or projector) slide shows (although the making of the slides—involving reproduction—as well as the distribution of copies or the making available online would not fall within the exception).

13.4 Recording of Broadcasts

Section 35 provides that, in the absence of a licensing scheme,³⁵⁰ educational establishments may make a recording of a broadcast, or a copy of such a recording, for the educational purposes of that establishment, provided that there is sufficient acknowledgement of the broadcast and that the educational purposes are non-commercial.³⁵¹ Section 35(1A) permits the playing or showing of the recording not merely on the premises, but also off-site by means of a secure electronic network that is only accessible to staff or pupils of the establishment.³⁵² Because a number of broadcasters offer licences through the Educational Recording Agency (ERA), the practical importance of the section often concerns incidental material, such as advertisements, which do not fall within the licensing arrangements.³⁵³ The extension of the exception in 2014 to secure networks offers some assurances as regards those incidental materials: the ERA had offered licences of this type from as early as 2007.³⁵⁴

13.5 Making and Supply of Copies

Section 36, much expanded by the 2014 amendments,³⁵⁵ provides that, to the extent that licences are unavailable, educational establishments may copy 5 per cent of a work (other than an artistic work or broadcast) in any given year for the purposes of instruction without infringing copyright.³⁵⁶ The copies may be distributed either as physical copies or electronically, as long as access is provided through a secure digital

network that is accessible only to members of staff or pupils.³⁵⁷ The exception operates only where the copies p. 285 ↵ are accompanied by sufficient acknowledgement (unless this would be impossible), and the instruction is for a non-commercial purpose.³⁵⁸ Again, the operation of the section 36 defence is limited as a result of the fact that educational establishments have entered into a number of relevant licensing schemes,³⁵⁹ although it is significant that the terms of any such licence are ineffective insofar as they purport to restrict copying to less than that permitted under the section.³⁶⁰

13.6 Lending of Copies

Copyright in a work is not infringed by the lending of copies of the work by an educational establishment.³⁶¹ It is unclear whether this would permit educational establishments to engage in digital lending. On the one hand, the VOB decision (discussed in Chapter 6, section 4, pp. 167–8) suggests a broad reading of the concept of ‘lending’ to include ‘e-lending’.³⁶² However, the implementation of that decision in the context of e-lending by public libraries suggests that the definition of lending in section 36A corresponds with that in section 18A of the 1988 Act, and since this refers to copies being ‘returned’ is limited to physical copies; the broader concept of lending that includes ‘e-lending’ only applies when the statute specifically provides (as with section 40A, discussed later). Such a limitation (to tangible copies) of the derogations permitted by Article 6 appears consistent with the CJEU decision in VOB.³⁶³

14 Libraries, Archives, and Museums

Public libraries have long had a vital role, both as repositories of cultural output and as providers of public access to works. The former role has been achieved historically through legal deposit requirements, in particular requirements to deposit books with specified libraries.³⁶⁴ For much of modern history, the ability of libraries to provide access has been secured by the principle of exhaustion, which meant that reading a book or magazine, or lending a work, did not implicate copyright. Objections that authors lost out as a result of such lending were met, in 1979, with the provision of a ‘public lending right’ (PLR) scheme paid for by taxpayers. Moreover, as photocopying technology became available, it became evident that certain freedoms should also be granted to libraries, for example to facilitate users creating copies for research purposes.³⁶⁵

p. 286 ↵ The CDPA 1988 provided librarians and archivists with a number of defences, to facilitate use by readers, to maintain stocks, and to allow for cooperation between libraries.³⁶⁶ These immunities, however, became outdated as digital technologies began to present new ways for libraries to fulfil their mission, for example by supplying digital copies. These technologies also mean that many acts that previously did not seem to implicate copyright (such as on-site browsing in electronic form) now do so. Following the Hargreaves Review and reflecting the flexibility available under the Information Society and other directives,³⁶⁷ the exceptions in the 1988 Act have been modified and extended (in particular to encompass a wider range of copyright works), while new freedoms are offered to other cultural institutions.³⁶⁸

14.1 Lending of Works

Historically, a key function of libraries has been to lend books to members of the public. As we saw in Chapter 6, as a consequence of EU harmonization, copyright owners were given the right to control public lending of their works.³⁶⁹ In order to ensure continued public access to literature, Article 6 of the Related Rights Directive permits member states to create a derogation to the public lending right as long as compensation is paid to affected authors. Taking advantage of this, section 40A of the 1988 Act provides that copyright in a work of any description is not infringed by the lending of a *book* by a *public library* if the book is eligible to be within the PLR scheme.³⁷⁰ In addition, in relation to an audio-book or e-book, copyright is not infringed by any copying or issuing a copy of the book ‘as an act incidental to lending it’. In VOB, the Court of Justice has interpreted Article 6 of the Related Rights Directive in a manner that would allow it to be applied to at least some remote ‘e-lending’ of works, though limited in that case to the situation where the library lends the number of copies in its holding (the so-called ‘one copy, one user’ rather than ‘one copy, multiple user’ model).³⁷¹ As explained in Chapter 13, the Public Lending Right Scheme has now been modified to include remote e-lending, and this in turn extends the operation of the section 40A to such e-lending (defined by reference to the Public Lending Rights Act 1979 rather than section 18A of the CDPA).³⁷² However, an important condition has been introduced: lending of ‘e-books’ and ‘audio books’ is only exempt where the lending is in compliance with any purchase or licensing terms to which the book is subject.³⁷³ While, as noted in Chapter 6, a number of questions concerning the relationship between the lending right and the communication to the public right remain to be resolved,³⁷⁴ section 40A seems to proceed on the assumption that any liability arising from ‘e-lending’ for copyright infringement could be conceived as liability under section 20 and to extend the exemption accordingly.

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Section 40A(2) provides that copyright is not infringed by the lending of copies of the work by a library or archive (other than a public library) that is not conducted for profit.³⁷⁵ This provision does not benefit from the extension of the concept of ‘lending’ to encompass ‘e-lending’, so appears to be limited to lending of hard copies.

14.2 On-Site Reference

Although not explicitly foreshadowed in the Hargreaves Review, during the subsequent consultation process, it was decided to introduce a new exception permitting cultural institutions to make works available from dedicated terminals,³⁷⁶ thus taking advantage of the freedom provided in Article 5(3)(n) of the Information Society Directive. This could allow libraries to give on-site access to ebooks or to offer users facilities to listen to sound recordings in a sound archive, or to browse digital images of artworks in an art museum or gallery.³⁷⁷

The new exception is narrow.³⁷⁸ First, it applies only with respect to the act of communicating or ‘making available’.³⁷⁹ However, the Court of Justice has held that there is an ‘ancillary right’ to digitize the work under Article 5(2)(c),³⁸⁰ at least as long as the library does not digitize its entire collection. The Court noted that the German legislation at issue ensured this freedom would not conflict with the three-step test, noting that the number of copies available on dedicated terminals was limited to the number of copies the library held in analogue form, and such making available was subject to a duty to pay ‘compensation’.³⁸¹

p. 288 ↵ Second, the work or a copy of it must have been ‘lawfully acquired’ by the institution.³⁸² Although this might at first sight suggest that the cultural institution must possess its own physical copy, there is no reason to regard the word ‘copy’ as so limited. Thus if one museum sends another museum a digital copy of a work, so that the latter copy is lawfully acquired, there seems nothing to preclude the recipient from making the work available. Third, the making available must be only to ‘individual members of the public’.³⁸³ Fourth, the work must be made available for ‘research or private study’.³⁸⁴ This condition would appear to allow for works to be made available in a research library but preclude the use of the work on terminals at a public exhibition (where members of the public might be present for purposes of recreation or entertainment). Fifth, access to the work must be provided through ‘dedicated terminals on [the institution’s] premises’.³⁸⁵ Finally, section 40B provides that the act must comply with any purchase or licensing terms to which it is subject.³⁸⁶ This reflects the limitation in Article 5(3)(n) of the Information Society Directive that the works or subject matter in issue are ‘not subject to purchase or licensing terms’. In *Technische Universität Darmstadt*, the Court construed this condition narrowly, taking the view that it operated only where an actual contract had been entered into between a library and the relevant right holder establishing the circumstances in which the library might use the specific work.³⁸⁷

14.3 Institutional and Preservation Copying

Because library holdings vary, it may be that some works are contained in some libraries, but not others. In order to ensure that users of one library can benefit from the collections of others, provision is made for materials to be copied by one library and supplied to another. Under section 41, libraries are allowed to make copies of the whole or part of a published work in order to supply a not-for-profit library.³⁸⁸ To ensure that this freedom does not become an opportunity to avoid paying for material provided by existing publishers (but is limited to old and obscure holdings), the exception does not apply if, at the time that the copy is made, the librarian knows or could reasonably ascertain the name and address of a person entitled to authorize the making of the copy.³⁸⁹

Libraries, archives, and museums also encounter situations in which material in their collections becomes fragile, is damaged, or is lost.³⁹⁰ Examples include old newspapers starting to fade, old books becoming difficult to handle without disintegrating, or pages having been deliberately torn from a book. Section 42

p. 289 ↵ provides that these institutions are free to copy from any ‘item’ in their permanent collection in order to preserve or replace that item or to replace an item from another institution’s permanent collection that has been lost, destroyed, or damaged.³⁹¹ This does not apply to institutions that lend items to the public,³⁹² nor where it is reasonably practicable to purchase a replacement.

14.4 Copies for Research or Private Study

In many libraries, users are free to use photocopying machines, scanners, and cameras to copy works insofar as they are permitted to do so under the section 29 exception. However, many libraries also offer copying services, in part to ensure that materials are appropriately handled when being copied. The Act makes provision for the making and supply of such copies if a series of prescribed conditions are complied with.³⁹³ The copies can be supplied in any medium.

First, librarians are permitted, in specified circumstances, to copy published works and to supply them to individuals at cost *and* for purposes of non-commercial research or private study.³⁹⁴ In the case of articles, they may copy up to one article in an issue of a periodical.³⁹⁵ In the case of other published works, they may copy no more than a reasonable proportion of the work.³⁹⁶ This latter criterion will prove problematic where the work is, for example, an illustration and thus an independent work in its own right.³⁹⁷ Copying such a work by an individual researcher might well amount to fair dealing within section 29, and a librarian should be able to make and supply any copy that the recipient could themselves make within the latter provision. The person making a request must make a declaration stating, among other things, that the copy is required for ‘the purposes of research for a non-commercial purpose or private study’.³⁹⁸

In the case of unpublished works,³⁹⁹ librarians or archivists may make and supply single copies of a work as long as the copyright owner had not prohibited copying thereof.⁴⁰⁰ A similar declaration is required of the recipient.⁴⁰¹

The librarian (or archivist) is not required to investigate the truth of the recipient’s statement and benefits from the defence as long as they are ‘not aware that the declaration is false in a material particular’.⁴⁰² This will not merely save librarians from having to make judgements that even specialists on copyright law find difficult (such as what is a ‘non-commercial’ purpose), it will also keep talking in libraries to a minimum.

p. 290 14.5 Archive Creation

In addition to section 42, which allows for the making of preservation copies, a number of defences aid in the preservation of cultural objects.⁴⁰³ A non-profit organization may record a song and make copies available for non-commercial research or private study even though there is copyright in the words or music. This is subject to the proviso that the words are unpublished and are of unknown authorship.⁴⁰⁴ In addition, where an article of cultural or historical importance cannot lawfully be exported from the United Kingdom unless a copy of it is made and deposited in an appropriate library or archive, it is not an infringement to make that copy.⁴⁰⁵ Finally, a recording of a broadcast, or a copy of such a recording, may be made for the purpose of being placed in an archive maintained by a not-for-profit body without thereby infringing any copyright in the broadcast or in any work included in it.⁴⁰⁶

Although the legal deposit provisions ensure that the main libraries have a complete record of print works published in the United Kingdom,⁴⁰⁷ the advent of digitization has led to huge amounts of non-print material. The Legal Deposit Libraries Act 2003 established a framework for collecting non-print publications and this has been put into operation from 6 April 2013.⁴⁰⁸ This allows for the deposit of off-line non-print works (such as works published on CD-ROM) under similar conditions to print works. The Regulations also cover online publications and facilitate automated ‘web-harvesting’ (including works that are subject to conditional access). The obligations to permit web-harvesting apply in regard to online works that are published in the United Kingdom, and a provision elaborates on the localization of the activity.⁴⁰⁹ The permissible uses of non-print works are defined restrictively,⁴¹⁰ and publishers may apply to have use by the public embargoed altogether for periods of three years at a time.⁴¹¹ Section 44A of the 1988 Act, introduced by the 2003 Act, confers immunities on creators or users of non-print material archives that fall within the Regulations.

15 Public Administration

The CDPA 1988 contains a number of defences that facilitate involvement in, and the dissemination of information about, public administration.⁴¹² To this end, the Act provides that copyright is not infringed by anything done for the purposes of parliamentary or judicial proceedings,⁴¹³ or for proceedings of a Royal Commission or statutory inquiry.⁴¹⁴ This means that copyright is not infringed if a barrister digitally scans a case report,⁴¹⁵ or if a police officer photocopies a statement for use in a trial.⁴¹⁶ The 1988 Act also provides that copyright is not infringed by anything done for the purposes of *reporting* such proceedings.⁴¹⁷ This means that law reports do not infringe copyright in the barristers' statements, a defendant's evidence, or a speech of a judge. It should be noted that these defences do not extend to the copying of the published reports of such proceedings. As such, the defence does not apply, for example, to the photocopying of law reports.

Special defences also enable the copying of material that is open to public inspection pursuant to a statutory requirement,⁴¹⁸ to material that is communicated to the Crown in the course of public proceedings,⁴¹⁹ and (in certain circumstances) to material on public records.⁴²⁰

16 Exceptions for Computer Programs

Special provisions in the CDPA 1988, which follow from the Software Directive, govern how far it is permissible to copy and otherwise use computer programs without infringing. These defences ensure that a lawful user is able to make a back-up copy, to decompile a program for certain purposes, to study the program, and to adapt or copy the program where necessary for the lawful use of the program. The first three of these exceptions cannot be excluded or restricted by contract, and provisions attempting so to do are to be treated as null and void.⁴²¹

16.1 Making Back-Up Copies

Section 50A(1) provides that it is not an infringement of copyright for a 'lawful user'⁴²² of a copy of a computer program to make any back-up copy of it, which is necessary for them to have for the purpose of their lawful use.⁴²³ By enabling users to make back-up copies, it provides a form of insurance in case a computer program fails or is corrupted. Importantly, section 50A(3) provides that any term or condition in an agreement that purports to prohibit or restrict an act that is permitted under section 50A is void.⁴²⁴

The scope of the defence will depend on when it is 'necessary' for a lawful user to make a back-up copy. It is likely that this will depend on factors such as the relative stability of the program (the more vulnerable the program, the more the need for back-up); the environment in which the program operates; and the consequences of a program failing (it is more likely that a court will consider it necessary to make a back-up copy where the program is used for air traffic control or to assist in heart surgery than where it is a computer game). Indeed, in *Sony Computer Entertainment Inc. v. Owen*,⁴²⁵ it was held that when a person buys a computer game on a CD, it is not 'necessary' for that person to make a back-up copy of the disk. Moreover, because a back-up copy is intended to meet 'the sole needs of the person having the right to use that program', a person cannot use that copy in order to sell the program to a third party.⁴²⁶

16.2 Decompilation

One of the problems facing creators of computer programs is that they have to ensure that their creations can be used in conjunction with existing products and processes. In the same way as a manufacturer of spare parts for cars needs to ensure that its products are the appropriate size and shape, so too producers of computer programs and devices used in conjunction with existing programs need to ensure that their products comply with the existing standards. While some of this information will be generic and widely available, some of it may be hidden in the program. For a producer to ensure that its creations are compatible (or interoperable) with existing systems, it needs to have access to the information that is hidden in the program. Some developers (most famously IBM) publish such information to encourage others to construct further application programs or add-on devices, whereas others license the information. In some circumstances, the only way in which the relevant information can be obtained is by decompiling or reverse engineering the program. The process of decompilation reduces the object code in the program to a form that approximates with the source code. The potential problem with this is that, because decompilation involves intermediate copying of a program, it is on its face an infringement of copyright.⁴²⁶

After considerable debate, it was decided to include a defence for decompilation in the Software Directive.⁴²⁷ This found its way into British law via section 50B of the CDPA 1988. Before looking at the defence, it should be noted that the parties cannot contract out of the decompilation defence.⁴²⁸ It should also be noted that the importance of section 50B is reinforced by the fact that fair dealing for the purpose of research and study does not apply to the decompilation of computer programs.⁴²⁹

Section 50B provides that it is not an infringement of copyright for a lawful user of a copy of a computer program expressed in a low-level language to convert it into a higher-level language (that is, to ‘decompile’ it) or, incidentally in the course of converting the program, to copy it. This is subject to the proviso that:

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- (a) it is necessary to decompile the program to obtain the information necessary to create an independent program which can be operated with the program decompiled or with another program ('the permitted objective'); and
 - (b) the information so obtained is not used for any purpose other than the permitted objective.⁴³⁰

These conditions will be not be met, for example, where (i) the relevant information is readily available to the lawful user; (ii) the decompilation is not confined to acts necessary to achieve the permitted objective; (iii) the lawful user supplies the information to any person to whom it is not necessary to do so in order to achieve the permitted objective; or (iv) the lawful user uses the information to create a program that is substantially similar in its expression to the program decompiled, or to do any act restricted by copyright.⁴³¹

The European Commission has criticized the way in which the decompilation exception has been implemented in the United Kingdom. In particular, the Commission has said there are four reasons why section 50B may be non-conforming.⁴³² First, section 50B's use of 'lawful user' appears not to include a 'person authorized on behalf of the licensee or person having a right to use a copy of the program'. Second, while Article 6 of the Software Directive mentions 'reproduction of the code and translation of its form', this has been implemented in section 50B of the 1988 Act as 'expressed in a low-level language to convert it into a

higher-level language'. Third, there is no restriction in the United Kingdom to 'parts' of the decompiled program; instead, section 50B is restricted to 'such acts as are necessary to achieve the permitted objective'. The final criticism is that the section 50B defence is not expressly subject to the three-step test (as is required under Article 6(3)). It is therefore likely that British courts will construe section 50B in such a way as to comply with many of the criticisms (if this were considered desirable).⁴³³

16.3 Observing, Studying, and Testing Programs

Section 50BA, introduced in October 2003,⁴³⁴ implements Article 5(3) of the Software Directive by providing that a lawful user of a copy of a program is not liable for infringement if, when carrying out an act that they are entitled to do (such as loading, displaying, running, transmitting, or storing the program), that person observes, studies, or tests the functioning of the program in order to determine the ideas or principles that underlie any element of the program. In *SAS Institute v. World Programming (WPL)*,⁴³⁵ the defendant had developed its competing (but non-infringing) statistics program by studying the 'learning edition' issued by the claimant. The terms of the licence for the learning edition limited its use to purposes of learning how to use the SAS system.⁴³⁶ Because WPL's purpose went well beyond learning how to use the system, there was an apparent breach of the licence terms.⁴³⁷ The question thus arose as to whether the terms were valid in the light of the Directive and whether the defence of studying was nevertheless available. ↗ Arnold J found himself unable to reach a conclusion confidently and referred the question to the Court of Justice. Unfortunately, he found that neither the Court of Justice's reasoning, nor its answer was 'very clear'.⁴³⁸ Nevertheless, Arnold J and the Court of Appeal interpreted the decision as drawing a distinction between 'acts' that were within the scope of a licence and a 'purpose' that formally took the acts outside the scope thereof. As long as the person with the licence was entitled to do the relevant acts, then the Article 5(3) defence operated.⁴³⁹

16.4 Copying and Adapting for Lawful Use

In the absence of contractual terms to the contrary, section 50C(1) allows a lawful user of a computer program to copy or adapt it if 'it is necessary for his lawful use'.⁴⁴⁰ An example of a situation in which it will be necessary to copy for a lawful use given by section 50C(2) is where a person needs to correct errors in the program.⁴⁴¹ In contrast, it has been held that a licence to use a computer game in Japan did not justify adaptation to circumvent copy protection so as to enable its use in the United Kingdom.⁴⁴² Given the limits of the licence to Japan, there was no lawful use in the United Kingdom. Another obvious example where copying is necessary relates to copying that occurs in the random-access memory (RAM) of a computer that enables the program to run (here, section 50C(2) achieves a similar effect to section 28A/Article 5(1) of the Information Society Directive). However, the CJEU has indicated section 50C(2) has a more significant role still, that is, in facilitating an equivalent of 'exhaustion':⁴⁴³ it is on this basis that the acquirer of an unlimited licence to use a program—whether an initial purchaser or 'transferee'—may make a copy by downloading it from the copyright owner's website.⁴⁴⁴

17 Exceptions for Databases

Section 50D of the CDPA 1988 provides that it is not an infringement of copyright in a database for a person who has a right to use the database or any part of the database (whether under a licence to do any of the acts restricted by the copyright in the database or otherwise) to do, in the exercise of that right, anything that is necessary for the purposes of access to and use of the contents of the database or of that part of the database.

p. 295 ↵ This means that if, in the course of searching a database, the database is downloaded into the memory of a computer, this will not be an infringement. Although in situations in which the copyright owner and the user are in a contractual relation (as a subscriber to *Lexis Library* would be), the user would have, at the very least, an implied licence covering these acts, this exception seems to operate in favour of others with a right to use the database, such as transferees of material copies of databases (e.g. the purchaser of a second-hand CD-ROM of the *Oxford English Dictionary*). It is important to bear in mind that fair dealing for the purposes of research and study is not available for databases. This increases the relative importance of the section 50D defence. As with the defences for the making of back-up copies and decompilation, it is not possible to contract out of the section 50D defence.⁴⁴⁵

18 Exceptions for Works in Electronic Form

Under section 56 of the CDPA 1988, if the purchaser of a work in electronic form is entitled to make further copies or adaptations of the work, then, unless there is an express stipulation to the contrary, so too is anyone to whom the copy has been transferred. Any copies remaining with the original purchaser after transfer are infringing.⁴⁴⁶ Given the parameters of the Software Directive, it is suggested that this section can have no role beyond that already provided by CDPA 1988, section 50C. Outside the field of computer programs, the section may apply only to sale in tangible form of electronic copies (e.g. on CD), as opposed to making available purely electronic copies (where the EU legislation hints that there is no exhaustion).⁴⁴⁷

19 Exceptions for Artistic Works

A number of defences exist in relation to artworks. Given that artistic works protect a broad array of subject matter, from paintings and sculpture through to typefaces and industrial designs, it is not surprising that these defences are similarly eclectic. In addition to the defences listed in the following sections, it should be noted that a number of defences exist in relation to industrial designs. These are discussed in Chapter 29.⁴⁴⁸

19.1 Representation of Works on Public Display

A special defence exists in relation to the representation of artistic works on public display.⁴⁴⁹ Section 62 of the CDPA 1988 provides that copyright in (a) buildings and (b) sculptures, models for buildings, and works of artistic craftsmanship if permanently situated in a public place or in premises open to the public, may be represented in a graphic work, photographed, filmed, or broadcast without a licence. The defence also applies p. 296 to subsequent dealings with the representation. Thus a postcard of a sculpture in Trafalgar Square can be reproduced and distributed without infringing copyright in the sculpture. Similarly, a film of a new

building could be made or broadcast without the consent of the owner of copyright in the building.⁴⁵⁰ It seems that the defence applies to both private and public buildings. If so, this means that a company taking photographs of private homes to be stored on a database for use by real estate agents could rely upon the defence to avoid a claim for infringement of any copyright in the building.

One potential problem with the defence is that section 62 is limited to infringement of copyright ‘in such a work’. As such, the defence would not apply to any preliminary drawings or plans that were used to create the public work. This limitation greatly reduces the significance of the defence.⁴⁵¹

19.2 Advertisements for Sale of an Artistic Work

Section 63 declares that it is not an infringement of copyright in an artistic work to copy it or to issue copies to the public in order to advertise the sale of the work. This means that it is permissible, when selling a painting, to take a photograph of the painting and to publish it in a catalogue. Section 63 serves to reconcile the conflict that may arise where the artistic work and the copyright in that work are owned by different parties. It does this by preventing the copyright owner from exercising their copyright so as to hinder the owner of the artistic work from selling it. It should be noted that subsequent uses of the copy, such as selling it, are not covered by the defence.⁴⁵² This means that the sale of a catalogue formerly used to advertise the sale of the work is an infringement of copyright.⁴⁵³

19.3 Subsequent Works by the Same Artist

It is common practice for artists to build upon and develop earlier works that they have created. A potential problem that arises for artists who sell the copyright in their works is that copyright owners may object to the artist continuing to work in the same style. Under general copyright principles, artists are able to develop the same ideas as long as they do not copy a substantial part of the expressive form of the earlier work. To ensure that owners of copyright in an earlier work are unable to stifle an artist’s ability to work in the same style, section 64 adds that an artist is able to copy their earlier works, provided that they do not repeat or imitate a work’s main design.⁴⁵⁴

19.4 Reconstruction of Buildings

Section 65 allows for the reconstruction of a building without infringement of any copyright in the building or in the original drawings or plans for it.⁴⁵⁵ This ensures that an owner of a building is able to carry out repairs without having to seek the approval of the copyright owner.

p. 297 **19.5 Use of Typefaces in the Ordinary Course of Printing**

A special defence exists where typefaces (which are protected as artistic works) are used in the ordinary course of printing. Section 54 provides that it is not an infringement of copyright in an artistic work consisting of the design of a typeface to use the typeface in the ordinary course of printing activities. The section also provides that it is not an infringement to possess or do anything in relation to the material produced by such a use.⁴⁵⁶

20 Broadcasts

Various acts are permitted in relation to the making, retransmission, and reception of broadcasts. In addition to the provisions at which we have already looked in relation to archives,⁴⁵⁷ education, and people with disabilities,⁴⁵⁸ the following defences may apply.

20.1 Incidental Recording for the Purpose of Broadcasting

A person authorized to broadcast a work may make a recording of it for purposes of the broadcast.⁴⁵⁹ This is subject to the requirement that the recording should not be used for any other purpose and should be destroyed within 28 days of first being used.⁴⁶⁰ This ensures that any temporary copies that are made in the course of broadcasting will not infringe.

20.2 Recording for Purposes of Supervision

As part of the regulatory framework that governs the broadcasting industry, a number of organizations are given the task of supervising broadcast programmes. To ensure that these bodies are able to perform these tasks, the 1988 Act provides that supervisory bodies (in particular, after the Communications Act 2003, the unitary body, Ofcom) may make recordings of broadcasts for the purpose of controlling broadcasting.⁴⁶¹

20.3 Time Shifting

Section 70 provides for a time-shifting defence, which allows for the private recording of broadcasts so that they may be watched at a later time. The making of a recording of a broadcast in domestic premises for private and domestic use, solely in order to view it or listen to it at a more convenient time, does not infringe any copyright in the transmission or of works included in the transmission.⁴⁶² This enables a person to record a television programme to watch at a more convenient time or to record a radio programme to which they want to listen later. Since broadcasts do not include most ‘Internet transmissions’, this defence cannot be employed to justify private copying from websites.

20.4 Free Public Showing or Playing

Although running a radio or television in public would normally count as a public performance (or communication to the public) of the broadcast and any works therein, a special defence limits the scope of such liability where a broadcast is shown or played to a non-paying audience.⁴⁶³ In so providing, UK law takes advantage of the fact that international and regional norms only require that broadcasters are given the right to control communication to the public of their broadcasts if such communication is made in places accessible to the public against the payment of an entrance fee.⁴⁶⁴ In utilizing this flexibility by way of an exception, section 72 further specifies that an audience will be treated as paying if they have paid admission, or if goods or services are supplied at that place at prices that are substantially attributable to the facilities afforded for seeing or hearing the broadcast or programme, or at prices exceeding those usually charged there and which are partly attributable to those facilities.⁴⁶⁵ So a wine bar wishing to offer a television for the benefit of customers, but which does not alter its prices, would fall within the exception,⁴⁶⁶ whereas a bar that charges an entry fee when broadcasts are being shown would not. The ‘free showing’ defence also covers the showing or playing of broadcasts to residents of hotels,⁴⁶⁷ inmates in prisons, patients in hospitals, and members of clubs, and it covers free demonstrations of broadcast-receiving equipment, for example in shop windows. However, the defence would not be available to justify showing of a live broadcast of a sports event to fans who paid to enter the venue to view the broadcast.⁴⁶⁸

The ‘free playing’ defence applies only to claims relating to infringement of copyright in the broadcast,⁴⁶⁹ and in certain specified situations, to the copyright in sound recordings. Permissions as regards other works included in the broadcast, for example music and lyrics of songs, will be required (from PRS for Music).⁴⁷⁰ In the case of sound recordings, the section distinguishes between two categories of recording. If they either are not recordings of music or songs (e.g. recorded interviews with politicians), or are musical recordings of which the author is also the author of the broadcast (such as sound recordings created as theme music for the channel or to accompany a programme), it is not an infringement of the copyright in the recording to show in public a broadcast that includes the recording.⁴⁷¹ The exception does not, however, excuse any infringement of the copyright in other sound recordings—that is, those that are recordings of music and songs where the author of the recording is not the author of the music (termed ‘excepted sound recordings’). These excepted sound recordings encompass most commercially distributed popular and classical music, so that the general ‘free playing’ defence would not apply to sound recordings featured on the radio or, historically, on *Top of the Pops*. For these ‘excepted sound recordings’, a much more limited exception exists as regards the free playing or showing of a broadcast for the purposes of repairing equipment for the reception of broadcasts, demonstrating that such repair has been carried out, or demonstrating such equipment.⁴⁷² So, while a wine bar, hotel, or even a National Health Service hospital or government-run prison will benefit from the broad ‘free playing’ defence as regards broadcasts, a Phonographic Performance Ltd licence will need to be obtained to cover the ‘excepted sound recordings’ included in the broadcast.

20.5 Photographs of Television Broadcasts

The taking of a photograph of an image from a broadcast, in domestic premises for private and domestic use, is not an infringement of copyright in the broadcast or any film included in it.⁴⁷³ The exception does not extend to photographs of artistic works included in television broadcasts.⁴⁷⁴

20.6 Reception and Retransmission of Wireless Broadcast by Cable

When the CDPA was passed, a special defence was included in section 73 dealing with the retransmission of wireless broadcasts by cable operators. The defence was designed to ensure that people in areas in which reception of the broadcast is very poor or restricted were able to get access to programmes. The defence also took account of the fact that certain cable operators are under a ‘must carry’ obligation.⁴⁷⁵ The Court of Justice has indicated that retransmissions of this sort in fact require the copyright owner’s permission,⁴⁷⁶ and the government has decided, for other reasons, to repeal the exception.⁴⁷⁷ This was done by section 34 of the Digital Economy Act 2017, with effect from 31 July 2017.⁴⁷⁸

p. 300 **21 Miscellaneous Defences**

21.1 Notes Or Recordings Of Spoken Words

Given that a person who makes a speech may have copyright in the speech (once recorded),⁴⁷⁹ a defence is provided to those who record speeches (such as journalists) to enable them to make use of their recordings. Section 58 provides that the copyright in spoken words cannot restrict the use of a recording thereof, where the recording was made for the purpose of reporting current events, or for communicating to the public the whole or part of the spoken work.⁴⁸⁰ For the defence to operate, the recording must be a direct record of the spoken words and the speaker must not have prohibited the recording of their speech.⁴⁸¹

21.2 Public Recitation

Section 59(1) of the 1988 Act provides that the reading or recitation in public by one person of a ‘reasonable extract’ from a publicized literary or dramatic work does not infringe any copyright in the work so long as it is accompanied by a ‘sufficient acknowledgement’.⁴⁸² Section 59(2) provides that copyright in a work is not infringed where a recording or recitation covered by section 59(1) is included in a sound recording or communicated to the public.

21.3 Abstracts

Where an article on a scientific or technical subject is published in a periodical accompanied by an abstract indicating the contents of the article, it is not an infringement of copyright in the abstract or in the article to copy the abstract or to issue copies of it to the public.⁴⁸³ The defence plays an important role in ensuring the circulation of scientific information.

21.4 Difficulties with Identifying Authors

Where works are of unknown authorship, a fixed term of copyright replaces the normal *post mortem* term.⁴⁸⁴ Similarly, in the case of films, where it is not possible to identify any of the persons by whom the calculation of the term of protection is normally made, a fixed term operates. In both situations, the possibility arises that while a user may rely on the fixed term, the author might have become known before the expiry of the fixed

p. 301 term. If so, the longer, conventional term would apply.⁴⁸⁵ In order to ensure that this does not create problems, there is a defence to infringement where reasonable inquiry cannot ascertain the identity of any author of a work and it is reasonable to suppose that copyright has expired in the work.⁴⁸⁶ This provision should now be viewed alongside the provisions relating to orphan works that are discussed in Chapter 12, section 5, pp. 363–4.

21.5 Right of Repair

As part of the general jurisdiction to refuse to enforce copyright where it would contravene public policy, the courts have sometimes treated a person as having a right to repair their property even though to do so would be a direct or indirect reproduction of a copyright work.⁴⁸⁷ This was taken furthest by the House of Lords in *British Leyland v. Armstrong*,⁴⁸⁸ holding that manufacturers were entitled to make spare parts for motor vehicles (even though to do so would be to reproduce the claimant's design drawings indirectly), so as to facilitate the repair of such vehicles. However, the defence enunciated in *British Leyland* has subsequently been qualified to such an extent that it is hard to imagine any situation in which it might apply. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc.*,⁴⁸⁹ Lord Hoffmann said that, for the defence to apply, it must be plain and obvious that the circumstances are unfair to customers and that the monopoly is anti-competitive. Soon after that decision, in *Mars v. Teknowledge*,⁴⁹⁰ Jacob J held that the *British Leyland* defence could not be applied to claims for infringement of copyright in computer software or to rights in databases because those rights stemmed from exhaustive European statutory regimes.⁴⁹¹ The upshot of this is that the right of repair has effectively been abolished.⁴⁹²

22 Reform

Having had two British reviews of copyright exceptions already this century, it might have been assumed unnecessary to raise the issue of the desirability of further reform.⁴⁹³ Nevertheless, two points are worth making (albeit briefly).

The first point is that these inquiries recognized that their freedom to propose legislative change was highly constrained by EU law, in particular, Article 5 of the Information Society Directive. Since leaving the EU, the various bilateral instruments that the United Kingdom has entered into seem to leave space for the government to modify the permitted acts recognized in the 1988 Act.⁴⁹⁴ In the short term, any such intervention seems likely to focus on improving the United Kingdom's competitiveness in key industries, such as expanding the text and data mining exception to facilitate the development and further exploitation of artificial intelligence.

p. 302 ↵ The second point is that pressure will resurface to introduce flexibilities that previous reviews favoured, but which were not possible because of EU constraints. The Gowers and Hargreaves Reviews were both attracted by the idea of 'fair use' and the flexibility associated with it.⁴⁹⁵ The content industries in the United Kingdom are, of course, very effective lobbyists, but one can at the very least foresee a vibrant debate as to whether it would be desirable for the United Kingdom to introduce a fair use regime.⁴⁹⁶

Notes

¹ Contrast various ‘immunities’, such as those for Internet intermediaries, discussed in Chapter 48, section 3.5, pp. 1321–6. These are not ‘exceptions’ because all they do is shield ISPs from liability for damages.

² For an attempt at a taxonomy of defences in EU copyright, see S Karapapa, *Defences to Copyright Infringement: Creativity, Innovation and Freedom on the Internet* (2020) (dividing the ‘defensive rules’ into ‘denials’ and ‘defences’ and the latter into four categories: (i) speech based; (ii) public policy; (iii) remunerated; and (iv) external).

³ *Pro Sieben Media v. Carlton UK Television* [1998] FSR 43, 48 (Laddie J). For a study of the merits of different forms of drafting exceptions, whether as standards or rules, see E. Hudson, *Drafting Copyright Exceptions: From the Law in Books to the Law in Action* (2020).

⁴ *Gowers Review*, ch. 4, 39, [3.26]; *Hargreaves Review*, 3, 8. New exceptions were added for ‘data mining’, quotation, and parody, while others, relating to education, libraries, persons with disability, and the administration, were substantially reformulated: The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 (SI 2014/1372); The Copyright and Rights in Performances (Disability) Regulations 2014 (SI 2014/1384); The Copyright and Rights in Performances (Public Administration) Regulations 2014 (SI 2014/1385); and The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (SI 2014/2356).

⁵ Info. Soc. Dir., Art. 5. Note also the requirements of the Rel. Rights Dir., Art. 10; Software Dir., Arts 5 and 6; Database Dir., Art. 6. For a systematic critique, see T. Rendas, *Exceptions in EU Copyright Law: A Search for Balance Between Flexibility and Legal Certainty* (2021).

⁶ *Padawan SL v. SGAE*, Case C-467/08 [2010] ECR I-10555, [AG43].

⁷ *Microsoft Mobile Sales International Oy v. Ministero per i beni e le attività culturali*, Case C-110/15, EU:C:2016:326, [AG20] (AG Wahl).

⁸ See section 3, pp. 253–6. Although not in mandatory form, the better view is that Info. Soc. Dir., Art 5(3)(d), recognizing a quotation exception, is also mandatory, because it has that status under Berne, Art. 10.

⁹ Info. Soc. Dir., Art. 5. On how far these really are ‘optional,’ see AG Szpunar in *Funke Medien v. Bundesrepublik Deutschland*, Case C-469/17, EU:C:2018:870, [AG39].

¹⁰ The CJEU has indicated that some exceptions need to be implemented without modification, whereas with others, member states retain some discretion as to implementation, albeit within certain constraints: *Funke Medien v. Bundesrepublik Deutschland*, Case C-469/17, EU:C:2019:623, [40]–[53] (Grand Chamber); *Spiegel Online v. Volker Beck*, Case C-516/17, EU:C:2019:625, [25]–[39] (Grand Chamber). Cf. *Vereniging Openbare Bibliotheeken (VOB) v. Stichting Leenrecht*, Case C-174/15, EU:C:2016:856, [61] (allowing member states to set additional conditions in implementation of Rel. Rights Dir., Art. 6(1)) with *DR, TV2 Danmark A/S v. NCB-Nordisk Copyright Bureau*, Case C-510/10, EU:C:2012:244, [36] (pointing out problems that arise if member states can set conditions, but in a case in which Danish law did not make reference to a condition in Art. 5(2)(d)).

¹¹ See Info. Soc. Dir., Recital 32; *Funke Medien v. Bundesrepublik Deutschland*, Case C-469/17, EU:C:2019:623, [55]–[64]; *Pelham GmbH v. Ralf Hüttner and Florian Schneider-Esleben*, Case C-476/17, EU:C:2019:624 (Grand Chamber), [58]–[65]. Some flexibility is offered by Art. 5(3)(o), which allows for exceptions in cases of ‘minor importance’ provided they only concern ‘analogue uses’. In *AKM v. Zürs.net Betriebs GmbH*, Case C-138/16, EU:C:2017:218, [37]–[38], this was interpreted strictly, and thus would not offer member states freedom to permit the retransmission of broadcasts to

groups of under 500 recipients. See also *Pelham*, Case C-476/17, EU:C:2018:1002, [AG57] (describing Art. 5(3)(o) as ‘a standstill clause’ and observing that the limitation to analogue uses meant such an exception could not cover acts of communication to the public by electronic means). Although the Info. Soc. Dir. creates an exhaustive list of exceptions to the rights specified therein, note that this is without prejudice to prior directives (Art. 1(2)), so derogations to the lending right, or to copyright in software and databases, specified in earlier instruments can be maintained, and without prejudice to ‘other legal provisions’ (Art. 9).

¹² See e.g. *Infopaq Int. v. Danske Dagblades Forening*, Case C-5/08 [2009] *ECR I-6569* (‘*Infopaq I*’), [57]; *Painer*, Case C-145/10 [2012] *ECDR* (6) 89, [109]; *AKM v. Zürs.net Betriebs GmbH*, Case C-138/16, EU:C:2017:218, [37]–[38]; *VCAST v. RTI SpA*, Case C-265/16, EU:C:2017:913, [32]. For discussion, see T. Rendas, ‘Fundamental Rights in EU Copyright Law: An Overview’, in E. Rosati (ed.), *The Routledge Handbook of EU Copyright Law* (2021) 18.

¹³ Cf. the traditional approach of the UK courts: *Newspaper Licensing Agency v. Marks & Spencer* [2000] 4 *All ER* 239 (CA), 257 (Chadwick LJ).

¹⁴ *Football Association Premier League v. QC Leisure and Karen Murphy v. Media Protection Services*, Cases C-403/08 and C-429/08 [2011] *ECR I-9083* (Grand Chamber) (‘*FAPL*’), [162]; *Painer*, Case C-145/10 [2012] *ECDR* (6) 89, [133]; *Deckmyn and Vrijheidsfonds*, Case C-201/13, EU:C:2014:2132, [23]; *Funke Medien v. Bundesrepublik Deutschland*, Case C-469/17, EU:C:2019:623, [71] (interpretation of the exceptions and limitations must allow their effectiveness to be safeguarded and their purpose to be observed, especially where those exceptions aim to ensure the observance of fundamental freedoms).

¹⁵ *FAPL*, Cases C-403/08 and C-429/08 [2011] *ECR I-9083* (Grand Chamber), [163]; *Painer*, Case C-145/10 [2012] *ECDR* (6) 89, [132], [134]; *Deckmyn*, Case C-201/13, EU:C:2014:458, [27]; *England & Wales Cricket Board v. Tixdaq* [2016] *EWHC* 575 (Ch), [73].

¹⁶ *Cofemel—Sociedade de Vestuário SA v. G-Star Raw CV*, Case C-683/17, EU:C:2019:363, [AG 55] (AG Szpunar).

¹⁷ *Funke Medien v. Bundesrepublik Deutschland*, Case C-469/17, EU:C:2019:623, [70]; *Spiegel Online v. Volker Beck*, Case C-516/17, EU:C:2019:625, [54] (emphasis added). For earlier indications, see *Technische Universität Darmstadt v. Eugen Ulmer KG*, Case C-117/13, EU:C:2014:2196, [43]; *Ryanair v. PR Aviation BV*, Case C-30/14, EU:C:2015:10, [39]–[40] (noted by T. Synodinou, ‘Databases and Screen-Scraping’ [2016] *EIPR* 313, 316 as ‘the major contribution’ of this ruling) and *EGEDA v. Administración del Estado*, Case C-470/14, EU:C:2016:24, [15] (AG Szpunar) (explaining rationale of private copying exception). On ‘users’ rights’ see M. Borghi, ‘Exceptions as Users’ Rights?’, in E. Rosati (ed.), *The Routledge Handbook of EU Copyright Law* (2021), ch. 13.

¹⁸ T. Rendas, ‘*Spiegel Online*: Do Copyright Exceptions and Fundamental Rights Make Easy Bedfellows?’ (2018) 13(1) *JILP* 10; C. Geiger and E. Izyumenko, ‘The Constitutionalisation of Intellectual Property Law in the EU and the *Funke Medien*, *Pelham* and *Spiegel Online* Decisions of the CJEU: Progress, But Still Some Way to Go!’ (2020) 51(3) *IIC* 282; S. Jacques, ‘On the Wax or on the Wane? The Influence of Fundamental Rights in Shaping Exceptions and Limitations’, in E. Rosati (ed.), *The Routledge Handbook of EU Copyright Law* (2021), ch. 14.

¹⁹ D. Jongsma, ‘The Nature and Content of the Three-Step Test in EU Copyright Law: A Reappraisal’, in E. Rosati (ed.), *The Routledge Handbook of EU Copyright Law* (2021), ch. 17, 338 at 339. The classic study is by M. Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004).

²⁰ Info. Soc. Dir., Art. 5(5); Marrakesh Dir, Art. 3(1) ('applied'); Rel. Rights Dir., Art. 10 ('applied'); Database Dir., Art. 6(3) ('interpreted in such a way as to allow its application to be used').

²¹ *Funke Medien v. Bundesrepublik Deutschland*, Case C-469/17, EU:C:2019:623, [52] (implementation), [61] (application) (Grand Chamber); R. Arnold and E. Rosati, 'Are National Courts the Addressees of the InfoSoc Three-Step Test?' (2015) 10(10) *JIPLP* 741–9 (arguing national court as well as legislature should apply test); S. Karapapa, *Defences to Copyright Infringement: Creativity, Innovation and Freedom on the Internet* (2020), 13 ('exceptions and limitations are subject to the three-step test twice under EU copyright: firstly at the legislative level and secondly at the judicial level').

²² J. Griffiths, 'Fair Dealing after *Deckmyn*', in M. Richardson and S. Ricketson (eds), *Research Handbook on IP in Media and Entertainment* (2017), ch. 3, 96–100.

²³ R. Burrell and A. Coleman, *Copyright Exceptions: The Digital Impact* (2005), ch. 9; M. de Zwart, 'An Historical Analysis of the Birth of Fair Dealing' [2007] *IPQ* 60; A. Sims, 'Strangling Their Creation: The Courts' Treatment of Fair Dealing in Copyright Law Since 1911' [2010] *IPQ* 192; A. Sims, 'Appellations of Piracy: Fair Dealing's Prehistory' [2011] *IPQ* 3.

²⁴ But see section 8, p. 269, discussing whether the CJEU's requirement of 'fair balance' is the same as 'fair dealing'.

²⁵ US Copyright Act of 1976, §107.

²⁶ *Hyde Park Residence v. Yelland* [2000] *EMLR* 363, [21].

²⁷ *Pro Sieben Media v. Carlton TV* [1999] *FSR* 610 (CA), 620; *England & Wales Cricket Board v. Tixdaq* [2016] *EWHC* 575 (Ch), [75].

²⁸ Whether something constitutes a 'parody' may depend on whether the user of the work did so with the intention of being humorous: see section 8, pp. 267–8. Moreover, in relation to quotation, the CJEU refers to an 'intention to enter into dialogue' with the quoted work: see section 7, p. 262. Focus on subjective intentions may produce problems when third parties are involved in, e.g., distribution or communication of a work that has been created relying on the defence. If we (the authors) quote material in this textbook in order to enter into dialogue with the quoted work, we benefit from the quotation defence; but does our publisher (OUP), when it communicates or makes available the quotation? The answer must, of course, be yes, otherwise the exceptions would frequently prove redundant; but it is not real to say OUP had the relevant subjective intention. For discussion of similar issues in the Australian context, see J. McCutcheon and S. Holloway, 'Whose Fair Dealing? Third-Party Reliance on the Fair Dealing Exception for Parody or Satire' (2016) 27 *Aust Intellect Prop J* 54.

²⁹ 'Fairness' here is primarily a British concept, although it also appears in Berne, Art. 10 and Info. Soc. Dir., Art. 5(3)(d). The concept of fairness, in contrast with the three-step test (in Art. 9(2) Berne, and Info. Soc. Dir., Art. 5(5)), is a 'multifactor' test rather than a set of cumulative steps or conditions.

³⁰ *Hubbard v. Vosper* [1972] 2 QB 84.

³¹ *Hyde Park Residence v. Yelland* [2000] *EMLR* 363, [38], (Aldous LJ); *Newspaper Licensing Agency v. Marks & Spencer* [2000] 4 *All ER* 239 (CA), [44], (Peter Gibson LJ).

³² *Ashdown v. Telegraph Group* [2002] Ch 149, 173, [71].

³³ Many countries offer a statutory list of factors and it seems surprising that such an approach was not adopted in the 2014 reforms.

³⁴ What follows is based on the established case law, so it is appropriate to note Arnold J's warning, *England & Wales Cricket Board v. Tixdaq* [2016] EWHC 575 (Ch), [75] that this case law 'must be treated with a degree of caution, since they were mostly decided prior to the implementation of the Information Society Directive and all of them were decided well before the recent jurisprudence of the CJEU concerning the interpretation of that Directive. Moreover ... there is no consideration in any of them of the three-step test.'

³⁵ *Duchess of Sussex v. Associated Newspapers* [2021] EWCA Civ 1810, [98], [101].

³⁶ At [101], the Court of Appeal emphasized that 'the use made of the Letter was unfair, because it was not about reporting current events, but reporting the actual contents of the Letter to make the splash of publication already referred to'.

³⁷ The factors considered at sections 2.1.4–2.1.7 may be thought of as relating the prejudice to the legitimate interests of the author or right holder.

³⁸ CDPA 1988, s. 30(1), (1A) (as amended to give effect to Info. Soc Dir., Art. 5(3)(d)); cf. Lord Denning in *Hubbard v. Vosper* [1972] 2 QB 84.

³⁹ *Hyde Park Residence v. Yelland* [2000] EMLR 363, 378, [34] (Aldous LJ); *HRH The Prince of Wales v. Associated Newspapers* [2007] 3 WLR 222, 264, [174] (Blackburne J), 288, [78]–[79] (Lord Phillips MR). But cf. *CCH Canadian v. Law Society of Upper Canada* [2004] SCC 13, [58].

⁴⁰ In terms of Info. Soc. Dir. Art. 5(5), the factors listed at sections 2.1.1–2.1.3 relate to whether the defendant's use interferes with the normal exploitation of the work.

⁴¹ [1972] 2 QB 84, 94.

⁴² Ibid., 94–5, 98 (Megaw LJ) (example of a parishioner quoting an epitaph on a tombstone in the churchyard); *Sillitoe v. McGraw Hill* [1983] FSR 545; *Associated Newspapers Group v. News Group Newspapers* [1986] RPC 515, 520.

⁴³ *Newspaper Licensing Agency v. Marks & Spencer* [1999] EMLR 369, 380 (Lightman J).

⁴⁴ But note CDPA 1988, s. 29(1) (fair dealing for research defence applies only to research for a non-commercial purpose); Database Dir., Art. 6(2)(b)).

⁴⁵ *Newspaper Licensing Agency v. Marks & Spencer* [2000] 4 All ER 239 (CA), 257.

⁴⁶ *Hubbard v. Vosper* [1972] 2 QB 84.

⁴⁷ *Beloff v. Pressdram* [1973] 1 All ER 241.

⁴⁸ Ibid.; *The Controller of Her Majesty's Stationery Office, Ordnance Survey v. Green Amps* [2007] EWHC 2755 (Ch), [54]; *Queensland v. TCN Channel Nine* [1993] IPR 58 (Supreme Court of Queensland); *British Oxygen v. Liquid Air* [1925] 1 Ch 383; cf. *Time Warner v. Channel 4* [1994] EMLR 1.

⁴⁹ *Hyde Park Residence v. Yelland* [2000] EMLR 363 (CA), [36]; *Pro Sieben Media v. Carlton Television* [1999] FSR 610, 614 (Walker LJ); *Beloff v. Pressdram* [1973] 1 All ER 241, 263.

⁵⁰ *Newspaper Licensing Agency v. Marks & Spencer* [1999] EMLR 369, 382–3 (Lightman J). Note also Info. Soc. Dir., Art. 5(3)(a), (c), (d). There is a tension between such an approach and ECHR-informed jurisprudence, which gives journalists leeway to determine what is necessary for a particular purpose: *Fressoz & Roire v. France* [2001] 31 EHRR 28, 60, [54]; *A v. B & C* [2002] 3 WLR 542, [11].

⁵¹ [2000] EMLR 363.

⁵² Ibid., 379.

⁵³ CDPA 1988, ss 29(1) (research for a ‘non-commercial purpose’), 29(1C), 178 (private study, defined as non-commercial), 29A(1)(a) (data analysis), 32(1)(a) (fair dealing for instruction), 35(1)(a) (recording of broadcasts for education), 36(1)(a) (copying for education), 42A(3)(c) (library making and supplying copies to users), 43(2)(c), and 61(4)(c) (library supply of unpublished works). Cf. CDPA 1988, s. 40B(3)(b) (not limiting research uses to ‘non-commercial’). The limitation to non-commercial research is required under a number of the EU law provisions: Info. Soc. Dir., Art. 5(2)(b), (c), (e), 5(3)(a), (b); Database Dir., Art. 6(2)(b). See S. Karapapa, *Private Copying* (2012), ch. 4.

⁵⁴ See Chapter 40, section 7, pp. 1131–2.

⁵⁵ Some further idea of what is meant might be gleaned from Enforcement Dir., Recital 14, which equates infringement on ‘a commercial scale’ with ‘acts carried out for direct or indirect economic or commercial advantage’, which ‘would normally exclude acts carried out by end consumers acting in good faith’. See also *Schrems v. Facebook Ireland*, Case C-498/16, EU:C:2018:37 (broad interpretation of notion of ‘consumer’ in Art. 15 of Regulation No. 44/2001).

⁵⁶ *The Controller of Her Majesty’s Stationery Office, Ordnance Survey v. Green Amps* [2007] EWHC 2755 (Ch), [23].

⁵⁷ CDPA 1988, s. 61 (recording of folk songs). See Info. Soc. Dir., Recital 40.

⁵⁸ CDPA 1988, s. 31A, as amended (accessible copies must be made from copy in lawful possession or lawful use of disabled person); Software Dir., Art. 5(1) (lawful acquirer), 5(2) (person having ‘right to use’); Database Dir., Arts 6(1), 8(1), (2).

⁵⁹ W. Blocher, ‘Computer Program Directive’, in Walter and von Lewinski, [5.5.39]; T.-E. Synodinou, ‘The Lawful User and a Balancing of Interests in European Copyright Law’ (2010) 41 *I/C* 819, 824.

⁶⁰ The Commission has said that ‘lawful acquirer’ meant a ‘purchaser, licensee, renter or a person authorized to use the program on behalf of the above’: *Report on the Implementation and Effects of Directive 91/250/EEC* (Apr. 2000) COM(2000) 199 final, 12. See also Blocher, ‘Computer Program Directive’, [5.5.11], [5.5.16].

⁶¹ Case C-128/11 [2012] 3 *CMLR* (44) 1039.

⁶² Ibid., [75], [80], [81], [82].

⁶³ Ibid., [85].

⁶⁴ CDPA 1988, s. 29A(1). See IPO, *Technical Review of the Draft Legislation on Copyright Exceptions: Government Response* (2014) (the ‘Technical Review’), 12. CDPA, s. 31A(1)(a); s. 31B(1)(a).

⁶⁵ CDPA 1988, s. 31A(1).

⁶⁶ CDPA 1988, s. 29(1), (1B) (as amended to give effect to Info. Soc. Dir., Arts 5(3)(c)), 29A(1)(b) (data analytics); 30(1) (criticism, review, quotation); 30(3), 32(1) (fair dealing by illustration for instruction); 35(1)(b) (educational recording of broadcasts); 36(1)(b) (educational copying); and 59 (public reading or recitation).

⁶⁷ CDPA 1988, s. 29(1), (1B) (as amended to give effect to Info. Soc. Dir., Arts 5(3)(c)), 29A(1)(b) (data analytics); 30(1) (criticism, review, quotation); 30(3) (reporting current events by sound recording, film, or broadcast); 32(1) (fair dealing by illustration for instruction); 35(1)(b) (educational recording of broadcasts); and 36(1)(b) (educational copying). But not CDPA 1988, ss 30(2) (reporting current events by means other than sound recording, film, or broadcast); or 59 (public reading or recitation). See also Info. Soc. Dir., Art. 5(3)(a), (c), (d), and (f), and *Painer*, Case

C-145/10 [2012] *ECDR* (6) 89, [147]–[148] (where work had been made available lawfully, but without author's name, it would be sufficient to indicate 'the source', but not to attribute the author); *Renckhoff*, Case C-161/17, EU:C:2018:279, [AG119] (no need to identify author if acting with prudence).

⁶⁸ These might be understood as statutory examples of cases in which it is 'impossible' to name the author.

⁶⁹ CDPA 1988, s. 178.

⁷⁰ *Pro Sieben Media v. Carlton Television* [1999] *FSR* 610, 616 (Walker LJ).

⁷¹ Ibid., 625; *Newspaper Licensing Agency* [1999] *EMLR* 369, 384 (Ch).

⁷² *Pro Sieben Media* [1997] *EMLR* 509, 597 (Laddie J).

⁷³ *Express Newspapers v. Liverpool Daily Post* [1985] 3 *All ER* 680; cf. *Forensic Telecommunication Services v. Chief Constable of West Yorkshire* [2011] *EWHC*, [2012] *FSR* (15) 428, [114] (although presumably Arnold J meant that the author, Seyton Bradford, should have been credited, rather than his employer, FTS).

⁷⁴ CDPA 1988, s. 28(1).

⁷⁵ Software Dir., Arts 5(2), 9; Database Dir., Art. 15 ('null and void').

⁷⁶ Info. Soc. Dir., Art. 9 (provisions in Directive without prejudice to 'law of contract').

⁷⁷ Hargreaves Review, 8. Bizarrely, and presumably until the government embarks on the much-needed codification, the effect is that contractual limitations remain possible in relation to the core public interest exceptions—fair dealing for criticism and review and reporting current events.

⁷⁸ CDPA 1988, ss 36(4), 50A, 50B, 296A(1)(a), 296A(1)(b), 296A(1)(c), and 296B. See also Broadcasting Act 1996, s. 137.

⁷⁹ CDPA 1988, ss 29(4B) (research and private study), 29A(5) (data analytics), 30(4) (quotation), 30a(2) (parody etc), 32(3) (teaching), 31F(8) (disability), 32(3) (instruction), 41(5) (library copying for other libraries), 42(7) (library copying to replace missing parts), and 42A(6) (library copying of published works for user research). Cf. CDPA 1988, ss 40B (use on-site in cultural institutions), 43(3)(b) (prohibited copying of unpublished works), which are capable of being overridden by contract.

⁸⁰ CDPA 1988, ss 296ZA and 296ZE, Sch. 5A (as amended by SI 2014/1372, Sch., para. 10, and SI 2014/1384, Sch., para. 7, and SI 2018/995, reg. 10(4) (both on disability)); Info. Soc. Dir., Art. 6. See Chapter 13, section 4.1.3, pp. 394–7.

⁸¹ CDPA 1988, s. 29A(2)(b) (copy for data analysis, use beyond purpose is infringement).

⁸² CDPA 1988, ss 29A(2)(a) (where copy made for data analysis, infringement occurs if copy is transferred to 'any other person') and 31A(4) (transfer of accessible copies to non-entitled persons).

⁸³ In many cases, the 'dealing' is an infringing act, being either a distribution or communication to the public.

⁸⁴ Compare CDPA 1988, ss 29A(4) (data analytics), 31A(7) (disability), 31B(12) (disability) (all defining 'dealt with' as 'sold or let for hire, or offered or exposed for sale or hire'); with ss 35(6), and 36(9) (defining 'dealt with' also to cover 'communication').

⁸⁵ Info. Soc. Dir., Art. 2.

⁸⁶ See P. B. Hugenholtz, 'Caching and Copyright: The Right of Temporary Copying' [2000] *EIPR* 482, 483; *Newspaper Licensing Agency v. Public Relations Consultants Association* [2013] *UKSC* 18, [2] (Lord Sumption).

⁸⁷ Info. Soc. Dir., Recital 33. For an analysis, see S. Karapapa, *Defences to Copyright Infringement: Creativity, Innovation and Freedom on the Internet* (2020), ch 4.

⁸⁸ CDPA 1988, s. 28A, does not, on its face, extend the exception to broadcasts. However, Floyd J has held that it must be interpreted to apply to broadcasts: *ITV Studios v. TV CatchUp* [2011] EWHC 1874 (Pat), [47], [121].

⁸⁹ *Infopaq I* [2009] ECR I-6569; *Infopaq International A/S v. Danske Dagblades Forening*, Case C-302/10, EU:C:2012:16 ('*Infopaq II*'); *FAPL*, Cases C-403/08 and C-429/08 [2011] ECR I-9083 (Grand Chamber).

⁹⁰ *FAPL*, Cases C-403/08 and C-429/08 [2011] ECR I-9083 (Grand Chamber), [179]; *PRCA*, Case C-360/13, EU:C:2014:1195, [24].

⁹¹ *VG Wort*, Cases C-457/11, C-458/11, C-459/11, and C-460/11, EU:C:2013:34, [AG73] (AG Sharpston).

⁹² *Infopaq I* [2009] ECR I-6569, [61], [64]. The Court assumed that caching and other acts that enable browsing would have this character: [63].

⁹³ *Technische Universität Darmstadt v. Eugen Ulmer KG*, Case C-117/13, EU:C:2014:1795 [AG34] (AG Jääskinen).

⁹⁴ *Infopaq I*, [2009] ECR I-6569, [67].

⁹⁵ *Infopaq II*, Case C-302/10, EU:C:2012:16, [30].

⁹⁶ *Infopaq II*, Case C-302/10, EU:C:2012:16, [36]; *PRCA*, Case C-360/13, EU:C:2014:1195, [31] (the condition is met even if it takes human action to terminate the process).

⁹⁷ *Infopaq II*, Case C-302/10, EU:C:2012:16, [37]–[38].

⁹⁸ Lawful use is defined to include uses ‘authorised by the rightholder or not restricted by law’: Info. Soc. Dir., Recital 33.

⁹⁹ *FAPL*, Cases C-403/08 and C-429/08 [2011] ECR I-9083 (Grand Chamber), [171]–[173].

¹⁰⁰ *Infopaq II*, Case C-302/10 EU:C:2012:16, [44].

¹⁰¹ *FAPL*, Cases C-403/08 and C-429/08 [2011] ECR I-9083 (Grand Chamber), [175]–[177].

¹⁰² *Infopaq II*, Case C-302/10, EU:C:2012:16, [50].

¹⁰³ Ibid., [51].

¹⁰⁴ [2013] UKSC 18; Case C-360/13, EU:C:2014:1195.

¹⁰⁵ See Chapter 3, section 2.2, p. 70, and Chapter 4, sections 3.5.6, p. 116, and 3.7.2, pp. 120–1.

¹⁰⁶ [2011] EWCA Civ 890, [35] (Morrit C.).

¹⁰⁷ *Public Relations Consultants Association (PRCA) v. The Newspaper Licensing Agency (NLA)* [2013] UKSC 18, [4].

¹⁰⁸ Ibid., [11]. But cf. *Stichting Brein v. Jack Frederik Wullems*, Case C-527/15, EU:C:2017:300, [61] (emphasizing cumulative nature of conditions).

¹⁰⁹ *Public Relations Consultants Association (PRCA) v. The Newspaper Licensing Agency (NLA)* [2013] UKSC 18, [28].

¹¹⁰ Ibid., [29].

¹¹¹ Ibid., [30].

¹¹² Ibid., [31].

¹¹³ Ibid., [33].

¹¹⁴ *Newspaper Licensing Agency (NLA) v. Public Relations Consultants Association*, Case C-360/13, EU:C:2014:1195, [25]. The Court, at [22], [25], refers to three conditions, the other being that the copy is temporary: this is dealt with cursorily at [26]–[27].

¹¹⁵ Ibid., [44]–[46]. This was so even though the user might e.g. leave the page on-screen while they went off to a meeting or to lunch, because the technological process was continuing.

¹¹⁶ Ibid., [47]–[50].

¹¹⁷ Ibid., [29].

¹¹⁸ Ibid., [55].

¹¹⁹ Ibid., [60]–[61].

¹²⁰ See also *Vereniging Openbare Bibliotheeken (VOB) v. Stichting Leenrecht*, Case C-174/15, EU:C:2016:459, [AG58] (suggesting that temporary copies made by an electronic borrower from a public library would be exempt on this basis).

¹²¹ *Stichting Brein v. Jack Frederik Wullems*, Case C-527/15, EU:C:2017:300.

¹²² Ibid., [69].

¹²³ Ibid., [70].

¹²⁴ Ibid., [71]–[72].

¹²⁵ *ACI Adam BV v. Stichting de Thuiskopie*, Case C-435/12, EU:C:2014:254; (private copying); *Vereniging Openbare Bibliotheeken (VOB) v. Stichting Leenrecht*, Case C-174/15, EU:C:2016:856, [68], [71]–[72] (public lending). See also *GS Media BV v. Sanoma Media Netherlands BV et al.*, Case C-160/15, EU:C:2016:644, [53].

¹²⁶ See section 5.2, pp. 258–9.

¹²⁷ See section 16.1, pp. 291–2.

¹²⁸ See section 20.3, pp. 297–8.

¹²⁹ Fifth Edition, pp. 240–2.

¹³⁰ The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 (SI 2014/2361) (later invalidated). The conditions for so doing were that: (i) the person was an individual; (ii) they had lawfully acquired an initial copy ('the individual's own copy'); (iii) they held the initial copy on a permanent basis (rather than on loan); (iv) the further copy was for the individual's private use; and (v) the further copy was made for non-commercial ends.

¹³¹ *R (on the application of British Academy of Songwriters, Composers and Authors) v. Secretary of State for Business, Innovation & Skills* [2015] EWHC 2041 (Admin), [2015] RPC (26) 703.

¹³² Ibid., [272].

¹³³ Ibid., [274].

¹³⁴ *R (on the application of British Academy of Songwriters, Composers and Authors) v. Secretary of State for Business, Innovation & Skills* [2015] EWHC 1723 (Admin).

¹³⁵ Limitations as to the types of work to which the defence applied were removed by SI 2014/1372, reg. 3(1). For the previous position, see Bently and Sherman (2008), 207.

¹³⁶ CDPA 1988, s. 29(4)–(4A), excluding from the fair-dealing exceptions acts which are permitted in relation to computer programs under CDPA 1988, ss 50B (decompilation) and 50BA (observing, testing, etc.), neither of which are limited to non-commercial acts. See section 16.2–16.3, pp. 292–4.

¹³⁷ CDPA 1988, s. 29(4B) (added by SI 2014/1372, reg. 3(e)).

¹³⁸ *De Garis v. Neville Jeffress Pidler* (1990) 18 IPR 292 (FCA). The ‘research’ exception is said to be justified by reference to Art. 5(3)(a) of the Directive, which refers to ‘scientific research’. The term ‘illustration’ in Info. Soc. Dir., Art. 5(3)(a), qualifies the exception to ‘teaching’ not research: *Forensic Telecommunication Services v. Chief Constable of West Yorkshire* [2011] EWHC 2892 (Ch), [2012] FSR (15) 428, [109]; S. von Lewinski, ‘Information Society Directive’, in Walter and von Lewinski, 733–5, [9.6.27]–[9.6.29].

¹³⁹ Like the private copying exception under CDPA 1988, s. 28B, this is permissible under the Info. Soc. Dir, Art. 5(2)(a) and (b).

¹⁴⁰ *Sillitoe v. McGraw Hill* [1983] FSR 545; *Longman Group v. Carrington Technical Institute* [1991] 2 NZLR 574 (CANZ).

¹⁴¹ See also CDPA 1988, s. 36, discussed in section 13.5, pp. 284–5.

¹⁴² CDPA 1988, s. 29(3); cf. *Longman v. Carrington* [1991] 2 NZLR 574.

¹⁴³ See section 2.2, pp. 249–50.

¹⁴⁴ *The Controller of Her Majesty’s Stationery Office, Ordnance Survey v. Green Amps* [2007] EWHC 2755 (Ch), [23].

¹⁴⁵ *Universities UK v. Copyright Licensing Agency* [2002] RPC 693, 702, [34].

¹⁴⁶ Database Dir., Art. 6(2)(b); Info. Soc. Dir., Art. 5(3)(a). See section 2.4, p. 251.

¹⁴⁷ See further JISC, *The Value and Benefits of Text Mining* (2012), available online at <https://www.jisc.ac.uk/reports/value-and-benefits-of-text-mining>.

¹⁴⁸ E. Rosati, ‘Copyright as an Obstacle or an Enabler? A European Perspective on Text and Data Mining and its Role in the Development of AI Creativity’ (2019) 2 APLR 198; A. Strowel and R. Ducato, ‘Artificial Intelligence and Text and Data Mining: A Copyright Carol’, in E. Rosati, *The Routledge Handbook of EU Copyright Law* (2021), ch. 15.

¹⁴⁹ R. Ducato and A. Strowel, ‘Limitations to Text and Data Mining and Consumer Empowerment: Making the Case for a Right to Machine Legibility’ (2019) 50 IIC 649.

¹⁵⁰ CDPA 1988, s. 29A, added by the Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 (SI 2014/1372), reg. 3(2).

¹⁵¹ IPO, *Post-Implementation Review* (2020).

¹⁵² IPO, *Artificial Intelligence and Intellectual Property: Copyright and Patents* (29 Oct. 2021). One alternative being considered is to adopt the model of the CDSM Dir., Art 4, which affords right holders the freedom to opt out. For assessment of the EU provision, see R. Ducato and A. Strowel, ‘Ensuring Text and Data Mining: Remaining Issues with the EU Copyright Exceptions and Possible Ways Out’ [2021] 43(5) EIPR 322.

¹⁵³ Further, third parties who are developing data mining tools will at least be able to supply them to non-commercial users, confident that, by so doing, they will not incur accessory liability (because use of the tools is not infringing).

¹⁵⁴ ECS, *General Opinion on the EU Copyright Reform Package* (2017), 5. For the concept of ‘non-expressive uses’, see Chapter 6, section 2, p. 157.

¹⁵⁵ CDPA 1988, s. 30(1ZA), added by the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (SI 2014/2356).

¹⁵⁶ *Pelham*, Case C-476/17, EU:C:2018:1002, [AG63]–[AG64].

¹⁵⁷ T. Aplin and L. Bently, *Global Mandatory Fair Use* (2020), 69–71.

¹⁵⁸ *Spiegel Online v. Volker Beck*, Case C-516/17, EU:C:2019:625, [82]; *Painer*, Case C-145/10, EU:C:2011:798, [120], [134].

¹⁵⁹ *Pelham*, Case C-476/17, EU:C:2018:1002, [AG54].

¹⁶⁰ *Funke Medien v. Bundesrepublik Deutschland*, Case C-469/17, EU:C:2019:623, [71].

¹⁶¹ *Beloff v. Pressdram* [1973] 1 All ER 241; *Associated Newspapers Group v. News Group Newspapers* [1986] RPC 515.

¹⁶² *Newspaper Licensing Agency v. Marks & Spencer* [2000] 4 All ER 239 (CA), 257 (Chadwick LJ); *Pro Sieben Media v. Carlton Television* [1999] FSR 610 (CA), 620. Criticism or review may be of the work as a whole or a single aspect of a work, the thought or philosophy underpinning a work, or its social and moral implications: *Hubbard v. Vosper* [1972] 2 QB 84, 94 ff; *Time Warner v. Channel 4* [1994] EMLR 1, 15; *Pro Sieben Media v. Carlton Television* [1999] FSR 610 (CA), 621.

¹⁶³ *Ashdown v. Telegraph Group* [2002] Ch 149, 171, [2002] RPC 235, 251. See also *Heythrop Zoological Gardens v. Captive Animals Protection Society* [2016] EWHC 1370 (Ch), [43] (noting distinction).

¹⁶⁴ Cf. *Time Warner v. Channel 4* [1994] EMLR 1, 15 (defence applied ‘equally where the criticism is of the decision to withdraw from circulation a film in the public domain, and not just the film itself’); *Pro Sieben* [1999] FSR 610 (CA); *Fraser-Woodward v. BBC* [2005] FSR 762.

¹⁶⁵ Berne, Art. 10(1) (‘It shall be permissible to make quotations from a work ...’); Info. Soc. Dir., Art. 5(3)(d) (‘quotations for purposes such as criticism or review ...’).

¹⁶⁶ The government wanted to retain the existing defence to cover acts other than quotation, e.g. the summary of works: *Technical Review*, 9.

¹⁶⁷ *Pelham GmbH v. Ralf Hütter and Florian Schneider-Esleben*, Case C-476/17, EU:C:2019:624, [70]–[71]; *Spiegel Online v. Volker Beck*, Case C-516/17, EU:C:2019:625, [77]–[78].

¹⁶⁸ *Pelham*, Case C-476/17, EU:C:2019:624, [72] (referring, with approval, to the Advocate-General’s Opinion, EU:C: 2018:1002, [AG64]). There, the Advocate-General indicated that such dialogue could be ‘in confrontation, as a tribute to or in any other way’. This limitation of the exception is criticized in T. Aplin and L. Bently, *Global Mandatory Fair Use: The Right of Quotation in International Copyright Law* (2020), 131–8, 215.

¹⁶⁹ Cf. Advocate-General Szpunar (asserting that ‘the aim of sampling is not to enter into dialogue with, be used for comparative purposes, or pay tribute to the works used’, but rather to use existing material to create new works). See further B. Jütte and J. Quintais, ‘The *Pelham Chronicles*’ [2021] JIPLP 213, 219–20 (suggesting this is a subjective requirement ascertained by reference to the user, but noting that, when the case fell to be decided by the German court, it found there was no dialogue, in part because the sample was short, but also because it would not be recognized as ‘foreign’ to the defendant’s recording in which it was incorporated: citing, BGH, Judgment of 30 April 2020, I ZR 115/16 (‘Metall auf Metall IV’), DE:BGH:2020:300420UIZR115.16.0, [54]–[55]).

¹⁷⁰ *Spiegel Online v. Volker Beck*, Case C-516/17, EU:C:2019:625, [79].

¹⁷¹ *Pelham*, Case.C-476/17, EU:C:2019:624, [73]–[74].

¹⁷² *Spiegel Online v. Volker Beck*, Case C-516/17, EU:C:2019:625, [79].

¹⁷³ *Ibid.*, [80].

¹⁷⁴ CDPA 1988, s. 30(1), (1ZA)(a). In *Spiegel Online*, Advocate-General Szpunar suggests that this condition recognizes an author's moral right to control the first disclosure of their work, referred to as the right of 'divulgation'. *Spiegel*, Case C-516/17, EU:C:2019:16, [AG55].

¹⁷⁵ CDPA 1988, s. 30(1A) (added by SI 2003/2498 to give effect to Info. Soc. Dir., Art. 5(3)(d)).

¹⁷⁶ *Spiegel Online*, Case C-516/17, EU:C:2019:625, [89]. It is not quite clear what the Court has in mind with the term 'statutory authorisation', and in particular whether it includes disclosure with an exception or limitation. In his Opinion, Advocate-General Szpunar suggested that the Court had already tacitly accepted this possibility, at least in relation to Info. Soc. Dir., Art. 5(3)(e) of Directive 2001/29, in the *Painer* case, C-145/10, EU:C:2011:798, [143]–[144]. Cf. *Spiegel*, Case C-516/17, EU:C:2019:16, [AG55].

¹⁷⁷ *Spiegel Online*, Case C-516/17, EU:C:2019:625, [94].

¹⁷⁸ For a useful discussion, see E. Hudson, *Drafting Copyright Exceptions: From the Law in Books to the Law in Action* (2020), 282–4.

¹⁷⁹ [2007] 3 WLR 222, 265, [176] (Blackburne J.).

¹⁸⁰ CDPA 1988, s. 30(1), (1ZA)(b). Cf. Info. Soc. Dir., Art. 5(3)(d) ('in accordance with fair practice').

¹⁸¹ *Funke Medien v. Bundesrepublik Deutschland*, Case C-469/17, EU:C:2019:623, [43] and *Spiegel Online*, Case C-516/17, EU:C:2019:625, [28].

¹⁸² *IPC Media v. News Group Newspapers* [2005] FSR 752 (copying for own competing commercial purpose unfair); cf. *Pro Sieben v. Carlton UK Television* [1999] FSR 610 (CA).

¹⁸³ *Fraser-Woodward v. BBC* [2005] FSR 762.

¹⁸⁴ There is no need for the critical work to be representative of the original: *Time Warner v. Channel 4* [1994] EMLR 1, 12.

¹⁸⁵ *Pro Sieben Media v. Carlton Television* [1999] FSR 610 (CA), 619. An author's remedy for unjustified criticism lies in the law of defamation.

¹⁸⁶ *Painer*, Case C-145/10 [2012] ECDR (6) 89, [AG212].

¹⁸⁷ *Spiegel Online*, Case C-516/17, EU:C:2019:625, [83].

¹⁸⁸ The original publisher was said to have altered the text so as to misrepresent the claimant's view on the topic. By comparing the manuscript with the book chapter as published, the defendant sought to make clear that all that the original publisher had done was to amend the title of the manuscript and shorten one of its sentences. As a result, the defendant suggested that the claimant had been misleading the public, in as much as the essential content of his manuscript had not been distorted in the book chapter as published. The matter was resolved by the German BGH on the basis of the reporting current event defence and without resort to the quotation right: Judgment of 30 April 2020, I ZR 228/15—'Reformistischer Aufbruch II' as discussed by G. Priora and B. J. Jütte, 'No Copyright Infringement for Publication by the Press of Politician's Controversial Essay' (2020) 15(8) JIPLP 583–4.

¹⁸⁹ But cf. *Pelham*, Case C-476/17, EU:C:2019:624, [69] (using the same language in the very different context of music sampling).

¹⁹⁰ CDPA 1988, s. 30(1ZA)(b), (c).

¹⁹¹ CDPA 1988, s. 30(1).

¹⁹² CDPA 1988, s. 30(1ZA). See *Pelham*, Case C-476/17, EU:C:2018:1002, [AG68] (suggesting that, in the case of a musical work, the source of the quotation might be indicated in the description of the quoting work, or even in its title).

¹⁹³ CDPA 1988, s. 30(4).

¹⁹⁴ See Chapter 8, section 2.3, p. 221.

¹⁹⁵ R. Burrell and A. Coleman, *Copyright Exceptions: The Digital Impact* (2005), 61; M. Spence, ‘Intellectual Property and the Problem of Parody’ (1998) 114 *LQR* 594; M. Spence, ‘*Rogers v Koons*: Copyright and the Problem of Artistic Appropriation’, in D. McClean (ed.), *The Trials of Art* (2007), 213–34, 228.

¹⁹⁶ *Williamson Music v. Pearson* [1987] *FSR* 97, 103. The case law is reviewed in L. Bently, ‘Parody and Copyright in the Common Law World’, in *Copyright and Freedom of Expression: ALAI 2006 Barcelona* (2008), 360.

¹⁹⁷ R. Deazley, ‘Taking Backwards the Gowers Review’ (2010) 73 *MLR* 785; R. Jacob, ‘Parody and IP Claims: A Defence? A Right to Parody?’, in R. Dreyfuss and J. Ginsburg (eds), *IP at the Edge* (2014), ch. 20.

¹⁹⁸ Gowers Review, Recommendation 12; IPO, *Taking Forward the Gowers Review of Intellectual Property* (2008), 31–6; Hargreaves Review, 50–1, [5.35] ff; IPO, *Modernising Copyright* (2012), 29–31.

¹⁹⁹ The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (SI 2014/2356), adding CDPA 1988, s. 30A(1).

²⁰⁰ S. Jacques, *The Parody Exception in Copyright Law* (2019) (drawing on a range of jurisdictions).

²⁰¹ A number of member states had such an exception: see e.g. art. L 122–5.4 of the French Intellectual Property Code. For comparative study, see D. Mendis and M. Kretschmer, *The Treatment of Parodies Under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles* (2013).

²⁰² *Deckmyn and Vrijheidsfonds v. Vandersteen*, Case C-201/13, EU:C:2014:2132 (Grand Chamber).

²⁰³ Ibid., [17].

²⁰⁴ Ibid., [20]. Advocate-General Cruz Villalón referred to these two parts as ‘structural’ and ‘functional’: EU:C:2014:458, [AG48]. Although recognizing, at 19, that these are ‘structural’ and ‘functional’ components of the definition, Sabine Jacques reinterprets the structural requirement in functional terms, treating it as equivalent to a requirement that the use produce ‘no confusion’: Jacques, *The Parody Exception* (2019) 36 (‘must be recognizably different from the underlying work to avoid confusion with it’ (emphasis added)); also, 101, 196.

²⁰⁵ Ibid., [21].

²⁰⁶ However, the distinction may have a bearing on the ‘fairness’ analysis: German Supreme Court, 28 July 2016, Case No. I ZR 9/15,—*Auf fett getrimmt* [38], (2017) 48 *IIC* 474. See further *Shazam Productions v. Only Fools The Dining Experience* [2022] *EWHC* 1379 (IPEC), [175]–[180] (identifying a requirement of ‘critical distance’ so as to distinguish parody from imitation).

²⁰⁷ BGH, 28 July 2016, Case No. I ZR 9/15—*Auffett getrimmt*, *ibid.*, [33] ('Whether in the individual case a parody is present, rather, is essentially to be evaluated objectively according to whether this type of antithetical treatment is recognisable for the person who is familiar with the parodied work and who possesses the necessary intellectual understanding to recognise the new work as a parody Which goal the author of the new work was pursuing specifically with his adaptation is in this respect irrelevant'). Cf. J. Griffiths, 'Fair Dealing After *Deckmyn*', in M. Richardson and S. Ricketson (eds), *Research Handbook on IP in Media and Entertainment* (2017), 64, 80 (preferring intention); E. Rosati, 'Just a Laughing Matter' (2015) 52(2) *CMLR* 511, 518–20 (preferring intention); D. Jongsma, 'Parody After *Deckmyn*' (2017) 48 *IIC* 652, 655–6 (citing pre-*Deckmyn* case law from national courts that focus on intention), 672–3 (arguing for intention test); S Jacques, *The Parody Exception*, 94, 196 (referring to characteristics as 'a humorous intent ... and absence of confusion'). Cf. S. Karapapa, *Defences to Copyright Infringement: Creativity, Innovation and Freedom on the Internet* (2020), 175 (seeming to assume that *Deckmyn* requires a humorous effect but offering no criteria as to how this might be assessed).

²⁰⁸ Cf. Info. Soc. Dir., Art. 5(3)(c) (the quotation exception, which is explicitly subject to a 'fair practice' condition).

²⁰⁹ *Deckmyn*, Case C-201/13, EU:C:2014:2132, [27]. In so doing, the Court converted a 'skeleton provision' into a 'usable defence': J. Griffiths, 'Fair Dealing After *Deckmyn*', in M. Richardson and S. Ricketson (eds), *Research Handbook on IP in Media and Entertainment* (2017), 64, 74.

²¹⁰ *Deckmyn*, Case C-201/13, EU:C:2014:2132, [31].

²¹¹ Other member states have hitherto operated qualifications of this sort. In Belgium, parodic use must accord with 'fair practice'; in France, it must have 'due consideration for the laws of this genre'; in the Netherlands, it must be 'in accordance with what the rules of social intercourse reasonably permit'.

²¹² The UK government had indicated that the 'fair dealing' condition would ensure that the exception would not be 'misused, and will preclude the copying of entire works where such taking would not be considered fair (for example if such works were already licensable for a fee)': IPO, *Modernising Copyright* (2012), 31.

²¹³ Cf. J. Griffiths, 'Fair Dealing after *Deckmyn*', in M. Richardson and S. Ricketson (eds), *Research Handbook on IP in Media and Entertainment* (2017), 91–4, arguing that the results of the shift 'may be significant'.

²¹⁴ As with the German 'fat-cropped celebrities' case: BGH, 28 July 2016, Case No. I ZR 9/15,—*Auffett getrimmt*, [39]–[40] reported in English at (2017) 48 *IIC* 474.

²¹⁵ For a narrow view, see *Deckmyn*, Case C-201/13, EU:C:2014:458, [AG85] (AG Cruz Villalón).

²¹⁶ *Ibid.*, [AG46].

²¹⁷ *Pelham*, Case C-476/17, EU:C:2018:1002, AG n. 30. Emily Hudson suggests that 'this would seem to misunderstand the definition of pastiche': E. Hudson, *Drafting Copyright Exceptions: From the Law in Books to the Law in Action* (2020), 292, n. 137. See also Copinger (18th edn), [9–82] (referring to pastiche as including a medley of pieces imitating various sources). Advocate-General Szpunar also states, at [AG70], that the exception, like the quotation exception, 'presupposes interaction with the work used, or at least with its author', but as Hudson points out, *Deckmyn* specifically does not require 'interaction' with the work used, leaving open the possibility of 'weapon parody'.

²¹⁸ R. Dyer, *Pastiche* (2007), 3, defines pastiche as 'a kind of aesthetic imitation', that is imitation of 'art' (broadly understood) by 'art' and that 'pastiche intends that it is understood as pastiche by those who read, see or hear it'.

²¹⁹ E. Hudson, ‘The Pastiche Exception in Copyright Law: A Case of Mashed-Up Drafting?’ [2017] *IPQ* 346 (arguing exception could cover mash-ups, fan fiction, music sampling, collage, appropriation art, and other forms of homage and compilation); *Shazam Productions v. Only Fools The Dining Experience* [2022] *EWHC* 1379 (IPEC), [189]–[193]. Cf. S. Jacques, *The Parody Exception* (2019), 24–7.

²²⁰ This means that a newspaper is not able to take photographs from another paper and claim this defence; hence the need to rely on the criticism or review defence in *Banier v. News Group Newspapers* [1997] *FSR* 812. See C. Kelly, ‘Current Events and Fair Dealing with Photographs: Time for a Revised Approach’ [2012] 4 *IPQ* 242 (reviewing exclusion).

²²¹ Although the defence pre-dates EU harmonization, under the harmonized regime it was permissible under Info. Soc. Dir., Art. 5(3)(c). According to the CJEU in *Funke Medien v. Bundesrepublik Deutschland*, Case C-469/17, EU:C:2019:623, [43] and *Spiegel Online v. Volker Beck*, Case C-516/17, EU:C:2019:625, [28], that provision is an example of partial harmonization, the assessment of whether a use is ‘to the extent justified by the informative purpose’ being a matter for national courts (and, it appears, national criteria).

²²² CDPA 1988, s. 30(3).

²²³ *Newspaper Licensing Agency v. Marks & Spencer* [2000] 4 *All ER* 239 (CA), 249. In *England & Wales Cricket Board v. Tixdaq & Fanatix* [2016] *EWHC* 575 (Ch), [112], Arnold J stated that ‘[t]he purpose of section 30(2) ... is to provide an exception to, or limit upon, copyright protection in the public interest, namely freedom of expression’.

²²⁴ *Funke Medien v. Bundesrepublik Deutschland*, Case C-469/17, EU:C:2019:623, [60]; *Spiegel Online v. Volker Beck*, Case C-516/17, EU:C:2019:625, [45]. British courts had already indicated that the value placed on freedom of information and freedom of speech requires that gateway to be wide: *Newspaper Licensing Agency v. Marks & Spencer* [2000] 4 *All ER* 239, 382; *Ashdown v. Telegraph Group* [2002] *Ch* 149, 172.

²²⁵ *Funke Medien*, [71].

²²⁶ *Spiegel Online v. Volker Beck*, Case C-516/17, EU:C:2019:625, [74]. Cf EU:C:2019:16, [AG28]–[AG29] (taking the view that such a condition was consistent with the exception).

²²⁷ CDPA 1988, s. 30(2).

²²⁸ Broadcasting Act 1996, s. 137 (as amended).

²²⁹ The CJEU has indicated that the concept of reporting current events is an ‘autonomous concept of EU law’: *Spiegel Online v. Volker Beck*, Case C-516/17, EU:C:2019:625, [64]. The Advocate-General preferred to interpret the concept narrowly in the light of the Berne Convention, Art. 10bis, where the specific exception is limited to ‘literary or artistic works seen or heard in the course of the event’ and reporting ‘by means of photography, cinematography, broadcasting or communication to the public by wire’: EU:C:2019:16, [AG31]–[AG34].

²³⁰ *Newspaper Licensing Agency* [2000] 4 *All ER* 239 (CA), 267 (Mance LJ).

²³¹ *British Broadcasting Corporation v. British Satellite Broadcasting* [1992] *Ch* 141; cf. *Newspaper Licensing Agency v. Marks & Spencer* [2000] 4 *All ER* 239, 257 (Chadwick LJ); *England & Wales Cricket Board & Sky UK v. Tixdaq & Fanatix* [2016] *EWHC* 575 (Ch), [106] (‘a contemporaneous sporting event, such as a cricket match, is a current event’).

²³² *Newspaper Licensing Agency* [1999] *EMLR* 369, 383.

²³³ *Independent Television Publications v. Time Out* [1984] *FSR* 64.

²³⁴ *Newspaper Licensing Agency* [1999] *EMLR* 369, 382.

²³⁵ *Newspaper Licensing Agency* [2000] 4 *All ER* 239 (CA), 250 (Gibson LJ), 267 (Mance LJ).

²³⁶ [1999] *FSR* 610.

²³⁷ *Spiegel Online v. Volker Beck*, Case C-516/17, EU:C:2019:625, [67].

²³⁸ *Hyde Park Residence v. Yelland* [1999] *RPC* 655.

²³⁹ *Ibid.*, 661. See also *Ashdown v. Telegraph Group* [2002] *Ch* 149, 172.

²⁴⁰ The BGH Judgment of 30 April 2020, I ZR 228/15—‘Reformistischer Aufbruch II’ is discussed by G. Priora and B. J. Jütte, ‘No Copyright Infringement for Publication by the Press of Politician’s Controversial Essay’ (2020) 15(8) *JIPLP* 583–4.

²⁴¹ *Spiegel Online v. Volker Beck*, Case C-516/17, EU:C:2019:625, [66].

²⁴² *Funke Medien v. Bundesrepublik Deutschland*, Case C-469/17, EU:C:2019:623, [75].

²⁴³ The website constitutes the Internet presence of the defendant’s newspaper *Westdeutsche Allgemeine Zeitung*.

²⁴⁴ BGH, Judgment of 30 April 2020, I ZR 139/15—‘Afghanistan Papiere II’ (described by B. J. Jütte and G. Priora, ‘Leaking of Secret Military Reports Qualifies as Reporting of Current Events’ (2020) 15(9) *JIPLP* 681–2).

²⁴⁵ [2016] *EWHC* 575 (Ch).

²⁴⁶ *Ibid.*, [70]. Referring to Info. Soc. Dir., Art. 5(3)(c), which permits use ‘to the extent justified by the informative purpose’, Arnold J concluded that ‘an important consideration in the assessment of fair dealing is whether the extent of the use is justified by the informative purpose’.

²⁴⁷ *Ibid.*, [114].

²⁴⁸ *Ibid.*, [129].

²⁴⁹ *Ibid.*, [129].

²⁵⁰ [2001] *RPC* 76, 87–8 (Gibson LJ), cf. 105–6 (Mance LJ).

²⁵¹ [2011] *EWCA Civ* 890, [2012] *RPC* 1, [39] (not considered on appeal).

²⁵² *England & Wales Cricket Board v. Tixdaq* [2016] *EWHC* 575 (Ch), [81].

²⁵³ *Associated Newspapers v. News Group Newspapers* [1986] *RPC* 515.

²⁵⁴ *Hyde Park v. Yelland* [2000] *EMLR* 363, 374, 379–80.

²⁵⁵ *Ashdown v. Telegraph Group* [2002] *Ch* 149, 166–7, [44].

²⁵⁶ *Associated Newspapers* [1986] *RPC* 515.

²⁵⁷ *Ashdown* [2002] *Ch* 149, 173, [69].

²⁵⁸ *HRH The Prince of Wales v. Associated Newspapers* [2007] 3 *WLR* 222, 264, 287.

²⁵⁹ *Newspaper Licensing Agency* [2000] 4 *All ER* 239 (CA), 258 (Chadwick LJ); *England & Wales Cricket Board v. Tixdaq* [2016] *EWHC* 575 (Ch), [85].

²⁶⁰ *England & Wales Cricket Board v. Tixdaq* [2016] *EWHC* 575 (Ch), [137], [145]–[147].

²⁶¹ *Associated Newspapers Group* [1986] *RPC* 515, 519; *Hyde Park* [2000] *EMLR* 363, 393, [78]; *England & Wales Cricket Board v. Tixdaq* [2016] *EWHC* 575 (Ch), [84], [149]–[151].

²⁶² *BBC v. British Satellite Broadcasting* [1992] *Ch* 141.

²⁶³ *Newspaper Licensing Agency* [2000] 4 *All ER* 239 (CA), 267 (Mance LJ).

²⁶⁴ Cf. *Initial Services v. Putterill* [1968] 1 *QB* 396.

²⁶⁵ *Hyde Park Residence v. Yelland* [1999] *RPC* 655, 663; reversed on different grounds: *Hyde Park v. Yelland* [2000] *EMLR* 363 (CA), 379, [40]; *England & Wales Cricket Board v. Tixdaq* [2016] *EWHC* 575 (Ch), [138] (if use is for the purpose of reporting current events, the fact that user is a commercial venture does not prevent the use from being fair dealing).

²⁶⁶ CDPA 1988, s. 30(2). See section 2.4, p. 251.

²⁶⁷ CDPA 1988, s. 30(3) (as amended to give effect to Info. Soc. Dir., Art. 5(3)(c)).

²⁶⁸ See also CDPA 1988, s. 62 (public display of artistic works).

²⁶⁹ CDPA 1988, s. 31(1). There is no defence of incidental inclusion in a website, because Internet transmissions fall outside the scope of the meaning of ‘broadcast’ in CDPA 1988, s. 8. However, the inclusion in a website of a work that incidentally includes another work and thus benefits from the exception in CDPA 1988, s. 31(1), will not infringe: CDPA 1988, s. 31(2).

²⁷⁰ [2004] *FSR* 1.

²⁷¹ *Ibid.*, [39] (Mummery LJ).

²⁷² *Ibid.*, [27] (Chadwick LJ).

²⁷³ *IPC Magazines v. MGN* [1998] *FSR* 431, 441. This was, evidently, a case of comparative advertising: the argument that it should therefore be permitted under the MCAD was rejected at 447. But note the doubt raised in *O2 Holdings v. Hutchison 3G* [2007] *RPC* (16) 407, [45]–[47], [55] (indicating that this question will have to be answered one day by the Court of Justice). See Chapter 41, section 6, pp. 1161–66.

²⁷⁴ *Football Association Premier League v. Panini UK* [2004] *FSR* (1) 1, [24].

²⁷⁵ The validity of the common law defence recognized in case law under the 1956 Act seemed to have been accepted by CDPA 1988, s. 171(3).

²⁷⁶ *Lion Laboratories v. Evans* [1985] *QB* 526, 536 (Stephenson LJ), 550 (Griffiths LJ).

²⁷⁷ [1985] *QB* 526.

²⁷⁸ [2000] *EMLR* 363.

²⁷⁹ [2002] *Ch* 149.

²⁸⁰ Cf. Berne, Art. 17. See Ricketson and Ginsburg, 842 *ff*, [13.88].

²⁸¹ Although Aldous LJ denied the existence of a public interest defence, he recognized that the courts do retain a power under their ‘inherent jurisdiction’ to refuse to enforce copyright where it offends against the ‘policy of the law’. For Aldous LJ, the courts would refuse to enforce copyright on the basis that it would be against the ‘policy of the law’ where the work is scandalous, immoral, or contrary to family life; where the work itself is injurious to public life, public

health, and safety, or the administration of justice; or where a work incites or encourages others to act in a way that is injurious to public life, public health, and safety, or the administration of justice: *Hyde Park Residence v. Yelland* [2000] *EMLR* 363, 389.

²⁸² Lord Phillips MR, Keene LJ, and Robert Walker LJ.

²⁸³ *Ibid.*, 163, [31].

²⁸⁴ *Ibid.*, 166, [39].

²⁸⁵ *Ibid.*, 164, [34], 170–1, [58]–[59].

²⁸⁶ *Lion Laboratories v. Evans* [1985] *QB* 526, 538 (Stephenson LJ), 548 (O'Connor LJ), 550 (Griffiths LJ).

²⁸⁷ *Hyde Park v. Yelland* [2000] *EMLR* 363, 392. See R. Burrell, 'Defending the Public Interest' [2000] *EIPR* 394.

²⁸⁸ *Ashdown v. Telegraph Group* [2002] *Ch* 149, 170, [59]. See P. Johnson, 'The Public Interest: Is It Still a Defence to Copyright Infringement?' [2005] *Ent LR* 1.

²⁸⁹ The closest that a court has come to accepting the defence was in *In the Petition by the BBC in the Case of HM Advocate v. Hainey* [2012] *HCJ DV* 10, [2012] *SLT* 476 (Lord Woolman) (allowing publication of photographs of child taken by mother who had been convicted of his murder), although even there the Judge had accepted a defence of reporting judicial proceedings. For a recent example where the defence failed, see *Duchess of Sussex v. Associated Newspapers* [2021] *EWCA Civ* 1810, [98] (affirming first instance decision that the public interest did not justify publication of a letter from Meghan Markle to her father).

²⁹⁰ J. Griffiths, 'Pre-empting Conflict' [2014] 34 *Legal Studies* 76, 95–6.

²⁹¹ For a potential example, see Case C-469/17, *Funke Medien*, EU:C:2018:870 (AG Szpunar) (suggesting that German government should not be able to invoke copyright in national reports of troop movements that were not confidential so as to prevent publication of those documents in the context of a debate concerning matters of public interest).

²⁹² CDPA 1988, s. 74 (as enacted). This has been repealed by SI 2014/1384, reg. 1(1). The general failure of copyright regimes to provide mechanisms that facilitate access to work by people with disabilities has now started to receive international attention, most importantly with the signing in 2013 of the Marrakesh Treaty.

²⁹³ Copyright (Visually Impaired Persons) Act 2002.

²⁹⁴ Info. Soc. Dir., Art. 5(3)(b). This was amended by Directive (EU) 2017/1564, by adding 'without prejudice' to that Directive.

²⁹⁵ IPO, *Modernising Copyright* (2012), 43.

²⁹⁶ In particular, the availability of the defence had been predicated on the idea that there is no commercially available equivalent source: CDPA 1988, s. 31A(2)(c), s. 31B(2), s. 31B(6). These were prohibited under the Directive: Directive (EU) 2017/1564.

²⁹⁷ Directive (EU) 2017/1564, *OJ L* 242/6 (20 Sept. 2017), Art. 3(1), Recital 14 (prohibiting additional conditions 'such as the prior verification of the commercial availability of works in accessible format'); IPO, *Consultation on Implementation of the Marrakesh Directive* (May 2018).

²⁹⁸ Copyright and Related Rights (Marrakesh Treaty etc.) (Amendment) Regulations 2018 (SI 2018/995).

²⁹⁹ See Chapter 2, section 6.6, pp. 51–2.

³⁰⁰ Marrakesh Directive, Art. 2(2) (identifying four categories: people who are blind; people with visual impairment that render them unable to read; people with perceptual or reading disability; and people who, due to other physical disability, are unable to hold or manipulate books) (largely replicating Marrakesh Treaty, Art. 3).

³⁰¹ IPO, *Consultation on the UK's Implementation of the Marrakesh Directive* (2018), 6; Marrakesh Regulations (SI 2018/995), Explanatory Note ('In line with the UK Government's policy not to discriminate between people with different types of disabilities, where possible, changes are being made to the disability exceptions in the CDPA to cover all forms of disability which prevent a person accessing a copyright work, and all types of work, rather than just those specified in the Marrakesh Directive'). But note two exceptions: (i) relating to import and export of accessible copies; (ii) in relation to the availability of the complaint mechanism where technological measures impede access to the exceptions, under CDPA 1988, s. 296ZE(9). For an explanation of the second, see IPO, *Government Response to Marrakesh Consultation* (Sept. 2018), 6, [30].

³⁰² CDPA 1988, s. 31F(2) (defining 'disability').

³⁰³ CDPA 1988, s. 31F(2). This avoids complex definitions, e.g. of visual impairment. Cf. CDPA 1988, s. 31F(9) (as introduced in 2002, but now repealed).

³⁰⁴ CDPA 1988, s. 31A(1)(a). The word 'substantially' was added in 2018, when other conditions were deleted.

³⁰⁵ CDPA 1988, s. 31A(2)(b).

³⁰⁶ CDPA 1988, s. 31A(1)(a).

³⁰⁷ CDPA 1988, s. 31A(2)(a).

³⁰⁸ CDPA 1988, s. 31F(6) (defining 'authorized body'). 'Educational establishment' is defined in CDPA 1988, s. 174 and The Copyright (Educational Establishments) Order 2005 (SI 2005/223).

³⁰⁹ CDPA 1988, s. 31B (added by SI 2014/1384) (reflecting Marrakesh Treaty, Art. 2(4) (defining 'authorized entities')).

³¹⁰ CDPA 1988, s. 31F(4) (reflecting Marrakesh Treaty, Art. 2(3), defining 'accessible format copies').

³¹¹ Cf. Directive (EU) 2017/1564, Art. 3(2) (an accessible format copy must respect 'the integrity of the work or other subject matter'). It is possible that the 'integrity' of a work might be affected by something that might not be categorized as a 'change to the work': cf. Chapter 10, section 4.2, pp. 314–16 (discussion of 'treatment' in the context of UK moral rights).

³¹² CDPA 1988, s. 31B(1)(a).

³¹³ CDPA 1988, s. 31B(1A).

³¹⁴ CDPA 1988, s. 31BA.

³¹⁵ Council Regulation (EU) 2017/1563, Art. 2(2) (which is retained EU law under EU(W)A, s. 3, defining 'beneficiary person').

³¹⁶ Council Regulation (EU) 2017/1563 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled, OJ L 242/1.

³¹⁷ Regulation (EU) 2017/1563, Art. 3 (as amended by SI 2019/605, reg. 36).

³¹⁸ Regulation (EU) 2017/1563, Art. 4.

³¹⁹ CDPA 1988, s. 31BB(3)(c).

³²⁰ The international norms governing educational defences are obscure in meaning. In particular, Berne, Art. 10(2), which explicitly permits use ‘of illustration for ... teaching’ can be understood in different ways. For a valuable study, see R. Xalabarder, *Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel* (2009), SCCR/19/8.

³²¹ In some areas of education, particularly tertiary education, the role of private providers is being challenged. In part in response to increased pressure on library budgets, there has been a move to incentivize, or even compel, academics to publish materials by way of ‘open access’. One way in which to do this is to pay publishers to publish work, but to require that they give access to all (immediately or after an embargo period).

³²² IPO, *Modernising Copyright* (2012), 40. See further R. Hooper, *Rights and Wrongs* (2012), 25–8, [65]–[71] (identifying 12 different organizations requiring licences in the schools sector and ten in further education colleges).

³²³ IPO, *Modernising Copyright* (2012), 41.

³²⁴ As specified by the Secretary of State under powers under CDPA 1988, s. 174(1)(b), (3). ‘School’ is defined by reference to the Education Act 1996, the Education (Scotland Act) 1962, and the Education and Libraries (Northern Ireland) Order 1986 (SI 1986/59: NI 3). Universities, theological colleges, and various institutions providing further education are ‘educational establishment(s)’: Copyright (Educational Establishments) Order 2005 (SI 2005/223). These provisions have been extended to apply to teachers employed by a local authority to give instruction to pupils unable to attend an educational establishment: Copyright (Application of Provisions relating to Educational Establishments to Teachers) (No. 2) Order 1989 (SI 1989/1067).

³²⁵ CDPA 1988, s. 32 (as amended by SI 2014/1372).

³²⁶ In this respect, it is much more significant than the provision in force prior to June 2014 that applied only to copying by non-reprographic processes.

³²⁷ E. Hudson and P. Wragg, ‘Proposals for Copyright Law and Education During the COVID-19 Pandemic’ (2020) 71 *NILQ* 571, 576. Hudson and Wragg are clearly correct to say that the defence must extend to universities that, e.g., reproduce, distribute, and communicate exam papers that have been set by an instructor. However, the exception might still be interpreted as limited to activities that are *initiated* by a teacher, examiner, or student.

³²⁸ Info. Soc. Dir., Art. 5(3)(a) (illustration for teaching). For discussion of reaction to the exception amongst users, see E. Hudson, *Drafting Copyright Exceptions: From the Law in Books to the Law in Action* (2020), 284–7.

³²⁹ See HM Government, *Technical Review of the Draft Legislation on Copyright Exceptions: Government Response* (2014), 7, which refers to the ‘narrow focus’ of the exception and suggests that if private music tutors were to reproduce sheet music and give it to their students to play, this would fall outside the exception ‘as it is ... unlikely to be considered either illustrative or fair dealing’.

³³⁰ E. Hudson and P. Wragg, ‘Proposals for Copyright Law and Education During the COVID-19 Pandemic’ (2020) 71 *NILQ* 571, 576 (relying on CDSM Dir., Recital 21).

³³¹ Emphasis added.

³³² See R. Xalabarder, *Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel* (2009), SCCR/19/8, 15 (evidence from the Stockholm Conference suggests that this was not intended to limit the scope of the exception); cf. Ricketson and Ginsburg, 794, [13.45].

³³³ CDSM Dir., Recital 21.

³³⁴ CDPA 1988, s. 32(1)(b).

³³⁵ CDPA 1988, s. 32(1)(b).

³³⁶ It is not obvious that this would be fair dealing for the purpose of ‘private’ study within CDPA 1988, s. 29, although it might be so construed.

³³⁷ E. Hudson and P. Wragg, ‘Proposals for Copyright Law and Education During the COVID-19 Pandemic’ (2020) 71 *NILQ* 571, 576; E. Hudson, ‘Controlled Digital Lending’ presentation to SCURL, 27 Jan. 2022, <https://www.youtube.com/watch?v=aPBHKvjI61M>. One important point made by these authors is that since ‘lending’ is permitted under CDPA 1988, s 36A, it is a short step to treating ‘e-lending’ as fair for the purposes of CDPA 1988, s. 32.

³³⁸ CDPA 1988, s. 32(2).

³³⁹ In this respect, the defence could conceivably be narrower than the old defence in s. 32(1) (as enacted). Although that applied only to non-reprographic copying, there appeared to be no limit on the quantity of copying.

³⁴⁰ See section 2.1, pp. 245–9.

³⁴¹ ‘Fairness’ might justify use of reasonable portions of works and sometimes (e.g. with artistic works and photographs) whole works; cf. IPO, *Modernising Copyright* (2012), 40 (‘*de minimis*’); *Technical Review*, 7 (‘minor reasonable uses’).

³⁴² Cf. *Technical Review*, 7 (a private music tutor would be using material for a commercial purpose). However, the status of the organization is not supposed to be determinative. See section 2.2, pp. 249–50.

³⁴³ CDPA 1988, s. 32(1)(a), (c). See section 2.4, p. 251.

³⁴⁴ CDPA 1988, s. 32(1)(c) (as amended by SI 2014/1372).

³⁴⁵ CDPA 1988, s. 33.

³⁴⁶ The work from which the passage is taken must itself not be intended for use in an educational establishment and no more than two excerpts from copyright works by the same author may be published in collections by the same publisher over any period of five years. Moreover, the collection in question must be described as being for use in educational establishments, must consist mainly of material in which no copyright subsists, and there must be a sufficient acknowledgement.

³⁴⁷ CDPA 1988, s. 34(1).

³⁴⁸ CDPA 1988, s. 34(3).

³⁴⁹ CDPA 1988, s. 34(2). However, it may now be arguable that these activities also fall within CDPA 1988, s. 20, and that because the s. 34 exception is an exception only to the s. 19 right (it says that the act is ‘not a playing or showing of the work in public’), the immunity no longer survives. If so, the fate of the Advocate-General’s comment in *Renckhoff*, Case C-161/17, EU:C:2018:279, [AG117] (to the effect that posting an image on a school website where access is restricted to teachers and pupils is not communication ‘to the public’) may become important.

³⁵⁰ CDPA 1988, s. 35(4) (as amended).

³⁵¹ CDPA 1988, s. 35(1).

³⁵² CDPA 1988, s. 35(3), introduced by SI 2014/1372. This freedom to give access to broadcasts via secure networks probably has to be justified within Art. 5(3) of the Info. Soc. Dir., most obviously Art. 5(3)(a) ('illustration for teaching'). Article 5(3)(n) is limited to 'dedicated terminals on the premises' of the establishment and seems unlikely to cover 'virtual' access: *Technische Universität Darmstadt v. Eugen Ulmer KG*, Case C-117/13, EU:C:2014:1795, [AG48] (AG Jääskinen).

³⁵³ The Educational Recording Agency licences cover broadcasts on the BBC, ITV, Channel 4, Five Television, S4C, and the Open University. For details on the ERA, see its website.

³⁵⁴ The so-called 'ERA Plus agreement'.

³⁵⁵ Section 36, as enacted, related only to 'reprographic copying' and only to extracts from 'published literary, dramatic and musical works'.

³⁵⁶ CDPA 1988, s. 36.

³⁵⁷ CDPA 1988, s. 36(3). It is not entirely clear whether this exception falls within those permitted by the Info. Soc. Dir.: Art. 5(2)(c) permits only 'reproduction' by educational establishments, and Art. 5(4) 'distribution', but electronic distribution probably implicates the right of communication to the public. Article 5(3)(a) allows exception to the latter right for the purpose of 'illustration for teaching', the meaning of which phrase seems very obscure.

³⁵⁸ CDPA 1988, s. 36(1).

³⁵⁹ CDPA 1988, s. 36(6). The key administrator here is the Copyright Licensing Agency, which operates as agent for the Authors' Licensing and Collecting Society, the Publishers' Licensing Services, and the Design and Artistic Copyright Society. Examples of its licences for education can be seen on its website.

³⁶⁰ Compare the CLA-HE Licence (2013–16), [3.4] (referring to a maximum of 5 per cent or, in the case of published law reports, a single case).

³⁶¹ CDPA 1988, s. 36A; Rel. Rights Dir., Art. 5(3).

³⁶² E. Hudson and P. Wragg, 'Proposals for Copyright Law and Education During the COVID-19 Pandemic' (2020) 71 *NILQ* 571, 576.

³⁶³ At [61].

³⁶⁴ Deposit requirements were initially in the 1709/10 Statute of Anne and the beneficiary libraries are commonly known as 'deposit libraries'. But it became clear that while the deposit was not a condition for protection, failure to deposit would lead to statutory penalties. See I. Alexander, *Copyright and the Public Interest in the Nineteenth Century* (2010), ch. 3, 47–63. The modern regime is contained in the Legal Deposit Libraries Act 2003 (requiring deposit of print works with the British Library and, on request, five other libraries: University of Oxford, University of Cambridge, the National Library of Scotland, the National Library of Wales, and Trinity College, Dublin).

³⁶⁵ E. Hudson, *Drafting Copyright Exceptions: From the Law in Books to the Law in Action* (2020), 107–22 (comparing historically the development of these provisions with those in Australia, Canada, and the United States).

³⁶⁶ CDPA 1988, ss 37–44 (as enacted).

³⁶⁷ The CJEU has tended to interpret these exceptions purposively and flexibly: *Technische Universität Darmstadt v. Eugen Ulmer KG*, Case C-117/13, EU:C:2014:2196, [27] (recognizing that the core mission of publicly accessible libraries is the ‘dissemination of knowledge’); *Vereniging Openbare Bibliotheeken v. Stichting Leenrecht*, Case C-174/15, EU:C:2016:856, [55] and [60] (noting the public interest in ‘cultural promotion’); EU:C:2016:459, [AG58].

³⁶⁸ IPO, *Modernising Copyright* (2012), 32–5. Such exemptions are permitted by Info. Soc. Dir., Art. 5(2)(c).

³⁶⁹ CDPA 1988, s. 18A; see Chapter 6, section 4, pp. 166–8.

³⁷⁰ Rel. Rights Dir., Art. 5; see Chapter 13, section 6, pp. 402–3.

³⁷¹ The copy must not have come from an unlawful source: *Vereniging Openbare Bibliotheeken (VOB) v. Stichting Leenrecht*, Case C-174/15, EU:C:2016:856, [68], [71]–[72].

³⁷² *Vereniging Openbare Bibliotheeken (VOB) v. Stichting Leenrecht*, Case C-174/15, EU:C:2016:856. For an intelligent commentary, see V. Breemen, ‘E-Lending According to the ECJ: Focus on Functions and Similar Characteristics in *VOB v. Stichting Leenrecht*’ [2017] *EIPR* 249. For the UK reforms, see Digital Economy Act 2017, s. 31 (amending CDPA 1988, s. 40A(1ZA)).

³⁷³ CDPA 1988, s. 40(1ZA)(b). In *VOB*, [55]–[65], the CJEU explicitly authorized member states to make e-lending conditional on prior distribution of the e-book with the right holder’s consent. More specifically, the Court stated that a member state might make the Art. 6 derogation ‘subject to the condition that the digital copy of a book made available by the public library must have been put into circulation by a first sale or other transfer of ownership of that copy in the European Union by the holder of the right of distribution to the public or with his consent, *for the purpose of Article 4(2) of Directive 2001/29*’. However, *Tom Kabinet* indicates that dissemination of a digital copy is non-exhausting and thus never ‘*for the purpose of* Article 4(2). On a literal reading, the Court in *VOB* authorized member states to make Art. 6(1) subject to a condition which could never be achieved! A more sensible interpretation is that, despite *Tom Kabinet*, member states can condition the operation of the derogation in Art. 6 of the Rel. Rights Dir. on the lending having ‘acquired’ the digital copy initially with the consent of the copyright owner.

³⁷⁴ Chapter 6, section 4, pp. 166–8.

³⁷⁵ CDPA 1988, s. 40A(2), as amended by SI 2014/1372, Sch., para. 3.

³⁷⁶ CDPA 1988, s. 40B (as added by SI 2014/1372).

³⁷⁷ CDPA 1988, s. 43A(3) (definitions).

³⁷⁸ But note the positive indications as to how it is being interpreted within cultural heritage institutions: E. Hudson, *Drafting Copyright Exceptions: From the Law in Books to the Law in Action* (2020), 154–6.

³⁷⁹ CDPA 1988, s. 40B(1). It is difficult to see how the ‘making available’ right is implicated if a person can access the work only from a dedicated terminal in a *specific library* during *opening hours*, rather than ‘from a place and at a time chosen’ by that person.

³⁸⁰ *Technische Universität Darmstadt v. Eugen Ulmer KG*, Case C-117/13, EU:C:2014:2196, [43], [54]. While a welcome interpretation, the framing of this as an ‘ancillary right’ raises the question whether it can be relied upon in national proceedings in the absence of implementation of the (optional) exception in Art. 5(2)(c) in national law. Our view is that the Court is suggesting that the ‘right’ might be implied into the terms of CDPA 1988, s. 40B (though we note that not all scholars agree: see e.g. E. Hudson, *Drafting Copyright Exceptions: From the Law in Books to the Law in Action* (2020), 153 (argument ‘not without its problems’)).

³⁸¹ Ibid., [48].

³⁸² CDPA 1988, s. 40B(3)(a).

³⁸³ CDPA 1988, s. 40B(3)(b).

³⁸⁴ CDPA 1988, s. 40B(3)(bb). It is curious that this is not limited to non-commercial research; cf. CDPA 1988, ss 29(1), 42A.

³⁸⁵ In *Technische Universität Darmstadt v. Eugen Ulmer KG*, Case C-117/13, EU:C:2014:2196, [54]–[55], the Court held that it might be permissible for users, who access the work on a dedicated terminal, to print it out or to copy it onto a USB drive if such acts are permitted under national legislation on private copying (giving effect to Arts 5(2)(a) or (b) of the Info. Soc. Dir.)—in the United Kingdom, the fair dealing exception in CDPA 1988, s. 29 (research and private study).

³⁸⁶ CDPA 1988, s. 40B(3)(c).

³⁸⁷ *Technische Universität Darmstadt v. Eugen Ulmer KG*, Case C-117/13, EU:C:2014:2196, [35].

³⁸⁸ CDPA 1988, s. 41(2)(a) (defining recipient as ‘not-for-profit’).

³⁸⁹ CDPA 1988, s. 41(2)(b). This condition does not apply in relation to parts of periodicals: s. 41(3).

³⁹⁰ Info. Soc. Dir., Art. 5(2)(c), refers explicitly to libraries, archives, museums, and educational establishments, while Recital 40 talks of ‘publicly accessible libraries or equivalent institutions, as well as archives’. CDPA 1988, s. 42, applies to libraries, archives, and museums, as defined in s. 43A(2), (3). For discussion, see E. Hudson, *Drafting Copyright Exceptions: From the Law in Books to the Law in Action* (2020), 139–41 (arguing that Hargreaves reform merely legitimized, rather than altered, existing practice).

³⁹¹ CDPA 1988, s. 42.

³⁹² CDPA 1988, s. 42(2). This requires that the item be either for reference, inaccessible to the public, or available for loan only to other cultural institutions.

³⁹³ CDPA 1988, s. 42A.

³⁹⁴ Ibid. This much simplified provision, introduced by SI 2014/1372, reg. 5(2), replaces ss 37–40 (as enacted).

³⁹⁵ CDPA 1988, s. 42A(1)(a) (formerly dealt with in s. 38 (as enacted)).

³⁹⁶ CDPA 1988, s. 42A(1)(b).

³⁹⁷ Cf. CDPA 1988, s. 36(5).

³⁹⁸ CDPA 1988, s. 42A(2) (declaration), (3) (identifying recipient and stating purpose of use, that it has not received the copy previously, and that others will not request the same material at the same time). CDPA 1988, s. 42A(4), limits the charges that a library may make when supplying copies under the section, but this is not expressed as a condition for operation of the defence.

³⁹⁹ CDPA 1988, s. 43, is not in terms limited to unpublished works, but it offers no defence where a work ‘has been published or communicated to the public before the date it was deposited in the library or archive’: s. 43(3)(a).

⁴⁰⁰ CDPA 1988, s. 43 (as amended by SI 2014/1372).

⁴⁰¹ CDPA 1988, s. 43(2). A parallel rule applies in relation to charging by the library for the copy: CDPA 1988, s. 43(4).

⁴⁰² CDPA 1988, ss 42A(2)(b), 43(1)(b).

⁴⁰³ These have been amended in 2014 to render them simpler: SI 2014/1372.

⁴⁰⁴ CDPA 1988, s. 61 (as amended by SI 2014/1372, reg. 7). The making of the recording must not infringe any other copyright and must not have been prohibited by any of the performers. A special provision, s. 61(3), permits the supply of copies of such recordings under virtually identical terms to CDPA 1988, s. 43.

⁴⁰⁵ CDPA 1988, s. 44.

⁴⁰⁶ CDPA 1988, s. 75 (as amended by SI 2014/1372, reg. 8).

⁴⁰⁷ Legal Deposit Libraries Act 2003, s. 1(1). Films and sound recordings are not subject to the obligation.

⁴⁰⁸ Legal Deposit Libraries Act 2003, s. 6 (but subjecting such material to restrictions on its use under s. 7); The Legal Deposit Libraries (Non-Print Works) Regulations 2013 (SI 2013/777).

⁴⁰⁹ SI 2013/777, reg. 18 (referring to the domain name and the activities of the publisher).

⁴¹⁰ Most notably, a deposit library may allow a particular work to be accessed at only one computer terminal at any one time.

⁴¹¹ SI 2013/777, regs 23–5.

⁴¹² Info. Soc. Dir., Art. 5(3)(e).

⁴¹³ CDPA 1988, s. 45(1). This includes arbitration proceedings: *London & Leeds Estates v. Paribas (No. 2)* [1995] 1 EGLR 102, 106.

⁴¹⁴ CDPA 1988, s. 46(2).

⁴¹⁵ *A v. B* [2000] EMLR 1007 (copying diary for use in divorce proceedings); *Vitof v. Altoft* [2006] EWHC 1678 (Ch), [175]; *Television New Zealand v. Newsmonitor Services* [1994] 2 NZLR 91, 100 (High Court of Auckland) (copying by legal advisers before proceedings start).

⁴¹⁶ CDPA 1988, ss 45(2), 46(2). The latter, which relates to royal commissions and statutory inquiries, is limited to the reporting of any such proceedings held in *public*.

⁴¹⁷ CDPA 1988, s. 47 (as amended by SI 2014/1385, to facilitate the relevant registry or public authority making the material available online). For background, see IPO, *Modernising Copyright* (2012), 46–7. This would seem to justify the making available of patent, trade mark, and design documentation: RDA 1949, s. 17(4); PA 1977, s. 118 (once published, patent documents can be requested); TMA 1994, ss 40(4), 63(3)(a). If a third party makes the material commercially available to the public with the authority of the copyright holder, the exception does not apply: s. 47(2)(c).

⁴¹⁸ CDPA 1988, s. 48.

⁴¹⁹ CDPA 1988, ss 47 and 49. CDPA 1988, s. 50, provides a defence for acts specifically authorized by an Act of Parliament.

⁴²⁰ CDPA 1988, ss 50A(3), 50BA(2), 50B(4), 296A(1), reflecting Software Dir., Art. 9(1), Recital 26.

⁴²¹ Defined as a person who has a right to use the program: CDPA 1988, s. 50A(2). See section 2.3, pp. 250–1.

⁴²² The Commission said that the notion of ‘back-up’ meant ‘for security reasons’ and that only one copy is permitted under Art. 5(2): *Report on the Implementation and Effects of Directive 91/250/EEC* (Apr. 2000) COM(2000) 199 final, 18.

⁴²³ CDPA 1988, ss 50A(3), 296A.

⁴²⁴ [2002] *EMLR* (34) 742.

⁴²⁵ *Aleksandrs Ranks, Jurijs Vasiļevičs v. Finanšu un ekonomisko noziegumu izmeklēšanas prokuratorūra, Microsoft Corp.*, Case C-166/15, EU:C:2016:762, [43].

⁴²⁶ *Top System SA v. Belgian State*, Case C-13/20, EU:C:2021:811, [34]–[39] (a post-Brexit decision). See P. Samuelson, ‘The Past, Present and Future of Software Copyright: Interoperability Rules in the European Union and United States’ [2012] *EIPR* 229.

⁴²⁷ Software Dir., Art. 6.

⁴²⁸ CDPA 1988, ss 50A(3), 50B(4), 50D(2).

⁴²⁹ CDPA 1988, s. 29(4).

⁴³⁰ CDPA 1988, s. 50B(2).

⁴³¹ CDPA 1988, s. 50B(3).

⁴³² *Report on the Implementation and Effects of Directive 91/250/EEC* (Apr. 2000) COM(2000) 199 final, 14.

⁴³³ U.-M. Mylly, ‘An Evolutionary Economics Perspective on Computer Program Interoperability and Copyright’ (2010) 41 *IIC* 284.

⁴³⁴ The specific implementation of Software Dir., Art. 5(3), seems to have been required now that the notion of fair dealing for research and private study in CDPA 1988, s. 29, has been limited to non-commercial ends. See *Navitaire Inc. v. Easy Jet Airline Co. & BulletProof Technologies Inc.* [2006] *RPC* (3) 111, [77].

⁴³⁵ [2010] *EWHC* 1829 (Ch).

⁴³⁶ Ibid., [271], [282], [286].

⁴³⁷ Ibid., [290].

⁴³⁸ [2013] *EWHC* 69 (Ch), [64] (Arnold J); cf. [2013] *EWCA Civ* 1482, [98] (saying that the Court of Justice gave a clear answer at [61]).

⁴³⁹ [2013] *EWHC* 69 (Ch), [71] (Arnold J); cf. [2013] *EWCA Civ* 1482, [101]. The Court of Appeal found that there was nothing in the licence to prevent the licensee from being a legal person, such as WPL, so that it was unnecessary to grapple with the issue that Arnold J had considered, as to what happens if the user is not the formally recognized licensee.

⁴⁴⁰ Although Software Dir., Art. 5(1) and Recital 18 may seem contradictory, the CJEU has tried to reconcile them: *Top System SA v. Belgian State*, Case C-13/20, EU:C:2021:811, [64]–[68]. This defence does not apply to the making of back-up copies (s. 50A), to the decompilation of programs (s. 50B), or to acts carried out to study or test the program (s. 50BA).

⁴⁴¹ The program may be decompiled to facilitate such error correction, unless the source code is lawfully or contractually accessible to the purchaser: *Top System SA v. Belgian State*, Case C-13/20, EU:C:2021:811, [63] (decided after the United Kingdom exited the EU, and so formally only of persuasive value).

⁴⁴² *Sony Computer Entertainment Inc v. Owen* [2002] *EMLR* (34) 742, 747.

⁴⁴³ See Chapter 6, section 3.4, pp. 163–5.

⁴⁴⁴ *UsedSoft*, Case C-128/11, EU:C:2012:407 (Grand Chamber), [75], [81]; *Aleksandrs Ranks, Jurijs Vasiljevičs v. Finanšu un ekonomisko nozīgumu izmeklēšanas prokuratoru, Microsoft Corp.*, Case C-166/15, EU:C:2016:762, [49]–[50].

⁴⁴⁵ CDPA 1988, s. 50D(2). See Davison, 77–8.

⁴⁴⁶ CDPA 1988, s. 56(2)–(3).

⁴⁴⁷ See Chapter 6, section 3.4, pp. 164–5.

⁴⁴⁸ CDPA 1988, ss 51 and 53. See Chapter 29, section 3, pp. 818–22.

⁴⁴⁹ See also incidental use defence in CDPA 1988, s. 31, discussed in section 10, pp. 274–5 (but with CDPA 1988, s. 62, there is no need for the use to be incidental: Info. Soc. Dir., Art. 5(3)(h)).

⁴⁵⁰ While a film of a building could be placed on a website without infringing, a direct live feed of images of the building would appear to fall outside the scope of the exception.

⁴⁵¹ R. Burrell and A. Coleman, *Copyright Exceptions: The Digital Impact* (2005), 233.

⁴⁵² CDPA 1988, s. 63.

⁴⁵³ Info. Soc. Dir., Art. 5(3)(j).

⁴⁵⁴ L. Bently, ‘Copyright and Self Copying’, in D. Hudson Hick (ed.), *The Aesthetics and Ethics of Copying* (2016).

⁴⁵⁵ CDPA 1988, s. 65; Info. Soc. Dir., Art. 5(3)(m).

⁴⁵⁶ CDPA 1988, s. 54. The typeface itself may be reproduced 25 years after the year of authorized marketing: CDPA 1988, s. 55. See J. Watts and F. Blakemore, ‘Protection of Software Fonts in UK Law’ [1995] *EIPR* 133.

⁴⁵⁷ CDPA 1988, s. 75, discussed in section 14.5, p. 290.

⁴⁵⁸ CDPA 1988, ss 31A, 32, 34(2), 35.

⁴⁵⁹ CDPA 1988, s. 68; Info. Soc. Dir., Art. 5(2)(d); Rel. Rights Dir., Art. 10(1)(c); Berne, Art. 11bis(3). See *DR, TV2 Danmark A/S v. NCB-Nordisk Copyright Bureau*, Case C-510/10, EU:C:2012:244.

⁴⁶⁰ *Phonographic Performance v. AEI Rediffusion Music* [1998] *Ch* 187, [1997] *RPC* 729.

⁴⁶¹ CDPA 1988, s. 69; Info. Soc. Dir., Art. 5(3)(e); Communications Act 2003, Sch. 17, para. 91(3).

⁴⁶² CDPA 1988, s. 71 (justified possibly by Info. Soc. Dir., Art. 5(2)(b), and Recital 35).

⁴⁶³ CDPA 1988, s. 72.

⁴⁶⁴ Rome Convention, Art. 13(d); Rel. Rights Dir., Art. 8(3).

⁴⁶⁵ CDPA 1988, s. 72(2)(b).

⁴⁶⁶ *Verwertungsgesellschaft Rundfunk GmbH v. Hettegger Hotel Edelweiss GmbH*, Case C-641/15, EU:C:2017: 131 (‘Rundfunk’).

⁴⁶⁷ Ibid., [23] (referring to WIPO Guide to Rome Convention view that paying for a meal in a restaurant or drinks in a bar where broadcast is shown is not ‘against payment of an entrance fee’).

⁴⁶⁸ Ibid., EU:C:2016:795, [AG36] (AG Szpunar).

⁴⁶⁹ Prior to amendment by the Copyright (Free Public Showing or Playing) (Amendment) Regulations 2016 (SI 2016/565), the exception also applied with respect to copyright in any film included in the broadcast. This was regarded as inconsistent with Info. Soc. Dir., Art. 3: *Football Association Premier League v. QC Leisure* [2012] EWHC 108 (Ch), [78], affirmed [2012] EWCA Civ 1708. For background, see C. Angelopoulos, ‘How Football Changed Copyright Law: Public Performance, Communication to the Public and the Free Public Showing of Broadcast Films’, in M. Senftleben et al., *Intellectual Property and Sports: Essays in Honour of P. Bernt Hugenholtz* (2021), 319–31.

⁴⁷⁰ Hence many electrical retailers allow the demonstration of television equipment with the sound off.

⁴⁷¹ CDPA 1988, s. 72(1A), introduced by SI 2003/2498 to implement Rel. Rights Dir., Art. 10(3).

⁴⁷² CDPA 1988, s. 72(1B)(b). A broader provision was removed in 2010: Copyright, Designs and Patents Act 1988 (Amendment) Regulations (SI 2010/2694), reg. 4.

⁴⁷³ CDPA 1988, s. 71 (justifiable, possibly, under Info. Soc. Dir., Art. 5(2)(b) or (3)(i)).

⁴⁷⁴ Other defences might assist, e.g. CDPA 1988, s. 31.

⁴⁷⁵ Such obligations were imposed under the Communications Act 2003, s. 64.

⁴⁷⁶ *ITV Broadcasting v. TV Catchup*, Case C-607/11, EU:C:2013:147, [2013] 3 CMLR (1) 1; *ITV Broadcasting v. TV Catchup* (in administration), Case C-275/15, EU:C:2017:144 (holding that exception not justified by Info. Soc. Dir., Art. 9).

⁴⁷⁷ DCMS, *The Balance of Payments between Television Platforms and Public Service Broadcasters: Consultation Paper* (Mar. 2015); DCMS, *The Balance of Payments (etc): Government Response* (July 2016) 5; IPO UK, *Government Response to a technical consultation on transitional arrangements following the repeal of Section 73 of the Copyright, Designs and Patents Act 1988 (reception and re-transmission of wireless broadcast by cable)* (2017).

⁴⁷⁸ Digital Economy Act 2017, s. 34; SI 2017/765, reg. 2(n).

⁴⁷⁹ See Chapter 3, section 2, p. 68; Chapter 4, section 2, pp. 98–9; section 3.7.1, pp. 119–20.

⁴⁸⁰ CDPA 1988, s. 58; cf. Info. Soc. Dir., Art. 5(3)(f) (which requires that the source, including the author’s name, is indicated).

⁴⁸¹ CDPA 1988, s. 58 (justifiable under Info. Soc. Dir., Art. 5(3)(o)).

⁴⁸² Defined in CDPA 1988, s. 178. See section 2.4, p. 251.

⁴⁸³ CDPA 1988, s. 60(1) (justified under Info. Soc. Dir., Art. 5(3)(a) or (o)).

⁴⁸⁴ CDPA 1988, s. 12(3).

⁴⁸⁵ CDPA 1988, ss 12(4), 13B(4).

⁴⁸⁶ CDPA 1988, ss 57, 66A (justifiable under Info. Soc. Dir., Art. 5(3)(o)).

⁴⁸⁷ See Info. Soc. Dir., Art. 5(3)(l) (allowing exceptions relating to use in relation to repair of equipment).

⁴⁸⁸ [1986] RPC 279.

⁴⁸⁹ [1997] FSR 817.

⁴⁹⁰ [2000] FSR 138.

⁴⁹¹ Ibid. (the defence was unlikely to succeed unless the court can be reasonably certain that no right-thinking member of society would quarrel with the result).

⁴⁹² See G. Llewellyn, 'Does Copyright Recognize a Right to Repair?' [1999] *EIPR* 596, 599.

⁴⁹³ As noted also in Chapter 2, section 9.1, p. 60, further consideration of exceptions and limitations is progressing slowly at WIPO.

⁴⁹⁴ Chapter 2, section 8, pp. 58–9.

⁴⁹⁵ *Gowers Review* (2006), ch. 4; *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) (The Hargreaves Review), especially, 3, 8, 44–6.

⁴⁹⁶ Copyright Act 1976 (US), s. 107. For a careful argument that the restrictive approach of British law would not necessarily change were a fair use defence adopted, see R. Burrell, 'Reining in Copyright Law: Is Fair Use the Answer?' [2001] *IPQ* 368. For a qualified critique of Burrell's position, see E. Hudson, *Drafting Copyright Exceptions: From the Law in Books to the Law in Action* (2020), ch. 1 and ch. 9.

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