



Contemporary Intellectual Property: Law and Policy (6th edn)

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p. 167 5. Copyright 4: exceptions and limitations

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<https://doi.org/10.1093/he/9780192855916.003.0005>

Published in print: 14 August 2023

Published online: August 2023

Abstract

This chapter discusses exceptions and limitations to the rights of the copyright owner. Copyright law establishes many such exceptions and limitations, listed in the Copyright, Designs and Patents Act 1988 (CDPA 1988) as the ‘permitted acts’. These acts can be carried out in relation to the copyright work without the owner’s permission or, in some cases, can be performed subject to terms and conditions specified by the statute rather than by the copyright owner. The chapter discusses the influence of the international framework and EU directives on exceptions and limitations. It analyses the ‘permitted acts’ and discusses the freedoms afforded through them to users of protected works in the UK, and also briefly considers how far they may be set aside by contractual provision.

Keywords: copyright law, copyright protection, permitted acts, exceptions, fair dealing, CDPA 1988, users

Introduction

Scope and overview of chapter

5.1 This chapter considers exceptions and limitations to the rights of the copyright owner described in Chapter 4. Copyright law establishes many such exceptions and limitations, listed in the Copyright, Designs and Patents Act 1988 (CDPA 1988) as what it calls the ‘*permitted acts*’, ‘acts which may be done in relation to copyright works notwithstanding the subsistence of copyright’ (CDPA 1988, s 28). These are acts which can be carried out in relation to the copyright work *without* the owner’s permission or, in some cases, which can be performed subject to terms and conditions specified by the statute rather than by the copyright owner.

5.2 Learning objectives

By the end of this chapter you should be able to describe and explain:

- the general nature of exceptions and limitations to the rights conferred by copyright;
- specific copyright exceptions in the UK.

5.3 The chapter analyses the ‘permitted acts’ under CDPA 1988 and the freedoms afforded through them to the users, and also, briefly, how far they may be set aside by contractual provision. So, the rest of the chapter looks like this:

- The public domain and copyright exceptions in general (5.4–5.8)
- Development of UK law: International, European, and domestic developments (5.9–5.16)
- Copyright exceptions in the UK (5.17–5.61)
- Other limitations on copyright (5.62–5.64)
- Contracting out of the exceptions (5.65–5.68).

The public domain and copyright exceptions in general

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5.4 This chapter deals with what people may do with works without the authorisation or permission of the copyright owner.¹ Some material, of course, is never in copyright—for example, a single word because it is not a literary work,² or an unoriginal artistic work.³ Some material which once was in copyright is no longer because the term of copyright has expired. In both cases, people are free to do all the things which in other cases copyright would restrict: that is, copy the work; issue copies to the public whether for sale, rental, or commercial lending; perform the work in public; communicate it to the public; or adapt it. Some uses of copyright works do not fall within the scope of the restricted acts and may be freely carried out: for example, reselling a book of which you were the first purchaser or performing a work of music in private. This copyright-free zone is sometimes known as the *public domain*.⁴ It has been argued that there is a ‘virtuous circle’ between copyright and the public domain, with the latter feeding the creation of new copyright works which in turn fall bit by bit into the public domain, the process becoming complete when the copyright expires.⁵

Question

How may the ‘public domain’ be defined in relation to copyright?

5.5 Further, and most importantly for the purposes of this section of the chapter, people may do certain things with copyright material without the licence of the copyright owner which *would* otherwise fall within the scope of the restricted acts, for example make a copy for private study and research, record a film on TV to watch it at a more convenient time, or use a work for purposes such as criticising it or reporting the news. This is because British copyright law contains extensive and detailed provisions by which various carefully specified acts which would otherwise be infringements of copyright are made lawful. They are described in the CDPA 1988 under the general heading, ‘Acts Permitted in Relation to Copyright Works’.⁶ Such acts do not require any licence from the copyright owner and may be freely performed by others.

5.6 The contents of the list of permitted acts reflect a legislative perception that certain interests in certain circumstances outweigh the interest in conferring and enforcing copyright. Some of the items on the list of permitted acts are grouped together as ‘fair dealing’, but there is no general principle that ‘fair dealing’ beyond the listed acts or for other than the listed purposes is allowed. (Note, however, the rather uncertain principle that copyright may be limited by what is known as the defence of ‘public interest’, discussed further at para 5.62.)

5.7 In this avoidance of a general principle and concentration upon a specific list of permitted acts, there is a contrast with US law, which provides a general ‘fair use’ defence covering purposes ‘such as’ criticism, comment, teaching, scholarship, and research, and indicating that factors to be taken into account ‘include’ such matters as whether the use is of a commercial nature or for non-profit educational purposes, the amount and substantiality of the portion used in relation to the whole work, and the effect of the use upon the market or value of the copyright work.⁷ The argument against such a general approach is that it creates uncertainty by contrast with the more specific approach in the UK;⁸ on the other hand, the flexibility of a general approach may enable the law to deal better with changing ways of producing and exploiting copyright works.

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5.8 The UK system has also differed from at least some Continental ones regarding the way in which exceptions or limitations operate, with the former taking them to be rather a limit on the grant of property whilst, by contrast, the latter perceive them rather as an exception to the property right granted. For instance, there are differences in approach with the way in which they operate in domestic law, with the UK favouring relatively broadly drawn fair dealing provisions for several statutory purposes (eg criticism, news reporting), but the Continental systems focusing rather on specific, narrow categories. There is also another contrast between the UK and many of the Continental laws, which tend to exclude private non-commercial copying from the scope of copyright, although a concomitant in many of these systems is levies on blank devices and storage media that facilitate copying (eg audio cassettes, CDs, and DVDs), the proceeds from which are routed back ultimately to copyright owners via their collecting societies.⁹ Thus, the permitted use is nonetheless one for which the copyright owner ultimately receives remuneration, whether paid directly or indirectly by the user. The UK, on the other hand, has resisted both a general exemption for private use and the correlative deployment of levies on materials and machinery used for copying purposes.¹⁰

Question

What contrasts exist between UK, US, and Continental European approaches to permitted acts?

Key points on permitted acts (introduction)

- Works never in copyright, or the copyright in which has expired, are often said to be ‘in the public domain’.
- The permitted acts are ones which would be infringements of copyright but are made lawful by specific statutory provision.
- UK law takes a specific rather than a general ‘fair use’ or ‘private use’ approach to this subject.

Development of UK law: International, European, and domestic developments

The International Background: Berne Convention, TRIPS, and WCT

5.9 Under Article 9(2) of the Berne Convention members of the Union may:

permit the reproduction of such [literary and artistic] works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

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↳ This formulation is known as the Berne ‘three-step test’. Article 10, under the heading ‘Certain Free Uses of Works’, goes on to permit quotation from work lawfully made available to the public, provided that this is ‘compatible with fair practice’ and is not in excess of what is ‘justified by the purpose’. The Article also allows members of the Union to permit ‘utilisation, to the extent justified by the purpose’ of literary and artistic works by way of illustration for teaching, provided that this is ‘compatible with fair practice’. In both cases, the source and the name of the author must be identified. Article 10bis of the Convention adds ‘Further Possible Free Uses of Works’ for the reporting of current events. The Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement of 1994 notes that limitations or exceptions to copyright are to be ‘confined’ to ‘certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder’.¹¹ For some reason, Article 10 of the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) 1996 repeats this formula no less than twice but, like TRIPS, where the Berne Convention talks of ‘permitting’ such acts, the WCT Article speaks of ‘confining’ them. In 2000 a Dispute Panel of the World Trade Organization (WTO) issued an opinion on the

scope of the three-step test, holding that section 110(5) of the US Copyright Act 1976 violated the test by allowing public performance of works received from broadcasts. All three steps had to be complied with in any copyright exception. While minor or *de minimis* departures from the test were permissible, section 110(5) did not fall into that category.¹²

Discussion point

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Why do TRIPS and the WCT 1996 want to ‘confine’ exceptions to copyright?

European Union

5.10 The European Union (EU) implemented WCT 1996 through the Information Society (InfoSoc) Directive 2001, which sets out a long, but exhaustive, list of ‘Exceptions and Limitations’ to copyright. Article 5 provides exceptions applicable to the exclusive rights that the Directive regulates,¹³ and limits the ability of individual member states to provide further exceptions in respect of those rights.¹⁴ However, only one of the exceptions listed in Article 5 is mandatory, and the rest are permissive—that is, the member states may (and therefore need not) introduce them. The optional nature of this provision resulted in an unharmonised scheme of exceptions and limitations in the EU.¹⁵ In negotiating and implementing the Directive, the approach in the UK was to maintain as far as possible the previously existing regime on exceptions, with only minor adjustments as necessary.¹⁶ It should also be noted that the Software and Database Directives made provision for exceptions to the rights which they conferred,¹⁷ and that these were largely unaffected by the InfoSoc Directive 2001.

Discussion point

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Find out whether there were any controversies during the prolonged gestation of the InfoSoc Directive 2001, and why.

5.11 There was further EU reform on exceptions in two specific areas. In 2012, the EU adopted a directive on orphan works, allowing certain cultural organisations to digitise such works and make them available across the EEA (see para 5.59).¹⁸ In September 2017, the EU agreed upon the implementation of the Marrakesh

Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013) (see further para 2.13) through two instruments. The Marrakesh Treaty Directive harmonised and established a mandatory exception for the benefit of those who are blind, visually impaired, or otherwise print disabled (para 5.48).¹⁹ The Marrakesh Treaty Regulation²⁰ allowed the import and export of accessible format copies made in accordance with the Marrakesh Treaty Directive.

Approach to copyright exceptions

5.12 The Berne ‘three-step test’ is not only found in international instruments (para 5.9), it is also referred to in EU directives (InfoSoc, Database, and Marrakesh) in that the exceptions and limitations thereunder are to be applied:²¹

- (1) only in certain special cases;
- (2) not conflicting with normal exploitation; and
- (3) not unreasonably prejudicing the legitimate interests of the copyright owner.

What is the relevance of the three-step test in the approach to provision of copyright exceptions? In the international context, the test is clearly relevant to a country’s framing of its national provisions on the matter. However, under the EU directives, it is unclear whether the three-step test is directed exclusively to the member states’ legislature when they frame their national laws on exceptions, or whether it is also relevant for the national courts, as a guide, when they interpret and apply the exceptions under the Directives in individual cases.²²

5.13 A generally restrictive approach to the exceptions is visible in the InfoSoc Directive:

[T]he provision of ... exceptions [to copyright] ... should ... duly reflect the increased economic impact that such exceptions ... may have in the context of the new electronic environment. Therefore, the scope of certain exceptions may have to be even more limited when it comes to certain new uses of copyright works ... (recital 44).

ECJ decisions, in interpreting provisions of the Directive, suggest a preference for a strict, and consequently, narrower interpretation of the exceptions (since they are derogations from the general principles established thereunder), but concurrently indicate that interpretations should safeguard effectiveness and be purposive,

p. 172 ↵ that is, to enable them to be effective and for their purpose to be observed.²³ The rationale is that exceptions and limitations in the Directive themselves confer rights on the users of works, and are intended to ensure a ‘fair balance’, as stated in recital 31, between, on the one hand, the rights and interests of rightholders, and on the other hand, the rights and interests of users of works.²⁴ The ECJ has also held that an independent and uniform interpretation must be given to terms which make no express reference to national law for determining its meaning and scope and such uniform interpretation is not invalidated by the optional nature of the exceptions. It is a matter for the national courts to determine, in light of all circumstances, if a fair balance is preserved in the application of an exception.²⁵

Brexit

5.14 Although the current UK framework of copyright exceptions is framed in light of EU directives and ECJ jurisprudence, the scope of copyright exceptions remains largely unchanged by the withdrawal of the UK from the EU, unless noted otherwise below (para 5.59). Much of EU derived law on exceptions will continue to be applicable in domestic law, as ‘retained EU law’. Both the UK and EU member states are party to the main international treaties applicable to the current framework of exceptions (eg the Berne Convention, WCT, TRIPS). Consequently, reciprocal protection will continue through the principles of such treaties. However, the UK is likely to diverge from EU law in this area in the future. For instance, the EU has recently introduced new mandatory copyright exceptions in the Copyright Directive 2019, in the areas of digital education, text and data mining, and cultural heritage.²⁶ Due to Brexit, the UK is not required to implement the Directive.²⁷ The UK may also choose to introduce new exceptions or amend existing ones in a way that the previous exhaustive list of exceptions under the InfoSoc Directive, or ECJ jurisprudence requiring uniform interpretation, did not permit.²⁸

Domestic reform

5.15 In the last two decades, copyright exceptions have featured prominently among the issues addressed by major UK independent reviews of intellectual property: the Gowers Review 2006 and the Hargreaves Review 2011. Questions had certainly arisen previously about whether exceptions are actually necessary in the digital environment (with which Gowers was also specifically concerned) and can be adapted to the digital environment (with which Hargreaves was concerned). It can be argued that copyright exceptions and limitations were created because they related to areas of activity in which the creation of an efficient market in which producers and users could bargain about prices for access to and use of works seemed impossible, or at least far too costly; but if that was so, one question was whether the internet solved the market’s failure by providing an environment in which transaction costs are hugely reduced by the automation of the contracting process between supplier and consumer.

5.16 The *Gowers Review of Intellectual Property* published in 2006²⁹ asked whether ‘fair use’ (sic) provisions for citizens are reasonable. Many of the issues about exceptions raised by the Gowers Review 2006 were taken up in a UK Intellectual Property Office (IPO) consultation published in January 2008. However, despite the then government’s acceptance of Gower’s recommendations, it failed to adopt those exceptions. The Hargreaves Review termed this as ‘a clear demonstration of the failure of the copyright framework to adapt’.³⁰ While it rejected a US-style ‘fair use’ defence, it indicated that the UK could benefit by taking up exceptions already permitted under the InfoSoc Directive and recommended a number of changes for the purposes of, *inter alia*, format shifting, parody, non-commercial research, and library archiving, in order to update the copyright exceptions framework for the digital age. This time, the government broadly accepted the recommendations in its response,³¹ and in 2014, major reforms to UK copyright exceptions came into force (2014 reforms).³²

Copyright exceptions in the UK

5.17 The following account provides an outline of the framework of copyright exceptions in the UK (see Figure 5.1), considering in detail the exposition of the key provisions by relevant ECJ and UK jurisprudence (including authorities from the pre-Directive law and pre-2014 reforms, to the extent relevant),³³ as well as issues for reform.

| Exceptions | Subject matter to which applicable | Exceptions | Subject matter to which applicable |
|--|---|---|---|
| Fair dealing: Non-commercial research | All | Disability | All |
| Fair dealing: Private Study | All | Public Administration | All |
| Fair dealing: Criticism or review | All | Incidental inclusion | All |
| Fair dealing: Quotation | All | Text and data analysis for non-commercial research | All |
| Fair dealing: Reporting current events | All, except photographs | Time-shifting | Broadcasts |
| Fair dealing: Caricature, parody or pastiche | All | Temporary reproduction (general) | All, apart from computer programs and databases |
| Fair dealing: Illustration for instruction | All | Temporary reproduction (special) | Computer programs and databases |
| Educational Establishments | All - varies according to individual provisions | Back up; decompilation; observe, study, test; adapt for lawful use/error correction | Computer programs |
| Libraries and archives | All | | |

Figure 5.1 Exceptions to copyright

p. 174 **Making temporary copies**

5.18 As noted earlier (para 4.35), copying in relation to any description of work includes the making of copies which are transient or incidental to some other use of the work.³⁴ Major examples of what may therefore be infringement of copyright without the licence of the copyright owner are loading a computer program into a computer's RAM, or accessing an online database or website, where again copies are made in the RAM of the machine being used for the purpose. Indeed, the actual operation of the internet, which involves the transmission of data in small packets from computer to computer across a network, also

involves the making of temporary copies in each of the computers through which the packages are forwarded on their way. The technology only works by the making of these copies, and its only purpose is to play a role in the transmission of the information from a website to the person accessing it. As such, the InfoSoc Directive and, following it, section 28A of the 1988 Act provides for an important exception which prevents such temporary copying being infringement in certain, carefully defined circumstances, and stops copyright from becoming an impediment to perfectly reasonable, indeed often necessary, activities such as browsing and caching.³⁵

Temporary reproduction exception

5.19 Copyright in author works (apart from computer programs and databases) and in typographical arrangements of a published edition, sound recordings, or films is not infringed by the making of a temporary copy which is transient or incidental, as long as:³⁶

- (1) the making is an *integral and essential part of a technological process*
and
- (2) the *sole purpose* is to enable either—
 - (a) a *transmission of the work in a network* between third parties by an intermediary;
or
 - (b) a *lawful use* of the work *and*
- (3) the temporary copy has no *independent economic significance*.

Rulings by the ECJ have provided some guidance on the interpretation of this exception.

■ Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening (Infopaq I)* [2009] ECDR 16 (ECJ)

For the facts of this case see para 4.19. The ECJ found that the acts of *printing* 11-word extracts from electronic news articles, carried out during the data capture process of an electronic ‘cuttings’ service by an agency, were not ‘transient’ copies. As a derogation from general principle (ie reproduction is infringement), the exception was to be interpreted restrictively and for the exception to apply, five cumulative conditions must be fulfilled (paras 54–71):

- (1) the act must be temporary;
- (2) it must be transient or incidental;
- (3) it must be an integral and essential part of the technological process;
- (4)

the sole purpose of the process must be to enable a transmission network between third parties by an intermediary or the lawful use of the work or protected subject matter; and

- (5) the act must have no independent economic significance.

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¶ The Court also noted that the storage and deletion of the copy must be automatic and not dependent on discretionary human intervention, particularly by the user, and the duration of the process must not exceed what is necessary for the proper completion of that technological process (paras 62 and 64).

■ **Case C-302/10 *Infopaq International A/S v Danske Dagblades Forening (Infopaq II)* (17 January 2012) (ECJ)**

The ECJ found that acts of temporary reproduction carried out during the *data capture process* of an electronic ‘cuttings’ service by an agency met requirements (3)–(5) of the exception as laid out above in *Infopaq I*. The Court re-emphasised that the exemption must be interpreted strictly. The exception aims to make access to the protected works and their use possible. As such, temporary copying should take place in the context of the implementation of the technological process (in this case data capturing) and not outside it, and the technological process would not function correctly and efficiently without the temporary copying. Technological process involving human intervention is not precluded, including being activated manually (paras 29–39). Recital 33 indicates that a use is lawful either where it is authorised by the rightholder or where it is not restricted by the applicable legislation. The technological process of copying was to enable drafting of summaries of news articles and such activity, while not permitted by the rights holders, is not restricted by EU legislation, and as such is not unlawful (paras 42–46). Acts of reproduction do not have independent economic significance if the implementation of those acts does not enable the generation of additional profit going beyond that derived from the lawful use of the work, and the temporary reproduction does not modify the work in any way (paras 47–54).³⁷ The Court also said that if the activity meets all the criteria set down in Article 5(1) of the InfoSoc Directive 2001, then it must be regarded as fulfilling the requirements of Article 5(5) (paras 55–57).

■ **Newspaper Licensing Agency Ltd v Meltwater Holding BV [2010]
EWHC 3099 (Ch); [2011] EWCA Civ 890 (CA); [2013] UKSC 18 (SC); C-360/13
[2014] AC 1438 (ECJ)**

For the facts of this case see para 4.19. The UK courts considered this exception in the context of a media-monitoring service. The High Court, with which the Court of Appeal agreed, found that the users of the service needed an end-user licence from N, for both receiving the monitoring reports by email, and browsing the report on M's website. Section 28A of the CDPA 1988 did not exempt the users from liability for making on-screen and cached copies of headlines and extracts of newspaper articles while browsing the monitoring reports because: the making of copies was generated by the user's own volition, through his voluntary decision to access the webpage and as such, was not part of the technological process; such copies were not an essential or integral part of the technological process but the end which the process was designed to achieve; and, viewing the copies did not constitute 'lawful use' because the copies were not authorised by the copyright owner. On appeal to the Supreme Court (SC), confined to the issue of whether the users required a licence for browsing the report on M's website, Lord Sumption began by noting that: 'This appeal raises an important question about the application of copyright law to the technical processes involved in viewing copyright material on the internet' (para 1). He explained that the five requirements of Article 5(1) are overlapping and repetitive, and must be read together to achieve the combined purpose of them all and usefully reviewed the effect of the relevant ECJ decisions (paras 11 and 26). He explained that the exception applied to copies generated during browsing by the user and the High Court and Court of Appeal could not have arrived at their decision 'if they had had the benefit of the judgments' in *FAPL* and *Infopaq II*, where the ECJ had given a 'far broader meaning' to the concept of 'lawful use' (paras 26 and 37). Nonetheless, the SC requested a preliminary ruling from the ECJ as it found that 'the issue has a transnational dimension and that the application of copyright law to internet use has important implications for many millions of people across the European Union making use of what has become a basic technical facility' (para 38). The ECJ found that copies made by an end-user, on the user's computer screen and in the internet cache of that computer's hard disk, in the course of viewing a website, satisfied Article 5(1) requirements and did not require authorisation of the copyright holders (para 63). In addition, and unlike *Infopaq II*, the Court also analysed the conditions of Article 5(5), containing the three-step test, and held that: on-screen copies and cached copies constituted a special case because they are created only for the purpose of viewing websites; the legitimate interests of the copyright holders are properly safeguarded because publishers are still required to obtain authorisation from copyright holders even though the copies allow users to access works on websites without authorisation from them; since the viewing of websites represents a normal exploitation of the works, and the creation of on-screen and cached copies forms part of such viewing, it doesn't conflict with the normal exploitation of the works (paras 54–62).

■ **Case C-527/15 *Stichting Brein v Jack Frederik Wullems* [2017] ECDR 14 (ECJ)**

For the facts of this case, see the *Filmspeler* decision at para 4.63. In assessing whether the temporary reproduction applied to the end user's streaming of copyright protected content from the multimedia player, the Court of Justice noted that the five requirements as elaborated in *Infopaq I* and *Infopaq II* 'are cumulative in the sense that non-compliance with any one of them will lead to the act of reproduction not being exempted' (para 61), and focused on the fourth requirement. Since the referring court had indicated that the end users' acts were not to enable a transmission, the key issue was whether the end user's acts had the sole purpose of enabling a lawful use of the work. In assessing this, the issue was whether the end user's acts were not restricted by the applicable legislation, since their use was not authorised by rightholders. The Court, in holding the end user's acts were not to enable a lawful use, emphasised the advertising of the multimedia players and the main attraction of the players for potential purchasers (ie users) being the pre-installed add-ons. It held that the purchasers 'deliberately and in full knowledge of the circumstances' access 'a free and unauthorised offer of protected works' (para 69). It also held that temporary acts of reproduction on the type of multimedia players in question (which allow streaming of unauthorised content from third-party websites) 'adversely affect the normal exploitation of relevant works and causes unreasonable prejudice to the legitimate interests of the rightholder', because such 'practice would usually result in a diminution of lawful transactions relating to the protected works, which would cause unreasonable prejudice to copyright holders' (para 70). This conclusion is unsurprising but quite significant, as the ECJ has clarified that in the case of unauthorised streaming end users cannot benefit from the temporary reproduction exception.

Question

Under what conditions is temporary reproduction a permitted act rather than an infringement? Give some illustrative examples.

Temporary reproduction of databases and computer programs

5.20 The Database Directive³⁸ and, following it, section 50D of the 1988 Act provide in effect that temporary reproduction of a database which is necessary for the purpose of access to and normal use of the contents of a database, or part thereof, by a person with a right to use the database, is not an infringement of copyright in the database. A person will have a right to use through licence, express or implied, or by way of the generally permitted acts as far as they apply to databases. Any term or condition of an agreement purporting to prohibit an act permitted under this exception is void.³⁹ The Software Directive⁴⁰ and, following it, section

50C of the 1988 Act also provide in effect that temporary reproduction or adaptation of a computer program necessary for a lawful user's lawful use of the program is permitted. But, in an example of contract prevailing over exceptions (unlike the position with databases just described), a term of any contract regulating the circumstances in which the user's use is lawful, and prohibiting the copying or adaptation in question, will make those acts infringements. There are, however, a number of other acts in relation to computer programs which may be undertaken by a lawful user thereof, and which cannot be overridden by contract (para 5.55). And for the owner of copyright in a computer program to put it on the market without granting a licence, express or implied, to enable the purchaser to load it into a computer's RAM and run it (thereby making the purchaser a lawful user) would seem an absurd scenario.

Key points on exceptions for temporary reproduction

- The general exception, which does not apply to computer programs and databases, is for copying as an integral part of a technological process enabling either a network transmission or a lawful use of the work, and having no independent economic significance.
- This is intended to allow 'browsing' on the internet and 'caching'.
- There are special exceptions for computer programs and databases, most of which cannot be contractually overridden.

Fair dealing exceptions

5.21 Fair dealing with a work will not constitute infringement of the copyright in the work if it is carried out for one of the permitted statutory purposes in CDPA 1988, and satisfies related requirements. The question whether the use by an infringer was 'for the purpose' set out in the Act is to be judged objectively: 'it is not necessary for the court to put itself in the shoes of the infringer of the copyright in order to decide whether the offending piece was published' for the statutory purpose, and the notion that all that is required is for the user to have the sincere belief, however misguided, that they are using the work for the statutory purpose should not be encouraged.⁴¹ Fair dealing for any other purpose, or dealing which is only fair in general, is not permitted as such, and if there is not to be liability for infringement of copyright the activity will have to be shown to fall within some other category of permitted act. But dealing for one of the statutory purposes and, at the same time, also for some other purpose may still be fair dealing.⁴² The permitted statutory purposes requiring 'fair dealing' and applicable to all types of works are:

- *research for a non-commercial purpose* (CDPA 1988, s 29(1));
- *private study* (CDPA 1988, s 29(1C));
- *criticism or review* (CDPA 1988, s 30(1));
- *quotation* (CDPA 1988, s 30(1ZA));
- *reporting current events* (CDPA 1988, s 30(2));⁴³

- *caricature, parody or pastiche* (CDPA 1988 s 30A(1));
- *illustration for instruction* (CDPA 1988, s 32(1)).

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Before the 2014 reforms, the exceptions for non-commercial research and private study were limited to literary, dramatic, musical, or artistic works and the typographical arrangement of a published edition. They did not extend to films, sound recordings, and broadcasts. As a result of recommendations by the Hargreaves Review, the exceptions were extended to cover *all* types of works.⁴⁴ Sufficient acknowledgement is required for the above permitted purposes, except private study and caricature, parody, or pastiche. This section discusses the meaning of ‘fair dealing’ and ‘sufficient acknowledgement’ first, before addressing each of the statutory purposes requiring ‘fair dealing’ in more detail.⁴⁵ It then discusses other exceptions available to a range of bodies (eg educational establishments, libraries, archives, and museums) or for specific purposes (eg text and data analysis, public administration).

Question

In the 2014 reforms, why was fair dealing for the purposes of non-commercial research or private study extended to cover films, sound recordings, and broadcasts?

Fair dealing and the ‘three-step test’

5.22 The dealing with the copyright work, for all the above permitted statutory purposes, must be fair; but the Act, both before and after the 2003 and 2014 amendments, contains no elaboration of what is or is not fair. Fair dealing is seen to be a question of degree and matter of impression.⁴⁶ Contrast the list of factors to be taken into account under the fair use provisions of the US Copyright Act, which ‘include’ such matters as whether the use is of a commercial nature or for non-profit educational purposes, the amount and substantiality of the portion used in relation to the whole work, and the effect of the use upon the market or value of the copyright work (see para 5.7). Some of these (eg commercial use) are built into the structure of the specific exceptions in the UK, and others have emerged in the case law, as will appear from the following account. But the question of fairness is still, at least to some extent, at large. However, the first important element is the express reference to the Berne ‘three-step test’ (para 5.9), not in the amended text of the 1988 Act, but in the underlying Software, Database, and InfoSoc Directives (para 5.12), which may require consideration of essentially the same factors as fair dealing.⁴⁷ The second element is the notion of ‘fair balance’ in the InfoSoc Directive 2001 and recent ECJ jurisprudence (para 5.13).

Fairness

5.23 Even if the dealing is shown to be for the statutory purposes, and appropriate acknowledgement has been made, the test of *fairness* remains to be satisfied. The British courts have taken a number of factors into account, according to the nature of the permitted purpose. For example, the quantity of material quoted and reproduced is relevant: to take large extracts from a work and criticise only some of them may be unfair and

make the dealing an infringement rather than a permitted act for the purposes of criticism.⁴⁸ Similarly, the impact of the infringer's activity upon the market for the rightholder's work, if any, can be a relevant factor in assessing the fairness of that activity: even if the infringer's activity involves criticism of someone else's work, comparative advertising is nonetheless not fair dealing because its primary purpose is to advance the critic's own work.⁴⁹ The Court of Appeal (CA) in one case on reporting current events, noted that in assessing fair dealing, 'it is appropriate to take into account the motives of the alleged infringer, the extent and purpose of the use, and whether that extent was necessary for the purpose of reporting the current events in question' and also, 'if the work had not been published or circulated to the public'.⁵⁰ Fairness must be judged by 'the objective standard of whether a fair minded and honest person would have dealt with the copyright work in the manner' that the defendant did for the purpose of reporting the current events.⁵¹ In another case, it considered the three important factors for fair dealing to be commercial competition, prior publication, and the amount and importance of the work taken.⁵²

Sufficient acknowledgement

5.24 A *sufficient acknowledgement* is an identification of the work in question by its title or other description and, unless the work is published anonymously or the identity of the author cannot be ascertained by reasonable inquiry, also identifying the author.⁵³ It is not sufficient for it to be merely possible to identify the original work and author in the activity said to be fair dealing; the acknowledgement must be such as to suggest recognition of the position or claim of the author in respect of the original work. Thus study aids on the work of well-known authors, aimed at school pupils, did not sufficiently acknowledge their position or claim even though the merest glance at the study aids revealed the works and authors in question.⁵⁴ Similarly, a brief reference in a newspaper story to the fact that quoted words had been given in answer to another newspaper's questions did not constitute sufficient acknowledgement of its authorship as distinct from its copyright.⁵⁵

Fair dealing: (a) research for non-commercial purposes

5.25 Fair dealing with any kind of copyright-protected work, for the purposes of research for a non-commercial purpose, is a permitted act.⁵⁶ A contractual term that purports to prevent or restrict this permitted act is unenforceable.⁵⁷ Research is required to be accompanied by a sufficient acknowledgement, unless such acknowledgement is impossible for reasons of practicality or otherwise.⁵⁸

Meaning of research

5.26 The meaning of the word 'research' appears never to have been judicially considered in the UK. Prior to the 2003 amendments it was linked to 'private study' but the two have since been severed, so they must each have a separate rather than a cumulative meaning. The InfoSoc Directive talks of 'scientific research', but this does not mean that only research in what would generally be thought of as science (as opposed to arts, humanities, or social sciences) is covered; rather, it means research directed to the development of knowledge and understanding (*scientia*) in whatever discipline. The *Oxford English Dictionary* defines research as a process of search or investigation undertaken to discover facts and reach new conclusions by the critical

study of a subject or by a course of scientific inquiry; or as a systematic investigation into and study of materials, sources, and so on, to establish facts or collate information. Study, on the other hand, is more about the application of the mind to the acquisition of knowledge, or reading a book or text with close attention.⁵⁹

- p. 180 Research may therefore be thought of as having some end product in view, a contribution to knowledge and understanding; while study is more about acquiring knowledge and understanding that already exists. But on these definitions, it must also be admitted that research is hardly conceivable without study, and that any distinction between the two is difficult to maintain. In the university context, research would be the characteristic activity of the PhD student and study that of the first-year undergraduate; but between the two levels there is a wide spectrum, indeed a progression, of activity partaking of both study and research. Thus, the undergraduate will study for exams and research for essays or dissertations, while the postgraduate will have studied for an undergraduate degree and to establish the base from which the subject of the doctoral research can be identified. The professor or lecturer, on the other hand, will research to write learned articles in scholarly journals, perhaps merely study in order to give lectures and tutorials, and be somewhere in between in writing a student textbook. It is not clear whether the professor merely keeping up to date in his field—for example reading and making copies of new publications and filing them for possible future use—can be said to be carrying out research: on these definitions, probably not, but perhaps it amounts to private study. While photocopying and scanning for the purpose of research would clearly be covered by this exception, it is not clear, however, how much of the material can be copied on this basis; the dealing does have to be fair, and the publisher's loss of a sale, for example, might be seen as unfair in at least some contexts. Whether research includes the publication of research results (ie quotation from research materials in the resulting publication) is perhaps a moot point since quotation is now specifically permitted under the new section 30(1ZA) (see para 5.34)⁶⁰

Non-commercial purpose

5.27 The really crucial change to UK law which was made by the InfoSoc Directive and the 2003 Regulations was the restriction of the exception or permission for research to research carried out for a *non-commercial purpose*. This restriction was not seen as satisfactory, and the meaning and scope of 'non-commercial' causes much concern in university and professional research circles. In its 2003 report on 'Keeping Science Open', the Royal Society stated: 'We believe that the limitation of fair dealing to non-commercial purposes gives rise to uncertainty, is not useful and is complex to operate, and we recommend that it be renegotiated when the Copyright [InfoSoc] Directive 2001 is reviewed in 2005.'⁶¹ The British Academy stated in its 2006 review of copyright and research in the humanities and social sciences: 'we believe that statutory clarification will be necessary to protect scholarship and the public interest in research'.⁶²

5.28 What does 'non-commercial' mean in this context? For example, the copying which might have been involved in a lawyer carrying out legal research on behalf of a client requires authorisation from—and probably the payment of a fee to—the copyright owner.⁶³ On the other hand, the research carried out by an undergraduate writing an essay for assessment is clearly for a non-commercial purpose, as would be that carried out by a civil servant while preparing an internal report for a government minister. Unfortunately, however, there is a large amount of ambiguity in the distinction between commercial and non-commercial research. To pursue the university context as an example: what is the position of the professor writing a

learned monograph which will be published by a commercial publisher, and from which the professor will earn royalties?⁶⁴ Is it different if the product is for a professional journal or conference for which the p. 181 professor will receive a fee? Or for research, which is initially published in an academic journal, for no fee, but which subsequently becomes the basis for the development of a commercial product? The language of the statute seems to suggest that the purpose of the research is to be tested at the time it is carried out, and that it is sufficient if there is 'a' non-commercial purpose.⁶⁵ However, if at the time of the research, the 'end use' is contemplated to be for a purpose with some commercial value, then this exception does not provide a defence.

■ ***Controller HMSO and Ordnance Survey v Green Amps [2007] EWHC 2755 (Ch)***

HMSO provided map data for a database service available to universities and the research community in the UK. Green Amps Ltd (GAL), a private company, gained unlicensed access to that service but argued that it came within the non-commercial research provision because it had used the data for a mapping tool facility in development, and their use thus had research and development status. The Court held that, even if use of the mapping data by GAL, a commercial company, had at that point only been for research, the intended end use, and as such, the research was for commercial purposes. Further, GAL's actions could not be described as fair dealing considering the extent and covert manner of its copying.⁶⁶

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-5-guidance-on-answering-the-discussion-points?options=showName>>.

Does the InfoSoc Directive 2001 require the exclusion of all commercial research from the benefit of the exception for research?

Exercise

The government commissions a private research consultancy company to investigate and report back on a social issue upon which it is proposed there should be legislation. The company will receive a substantial fee for its work. Is the company's research for government non-commercial? Would your answer be any different if the research was to be carried out by a charity active in the area where the social issue arises? Or by a law firm with expertise on it?

Key points on the exception for non-commercial research

- Research, a process of search and investigation, must be distinguished from private study.
- Research for a commercial purpose is not within the exception. It is enough that there is 'a' commercial purpose; the presence of other non-commercial purposes will probably not bring the research within the exception.
- The purpose is tested at the time the research is carried out, but the contemplated end use at the time should not be commercial.
- This exception applies to all copyright works.
- Sufficient acknowledgement is required.

p. 182 Fair dealing: (b) private study

5.29 Fair dealing with any kind of copyright-protected work for the purpose of private study is a permitted act.⁶⁷ A contractual term that purports to prevent or restrict this permitted act is unenforceable.⁶⁸ Private study doesn't have a 'sufficient acknowledgement' requirement. We have already defined 'study' as the application of the mind to the acquisition of knowledge (para 5.26). 'Private study' does not include any study which is directly or indirectly for a commercial purpose.⁶⁹ It must be the private study of the person dealing with the work. The fact that some third party may use the secondary work for purposes of private study does not protect the copier from a claim of infringement of copyright. Thus, the reprinting of examination papers as a collection for sale to students was not fair dealing with the examination papers,⁷⁰ nor was the publication of study aids on well-known literary works for the use of school pupils.⁷¹ This principle is reinforced by statutory provision to the effect that copying by a person other than the student himself is not fair dealing in two cases. First is the provision of copies by librarians outside the special provisions for them found elsewhere in the 1988 Act.⁷² Second is the person who makes the copy, knowing or having reason to believe 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.⁷³ This seems to ensure that the

production of multiple copies cannot be justified under the heading of private study. It would also seem that study carried out for another person—an employer, for example—cannot be private study. Private must mean that the study is for one's own personal purposes.

Private study and students in schools, colleges, and universities

5.30 The exception for private study is of particular importance to students undertaking education in schools, colleges, and universities.⁷⁴ There is extensive provision in the 1988 Act restricting reprography (ie photocopying, digital scanning) by *educational establishments*, which sets out what can be freely done by and on behalf of an educational establishment for the purposes of providing instruction (paras 5.43–5.45), but *not* what can be done by *the individual receiving instruction* or, indeed, carrying out research, where the fair dealing exceptions may be relevant. An institution making and distributing photocopies or printouts to a class as a course pack can be distinguished from students copying parts of or complete works for their own study. The latter does not fall within the scope of any of the other exceptions for educational reprography or copying by librarians, but this does not mean that the defence of fair dealing for private study is unavailable.⁷⁵

Exercise

Find out what the policies of your educational establishment are with regard to the making and distribution of copies of material for study purposes. Who, if anyone, pays for the making of these copies?

Key points on the exception for private study

- Study, the application of the mind to the acquisition of knowledge, is distinct from research.
- ‘Private’ means that the study is for the student’s personal purposes.
- ↗ Copying or issuing material to the public for the purpose of others’ private study is not within the exception.
- There are a number of special exceptions for educational establishments and libraries to enable them to provide copies for others’ private study.
- The exception applies to all copyright works.

Fair dealing: (c) criticism or review

Criticism or review

5.31 Fair dealing with any kind of copyright-protected work, for purposes of *criticism and review* of that, or of another, work or of a performance of a work, is also a permitted act if accompanied by a *sufficient acknowledgement*, and provided that the work has been made available to the public.⁷⁶ Review requires, as a minimum, some dealing with an original copyrighted work other than condensing that work into a summary. Criticism, on the other hand, is not solely focused on the style of a copyrighted work but can also extend to the ideas or theories that work contains. Sufficient acknowledgement is required unless this would be impossible for reasons of practicality or otherwise.⁷⁷

5.32 A typical example of an activity coming within the exception would be a review of a book with quotations in illustration of critical points, or a film review on a TV programme containing extracts from the film in question. Another instance would be comments upon a book in another book or article, with the use of quotations to point the criticism. The criticism need not be hostile. But how much of the original work can be used for such purposes? Lengthy extracts from the original work have been permitted where the purpose was purely to enable criticism to be made,⁷⁸ but where the purpose is not so much to provide criticism but the same information as the original work and to compete with it, the activity cannot be allowed.⁷⁹ Further, the criticism or review must be directed to the original or another work, not at the author or against the person whose activities are the subject of the original work.⁸⁰ The original or other work criticised must be a work of the kind protected by copyright, although it need not be in copyright at the time.⁸¹

■ *Hubbard v Vosper [1972] 2 QB 84 (CA)*

This case involved the unauthorised publication (although in a traditional rather than an electronic medium) of the works of L Ron Hubbard, founder of the Church of Scientology, together with critical commentary thereupon. The Court of Appeal found that the criticism was sufficient to make the taking of substantial extracts of the copyright material fair dealing.⁸²

■ *Pro Sieben Media AG v Carlton UK Television Ltd [1999] FSR 610 (CA)*

The case concerned a German TV programme in which Mandy Allwood, then pregnant with eight foetuses as a result of fertility treatment, was interviewed with her boyfriend, both having been paid for their participation. Carlton TV used unauthorised extracts from the German programme in another documentary ↗ attacking ‘chequebook’ journalism. It was held that their use was fair dealing as criticism and review rather than copying to take the rightholder’s market. The Court of

Appeal said that the extent of use was relevant in considering fair dealing, but that relevance would depend on the circumstances of each case. Most important was the degree of competition, if any, between the two works in question. The mental element of the user was of little importance, so that a sincere belief that one was being critical in one's handling of the previous work would not be enough to make out the defence. However, the Court emphasised that the phrase 'criticism or review' was of wide and indefinite scope, and should be interpreted liberally.

■ ***Fraser-Woodward Ltd v BBC and another [2005] FSR 36***

Photographs of a well-known footballer (David Beckham) and his family were published under licence in tabloid newspapers. The defendants used images of the newspaper pages with the photographs in a BBC TV programme, to criticise their coverage of the doings of celebrities. The copyright owner sued for infringement of the copyright in the photographs. It was held that the defendants' use was for the purposes of criticism and review of the newspapers rather than the photographs themselves. But since under section 30(1) a work could be used to criticise 'another work', the defendants' activity fell within the scope of the permitted act. The other work had to be a work of the kind protected by copyright, but it did not have to be in copyright. The *Pro Sieben* case also showed that the ideas or philosophy underlying a certain style of journalism could be the subject of criticism within the scope of section 30(1).

■ ***IPC Media Ltd v News Group Newspapers Ltd [2005] FSR 35***

The *Sun* newspaper advertised its new magazine with illustrations of the front covers of two other magazines with which it was to compete. The owners of the rival magazines sued for copyright infringement, to which the owners of the *Sun* responded with a claim of fair dealing for purposes of criticism or review. It was held that the criticism/review in this case was directed not at the claimant's work, but at their product. Comparative advertising was intended to advance the *Sun*'s work at the expense of the other works, and this was not fair dealing.

Discussion point 1

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-5-guidance-on-answering-the-discussion-points?options=showName>>.

Do you agree with the decision of the Court of Appeal in *Hubbard v Vosper*?

Discussion point 2

Why is a ‘wide, liberal’ approach needed for the exemption for criticism and review? How does this compare to the ECJ’s approach to exceptions?

Public availability of work being criticised and reviewed

5.33 Only criticism and review of a work which has been made available to the public is fair dealing.⁸³ The work may have been made available by any means—by issue of copies to the public, by making work available through an electronic retrieval system, by way of public rental, lending, performance, exhibition, showing, or playing, or through public communication. However, no account is to be taken in this regard of any unauthorised act.⁸⁴ Thus, it would seem that criticism or review of unpublished material involving quotation thereof, or where the material has been obtained surreptitiously or by breach of confidence, cannot claim to be fair dealing as criticism or review.⁸⁵

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Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-5-guidance-on-answering-the-discussion-points?options=showName>>.

The 2003 Regulations implemented the requirement of the InfoSoc Directive 2001 for the copyright work to have already been lawfully made available to the public for the purposes of criticism and review. Find out what was the position under the law before 31 October 2003.

■ ***HRH The Prince of Wales v Associated Newspapers Ltd (No 3) [2008] Ch 57 (CA)***

Extracts from unpublished journals of the Prince of Wales recording his impressions from his official visit to Hong Kong were published in the *Mail on Sunday* in 2005, without the Prince's consent. The High Court, with which the Court of Appeal agreed, held that since the journals had not been made available to the public, the exception for criticism and review was inapplicable. The fact that much of the *information* contained in the journals was already in the public domain made no difference.

Key points on exception for criticism and review

- This exception applies to all forms of copyright work.
- The work criticised/reviewed must be one that is publicly available.
- The exception should be given a wide and liberal interpretation.
- Use of a copyright work in the criticism or review of another work, even one that is not in copyright, may be justified under the exception.
- But the exception does not allow one freely to criticise the author of the work as distinct from the work itself, or the person whose activities are the subject of the work's content.
- Sufficient acknowledgement is required.

Fair dealing: (d) quotation

5.34 Before the 2014 reforms, the law allowed users to quote from copyright works if the purpose of that quotation was criticism or review. However, the Berne Convention 1886 does not limit the exception for quotation by any purpose.⁸⁶ The corresponding provision in the InfoSoc Directive 2001 is also broader as it refers to 'quotations for purposes such as criticism or review' (emphasis added).⁸⁷ In response to criticism of the narrow scope of this exception, the UK government introduced a new exception allowing quotation from a work, whether for the purpose of criticism or review or otherwise.⁸⁸ The exception was envisaged to remove unnecessary restrictions to freedom of expression and improve the alignment of UK law with international copyright standards.⁸⁹

p. 186 ↵ **5.35** The exception allows for quotations, from any form of copyright work, such as films or photographs and not just literary works. Most requirements here are similar to that of the criticism and review exception (paras 5.31–5.33): the work is available to the public; the use of the quotation is fair dealing with the work; and the quotation is accompanied by sufficient acknowledgement, unless this would be impossible for reasons of practicality or otherwise. The only additional requirement is that the extent of the

quotation is no more than is required by the specific purpose for which it is used.⁹⁰ Consequently, the use should not go beyond what is necessary to achieve the informative purpose of that particular quotation.⁹¹ A contractual term that purports to prevent or restrict this permitted act is unenforceable.⁹²

5.36 Quotation is not defined in the UK statutory provision but recent ECJ jurisprudence provides useful guidance. The meaning and scope of ‘quotation’ must be determined by considering its usual meaning in everyday language, while also accounting for the relevant legislative context and the purpose of relevant rules.⁹³ With regard to such meaning:⁹⁴

... the essential characteristics of a quotation are the use, by a user other than the copyright holder, 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, since the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into ‘dialogue’ with that work ...

However ... there can be no such dialogue where it is not possible to identify the work concerned by the quotation at issue.

In addition to the concepts of entering into a ‘dialogue’, and recognisability, it has also been noted that the user of the work 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’ and ‘the use of the quoted work must be secondary in relation to the assertions of that user’.⁹⁵ It is not required that the quoted work is inextricably integrated within the user’s work (eg by way of reproductions in footnotes) and a quotation can be made through a hyperlink to the quoted work (eg to a file which can be downloaded independently).⁹⁶

5.37 The objective of the InfoSoc provision on quotation is wide, in that it is intended to preclude the reproduction right ‘from preventing the publication, by means of quotation accompanied by comments or criticism, of extracts from a work already available to the public’.⁹⁷ However, the UK exception was envisaged to only permit ‘minor uses’ such as quotations in academic papers, internet blogs, and tweets, and seen as ‘highly unlikely’ to allow for unauthorised uses of commercially available clips from news agencies and film archives because the fairness requirement would not be met where such use conflicted with the normal exploitation of the work or harm the rights holders unreasonably.⁹⁸ It remains to be seen how the UK courts will interpret this exception, and if they will use the ‘fairness’ requirement to curtail the scope of the exception by assessing whether certain purposes are justified or not.

Key points on exception for quotation

- This exception applies to all forms of copyright work.
- The work quoted from must be one that is publicly available.

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- ↗ The quotation can be used for criticism or review or any other purpose.
- The extent of the quotation should be no more than is required by the specific purpose for which it is used.
- Sufficient acknowledgement is required.

Fair dealing: (e) reporting current events

5.38 Fair dealing with any work *other than a photograph* for the purpose of reporting current events does not infringe copyright, provided that it is accompanied by a sufficient acknowledgement.⁹⁹ However, no acknowledgement is required when current events are being reported by means of a sound recording, film, or broadcast, where this would be impossible for reasons of practicality or otherwise.¹⁰⁰ The underlying idea here is clearly to support the circulation of news, the purpose being ‘to provide an exception to, or limit upon, copyright protection in the public interest, namely freedom of expression’.¹⁰¹ There is no requirement like that for the criticism/review exception, that the work being reported is available to the public, although in the modern case law unauthorised takings of material subsequently quoted in news reports has been a factor in holding the publication not fair dealing.¹⁰² Photographs are exempted altogether from the fair dealing provisions on news reporting. Since news reporting is a major use of photographs in all media, the availability of a fair dealing exception in respect of these works was felt to undermine the market position of the photographer too much.

5.39 The event reported must be *current*, the copied material must be used for *reporting* the current event, and the dealing must be fair. The defence is not limited to general news programmes and was upheld in *BBC v BSB Ltd*,¹⁰³ where extracts from BBC sports broadcasts lasting from 14 to 37 seconds and made with acknowledgement to the BBC were included without permission in BSB sports news programmes. In *Newspaper Licensing Agency v Meltwater* (for the facts of this case, see para 4.19),¹⁰⁴ it was held that scraped extracts from articles in media monitoring reports provided by M, were not intended for public consumption and not made for the purpose of reporting current events; their purpose was to enable the enduser to see when, where, and in what context the search terms were used. The Court of Appeal in *Pro Sieben Media AG v Carlton UK Television*¹⁰⁵ indicated that, like ‘criticism or review’, ‘reporting current events’ is an expression of wide scope and is to be interpreted liberally.

■ *Hyde Park Residence Ltd v Yelland [1999] RPC 655 (Jacob J); [2000] RPC 604 (CA)*

This case was concerned with the unauthorised publication by the *Sun* in September 1998 of CCTV photographs of Princess Diana and Dodi al-Fayed, taken before their deaths on 31 August 1997 at the former mansion of the Duchess of Windsor. Jacob J held that the one-year gap in time did not prevent

these events continuing to be ‘current’, given the continuing publicity about the visit arising from statements made two days before the publication in question by Mohammed al-Fayed, tenant of the mansion and, through a security company which he controlled, owner of the copyright in the photographs. This ‘liberal’ approach to the definition of current events was accepted by the Court of Appeal, even though the *Sun’s* actual use of the photographs was held not to be fair dealing, because the falsity of Mr al-Fayed’s statements was already public knowledge, and the spread given to material itself dishonestly obtained and hitherto unpublished was excessive.

■ ***Ashdown v Telegraph Group Ltd [2002] ECC 19 (CA)***

The ‘liberal’ approach to the currency of events was again applied by the Court of Appeal in this case. The *Sunday Telegraph* newspaper had published unlicensed extracts from the diaries of Paddy Ashdown, the former Liberal Democrat leader, shortly before they were due to be published by him as a book. The copying in question occurred in November 1999 but related to events over two years earlier. These were nonetheless arguably current events:

The defence provided by section 30(2) is clearly intended to protect the role of the media in informing the public about matters of current concern to the public ... In a democratic society, information about a meeting between the Prime Minister and an opposition party leader during the then current Parliament to discuss possible close co-operation between those parties is very likely to be of legitimate and continuing public interest. It might impinge upon the way in which the public would vote at the next general election (para 64).

But in the end the Telegraph Group’s dealings were unfair: the publication destroyed part of the commercial value of Ashdown’s diary, which he intended to publish himself;¹⁰⁶ much of the material covered was already in the public domain at the time of publication, although the diary was previously unpublished; the material had been obtained in breach of confidence; and a substantial portion was copied, adding significant commercial value for the newspaper.

■ ***HRH The Prince of Wales v Associated Newspapers Ltd (No 3) [2008] Ch 57 (CA)***

For the facts of this case, see para 5.33. It was held that the exception for reporting current events was inapplicable. The events in question—the UK’s return of Hong Kong to the People’s Republic of China in 1997—were no longer current in 2005, when the extracts were published. While there was some

faint light on the recent conduct of the heir to the throne and his approach to his position, the overall impression of the article was of a selection of ‘choice passages’ from the journal, with the revelation of the contents of the journal itself the event of interest.

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-5-guidance-on-answering-the-discussion-points?options=showName>>.

Is the death of Princess Diana in August 1997 still a current event? Or the events in New York on 11 September 2001? Or the fall of the Berlin Wall in 1989?

■ *England and Wales Cricket Board v Tixdaq [2016] EWHC 575 (Ch)*

For the facts of this case, see para 4.20. In considering whether the clips uploaded to the app could benefit from the exception for reporting current events, Arnold J noted that the exception must be construed in accordance with Article 5(3)(c) of the InfoSoc Directive 2001 and an important consideration in the assessment of ‘fair dealing’ here is ‘whether the extent of the use is justified by the informative purpose’ (paras 68–70). He confirmed that a contemporaneous sporting event, such as a cricket match, qualifies as a current event (para 106) and it is necessary to construe the term ‘reporting’ purposively, according to ↗ the context (para 112). Consequently, reporting current events is not restricted to traditional media, and citizen journalism can qualify for it too. He noted that:

If a member of the public captures images and/or sound of a newsworthy event using their mobile phone and uploads it to a social media site like Twitter, then that may well qualify as reporting current events even if it is accompanied by relatively little in the way of commentary (para 114).

However, he held that the clips had not been used by T ‘to inform the audience about a current event, but presented for consumption because of their intrinsic interest and value’, and its use was ‘purely commercial rather than genuinely informative’ (para 129). He also held that even if T’s use did qualify as reporting current events, it was not fair dealing because it was commercially damaging to the claimants and conflicted with the normal exploitation of the underlying copyright works (para 147).

■ **Case C-516/17 *Spiegel Online v Beck* [2019] ECDR 24 (ECJ)**

The ECJ held that since Article 5(3)(c) of the InfoSoc Directive 2001 provides no definition of the words ‘in connection with the reporting of current events’, they must be determined by considering their usual meaning in everyday language, while also accounting for the relevant legislative context and the purpose of relevant rules. ‘A current event is an event that, at the time at which it is reported, is of informative interest to the public’ (para 67). Reporting requires providing information on a current event, although it does not require analysis of the event in detail, it is also not sufficient to merely announce that an event has occurred (para 66). The court also held that freedom of information and freedom of the press are not capable of justifying any derogation from the author’s exclusive rights covered by the Directive, beyond the exceptions or limitations in the InfoSoc Directive. While the Directive requires a fair balance between rightholders and users, including the latter’s freedom of expression and information, the requisite balancing mechanisms are contained within the Directive itself, that is through its provisions on exclusive rights and exceptions and limitations (paras 40–49).¹⁰⁷

■ **HRH The Duchess of Sussex v Associated Newspapers Limited [2021] EWHC 273 (Ch); [2022] ECDR 13(CA)**

Large extracts from a letter from Meghan Markle, the Duchess of Sussex, to her father, were published by the *Mail on Sunday*, without the Duchess’ consent. In granting summary judgment on copyright infringement in favour of the Duchess, the court held that only one of the paragraphs reproduced by the defendant could count as fair dealing for the purposes of reporting current events, and much of the letter was reproduced for the purpose of reporting the contents of the letter, rather than any current event. The use could not be characterised as fair dealing as the defendant knowingly dealt with an unpublished work, infringed the claimant’s privacy rights, and the use was largely irrelevant to any legitimate reporting purpose and also disproportionate. The Court of Appeal upheld the summary judgment.

Key points on the exception for reporting current events

- The exception applies to all copyright works except photographs.
- There must be sufficient acknowledgement of the source.
- The exception is to receive wide scope and a liberal interpretation.
- Events may remain ‘current’ for some time after their occurrence, but not indefinitely.

p. 190 **Fair dealing: (f) caricature, parody, or pastiche**

5.40 Before the 2014 reforms, creating a ‘parody’ of another work was neither necessarily an infringement of copyright, nor an independent, substantive defence to a charge of infringement. Whether a parody of another work had infringed its copyright depended on whether a substantial part was copied or not; the infringement not being dependent on it being a parody (see para 4.38). Equally, there was no defence based solely on the fact that work was a parody; instead a user would have had to demonstrate that their parody fell within one of the permitted acts available at the time, such as fair dealing for criticism or review. This arrangement was far from satisfactory for a number of reasons. A parody may require copying of more than an insubstantial part of a work. The criticism and review exception could only indirectly, if at all, cover the nature of a parody: it requires criticism of a ‘work’ or ‘ideas or philosophy underlying a work’ so parodies of wider social practices would not fit; it requires sufficient acknowledgement while a parody would usually seek to evoke another work without expressly identifying the work or its author.¹⁰⁸

5.41 Article 5(3)(k) of the InfoSoc Directive 2001 permits an exception for caricature, parody, or pastiche but the UK government, in transposing the Directive, had chosen not to implement it.¹⁰⁹ The Gowers Review in 2006 had recommended that an exception be expressly introduced in the UK. The Hargreaves Review also recommended use of the parody exception allowed in the EU as it has both economic and cultural consequences in the digital environment. As a result, in October 2014, the UK government introduced a new exception allowing fair dealing with a work for the purposes of caricature, parody, or pastiche.¹¹⁰ There is no requirement for sufficient acknowledgement. A contractual term that purports to prevent or restrict this permitted act is unenforceable.¹¹¹

5.42 The statutory provision lacks detail as to when a use is a caricature, parody, or pastiche but recent case law has shed some light on the matter.

■ **C-201/13 *Deckmyn v Vandersteen* [2014] ECDR 21 (ECJ)**

D, a member of a Belgian political party, reproduced a drawing resembling the cover of a *Suske en Wiske* comic book, authored by V. In the original drawing, one of the book’s main characters, wearing a white tunic, is throwing coins to people, who are trying to pick them up. D had replaced the character with ‘the Mayor of the City of Ghent and the people picking up the coins’ with ‘people wearing veils and people of colour’. The Brussels Court of First Instance held D’s drawing to be infringing but on appeal, the drawing was argued to fall with the parody exception and the Court referred it to the ECJ, seeking guidance on the meaning of parody. The ECJ held that despite the optional nature of the parody exception in the InfoSoc Directive, ‘parody’ must be regarded as an autonomous concept of EU law and interpreted uniformly through the EU (paras 15–16). The meaning and scope of ‘parody’ must be determined by considering its usual meaning in everyday language and with regard to such meaning there are two essential characteristics of a parody: it evokes an existing work, while being noticeably different from it; and, it constitutes an expression of humour or mockery. The concept of parody is *not* required to fulfil other conditions such as the

following: that it should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; or, it could reasonably be attributed to a person other than the author of the original work itself; or it should relate to the original work itself or mention the source of the parodied work (paras 19–21). It is for the national courts to determine, in light of all circumstances, whether a ‘fair balance’ is preserved in the application of the exception, between the rights and interests of right owners and the freedom of expression of the user of the copyright work (paras 26–28). The fairness test in the UK will be key to achieving this balancing exercise, and factors used in relation to other fair dealing exceptions are likely to be relevant. The ECJ also noted that the national court must have regard to the copyright holder’s legitimate interest in the protected work not being associated with a discriminatory message conflicting with the principle of equal treatment between persons irrespective of race, colour, or ethnic origin (paras 29–31). This is seen to be a problematic aspect of the ruling because copyright may not be the most appropriate mechanism for regulating discriminatory messages and while moral rights might be more suitable for the purpose, they are outside the scope of InfoSoc Directive 2001.¹¹²

■ *Shazam Productions Ltd v Only Fools the Dining Experience Ltd [2022] EWHC 1379 (IPEC)*

For the facts of this case, see para 3.51. It was held that the interactive dining show OFDE’s use of the characters (including the appearance, mannerisms, voices and catchphrases) from the TV series OFAH was not a parody or a pastiche, and such use was also not fair dealing. The judge accepted that the *Deckmyn* definition of parody is potentially too wide in the context of uses of existing humorous (as opposed to serious) works, which may simply borrow the humour from the copied work. As such, to constitute an expression of humour or mockery, it was essential that a parody ‘does express some kind of opinion by means of its imitation, but noticeable difference, from the work parodied’ (para 176). Such opinion can be about the parodied work itself or about something outside of the work, but the need for an opinion to be expressed is particularly important in the case of parodies of comedies (paras 176–77). OFDE’s use was not a parody as it did not evoke OFAH to express humour about OFAH or to mock it. Any humour in OFDE came from the borrowed OFAH material.

The judge also addressed the meaning of pastiche, and held that the two essential ingredients for pastiche are that: it either imitates the style of another work or is an assemblage (medley) of a number of pre-existing works; and it is noticeably different from the original work (para 188). However, if this definition is too widely interpreted to cover any or all forms of imitation then it would stop being a ‘special’ case (under the three-step test), and would become a ‘general fair use’ provision, neither of which was intended by the EU or UK legislature (paras 189–90). OFDE’s use was not a pastiche as it neither imitated the style of OFAH nor was it a medley or assemblage. Instead it ‘takes

the characters, with their full back story and catch phrases and simply (re)presents them in a live dining format' (para 195). OFDE's use was closer in form to a reproduction by adaptation rather than a parody or pastiche.

As the first ever case on the section 30A exception since it came into force in 2014, the judgment offers a useful consideration of parody and pastiche in light of ECJ jurisprudence and academic scholarship,¹¹³ while sounding a note of caution against broad interpretation of these terms. However, it remains to be seen what sort of uses will successfully qualify for this exception.

Key points on exception for caricature, parody, or pastiche

- This exception applies to all forms of copyright work.
- The work can be used for the purposes of caricature, parody, or pastiche.
- Sufficient acknowledgement is not required.

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Exercise

Consider the case of *Société Moulinsart v Xavier Marabout* (Tribunal Judiciaire de Rennes, France)¹¹⁴ involving paintings by Marabout representing characters from Hergé's 'The Adventures of Tintin', created in the style of the American artist Edward Hopper, without permission from Moulinsart (the manager of Hergé's works). The claims of copyright and moral rights infringement were unsuccessful as the use was held to fall under the French parody exception. Would the use in question be permitted under the section 30A exception in the UK? Should it be?

Educational establishments

5.43 There are a number of exceptions in favour of educational establishments (schools, further education colleges, and universities).¹¹⁵ In the 2014 reforms, several changes were made to these exceptions in order to allow educational establishments increased use of materials in conjunction with educational licensing schemes, and teachers to deliver multimedia teaching without infringement. Two examples are the exceptions for illustration for instruction and copying and use of extracts by educational establishments.

5.44 Fair dealing with *any* copyright-protected work for the sole purpose of illustration for instruction is not infringement provided that the dealing is done by the person giving or receiving instruction or in preparation for the same, is for a non-commercial purpose, and is accompanied by a sufficient acknowledgement unless

practically or otherwise impossible.¹¹⁶ The purpose of instruction includes setting, communicating, and answering examination questions and a contractual term that purports to prevent or restrict this permitted act is unenforceable.¹¹⁷ Copying of extracts of a work by educational establishments, and communicating to its pupils and staff, is also permitted.¹¹⁸ However, there are several prescribed conditions: the copy made should be for the purposes of instruction for a non-commercial purpose and accompanied by sufficient acknowledgement; a broadcast, and an artistic work not incorporated into another work, are excluded; copying of more than 5 per cent of any work in any 12-month period is prohibited; and acts allowed under this provision are not permitted if licences for such copying are available¹¹⁹ and the educational establishment knew or ought to have known of that fact.¹²⁰ Online distance learning is now accommodated by permitting communication of a copy of an extract outside the premises of the establishment, only if made by means of a secure electronic network that is accessible only by the establishment's pupils and staff.¹²¹

Question

What steps, if any, should be taken by a school teacher wishing to distribute copies of a copyright-protected poem for discussion in her class?

p. 193 ↵ 5.45 Other exemptions for educational establishments include:

- inclusion in educational anthologies of short extracts from published literary and dramatic works;¹²²
- performing, playing, or showing works in the course of educational activities;¹²³
- recording broadcasts for educational purposes;¹²⁴
- lending of copies.¹²⁵

Education is clearly an area of activity for which dissemination of material amongst teachers and students is important, and the 2014 reforms have significantly increased the subject matter, nature, and scope of uses permitted under the provisions above. However, the permissions continue to restrict what can be freely done by and on behalf of an educational establishment for the purposes of providing instruction, and are really aimed at providing a basis upon which the real needs of the educational establishment can only be met by obtaining and paying for a licence from collecting societies acting on behalf of authors and publishers.

Libraries, archives, and museums

5.46 There are a number of exceptions in the CDPA 1988 for libraries, archives, and museums.¹²⁶ The 2014 reforms simplified and extended these exceptions to make them more suitable for the digital environment.¹²⁷ A public library does not infringe copyright in a work of any description by lending books, audiobooks, or e-books within the Public Lending Right scheme,¹²⁸ while libraries and archives other than public libraries, not conducted for profit, likewise do not infringe copyright by lending copies of the work.¹²⁹ Librarians, of libraries not conducted for profit, are permitted to make and supply readers with a single copy of published works for the purposes of private study or non-commercial research, subject to prescribed conditions.¹³⁰

Further, libraries, archives, museums, and educational establishments, are also permitted to communicate or make available to individual members of the public works by means of a dedicated terminal on its premises, for the purposes of research or private study, subject to prescribed conditions.¹³¹ This new exemption is geared to enabling access to digital copies of books, sound recordings, and images through cultural institutions. Libraries, archives, and museums are also permitted to make replacement copies of works from their permanent collection subject to prescribed conditions,¹³² enabling them to preserve their collections. They can also supply single copies of works to other libraries.¹³³

Deposit libraries

5.47 The Legal Deposit Libraries Act 2003 is the current provision under which those who publish print material in the UK can be required to deposit a copy of the publication with each of the following libraries: the British Library, the National Libraries of Scotland and Wales, the Bodleian Library, Oxford, the Cambridge University Library, and the Library of Trinity College Dublin. The deposit rights have existed since the eighteenth century; the purpose of the 2003 Act was to extend the deposit obligation beyond print, and in particular to non-print works published on the internet. In order to facilitate the capture of internet material for the deposit libraries, the Act introduced an exception allowing them to make copies of such material for the purpose.¹³⁴

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Key points on libraries, archives, and museums

- Libraries receive some special exemptions in relation to their lending activities.
- Libraries, archives, and museums are also enabled to provide access to works to readers for their private study or research.
- There are six ‘copyright libraries’, each entitled to receive a copy of every copyright work printed in the UK, and a framework for collecting non-print works is also in operation.

Provisions for disability

5.48 The InfoSoc Directive 2001 allows ‘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’.¹³⁵ As originally passed in 1988, the CDPA contained provisions enabling designated bodies to make copies of broadcasts and issue them to the public with subtitles for the deaf and hard of hearing, or otherwise modified for the special needs of those physically or mentally handicapped in other ways.¹³⁶ The 1988 Act was supplemented in 2002, and again simplified and supplemented by the 2014 reforms, which broadened the provisions.¹³⁷ In May 2018, the UK government launched a public consultation for implementation of the Marrakesh Directive (see para 5.11).¹³⁸ It indicated the government’s intended approach to not discriminate between people with different types of disability, and its intention to apply changes in general to the provisions in the 1988 Act, even though the Directive’s focus is narrower. The Directive was implemented in

the UK in October 2018,¹³⁹ broadening the existing provisions even further; for example, previously the exceptions did not apply if a commercial accessible format copy of a work was available, but the commercial availability provisions have now been deleted. The consultation had also sought views on whether, and if so how, the UK should implement a form of compensation scheme for rightholders, an option in the Directive. However, the government decided not to implement a compensation scheme due to lack of robust evidence of harm to rightholders and the government's desire for fair outcomes for authorised bodies, that is, to not subject UK-based bodies to a compensation scheme when those based outside the UK are not subject to the same obligations.¹⁴⁰ The UK's implementation of both the EU Marrakesh Treaty Directive and Regulation has been retained in UK law.¹⁴¹ Although the UK was only party to the Marrakesh Treaty via the EU, it has ratified the treaty in its own capacity since leaving the EU.¹⁴²

5.49 There are two types of exceptions for disability.¹⁴³ A disabled person, or a person acting on their behalf, is permitted to make accessible copies of a work for the personal use of a disabled person, provided that the disabled person has lawful access to a copy of the work, and the person's disability prevents them from enjoying the work to substantially the same degree as a person who does not have that disability.¹⁴⁴ Further, p. 195 authorised bodies that have lawful access to a published work may make, communicate, distribute, or lend, accessible copies of the work on a non-profit basis for the personal use of disabled persons in the UK.¹⁴⁵ Authorised body means an educational establishment, or a body that is not conducted for profit.¹⁴⁶ Disability includes both physical and mental impairments which prevent the person from enjoying a work to substantially the same degree as a person who does not have that impairment.¹⁴⁷

Public administration

5.50 Copyright is not infringed by a number of actions which are grouped under the heading of public administration.¹⁴⁸ Again, this is permitted under the InfoSoc Directive 2001,¹⁴⁹ as use for the purpose of 'public security'¹⁵⁰ or to ensure the proper performance or reporting of administrative, parliamentary, or judicial proceedings. Only one example, perhaps of particular pertinence to law students and lawyers, will be given here. Anything done for the purpose of reporting parliamentary or judicial proceedings does not infringe copyright; but this does not authorise the copying of a work which is itself a published report of the proceedings (eg Hansard, a law report).¹⁵¹

Incidental inclusion

5.51 Copyright in a work is not infringed by its incidental inclusion in an artistic work, sound recording, film, or broadcast:¹⁵² for example, the inclusion in the background of an informal photographic portrait of a painting or sculpture, or its appearance in the background of a television broadcast. Copyright is not infringed by the issue to the public of copies (eg videos of the broadcast), or the playing, showing, or broadcasting or communication to the public of such a work.¹⁵³ A musical work, words spoken or sung with music, or so much of a sound recording, or broadcast as includes a musical work or such words, is not to be regarded as incidentally included in another work if it is deliberately included¹⁵⁴—for example, as part of background noise in a film or television production; thus, copyright permission will be required.

■ ***FA Premier League v Panini [2004] FSR 1 (CA)***

P distributed an unofficial football sticker album and a sticker collection of pictures of players from Premier League clubs wearing team strips showing the Premier League logo or the logo of a Premier League club. FAPL, acting on behalf of the clubs, had granted exclusive rights to T, to use and reproduce the official team logos in stickers and albums. It was held at first instance that there was infringement. The use of the logos was not incidental, meaning casual or of secondary importance, but integral to showing the footballer in his current strip. An appeal was dismissed. ‘Incidental’ did not mean only unintentional or non-deliberate inclusion, and the question had to be answered by considering the circumstances in which the relevant artistic work was created. There was no necessary dichotomy between ‘incidental’ and ‘integral’. Where a copyright-protected artistic work appeared in a photograph because it was part of the setting in which the photographer found his subject, it could properly be said to be an integral part of that photograph. In order to test whether the use of one work in another was incidental, it was proper to ask why it had been included in the other, considering both commercial and aesthetic reasons. Applying that test, it was evident that the use of the team and Premier League logos in the stickers was not incidental. Further, the defence would probably not apply to the albums since they were arguably literary works.

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Question

What does ‘incidental’ mean in this context?

Representation of certain artistic works on public display

5.52 Alongside the rule of incidental exclusion exception should be considered the exception permitting certain acts in respect of buildings, sculptures, models for buildings, and works of artistic craftsmanship (three-dimensional works) which are situated permanently in a public place or in premises open to the public: they may be made the subject of a graphic work, a photograph or film, or included in a broadcast as a visual image without their copyright being infringed thereby.¹⁵⁵ Copyright is not infringed by the issue to the public of copies (eg videos of the broadcast), or the communication to the public of such a work.¹⁵⁶

Discussion point 1

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-5-guidance-on-answering-the-discussion-points?options=showName>>.

Is ‘incidental inclusion’ really an exception to copyright? Or does it just follow from the definitions of copyright and infringement thereof?

Discussion point 2

If I take a photograph of my family against the background of a statue in a city square in order to create a striking overall image, is the sculptor’s copyright infringed? Is it any different from taking a picture of a well-known actor against the background of a sculpture in his home because I think the statue symbolises something of the actor’s personality?

Text and data analysis

5.53 The Hargreaves Review noted that copyright can inhibit use of valuable new technologies like text and data mining which requires copying of large amount of data, in order to computationally find patterns and associations that would assist researchers (eg text analysis, through a computer software, of a large number of research articles describing malaria in different communities, could identify useful relationships and provide significant insights for prevention of malaria today). It recommended extension of exceptions to enable use of analytics for non-commercial use. The 2014 reforms introduced a new exception which permits the making of a copy of a work by a person who has lawful access to the work provided that the copy is made for the person to carry out a computational analysis of anything recorded in the work for the sole purpose of research for a non-commercial purpose.¹⁵⁷ The copy should be accompanied by sufficient acknowledgement unless this would be impossible for reasons of practicality or otherwise. Transfer of the copy to any other person, or use of the copy for any other purpose, is infringement unless authorised by the copyright owner. The person must have lawful access to the work, for instance, through a sale or licence. A contractual term that purports to prevent or restrict this permitted act is unenforceable. There is no fairness requirement for the exception to apply.

p.197 ↵ **5.54** This exception has gained particular relevance for the use and development of artificial intelligence (AI) as AI systems are trained by the process of text and data mining. The UK government wants the country to be at the forefront of AI and a policy issue is whether the copyright framework should be amended to make it easier for AI systems to use protected content in a commercial context.¹⁵⁸ The UK introduced the section 29A exception for research ‘for a non-commercial purpose’, in light of the limitations

of EU framework at the time.¹⁵⁹ However, the EU has since introduced a corresponding but more broadly formulated exception in this area through Article 4 of the Copyright Directive 2019.¹⁶⁰ It provides an exception for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining, on the condition that such use has not been expressly reserved by the rightholder in an appropriate manner (eg by machine-readable means in the case of content made publicly available online). The exception contains no restrictions on commercial use. The UK is not required to implement this (para 5.14). As such a policy issue is whether the section 29A exception should be amended to permit text and data analysis for commercial purposes, particularly with a view to incentivise investment in and development of AI.

Exercise

The UK IPO ran a consultation on AI and IP between October 2021 and January 2022¹⁶¹ to seek evidence and views, *inter alia*, on five options for the current text and data analysis exception:

make no legal change to the existing exception; improve the licensing environment for the purposes of text and data mining; extend the existing exception to cover commercial research; adopt an exception for any use with a rights holder opt out; or adopt an exception for any use with no possibility for rights holder opt out.

Which of these options do you support and why? Find out the outcome of the IPO's consultation. Have any recommendations been made or implemented to change the existing text and data analysis exception? Do they achieve a balance between the competing interests of authors, copyright owners, and developers and users of AI systems?

Lawful uses of computer programs

5.55 A lawful user of a computer program (meaning someone who has a right to use it, whether under a licence or otherwise, eg under a fair dealing exception) who does the following things with the program is not infringing copyright:

- makes a *back up* copy necessary for his lawful use (CDPA 1988, s 50A);
- *decompiles* the program (ie converts it from a low-level language (object code) to a high-level one, incidentally copying it in the process), for the sole purpose of obtaining the information necessary to enable the creation of another program which will be interoperable with the original one (CDPA 1988, s 50B);
- *observes, studies, or tests* the functioning of the program to determine its underlying ideas and principles, while loading, displaying, running, transmitting, or storing the program as entitled to do (CDPA 1988, s 50BA);¹⁶²

- *copies or adapts as necessary for lawful use*, and so far as not contractually prohibited, in particular for the purpose of *error correction* (CDPA 1988, s 50C).

p. 198 ↵ Only the last of these is subject to any overriding contractual clause; in the other three cases, such clauses are void.¹⁶³

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-5-guidance-on-answering-the-discussion-points?options=showName>>.

To what extent may the exceptions for lawful use of computer programs be compared with fair dealing for purposes of private study and non-commercial research?

Time-shifting

5.56 The development of the video recorder as a consumer item made it normal for individuals to be able to make copies of television programmes which can be viewed later at a more convenient time than that scheduled by the broadcasting authority. This is commonly known as ‘time-shifting’. Such activities do not constitute infringement of copyright either in the broadcast or in any work included in it—for example, a film—as long as carried out in domestic premises for private and domestic use.¹⁶⁴ The provision also applies to audio-taping of a radio broadcast.¹⁶⁵ Similarly, the making for private and domestic use of a photograph of the whole or any part of an image forming part of a television broadcast, or a copy of such a photograph, does not infringe any copyright in the broadcast or in any film included in it.¹⁶⁶ Selling or otherwise dealing with a copy made under these provisions will become an infringement of copyright.¹⁶⁷

Further issues for reform

Private copying

5.57 There is no exception in favour of ‘place-shifting’ in the UK for private and domestic use in relation to copyright works, akin to that in existence for ‘time-shifting’ for broadcasts, that is, allowing the owner of a lawful copy of a sound recording or film to make copies usable on other machinery; for example, copy a CD held in the house to obtain a copy to keep in the car, or in a portable playing device. A private copying exception, provided that fair compensation is paid to the rights holder, is allowed within the EU framework (InfoSoc Directive, Art 5(2)(b)).¹⁶⁸ The requirement for fair compensation has meant that in many of the EU states where this exception has been introduced, it has been done so alongside a levy system. The idea being that levies are imposed on equipment used for private copying, for example on blank CDs, the proceeds of which are then fed back to the rightholder to compensate for the exception to their right. Historically, there

had been no private copying exception in the UK. The Gowers Review 2006 recommended the non-retrospective introduction of a limited private copying exception for this purpose, confined to ‘format-shifting’ such as transferring a CD to an MP3 player or a video cassette to a DVD. Noting that in many other member states of the EU such exceptions were funded by levies on the sale prices of the relevant equipment, from which copyright owners were then remunerated, the Review argued that owners themselves could set sale prices at levels reflecting the additional use conferred by the new exception. The Hargreaves Review 2011 also recommended the introduction of a limited private copying exception to allow making of copies by individuals for their own and immediate family’s use on different media. The government consulted on the p. 199 impact of a potential exception and concluded that if it introduced a narrow exception limited to personal use, rather than use by friends and family, there would be no harm to the rightholder and hence no need for a levy, the main argument being that the sellers had already priced in to the initial sale price any loss made from an infringing private copy.

5.58 In October 2014, a new private use exception was introduced in the UK¹⁶⁹ without a compensation scheme but it was subsequently repealed, and was only in force for a short period. The exception required several conditions to be met: first, the person must be an individual, not a corporate entity. Secondly, it must be ‘the individual’s own copy of the work’ and they must have acquired the copy lawfully.¹⁷⁰ Thirdly, they must hold that copy on a permanent basis, rather than it being loaned by a friend, for example.¹⁷¹ Finally, the copy could only be made for the user’s private use and not have a commercial end.¹⁷² Moreover, any contract which seeks to restrict or override the exception would be unenforceable.¹⁷³ The decision to not implement a levy scheme, however, proved controversial. In November 2014 several representatives of various authors and right owners applied for judicial review of the new section 28B, claiming it was incompatible with Article 5(2) (b) as it did not provide fair compensation.¹⁷⁴ They argued that the evidence the government had relied on to decide that no harm would come to rightholders, and hence no compensation was necessary, was inadequate. The Court agreed with the claimants, on the basis that the conclusions and inferences drawn from the evidence were not justified and the decision to introduce section 28B without a compensation mechanism was unlawful. In a further judgment, on 17 July 2015, the Court ordered that section 28B be quashed with prospective effect.¹⁷⁵ While an exception for private copying corresponds to what consumers are already doing, such acts became unlawful again in the UK after the repeal of section 28B. A policy issue then is whether private copying should be legalised in the UK, and whether this should be with a levy system.

Discussion point

For answer guidance visit www.oup.com/he/brown6e <<https://iws.oupsupport.com/ebook/access/content/brown6e-student-resources/brown6e-chapter-5-guidance-on-answering-the-discussion-points?options=showName>>

Is ‘place-shifting’ as legitimate as ‘time-shifting’? Ought there to be such an exception to copyright?

Orphan works

5.59 The problem of orphan works (para 6.46) was partially alleviated by EU's Orphan Works Directive (para 5.11) permitting certain cultural heritage organisations (CHIs) to digitise orphan works for non-commercial use throughout the EU. In October 2014, a new permitted act was introduced in the UK,¹⁷⁶ which permitted UK CHIs (eg a publicly accessible library, an educational establishment, museum, or an archive) to copy certain types of orphan works in their collections and make them available to the public without the permission of the right owner.¹⁷⁷ The use was required to be non-commercial (eg relate to the institution's public interest mission) and the institutions required to carry out a diligent search. This UK exception was repealed on withdrawal from the EU.¹⁷⁸ This means that UK CHIs are no longer able to rely on the exception, and had to remove any orphan works previously placed online under the exception. UK CHIs who now to wish p. 200 to make orphan works available online would need to pursue other options such as seek a licence under the UK's orphan works licensing scheme (para 6.48), and if so, to limit access to UK users. However, the licensing scheme might be unsuitable for the needs of CHIs, or incapable of addressing the intended purpose of the exception, which was to facilitate dissemination of orphan works online for *public benefit*.¹⁷⁹ A policy issue then is whether this repeal was desirable and whether an exception, or a different solution, should be adopted for CHIs.

Exercise

Look at Articles 5, 6, and 14 of the Copyright Directive 2019? Does the UK need reform or clarification of existing rules in any of those areas? Should the UK introduce any changes similar to, or inspired by, these provisions?

Specific or open-ended exceptions

5.60 A significant amount of copyright reform in the UK in the past two decades has been aimed at broadening the nature and scope of exceptions and limitations. A policy issue as such is whether further exceptions are necessary in the digital context. The Gowers Review 2006 had boldly recommended an exception for creative, transformative, or derivative works within the Berne three-step test, to legitimise clearly the reworking of existing material for a new purpose or to give it a new meaning, and to align the law with that of the United States. The transformative use would have to be such as not to prejudice the market or the artistic integrity of the work so used. At the time, the InfoSoc Directive 2001 did not permit such an exception. Having left the EU, the UK can now choose to introduce further specific exceptions such as the one recommended by the Gowers review, to improve access to works for creative and transformative uses, and to reflect the realities and practice of appropriation and remixing in the digital environment.

5.61 Unlike the UK approach of permitting a range of specific exceptions, the approach of the US copyright statute is to provide a general 'fair use' defence covering purposes 'such as' criticism, comment, teaching, scholarship, and research, and indicating that factors to be taken into account 'include' such matters as

whether the use is of a commercial nature or for non-profit educational purposes, the amount and substantiality of the portion used in relation to the whole work, and the effect of the use upon the market or value of the copyright work. The very openness of the defence makes it vulnerable to the charge that it creates uncertainty. A proposal for such a general fair use exception to be included in the InfoSoc Directive was rejected during its negotiation. In the UK, both Gowers and Hargreaves were asked to consider whether fair use would be beneficial in the UK. The Hargreaves Review 2011 rejected this because there were genuine legal doubts about viability of transposing fair use into the UK legal framework which is based in a European context. Instead, it recommended the use of all copyright exceptions at national level which are allowed in the EU by the InfoSoc Directive. However, a policy issue is whether the approach of carving out an ever-growing list of specific exceptions is ill-suited for dealing with very rapid technological and societal changes, and whether the UK should re-consider a broad, fair-use style exception, now that it has left the EU.

Exercise

Consider the current range of exceptions in the UK and also the need to create a copyright law appropriate to the digital environment. What do you think remain important challenges for users of copyright works, what would your solutions be, and how would you justify them?

p. 201 **Other limitations on copyright**

Public interest and public policy

5.62 The 1988 Act saves various rights and privileges in general terms as unaffected by its provisions.¹⁸⁰ For instance, it is provided that nothing in the Act affects the law on breach of trust or confidence,¹⁸¹ or any rule preventing or restricting the enforcement of copyright on grounds of public interest or otherwise.¹⁸² The *public policy* concept is that certain types of work—pornography or material published in breach of a lifelong obligation of secrecy, for example—are undeserving of the protection of copyright because it would be against public policy to protect them and the Court can refuse to enforce copyright on public policy grounds.¹⁸³ A second limitation is one which allows otherwise infringing acts—or enables dissemination—on the ground that they are in the *public interest*.¹⁸⁴ In a pre-CDPA case, it was held that a public interest defence, which had been well established in the law of confidential information, also extended to copyright.¹⁸⁵ However, the existence of this defence since then has been contested and its scope remains uncertain.¹⁸⁶

■ ***Hyde Park Residence Ltd v Yelland [1999] RPC 655 (Jacob J); [2000] RPC 604 (CA)***

Jacob J held that a public interest defence existed and was applicable against a private individual (Mohammed al-Fayed), enabling the defendant to counter misleading public statements about how much time Princess Diana and Dodi al-Fayed had spent at the 'House of Windsor' in Paris on the day of their deaths. He formulated the test as being one of reasonable certainty that no right-thinking member of society would quarrel with the result.¹⁸⁷ But this was overturned by the CA, the majority (Aldous and Stuart-Smith LJ) holding that (1) the Act does not give the Court a general power to enable an infringer to use another's copyright in the public interest, but the courts have 'an inherent jurisdiction to refuse to allow their process to be used in certain circumstances' and this inherent jurisdiction is preserved by section 171(3) (paras 43–44); (2) the circumstances in which copyright would not be enforced, because it be against the policy of the law, must derive from the work itself (ie its immoral character or deleterious effects) rather than from the conduct of the owner of copyright; and (3) the considerations arising in breach of confidence cases, where the courts balanced the public interest in maintaining confidentiality against the public interest in knowledge of the truth and freedom of expression, were different from copyright ones, where property rights were involved and the legislation already provided fair dealing defences in the public interest. It should not be possible for public interest to uphold as legitimate an act that had been found, as in this case, not to be fair dealing (see para 5.39).¹⁸⁸ While generally agreeing with this approach, the third member of the Court, Mance LJ, indicated that there might be cases where a public interest dimension did arise from the ownership of the work, although this was not such a case.¹⁸⁹

■ ***Ashdown v Telegraph Group Ltd [2002] ECC 19 (CA)***

The approach of Mance LJ was preferred by a subsequent Court of Appeal in this case (see para 5.39). The Court held that section 171(3) of the CDPA permitted a defence of public interest to be raised, noting that:

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... we do not consider that Aldous LJ was justified in circumscribing the public interest defence to breach of copyright as tightly as he did. We prefer the conclusion of Mance LJ that the circumstances in which public interest may override copyright are not capable of precise categorisation or definition ...

↳ We do not consider that this conclusion will lead to a flood of cases where freedom of expression is invoked as a defence to a claim for breach of copyright. It will be very rare for the public interest to justify the copying of the form of a work to which copyright attaches (paras 58–59).

The Court emphasised in particular the public interest in freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), albeit on the facts of the case it was held that the defence was not made out, since the newspaper had extracted from Mr Ashdown's diaries 'colourful passages ... likely to add flavour to the article and thus to appeal to the readership of the newspaper ... for reasons that were essentially journalistic in furtherance of the commercial interests of the Telegraph Group' (para 82) rather than in the public interest.

In *HRH The Prince of Wales v Associated Newspapers Ltd (No 3)*,¹⁹⁰ it was held that the unauthorised publication in a newspaper of extracts from the Prince's unpublished journals was not justified by any public interest defence, such as making more widely known the political views of the heir to the throne in relation to an important foreign power (the People's Republic of China). The Court of Appeal noted that it would be rare for a case on public interest to succeed where the fair dealing defences had been found inapplicable. Public interest also rarely justified copying content rather than simply referring to the information therein. Recent cases appear to confirm that a common law defence of public interest exists, but it will only be in very rare instances where public interest will 'trump' the right of the copyright owner.¹⁹¹

Exercise 1

Explain the distinction between 'public policy' and 'public interest', if any. What difference does it make?

Exercise 2

Should pornography be unprotected by copyright? Does this encourage or discourage freedom of expression?

Human rights and exceptions to copyright

5.63 How do human rights interact with exceptions to copyright?¹⁹² Does the Human Rights Act (HRA) 1998 and its incorporation of specific rights and freedoms under the ECHR have an impact on the UK courts' assessment of exceptions?¹⁹³ In *Ashdown v Telegraph Group*,¹⁹⁴ the Court of Appeal held that exceptions to copyright must be read in the light of the ECHR. The *Sunday Telegraph* newspaper had published unlicensed extracts from the diaries of Paddy Ashdown, the former Liberal Democrat leader. The issue concerned the impact of the Article 10 right to freedom of expression under the ECHR upon the fair dealing defences to claims of infringement under the CDPA 1988. At first instance Sir Andrew Morritt V-C held that the fair dealing provisions of the statute in themselves satisfied the requirements of Article 10 and that there was no need to bring into play section 3 of the HRA 1998 (which requires statutes to be interpreted as far as possible in consistency with Convention rights):¹⁹⁵

[T]he balance between the rights of the owner of the copyright and those of the public has been struck by the legislative organ of the democratic state itself in the legislation it has enacted. There is no room for any further defences outside the code which establishes the particular species of intellectual property in question.

The Court of Appeal concluded, however, that:¹⁹⁶

rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the Copyright Act, notwithstanding the express exceptions to be found in the Act. In these circumstances, we consider that the court is bound, insofar as it is able, to apply the Act in a manner that accommodates the right of freedom of expression.

This view must be correct under section 3 of the HRA 1998. The Court went on to observe that, at least in this case, the approach required could be fulfilled, not so much through examination of the statutory language as such, as by way of the remedies granted to enforce the legislation: in the particular case, by withholding the discretionary relief of an injunction and leaving the copyright owner to a damages claim or an account of profits.¹⁹⁷ Further, while the statutory defences and the judicial precedents elaborating upon their application fell to be reconsidered in the light of Article 10, this did not require the defendant to be able to profit from the use of another's copyright material without paying compensation. The political interest of the matters discussed and freedom of expression under Article 10 of the ECHR did not justify deliberate filleting of and selection of the most colourful passages from the Ashdown diary.

■ **BBC, Petitioners (in the case of HM Advocate v Hainey) [2012] SLT 476**

B sought to engage the right of freedom of expression to access photos lodged as Crown productions in H's trial for the murder of H's son. H objected on the basis of ownership of copyright in the photos. B was successful in gaining access to photos of the son only. The Court suggested that the permitted act provisions in the CDPA 1988, particularly fair dealing provisions, usually provide a defence where there is a potential conflict between Article 10 rights and the rights of the copyright owner; but there are 'exceptional and rare' cases where this is not the case, even if the CDPA 1988 is given a generous interpretation to accommodate the right (para 24).¹⁹⁸ The Court also stated *obiter* that 'were it necessary to do so, the public interest in the proper and full reporting of this case is sufficient to "trump" any right of the copyright owner' (para 26).

■ **Ames v Spamhaus Project Ltd [2015] EWHC 127 (QB)**

C, owner of S claimed copyright infringement against A, for placing a photograph of him on a website and naming him on a list of the world's worst spammers. A argued the publication of the photograph was in the public interest. The Court considered the competing Article 8 right of C with A's right to freedom of expression, but refused to strike out the claim and observed that it is clear law that a defence of public interest exists, but it will be rare for it to justify copying, although 'the implications of the Human Rights Act 1998 must always be considered when an injunction is sought' (para 57).

Exercise

What other ECHR rights apart from freedom of expression (Art 10) might be relevant to copyright exceptions?

p. 204 No derogation from grant

5.64 In *British Leyland v Armstrong Patents*,¹⁹⁹ the House of Lords declared that a copyright owner could be deprived of his rights where their exercise was in 'derogation from grant'. The context was the manufacture and supply to consumers of spare parts for cars, to which the car manufacturers took objection by means of copyright. The House found that car owners had a right to repair their vehicles, and that the car manufacturers could not exercise their copyright so as to prevent third parties enabling the owners to exercise their own separate and pre-existing rights as cheaply as possible. This was founded on the general

legal principle of ‘no derogation from grant’, established in the context of leases, sales of goodwill, and easements or servitudes. It had never been previously applied to copyright, and the reasoning of the House on the point is unsatisfactory. The Privy Council has since indicated that the principle should be interpreted very narrowly in copyright law, and that it is really based on public policy.²⁰⁰ The defence was also unsuccessful in a case concerning reverse engineering of computer programs and databases.²⁰¹ Although there is nothing in the 1988 Act that affects this defence, it is understood to be of less importance now.²⁰²

User rights

There has been little discussion in the UK to compare with a US and Canadian debate as to whether the rules on permitted acts merely provide defences to claims of infringement or are free-standing user or public rights.²⁰³ The difference is important because, if the permitted acts are substantive ‘user rights’, then the copyright owner should not be able to prevent actions designed to exercise them. But if the permitted acts are merely defences, then they can be invoked only when the copyright owner sues for infringement. The 1988 Act does say that its provisions on permitted acts: ‘relate only to the question of infringement of copyright and do not affect any other right or obligation restricting the doing of any of the specified acts’.²⁰⁴

This is clearly against the notion that the permissions are to be seen as user rights. Further, the UK approach, of laying down carefully specified, extensive, and detailed exceptions is also not really consistent with the idea that such permitted acts are ‘user rights’ (see paras 5.5–5.7). However, recent ECJ jurisprudence on exceptions and limitations uses the language of rights of users, and the need to achieve a ‘fair balance’ between the rights and interests of authors on the one hand, and the rights of users on the other (see para 5.13).

Discussion point 1

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Is there a real difference between acts which are not within the scope of copyright at all and acts which are permitted as exceptions to copyright? Is this important in the context of the idea of ‘user rights’?

Discussion point 2

Can you distinguish between ‘fair dealing’ and ‘public interest’ exceptions to copyright?

Contracting out of the exceptions?

5.65 An important issue for protection of users’ interests is whether exceptions and limitations prevail over contrary contractual provision, contained, for example, in a copyright licence. To put it another way, can one contract out of exceptions?²⁰⁵ Article 9 of the InfoSoc Directive 2001 indicates that its provisions are without prejudice to, amongst others, the law of contract, applicable in the member states. This seems to suggest that, at least in some circumstances, contractual provision may eliminate copyright exceptions. The Software Directive notably lays down that most of the exceptions to copyright in computer programs—in particular, making back-up copies, decompilation and observation, studying, and testing—cannot be overcome by contractual agreement.²⁰⁶ The unargued assumption in the UK had been that exceptions prevail over contract but this assumption was ill-founded, at least as a generalisation. The Hargreaves Review in 2011 noted that ‘at present it is possible for rights holders licensing rights to insist, through licensing contracts, that the exceptions established by law cannot be exercised in practice’ and recommended that the government should make exceptions mandatory and legislate to make it clear that contract cannot override copyright exceptions.²⁰⁷ It cited a study by the British Library that had demonstrated that contracts often overrode copyright exceptions in practice. Consequently, the 2014 reforms introduced several provisions to this effect (see para 5.67).

5.66 The current framework of exceptions in the UK contains two types of provisions. On the one hand, there are provisions that suggest that copyright licensing and contractual terms prevail over exceptions and limitations in certain circumstances. For example, the exception enabling educational establishments to make a limited quantity of copies of works for purposes of instruction does not apply if a licence for such activity is available (para 5.44).²⁰⁸ There is also an introductory provision on exceptions, which might be read as meaning that beyond the permitted acts may lie, unaffected, other rights or obligations restricting the doing of any of the specified acts.²⁰⁹ Another example of contract prevailing over exceptions relates to the permitted act of temporary reproduction or adaptation of a computer program necessary for a lawful user’s lawful use of the program: a term of any contract regulating the circumstances in which the user’s use is lawful, and prohibiting the copying or adaptation in question will make those acts infringements (para 5.20).²¹⁰

5.67 On the other hand, there are several provisions emphasising that contract does *not* prevail over exceptions and limitations in certain circumstances. For instance, any term or condition of an agreement purporting to prohibit the permitted act of temporary reproduction of a database necessary for the purpose of access to and normal use of the database contents by a person with a right to use the database is void.²¹¹ A number of other acts in relation to computer programs which are permitted to a lawful user thereof cannot be overridden by contract: that is, making a back-up copy of the program;²¹² decompilation;²¹³ and observing,

studying, or testing the functioning of the program.²¹⁴ As a result of 2014 reforms, any contractual term that purports to prevent or restrict the permitted acts of research for non-commercial purpose, private study, quotation, parody, caricature and pastiche, text and data analysis, and illustration for instruction, is unenforceable.²¹⁵

5.68 Overall, this seems to reflect the view of Burrell and Coleman that it is:²¹⁶

generally possible to contract out of the permitted acts. There is, however, a growing list of circumstances in which it is not possible to contract out of the permitted acts, Parliament and the European legislator having recognised that it ought not to be possible to exclude the exceptions in certain circumstances.

They argue that such a piecemeal approach is preferable to the inflexibility which would arise from a blanket prohibition on contractual exclusion of the permitted acts.²¹⁷ It would be better, in their view, to distinguish types of use, those excludable by contract and those not.²¹⁸

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Question

As a result of reforms in 2014, any contract that purports to prevent or restrict the permitted acts of research for non-commercial purpose, private study, quotation, parody, caricature and pastiche, text and data analysis, and illustration for instruction, is unenforceable. However, similar provisions were not introduced with respect to, arguably important, fair dealing exceptions for criticism and review or current events. Should this anomaly in the current law be rectified? Is it symptomatic of a wider problem of lack of codification of copyright law in the UK (resulting from the CDPA being amended numerous times in a piecemeal fashion)?

Further reading

Books

S Balganesh, NW Loon, and H Sun (eds), *The Cambridge Handbook of Copyright Limitations and Exceptions* (2021)

L Bently, B Sherman, D Gangjee, and P Johnson, *Intellectual Property Law* (6th edn, 2022), Ch 9

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

N Caddick, G Harbottle, and U Suthersanen (eds), *Copinger & Skone James on Copyright* (18th edn, 2021), Ch 9

G Davies, *Copyright and the Public Interest* (2nd edn, 2003)

C Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (2015)

5. Copyright 4: exceptions and limitations

J Griffiths and U Suthersanen (eds), *Copyright and Free Speech* (2005)

LMCR Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (2002)

S Jacques, The Parody Exception in Copyright Law (2019)

D Llewelyn and T Aplin, Cornish, Llewelyn and Aplin Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights (9th edn, 2019), Chs 12.3, 12.4, 14.1, 14.2

RL Okediji (ed) *Copyright Law in an Age of Limitations and Exceptions* (2017)

M Senftleben, *Copyright Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (2004)

C Waelde and HL MacQueen (eds), *The Many Faces of the Public Domain* (2007)

Articles

H Cohen Jehoram, 'Is there a hidden agenda behind the general non-implementation of the EU three-step test?' [2009] EIPR 408

AW Dnes, 'Should the UK move to a fair-use copyright exception?' [2013] IIC 418

C Geiger, G Frosio, and O Bulayenko, 'The EU Commission's proposal to reform copyright limitations: a good but far too timid step in the right direction' [2018] EIPR 4

C Geiger, DJ Gervais, and M Senftleben, 'The three-step-test revisited: How to use the test's flexibility in national copyright law' (2014) 29(3) American University Int Law Rev 581.

E Hudson, 'The pastiche exception in copyright law: a case of mashed-up drafting?' [2017] IPQ 346

D Jongsma, 'Parody after Deckmyn—a comparative overview of the approach to parody under copyright law in Belgium, France, Germany and the Netherlands' [2017] IIC 652

A Sims, 'Strangling their creation: the courts' treatment of fair dealing in copyright law since 1911' [2010] IPQ 192

Notes

¹ See in general G Davies, *Copyright and the Public Interest* (2nd edn, 2003); LMCR Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (2002); R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (2005); RL Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (2017).

² See *Exxon Corp v Exxon Insurance* [1982] Ch 119.

³ CDPA 1988, s1(1)(a). See also para 3.5.

⁴ See generally C Waelde and HL MacQueen (eds), *The Many Faces of the Public Domain* (2007), and references therein.

⁵ W Davies and K Withers, *Public Innovation: Intellectual Property in a Digital Age* (Institute of Public Policy Research, 2006); see also MD de Rosnay and JC de Martin (eds), *The Digital Public Domain: Foundations for an Open Culture* (2012).

⁶ CDPA 1988, Chapter III, ss 28–76.

⁷ US Copyright Act 1976, s 107.

⁸ For a recent discussion on whether the UK should adopt ‘fair use’, see I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/preview-finalreport.pdf (http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/preview-finalreport.pdf) (Hargreaves Review). See also paras 5.16 and 5.61.

⁹ See, eg, the German Copyright Act (*Urheberrechtsgesetz*) 1965, as last amended in 2021, ss 53, 54, and 54a–h.

¹⁰ See paras 5.57–5.58 for further details.

¹¹ TRIPS, Art 13.

¹² Report of the WTO Panel dated 15 June 2000, WT/DS160/R. See further C Geiger, J Griffiths, and RM Hilty, ‘Towards a balanced interpretation of the “three-step test” in copyright law’ [2008] EIPR 489. C Geiger et al, ‘The three-step-test revisited: How to use the test’s flexibility in national copyright law’ (2014) 29(3) American University Int Law Rev 581.

¹³ Although Art 5(3)(o) permits member states to provide for ‘use in certain other cases of minor importance where exceptions already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community’ (emphasis added).

¹⁴ See recital 32, Case C-516/17 *Spiegel Online v Beck* [2019] ECDR 24 at para 49, Case C-469/17 *Funke Medien v Bundesrepublik Deutschland* [2019] ECDR 25 at para 64, Case C-476/17 *Pelham v Hüttner* [2019] ECDR 26 at para 65.

¹⁵ Although recent ECJ jurisprudence has achieved more harmonisation by clarifying key concepts underpinning such optional exceptions.

¹⁶ Copyright and Related Rights Regulations 2003 (SI 2003/2498).

¹⁷ Software Directive 2009 (Software Directive 1991 was consolidated into Directive 2009/24/EC and unless stated otherwise, all references will be to the latter directive), Arts 5, 6; Database Directive 1996, Arts 6, 9.

¹⁸ Directive 2012/28/EU on certain permitted uses of orphan works.

¹⁹ Directive (EU) 2017/1564 on certain permitted uses 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.

²⁰ 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.

²¹ Database Directive 1996, Art 6(3); InfoSoc Directive 2001, Art 5(5); Marrakesh Treaty Directive 2017, Art 3(3); Software Directive 2009, Art 6(3).

5. Copyright 4: exceptions and limitations

²² *England and Wales Cricket Board v Tixdaq* [2016] EWHC 575 (Ch) at para 72. This is because the ECJ, in its preliminary rulings on exceptions, has sometimes separately considered the three-step test in InfoSoc Directive 2001, Art 5(5) (see Case C-360/13 in para 5.19) and at other times not.

²³ *England and Wales Cricket Board v Tixdaq* [2016] EWHC 575 (Ch) at para 71; see also Case C-516/17 *Spiegel Online v Beck* [2019] ECDR 24 at para 53.

²⁴ Case C-516/17 *Spiegel Online v Beck* [2019] ECDR 24 at paras 54–55; see also Case C-469/17 *Funke Medien v Bundesrepublik Deutschland* [2019] ECDR 25.

²⁵ See C-201/13 *Deckmyn v Vandersteen* [2014] ECDR 21 at paras 15–16 and 35 for these points.

²⁶ Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market, Arts 3–6.

²⁷ Nor does the UK government intend to. See UK Parliament, ‘Copyright: EU Action’, Question for Department for Business, Energy and Industrial Strategy, 16 January 2020 available at <https://questions-statements.parliament.uk/written-questions/detail/2020-01-16/4371>.

²⁸ Albeit while complying with relevant international frameworks eg Berne Convention Arts 9(2), 10; TRIPS, Art 13.

²⁹ *Gowers Review of Intellectual Property* (HM Treasury, 2006) 4.

³⁰ Hargreaves Review, 50.

³¹ See IPO, ‘The Government Response to the Hargreaves Review of Intellectual Property and Growth’, August 2011. It then launched a consultation to seek views on its proposals to widen copyright exceptions, see IPO, ‘Consultation on Copyright’, December 2011; and then outlined its plans for policy reform—see IPO, ‘Modernising Copyright: A Modern, Robust and Flexible Framework’ (2012). The government then published draft legislation on changes to UK copyright exceptions in 2013 and undertook a technical review of the draft exceptions; see IPO, ‘Technical Review of Draft Legislation on Copyright Exceptions: Government Response’ (2014).

³² Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations (SI 2014/1372); Copyright and Rights in Performances (Disability) Regulations (SI 2014/1384); Copyright (Public Administration) Regulations (SI 2014/1385); Copyright and Rights in Performances (Quotation and Parody) Regulations (SI 2014/2356).

³³ In *England and Wales Cricket Board v Tixdaq* [2016] EWHC 575 (Ch) at para 74, Arnold J indicated that pre-Directive authorities should be treated with a degree of caution as they were decided before the ECJ jurisprudence on exceptions and lack consideration of the three-step test.

³⁴ CDPA 1988, s 17(6).

³⁵ Article 5(1), which was the only mandatory exception under the Directive. See also recital 33.

³⁶ CDPA 1988, s 28A.

³⁷ See also Case C-429/08 *Football Association Premier League Ltd v QC Leisure, Murphy v Media Protection Services Ltd (FAPL)* [2012] 1 CMLR 29 at paras 174–78 where the reproduction taking place in the memory of a satellite decoder and its visual display were found to fulfil the conditions of Art 5(5) and in particular, was found to have no independent economic significance beyond the advantage derived from mere reception of the broadcasts at issue and to have the sole purpose of enabling a lawful use. See also *ITV Broadcasting Ltd v TVCatchup* [2011] EWHC 2977 (Pat) at paras 28–31 for reproduction taking place in the server memory of a streaming service.

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³⁸ Database Directive 1996, reading Art 6(1) in conjunction with Art 5(a).

³⁹ CDPA 1988, ss 50D(2) and 296B. For an example of a clause being held void under s 50D, see *Navitaire Inc v EasyJet Airline Co Inc* [2006] RPC 3.

⁴⁰ Software Directive 2009, reading Art 5(1) in conjunction with Art 4(a).

⁴¹ *England and Wales Cricket Board v Tixdaq* [2016] EWHC 575 (Ch) at para 75, citing *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] FSR 610 (CA) at 620.

⁴² *Sillitoe v McGraw-Hill Book Co Ltd* [1983] FSR 545.

⁴³ Note that photographs are not included under the exception for reporting current events.

⁴⁴ Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, reg 3(1)(a), (b).

⁴⁵ Note that the illustration for instruction exception is not discussed separately as a ‘fair dealing’ exception, but within the broader context of exceptions for educational establishments.

⁴⁶ *Hubbard v Vosper* [1972] 2 QB 84.

⁴⁷ *England and Wales Cricket Board v Tixdaq* [2016] EWHC 575 (Ch) at paras 88–89.

⁴⁸ *Hubbard v Vosper* [1972] 2 QB 84; *Sillitoe v McGraw-Hill Book Co (UK) Ltd* [1983] FSR 545.

⁴⁹ *IPC Media Ltd v News Group Newspapers Ltd* [2005] FSR (35) 752.

⁵⁰ *Hyde Park v Yelland* [2000] RPC 604 (CA) per Aldous LJ at para 37.

⁵¹ *ibid*, para 38.

⁵² *Ashdown v Telegraph Group Ltd* [2002] ECC 19 (CA) at para 70.

⁵³ CDPA 1988, s 178.

⁵⁴ *Sillitoe v McGraw-Hill Book Co (UK) Ltd* [1983] FSR 545.

⁵⁵ *Express Newspapers plc v News (UK) Ltd* [1990] FSR 359.

⁵⁶ CDPA 1988, s 29(1). Note s 29(4) and (4A) in relation to computer programs.

⁵⁷ CDPA 1988, s 29(4B).

⁵⁸ CDPA 1988, s 29(1) and (1B).

⁵⁹ For these definitions see the *Oxford English Dictionary*; note also the Australian and New Zealand cases of *De Garis v Neville Jeffress Pidler* (1990) 18 IPR 292 (Fed Ct Aus); *Television New Zealand v Newsmonitor Services* [1994] 2 NZLR 91 (High Ct NZ); and *Copyright Licensing v University of Auckland* (2002) 53 IPR 618 (NZ).

⁶⁰ Although it is difficult to see how one accompanies research carried out in one’s own office, or in a library, archive, or gallery, with the ‘sufficient acknowledgement’ required by the statute. So the use of that phrase with regard to the research exception (but not that for private study) at least suggests that the former does cover quotation from research materials (with appropriate citation) in the publication of the researcher’s results.

⁶¹ The Royal Society, ‘Keeping Science Open: The Effects of Intellectual Property Policy on the Conduct of Science’ (2003), para 4.19.

⁶² The British Academy, ‘Copyright and Research in the Humanities and Social Sciences’ (2006), para 29.

⁶³ So the comment in *Law Society of Upper Canada v CCH Canadian* [2004] 1 SCR 339 at para 51 ('Lawyers carrying on the business of law for profit are conducting research') may be literally true, but that would probably not enjoy the benefit of the exception in the UK.

⁶⁴ Contrary to popular belief amongst students, academic authors do earn royalties!

⁶⁵ Note that Database Directive 1996, Art 6(2)(b) and InfoSoc Directive 2001, Art 5(3)(a) say that the 'sole purpose' must be scientific research.

⁶⁶ See further E Derclaye, 'Of maps, Crown copyright, research and the environment' [2008] EIPR 162.

⁶⁷ CDPA 1988, s 29(1C). Note s 29(4) and (4A) in relation to computer programs.

⁶⁸ CDPA 1988, s 29(4B).

⁶⁹ CDPA 1988, s 178.

⁷⁰ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.

⁷¹ *Sillitoe v McGraw-Hill Book Co Ltd* [1983] FSR 545.

⁷² CDPA 1988, s 29(3)(a); and see further para 5.46.

⁷³ CDPA 1988, s 29(3)(b).

⁷⁴ See generally *Universities UK v Copyright Licensing Agency* [2002] RPC 36 (Copyright Tribunal) at paras 31–40. See also para 6.44.

⁷⁵ See CDPA 1988, s 28(4).

⁷⁶ CDPA 1988, s 30(1).

⁷⁷ CDPA 1988, s 30(1).

⁷⁸ *Hubbard v Vosper* [1972] 2 QB 84; cf *Sillitoe v McGraw-Hill Book Co Ltd* [1983] FSR 545.

⁷⁹ *Independent Television Publications Ltd v Time Out Ltd* [1984] FSR 64.

⁸⁰ *Ashdown v Telegraph Group Ltd* [2002] ECC 19 (CA).

⁸¹ *Fraser-Woodward Ltd v BBC and another* [2005] FSR 36.

⁸² cf the US case of *Religious Technology Center v Lerma*, 1996 WL 633131 (ED Va). See also *Religious Technology Center v Netcom On-Line Communication Service* 907 F Supp 1361 (ND Cal, 1995).

⁸³ CDPA 1988, s 30(1).

⁸⁴ For all this see CDPA 1988, s 30(1A). The ECJ has held that a work has 'been lawfully made available to the public, if it has been made available with the authorisation of the copyright holder or in accordance with a non-contractual licence or a statutory authorisation'. Case C-516/17 *Spiegel Online v Beck* [2019] ECDR 24, para 89.

⁸⁵ In appropriate cases, however, it might be fair dealing for the purpose of reporting current events: see further paras 5.38–5.39.

⁸⁶ Article 10(1) of the Berne Convention 1886. See further T Aplin and L Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (2020).

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⁸⁷ Article 5(3)(d) of the InfoSoc Directive 2001 provides an illustrative list. Case C-469/17 *Funke Medien v Bundesrepublik Deutschland* [2019] ECDR 25 at para 43.

⁸⁸ CDPA 1988, s 30(1ZA), added by Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, reg 3(4).

⁸⁹ IPO, ‘Modernising Copyright: A Modern, Robust and Flexible Framework’ (2012), 26.

⁹⁰ CDPA 1988, s 30(1ZA)(c). This corresponds to the InfoSoc Directive 2001, Art 5(3)(d) which requires the use to be ‘in accordance with fair practice, and to the extent required by the specific purpose’.

⁹¹ Case C-476/17 *Pelham v Hütter* [2019] ECDR 26 at para 69.

⁹² CDPA 1988, s 30(4).

⁹³ Case C-516/17 *Spiegel Online v Beck* [2019] ECDR 24 at para 77; Case C-476/17 *Pelham v Hütter* [2019] ECDR 26 at para 70.

⁹⁴ Case C-476/17 *Pelham v Hütter* [2019] ECDR 26 at paras 71 and 73.

⁹⁵ Case C-516/17 *Spiegel Online v Beck* [2019] ECDR 24 at para 79.

⁹⁶ ibid, paras 80–84.

⁹⁷ Case C-145/10 *Painer v Standard Verlags GmbH* [2012] ECDR 6 at para 120.

⁹⁸ IPO, ‘Modernising Copyright: A Modern, Robust and Flexible Framework’ (2012), 4 and 27.

⁹⁹ CDPA 1988, s 30(2). See also s 45(2) in relation to reporting parliamentary and judicial proceedings.

¹⁰⁰ CDPA 1988, s 30(3).

¹⁰¹ *England and Wales Cricket Board v Tixdaq* [2016] EWHC 575 (Ch) at para 112.

¹⁰² See *Hyde Park Residence Ltd v Yelland* [2000] RPC 604 (CA); *Ashdown v Telegraph Group Ltd* [2002] ECC 19 (CA); and further J Griffiths, ‘Copyright law after Ashdown: time to deal fairly with the public’ [2002] IPQ 240.

¹⁰³ [1992] Ch 141.

¹⁰⁴ [2010] EWHC 3099 (Ch); [2011] EWCA Civ 890 (CA). See also *Newspaper Licensing Agency v Marks and Spencer plc* [2001] Ch 257 (CA).

¹⁰⁵ [1999] FSR 610 (CA).

¹⁰⁶ And, in fact did, in November 2000: *The Ashdown Diaries, vol 1: 1988–1997* (2000).

¹⁰⁷ See also Case C-469/17 *Funke Medien v Bundesrepublik Deutschland* [2019] ECDR 25 at paras 55–64.

¹⁰⁸ See further R Deazley, ‘Copyright and parody: taking backward the Gowers Review?’ (2010) 73(5) MLR 785.

¹⁰⁹ Several other EU member states have allowed a parody exception. See further D Jongsma, ‘Parody after Deckmyn – a comparative overview of the approach to parody under copyright law in Belgium, France, Germany and the Netherlands’ [2017] IIC 652. Also, outside the EU, the United States has allowed ‘parody’ as fair use, although it is a creation of the courts rather than something spelled out in the legislation.

¹¹⁰ CDPA 1988, s 30A, added by Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, reg 5(1).

¹¹¹ CDPA 1988, s 30A(2).

¹¹² J Griffiths et al, ‘The European Copyright Society’s Opinion on the judgment of the CJEU in Case C-201/13 Deckmyn’ [2015] EIPR 127.

¹¹³ J Griffiths, ‘Fair Dealing after Deckmyn – the United Kingdom’s defence for caricature, parody or pastiche’ in M Richardson and S Rickeson (eds), *Research Handbook on Intellectual Property in Media and Entertainment* (2017); E Hudson, ‘The pastiche exception in copyright law: a case of mashed-up drafting?’ [2017] IPQ 346.

¹¹⁴ No 17/04478, 10 May 2021.

¹¹⁵ CDPA 1988, ss 32–36A; s 174 (meaning of educational establishment). See generally IPO, ‘Exceptions to Copyright: Education and Teaching’ (October 2014).

¹¹⁶ CDPA 1988, s 32(1) as amended by Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, reg 4(1).

¹¹⁷ CDPA 1988, s 32(2) and (3).

¹¹⁸ CDPA 1988, s 36, as amended by Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, reg 4(3).

¹¹⁹ As they commonly will be, from the Copyright Licensing Agency: see *Universities UK v Copyright Licensing Agency* [2002] RPC 36 (para 6.44), and see further U Suthersanen, ‘Copyright and educational policies: a stakeholder analysis’ (2003) 23 OJLS 585.

¹²⁰ CDPA 1988, s 36(1) and (4)–(6).

¹²¹ CDPA 1988, s 36(3). See also s 40B permitting making work available through dedicated terminals (para 5.46).

¹²² CDPA 1988, s 33.

¹²³ CDPA 1988, s 34; and see paras 4.50–4.56.

¹²⁴ CDPA 1988, s 35.

¹²⁵ CDPA 1988, s 36A. See further para 5.46.

¹²⁶ CDPA 1988, ss 40A–44A.

¹²⁷ Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014; see generally IPO, ‘Exceptions to Copyright: Libraries, Archives and Museums’ (October 2014).

¹²⁸ CDPA 1988 s 40A(1). See also sub-sections 1ZA and 1A.

¹²⁹ CDPA 1988, s 40A(2).

¹³⁰ CDPA 1988, s 42A; see s 43 for unpublished works.

¹³¹ CDPA 1988, s 40B; a corresponding provision can be found in InfoSoc Directive 2001, Art 5(3)(n), for the scope of which see Case C-117/13 *TU Darmstadt v Ulmer* [2014] ECDR 23.

¹³² CDPA 1988, s 42.

¹³³ CDPA 1988, s 41 permitting institutional sharing.

¹³⁴ CDPA 1988, s 44A.

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¹³⁵ Art 5(3)(b).

¹³⁶ CDPA 1988, s 74, repealed in 2014.

¹³⁷ Copyright (Visually Impaired Persons) Act 2002; Copyright and Rights in Performances (Disability) Regulations 2014; see generally IPO, ‘Exceptions to Copyright: Accessible Formats for disabled people’ (October 2014).

¹³⁸ IPO, ‘Consultation on UK’s Implementation of the Marrakesh Treaty’ (May 2018).

¹³⁹ Copyright and Related Rights (Marrakesh Treaty etc) (Amendment) Regulations 2018 (SI 2018/995).

¹⁴⁰ IPO, ‘Government response to Marrakesh Consultation’ (Sep 2018).

¹⁴¹ With amendments to relevant references to EU, Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019, regs 9,10, 35, and 36.

¹⁴² UK government, Guidance on ‘Marrakesh Treaty’ (2 May 2019) available at <https://www.gov.uk/guidance/the-marrakesh-treaty> <<https://www.gov.uk/guidance/the-marrakesh-treaty>>. The treaty entered in force with respect to the UK on 1 January 2021, WIPO, Marrakesh Notification No. 75, Ratification by the United Kingdom of Great Britain and Northern Ireland (1 October 2020) available at https://www.wipo.int/treaties/en/notifications/marrakesh/treaty_marrakesh_75.html <https://www.wipo.int/treaties/en/notifications/marrakesh/treaty_marrakesh_75.html>.

¹⁴³ See in general CDPA 1988, s 31A–31F.

¹⁴⁴ CDPA 1988, s 31A.

¹⁴⁵ CDPA 1988, s 31B. See also s 31BA permitting making of intermediate copies.

¹⁴⁶ CDPA 1988, s 31F.

¹⁴⁷ CDPA 1988, s 31F.

¹⁴⁸ CDPA 1988, ss 45–50.

¹⁴⁹ Article 5(3)(e).

¹⁵⁰ On the use of public security, see Case C-145/10 *Painer v Standard Verlags GmbH* [2012] ECDR 6.

¹⁵¹ CDPA 1988, s 45(2). For successful uses of s 45, see *Ebden v News International Ltd* [2011] EWHC 4082 (Ch); *BBC, Petitioners (in the case of HM Advocate v Hainey)* [2012] SLT 476.

¹⁵² CDPA 1988, s 31(1). See generally R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (2005), 64–66.

¹⁵³ CDPA 1988, ss 31(2).

¹⁵⁴ CDPA 1988, s 31(3).

¹⁵⁵ CDPA 1988, s 62.

¹⁵⁶ CDPA 1988, s 62(3).

¹⁵⁷ CDPA 1988, s 29A. For ambiguities in the scope of the new exception see S Kheria, C Waelde, and N Levin, ‘Digital transformations in the Arts and Humanities: Negotiating the copyright landscape in the United Kingdom’, in R Hobbs (ed), *The Routledge Companion to Media Education, Copyright, and Fair Use* (2018).

¹⁵⁸ See IPO, ‘Government response to call for views on artificial intelligence and intellectual property’ (Mar 2021).

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¹⁵⁹ The Hargreaves Review had also recommended the government to press at EU level for such an exception for commercial use, see para 5.26 therein. Also, the exception is only applicable to copyright and not the *sui generis* database right.

¹⁶⁰ See also Art 3 permitting text and data mining for the purposes of scientific research.

¹⁶¹ <https://www.gov.uk/government/consultations/artificial-intelligence-and-ip-copyright-and-patents/artificial-intelligence-and-intellectual-property-copyright-and-patents> <<https://www.gov.uk/government/consultations/artificial-intelligence-and-ip-copyright-and-patents/artificial-intelligence-and-intellectual-property-copyright-and-patents>>

¹⁶² See C-406/10 *SAS Institute Inc v World Programming Ltd* [2012] ECDR 22 and *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482, discussed at para 4.33.

¹⁶³ CDPA 1988, s 296A.

¹⁶⁴ CDPA 1988, s 70.

¹⁶⁵ On the role of the exception in the context of an internet radio station, see *Warner Music UK Ltd v TuneIn Inc* [2019] EWHC 2923 (Ch) at paras 181–91.

¹⁶⁶ CDPA 1988, s 71.

¹⁶⁷ CDPA 1988, ss 70(2), (3) and 71(2), (3).

¹⁶⁸ The provision has given rise to a number of decisions by the ECJ.

¹⁶⁹ Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 (SI 2014/2361) inserted s 28B in the CDPA 1988. It was repealed on 17 July 2015.

¹⁷⁰ CDPA 1988, s 28B(2).

¹⁷¹ CDPA 1988, s 28B(2) and (4).

¹⁷² CDPA 1988, s 28B(1) and (5).

¹⁷³ CDPA 1988, s 28B(10).

¹⁷⁴ *R (on the application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin).

¹⁷⁵ *R (on the application of British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills* [2015] EWHC 2041 (Admin).

¹⁷⁶ Copyright and Rights in Performances (certain permitted use of orphan works) Regulations 2014 (SI 2014/2861).

¹⁷⁷ CDPA 1988, ss 44B, 76A, and sch ZA1.

¹⁷⁸ Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019, regs 11, 12, and 23.

¹⁷⁹ A post-implementation review of the UK exception had indicated that UK institutions had used it more widely than EU counterparts, and that they tended to prefer it over the licensing scheme due to cost-effectiveness. UK IPO, Post Implementation Review, ‘Management of copyright (Orphan Works and Extended Collective licensing)’ (2020) https://www.legislation.gov.uk/uksi/2014/2863/pdfs/uksiod_20142863_en.pdf <https://www.legislation.gov.uk/uksi/2014/2863/pdfs/uksiod_20142863_en.pdf>

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¹⁸⁰ CDPA 1988, s 171.

¹⁸¹ CDPA 1988, s 171(1)(e).

¹⁸² CDPA 1988, s 171(3).

¹⁸³ See, eg, *Glyn v Weston Feature Film Co* [1916] 1 Ch 261; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109; *ZYX Music v King* [1995] FSR 566. See also A Sims, ‘The denial of copyright on public policy grounds’ [2008] EIPR 189.

¹⁸⁴ *Beloff v Pressdram* [1973] RPC 765. See generally G Davies, *Copyright and the Public Interest* (2nd edn, 2003); R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (2005), 80–112.

¹⁸⁵ *Lions Laboratories v Evans* [1985] QB 526 (CA).

¹⁸⁶ A Sims, ‘The public interest defence in copyright law: myth or reality?’ [2006] EIPR 335. See also J Griffiths, ‘Pre-empting conflict—a re-examination of the public interest defence in UK copyright law’ [2014] 34(1) Legal Studies 76.

¹⁸⁷ See also Jacob J in *Mars UK Ltd v Teknowledge Ltd* [2000] FSR 138.

¹⁸⁸ See paras 55, 58, 64–67.

¹⁸⁹ See paras 79–83.

¹⁹⁰ [2008] Ch 57 (CA), see para 5.33.

¹⁹¹ See *BBC, Petitioners (in the case of HM Advocate v Hainey)* [2012] SLT 476; *Ames v Spamhaus Project Ltd* [2015] EWHC 127 (QB); *HRH The Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 273 (Ch) and [2022] ECDR 13(CA).

¹⁹² See generally P Torremans (ed), *Intellectual Property and Human Rights* (2015), Part II; PB Hugenholtz, ‘Copyright and freedom of expression in Europe’ in RC Dreyfuss, DL Zimmerman, and H First (eds), *Expanding the Boundaries of Intellectual Property* (2001), 343–64.

¹⁹³ At the time of writing, the UK government is planning to reform the HRA 1998 and replace it with a new Bill of Rights. <https://www.gov.uk/government/news/plan-to-reform-human-rights-act>

¹⁹⁴ [2001] ECDR 21 (Morritt V-C); rev’d [2002] ECC 19 (CA). See also *England and Wales Cricket Board v Tixdaq* [2016] EWHC 575 (Ch) at para 73.

¹⁹⁵ [2001] ECDR 21 at para 20.

¹⁹⁶ [2002] ECC 19 at para 45.

¹⁹⁷ ibid, paras 46 and 59.

¹⁹⁸ Citing with approval *Copinger and Skone James on Copyright* at para 3–308.

¹⁹⁹ [1986] AC 577 gives the House of Lords’ speeches only.

²⁰⁰ *Canon Kabushiki Kaisha v Green Cartridge Co (Hong Kong) Ltd* [1997] AC 728.

²⁰¹ *Mars UK Ltd v Teknowledge Ltd* [2000] FSR 138 (Jacob J).

²⁰² N Caddick, G Harbottle, and U Suthersanen (eds), *Copinger & Skone James on Copyright* (2021), para 5.285.

²⁰³ The language of ‘user rights’ features strongly in *Law Society of Upper Canada v CCH Canadian Ltd* [2004] 1 SCR 339. For a different perspective, see H Cohen Jehoram, ‘Restrictions on copyright and their abuse’ [2005] EIPR 359.

²⁰⁴ CDPA 1988, s 28(1).

²⁰⁵ See LMR Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (2002); R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (2005), 67–70, 269–70, 306–10.

²⁰⁶ Software Directive 2009, Arts 5(2), (3), 6(1), and 8. See CDPA 1988, ss 50A(3), 50B(4), 50BA(2), and 296A. See also Database Directive 1996, Arts 6(1), 15, and CDPA 1988, ss 50D(2) and 296B.

²⁰⁷ Hargreaves Review, 51.

²⁰⁸ CDPA 1988, s 36(6).

²⁰⁹ CDPA 1988, s 28(1).

²¹⁰ CDPA 1988, s 50C. See also Art 5(1) in conjunction with Art 4(a) of Software Directive 2009.

²¹¹ CDPA 1988, ss 50D(2) and 296B.

²¹² CDPA 1988, s 50A(3).

²¹³ CDPA 1988, s 50B(4).

²¹⁴ CDPA 1988, s 50BA(2).

²¹⁵ CDPA 1988, ss 29(4B), 30(4), 30A(2), 29A(5), and 32(3).

²¹⁶ R Burrell and A Coleman, *Copyright Exceptions: The Digital Impact* (2005), 69.

²¹⁷ ibid, 70.

²¹⁸ ibid, 269–70, 306–10.

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