Ligue Internationale du Droit de la Concurrence

Question B – To what extent do current exclusions and limitations to copyright strike a fair balance between the rights of owners and fair use by private individuals and others?[*]

UNITED KINGDOM

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[*] The complete questionnaire and guidance to national rapporteurs can be viewed at https://drive.google.com/file/d/0B6d07lh0nNGNVFAtczQyWjk0LXc/view?usp=sharing.

[**] The Author is grateful to Michael Browne (Redd Solicitors) and the attendees of the workshop organized by the Competition Law Association at Redd Solicitors (London) on 13 June 2017 for their feedback on an earlier version of this report.

Like all the other Member States of the European Union (EU), in general terms the "acts permitted in relation to copyright works" under the Copyright, Designs and Patents Act 1988 (CDPA)[1] follow the closed system of exceptions and limitations envisaged by relevant EU directives, notably Directive 2001/29[2] (the InfoSoc Directive).[3] However, it should be noted at the outset that, while the InfoSoc Directive is 'the' general EU copyright directive, EU legislature has adopted directives relating to specific subject-matter, which also provide for sets of exceptions and limitations that are either optional[4] or mandatory[5] for EU Member States to transpose into their own legal systems.

1. THE SYSTEM OF THE INFOSOC DIRECTIVE

One of the objectives that EU legislature intended to achieve by adopting the InfoSoc Directive was to harmonise certain aspects of substantive copyright law. This was so on consideration that, without harmonisation at the EU level, diverging national approaches would result in significant levels of protection and – from an internal market perspective – restrictions on the free movement of services and products incorporating, or based on, intellectual property.[6] This problem would also become more acute in light of the challenges facing technological advancement.[7] Inconsistent national responses to the challenges facing technology would therefore need to be avoided, also "to ensure that competition in the internal market is not distorted as a result of differences in the legislation of Member States."[8]

In parallel with harmonisation of the exclusive rights of reproduction (Article 2), communication and making available to the public[9] (Article 3), and distribution (Article 4)[10], the InfoSoc Directive also harmonised related exceptions and limitations (Article 5). With the exclusion of the exception for temporary copies (Article 5(1)), all the other exceptions and limitations within Article 5 are *optional* for EU Member States to implement. The InfoSoc Directive sought to define exceptions and limitations more harmoniously, but it was felt that their degree of harmonisation should be based on their impact on the smooth functioning of the internal market,[11] taking account of the different legal traditions in the

[1] Chapter III CDPA refers to "acts permitted in relation to copyright works". For the avoidance of doubt, the present report will consider the phrase "acts permitted in relation to copyright works" as synonymous with copyright 'exceptions', 'limitations', 'exclusions', and 'defences'.

[2] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 10-19 (InfoSoc Directive).

[3] When the CDPA was enacted, UK legislature still enjoyed significant freedom from EU law constraints: the first copyright directive was in fact adopted in 1991 (Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122, 42-46).

[4] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 20-28 (Database Directive), Article 6(2); Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376, 28-35 (Rental and Lending Rights Directive), Article 10.

[5] Database Directive, Article 6(1); Directive 2009/24 of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version), OJ L 111, 16-22 (Software Directive), Articles 5 and 6; Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L299, 5-12 (Orphan Works Directive), Article 6. Also the recent proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593 final, 2016/0280 (COD) (DSM Directive), contains three new mandatory exceptions: see Article 3 to 6.

[6] InfoSoc Directive, Recitals 6 and 7.

[7] InfoSoc Directive, Recital 7

[8] *DR and TV2 Danmark A/S v NCB – Nordisk Copyright Bureau*, C-510/10, EU:C:2012:244, [35], referring to *Laserdisken ApS v Kulturministeriet*, C-479/04, EU:C:2006:549, [26] and [31]-[34].

[9] The rights of communication and making available to the public are distinct and have different scope: "as follows from the wording of Article 3(1) of Directive 2001/29, and in particular from the terms 'any communication to the public of their works, … including the making available to the public', the concept of 'making available to the public', also used in Article 3(2) of that directive, forms part of the wider 'communication to the public'": *C More Entertainment AB v Linus Sandberg*, C-279/13, EU:C:2015:199, [24].

[10] As regards exhaustion of the right of distribution, UK law follows the EU approach. With specific regard to digital copies of copyright works, also under UK law it is uncertain whether exhaustion is available as a general principle or only applies to digital copies of computer programs (*UsedSoft GmbH v Oracle International Corp*, C-128-11, EU:C:2012:407). See further Rosati (2015a).

[11] InfoSoc Directive, Recital 31.

various Member States.[12] The outcome of this approach has been criticised by some commentators, who have stated that "the effect is of rough harmonisation only"[13], or even declared (with particular regard to the optional nature of exceptions and limitations in Article 5) that the InfoSoc Directive has been "a total failure, in terms of harmonization".[14]

The exceptions and limitations available under the *exhaustive* list within Article 5 are subject to the three-step test (Article 5(5)): they shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter, and do not unreasonably prejudice the legitimate interests of the rightholder. Despite precedents in the Berne Convention (Article 9(2)) and the TRIPs Agreement (Article 13), the three-step test in Article 5 of the InfoSoc Directive is derived from the one contained in WIPO Treaties (Article 10 of WIPO Copyright Treaty, and Article 16(2) of the WIPO Phonograms and Performances Treaty), which EU legislature sought indeed to implement into the EU legal order by adopting the InfoSoc Directive.[15]

As far as the United Kingdom (UK) is concerned, this Member State took limited advantage of the possibilities offered by Article 5 of the InfoSoc Directive, and the UK approach was criticised in both the Gowers[16] and Hargreaves[17] reviews. Eventually, in 2014 UK Government chose to implement new exceptions from Article 5 list (parody; quotation; personal copies for private use; text and data analysis), and broaden the scope of certain existing exceptions (education; disabilities; libraries and archives; public administration).

2. UK EXCEPTIONS AT A GLANCE: THE 2014 REFORM

As a reflection of the closed system of exceptions and limitations under Article 5 of the InfoSoc Directive, also the acts permitted in relation to copyright works (Chapter III CDPA) are a *numerous clausus*. Generally speaking, UK exceptions do not differentiate as to the exclusive rights at stake. In addition to a number of general exceptions in sections 28A to 31 (temporary copies; research and private study; text and data analysis; criticism, review, quotation and news reporting; caricature, parody or pastiche; and incidental inclusion of copyright materials), miscellany provisions for specific types of works (sections 57 to 75, including freedom of panorama sub section 62[18]) and an exception to the right of adaptation (section 76), the CDPA provides a number of exceptions relating to: disabilities (sections 31A to 31F), education (including distance learning; sections 32 to 36A), libraries and archives (sections 37 to 44A), orphan works (sections 44B and 76A), public administration (sections 45 to 50), computer programs (sections 50A to 50C), databases (section 50D), designs (sections 51 to 53), typefaces (sections 54 and 55), and works in electronic form (section 56).

As mentioned, the rigidity and narrow scope of UK copyright exceptions has been subject to criticism over time. Both the 2006 Gowers Review and 2011 Hargreaves Review considered the existing (at the time) copyright exceptions to be inadequate. They recommended the introduction of new exceptions (private copying[19], parody[20], text and data

[12] InfoSoc Directive, Recital 32 and Article 5(3)(o).

[13] Cornish et al. (2013), §12.37.

[14] Hugenholtz 2000, p. 501. In the same sense, see Janssens 2009, p. 332, and bibliography cited in it. For similar criticisms, expressed at the proposal stage, see Hart 1998, pp 169–170.

[15] InfoSoc Directive, Recital 15. For a discussion of the three-step test in the InfoSoc Directive, see Arnold and Rosati (2015), pp 742-744.

[16] Gowers Review 2006.

[17] Hargreaves Review 2011.

[18] Section 62 applies to buildings, sculptures, models for buildings and works of artistic craftsmanship, if permanently situated in a public place or in premises open to the public. It provides that copyright in such works is not infringed by: making a graphic work representing it; making a photograph or film of it; or making a broadcast of a visual image of it. Nor is the copyright infringed by the issue to the public of copies, or the communication to the public, of anything whose making was, by virtue of this section, not an infringement of the copyright.

[19] Gowers Review 2006, Recommendation 8; Hargreaves Review 2011, §§5.27-5.31.

[20] Gowers Review 2006, Recommendation 12; Hargreaves Review, §5.32.

analysis[21]), or the broadening (education[22], libraries and archives[23]) of existing ones. As a follow-up action to the recommendations included in the Hargreaves Review, in 2014 the UK legislature reformed the UK system of copyright exceptions. It introduced new exceptions allowing caricature, parody or pastiche (section 30A), quotation (section 30(1ZA), the making of personal copies for private use (section 28B), the making of copies for text and data analysis for non-commercial research (section 29A). The scope of a number of existing exceptions was also broadened: research and private study, education, libraries and archives, disabilities, and public administration.

Section 28B CDPA (personal copies for private use) was quashed in 2015, further to an application for judicial review filed by the British Academy of Songwriters, Composers & Authors (BASCA), the Musicians' Union, and UK Music over lack of a fair compensation mechanism.[24] Green J motivated his decision[25] on grounds that UK Government had not provided adequate evidence as to why the new UK private copying exception would be exempt from the provision of a fair compensation requirement as appears instead required under Article 5(2)(b) of the InfoSoc Directive.[26]

3. THE (NON-EXISTENT) UK THREE-STEP TEST

Unlike other Member States (eg, France[27]), the UK has not transposed the language of the three-step test within Article 5(5) of the InfoSoc Directive into its own copyright law. The reason is that, at the time of implementing the InfoSoc Directive into its own legal system, UK Government took the view that relevant copyright exceptions already complied with Article 5(5).[28]

It is arguable that lack of a specific provision outlining the three-step test in the CDPA, together with the idea that the three-step test would be akin to the UK concept of 'fair dealing'[29], is the principal reason as to why "[th]ere has been very little judicial consideration"[30] of the three-step test in UK case law. Only the decisions in *England and Wales Cricket Board v Tixdaq* (2016)[31] (*Tixdaq*) and *Services v Chief Constable of West Yorkshire* (2011)[32] provide some meaningful considerations of the InfoSoc three-step test in the UK context.

In particular, *Tixdaq* (also discussed further below, sub §4.4.2.) was a case concerning whether the unauthorised reproduction and making available of short extracts of television broadcasts of cricket matches would amount to a

[21] Hargreaves Review 2011, §5.33.

[22] Gowers Review 2006, Recommendation 2 (recommending amendments to sections 35 and 36 CDPA to cover distance learning and interactive whiteboards); Hargreaves Review 2011, §5.3.

[23] Gowers Review 2006, Recommendations 10a and 10b; Hargreaves Review 2011, Recommendation 5.

[24] Doubts regarding the lawfulness of the new exception for personal copies for private use had been also expressed prior to the application for judicial review: see Cameron (2014), p. 1003; Grisse and Koroch (2015), pp 566-569.

[25] *British Academy of Songwriters, Composers and Authors and Others v Secretary of State for Business, Innovation and Skills* [2015] EWHC 1723 (Admin).

[26] However InfoSoc Directive, Recital 35 provides that "[i]n certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise." This means that "the notion and level of fair compensation are linked to the harm resulting for the author from the reproduction of his protected work without his authorisation. From that perspective, fair compensation must be regarded as recompense for the harm suffered by that author": *Hewlett-Packard Belgium SPRL v Reprobel SCRL*, C-572/13, EU:C:2015:750, [36], referring to *Padawan SL v Sociedad General de Autores y Editores de España* (SGAE), C-467/08, EU:C:2010:620, [37] (in the same sense, see also *Copydan Båndkopi v Nokia Danmark A/S*, C-463/12, EU:C:2015:144, [65]).

[27] Article L 122-5 of the French Intellectual Property Code (Code de la propriété intellectuelle, consolidated version as to 17 March 2017) (CPI).

[28] Arnold and Rosati (2015), p. 743, citing DTI, Consultation paper on implementation (August 2002), 11–12, as reported in Cornish et al. (2013), §12.37. See also Hart and Holmes (2004), p. 255.

[29] *England and Wales Cricket Board Limited and Others v Tixdaq Limited and Another* [2016] EWHC 575 (Ch), [89].

[30] *Ibid*, [88]

[31] *Ibid*, [88]-[92].

[32] *Services v Chief Constable of West Yorkshire* (2011) [2011] EWHC 2892 (Ch), [113].

copyright infringement or whether, instead and among other things, the defence of fair dealing for the purpose of reporting current events within section 30(2) CDPA would apply. Arnold J ruled against the defendants, in that their conduct could not be regarded as fair dealing within such provision. In reaching his conclusion, Arnold J also provided some clarifications on the individual steps of the three-step test. In particular, he noted that 'conflict with a normal exploitation of the work or other subject-matter' refers to exploitation of the work by the copyright owner, whether directly or through licensees. This requires

> "consideration of potential future ways in which the copyright owner may extract value from the work as well as the ways in which the copyright owner currently does so. On the other hand, it also embraces normative considerations i.e. the extent to which the copyright owner should be able to control exploitation of the kind in question having regard to countervailing interests such as freedom of speech."[33]

Considering the third step (that the exception at hand must not 'unreasonably prejudice the legitimate interests of the rightholder'), Arnold J found that:

> "Although this is often treated as a separate and additional requirement to the second step, it has also been forcefully argued that it qualifies the second step. In other words, it indicates that it is not sufficient for an exception not to apply that there is some conflict with the copyright owner's legitimate interests, including the copyright owner's normal exploitation of the work. Rather, the exception can apply unless those interests are unreasonably prejudiced. This requires consideration of proportionality, and a balance to be struck between the copyright owners' legitimate interests and the countervailing interests served by the exception."[34]

4. SPECIFIC ASPECTS OF UK COPYRIGHT EXCEPTIONS

Determining whether a certain, unauthorised use of a work is shielded from liability by means of an exception is not entirely straightforward. The situation may be complicated further if the applicable law is that of a country, eg the UK and all the other EU Member States, that does not have an open-ended fair use-style exception but rather requires one to, first, *identify* what exception might be applicable to the case at hand and, secondly, *verify* that all the relevant conditions for the application of that particular exception are satisfied.

As mentioned, the general approach of UK copyright law to copyright exceptions has been overall in line with the approach under Article 5 of the InfoSoc Directive. This means that, with the exclusion of certain subject-specific exceptions (eg libraries, archives, public administration, educational establishments, persons with disabilities), the beneficiaries of the principal exceptions are the generality of users of protected-works. Thus, the relevant assessment focuses on the type, finality, and modality of the use at issue. More specifically, what appears required under UK to determine applicability of a certain exception is to address the following questions:[35]

a) Is the exception limited to certain, specified beneficiaries?
b) Is the exception limited to certain subject-matter?
c) Are the conditions provided for in the relevant provision respected?
d) Does the relevant provision envisage that the use is for a certain specified purpose?
e) (If the exception is framed within fair dealing) Must the use at hand be a 'fair dealing' with the work in question?
f) Other considerations?

Answering questions a) and b) serves to rule out at the outset the applicability to the particular case considered of exceptions whose beneficiaries are limited (eg in the case of exceptions for libraries, archives, public administration, educational establishments, persons with disabilities) or only apply to certain types of works (eg computer programs or

[33] *England and Wales Cricket Board Limited and Others v Tixdaq Limited and Another* [2016] EWHC 575 (Ch), [91].

[34] *Ibid*, [92].

[35] A preliminary checklist was published in Rosati (2017).

databases). In a sense, these are preliminary questions to be considered and addressed. What is instead the core of the assessment regarding the applicability of a certain exception in a specific instance is answering questions c) to e).

Question c) requires consideration of whether a certain exception requires a number of conditions to be satisfied. For instance, the new (introduced in 2014 and yet to be subjected to judicial consideration[36]) exception for quotation within section 30(1ZA) requires that: (1) the work has been made available to the public; (2) the use of the quotation is fair dealing with the work; (3) the extent of the quotation is no more than is required by the specific purpose for which it is used, and (4) the quotation is accompanied by a sufficient acknowledgement (unless this is impossible for reasons of practicality or otherwise).

Question d) requires one to determine whether the exception considered is only applicable to use of a work for certain, specified purposes. While section 30(1ZA) does not require that the quotation is made for any particular purposes, the same is not the case for other exceptions, such as criticism or review (section 30(1)), news reporting (section 30(2)), caricature, parody or pastiche (section 30A).

Question e) is a crucial one for those exceptions that are framed within fair dealing (see also below, sub §4.5.).

Finally, answering question f) requires one to consider other factors that might have an impact on the actual applicability of a certain exception. So, for instance, while applicability of the exception for caricature, parody or pastiche within section 30A cannot be overridden by contract (such terms would be unenforceable), the exception is without prejudice to an author's moral rights.

A more detailed discussion of the issues underlying these questions is provided below.

4.1. BENEFICIARIES OF UK COPYRIGHT EXCEPTIONS

As mentioned, with the exclusion of specific exceptions in favour of, eg, libraries, archives, public administration, educational establishments, and persons with disabilities, relevant CDPA provisions do not seem to restrict the beneficiaries of copyright exceptions. It is worth observing that, recently, UK Government has legislated to broaden the types of beneficiaries of certain exceptions (eg disabilities), and the UK position in relation to certain exceptions – notably text and data analysis – is generous as far as the beneficiaries of the exception are concerned.

In relation to the broadening of the type of beneficiaries of certain exceptions, one might recall that with its 2014 reform, the UK altered the scope of the disability exceptions (sections 31A to 31F), so that they would apply to any persons whose disability prevent them from enjoying the work to the same degree as a person who does not have that disability. Previously, the exceptions within sections 31A–F only allowed accessible versions of literary, dramatic, musical and artistic works be made for visually impaired persons.[37]

Turning to consideration of UK text and data analysis for non-commercial research (section 29A, also introduced in 2014), UK Government believed that it could adopt such an exception by taking fuller advantage of the possibilities available under Article 5(3)(a) of the InfoSoc Directive. In particular, the new exception for text and data analysis was framed within a scientific research purpose, and was allowed insofar as this remains of a non-commercial character. This was required to comply with the wording of Article 5(3)(a) of the InfoSoc Directive. However, this provision of EU law does not set any particular limitations as regards the beneficiaries of the exception. The UK decided not to impose any restrictions, as long the work used to make a copy for text and data analysis research is one to which the relevant person has lawful access. In this sense, the range of beneficiaries of the section 29A CDPA is broader than what is currently being considered for introduction at the EU level.

[36] It is arguable that when the opportunity arises, one of the principal decisions to consider will be *Eva-Maria Painer v Standard VerlagsGmbH and Others*, C-145/10, EU:C:2011:798, concerning interpretation of Article 5(3)(d) of the InfoSoc Directive. For a discussion of the international and EU quotation exceptions, see Rosati (2016), pp 588-591.

[37] For doubts concerning the compatibility with EU law of the pre-2014 UK disability exceptions, see Rosati (2014), pp 594-596.

In September 2016, as a follow-up to its Digital Single Market Strategy[38], the EU Commission released a proposal for a DSM Directive which – among other things and if adopted in the same form – would in fact introduce a new mandatory exception for text and data mining (Article 3). Although including commercial and non-commercial uses alike (thus differing from section 29A CDPA), the scope of the proposed text and data mining exception appears narrower than the UK exception as regards its catalogue of beneficiaries. These would be, in fact, only research organisations. They would be able to rely on the exception solely to carry out text and data mining of works or other subject-matter to which they have lawful access for the purposes of scientific research. In addition, the definition of 'research organisation' itself is narrow: it only includes (Article 2(1)) universities, research institutes, non-profit or public interest research-intensive organisations. In principle the draft directive does not exclude applicability of the text and data mining exception to public-private partnerships (Recital 10), but rules out that this could be possible when a commercial undertaking has a decisive influence and control over the research organisation in question (Recital 11).

4.2. SUBJECT-MATTER OF EXCEPTIONS

The CDPA contains exceptions that are only applicable to certain categories of works. The introduction of subject-matter specific exceptions has been often the result of implementing relevant provisions in EU directives. This has been for instance the case of sections 50A to 50C in relation to Articles 5 and 6 of the Software Directive; section 50D in relation to Article 6 of the Database Directive; and section 44B in relation to Article 6 of the Orphan Works Directive.

4.3. CONDITIONS OF EXCEPTIONS

Some CDPA exceptions are subject to a number of conditions. An example is the exception allowing the making of temporary copies (section 28A). Derived from Article 5(1) of the InfoSoc Directive (this being the only mandatory exception in the list of exceptions available under that EU law provision), section 28A provides that copyright in a literary work, other than a computer program or a database, or in a dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringed by the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable: (a) a transmission of the work in a network between third parties by an intermediary; or (b) a lawful use of the work; and which has no independent economic significance. Following lengthy litigation against media monitoring provider Meltwater[39], which also included a reference for a preliminary ruling to the Court of Justice of the European[40] (CJEU), the UK Supreme Court held that section 29A CDPA would also apply to temporary copies generated by an internet end-user[41] (*PRCA*). Recently, the CJEU has excluded that the exception within Article 5(1) of the InfoSoc Directive would apply to viewers of unlawful streams.[42]

A condition that is often to be found in relation to CDPA exceptions is the one imposing sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise). While this aspect is also a factor considered when undertaking the fair dealing assessment[43], it should be noted that lack of acknowledgment could not only prevent application of a certain exception (eg quotation within section 30(1ZA)), but also amount to an infringement of the author's moral right of attribution within section 77 CDPA, with the exception of cases in which the right does not apply. The moral right of attribution is in fact excluded in relation to: section 30, so far as it relates to the reporting of current events by means of a sound recording, film or broadcast; section 31 (incidental inclusion of work in an artistic work, sound recording, film or broadcast); section 45 (parliamentary and judicial proceedings); section 46(1) or (2)

[38] European Commission (2015).

[39] *The Newspaper Licensing Agency Ltd and Others v Meltwater Holding BV and Others* [2010] EWHC 3099 (Ch); *The Newspaper Licensing Agency Ltd and Others v Meltwater Holding BV and Others* [2011] EWCA Civ 890.

[40] *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others*, C-360/13, EU:C:2014:1195.

[41] *Public Relations Consultants Association Limited (Appellant) v The Newspaper Licensing Agency Limited and Others (Respondents)* [2013] UKSC 18.

[42] *Stichting Brein v Jack Frederik Wullems, also trading under the name Filmspeler*, C-527/15, EU:C:2017:300, [59]-[70].

[43] Bently and Sherman (2014) p 224-226.

(Royal Commissions and statutory inquiries); section 51 (use of design documents and models); sections 57 or 66A (acts permitted on assumptions as to expiry of copyright. The list in sub section 79(4) suggests in any case that the moral right of attribution remains enforceable in relation to exceptions that provide an acknowledgment requirement.

4.4. PURPOSE OF THE USE

Determining whether the use at hand pursues the purpose allowed by a certain exception has proved challenging. In this respect instances relating to criticism or review, and news reporting are enlightening.

4.4.1. CRITICISM OR REVIEW

Section 30(1) CDPA states that fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public. Criticism or review of a work has been always permitted and, since the 1911 Copyright Act, has been the subject of a specific statutory provision. Prior to the inclusion of a quotation exception in 2014, formulation of the exception for criticism or review appeared however fairly narrow, especially if one compared the UK position to that of other EU Member States, and what is expressly permitted under Article 5(3)(d) of the InfoSoc Directive.

Despite its potential range, this fair dealing defence has not been much elucidated in UK case law.[44] In *Hubbard v Vosper* (a case concerning publication of a book that criticised the Church of Scientology and allegedly included material copied from works by Scientology founder Ron Hubbard), Lord Denning MR clarified that the exception applies equally to the ideas expressed in a work and their mode of expression, and that overall assessment whether dealing with a work for criticism or review is fair is a matter of impression.[45] In general terms it can be said that to qualify potentially for this exception it is necessary that the criticism or review is of the work, or another work or a performance of a work. It may concern the work as a whole or a single aspect of a work, the thought or philosophy underpinning a work, or its social and moral implications.[46] Some decisions have suggested that the criticism or review may not be necessarily of a work at all.[47] For instance, in *Time Warner v Channel 4*[48] (*Channel 4*) the Court of Appeal of England and Wales considered whether use in a TV documentary of twelve clips from Kubrick's film *A Clockwork Orange* that varied in length between 10 seconds and 115 seconds and amounting in aggregate to about 12.5 minutes (8% of the film and 40% of the TV programme) could be considered fair. The court answered affirmatively because inclusion of parts of Kubrick's work served the aim of illustrating the decision to withdraw the film from circulation in the UK. It was held that, although there is no codified test of fairness under UK law, there are criteria that courts take into account, including: (i) to what extent alleged infringing use competes with exploitation of the copyright work by the owner, including any form or activity which potentially affects the value of the copyright work; (ii) the extent of the use and importance of what has been taken; (iii) the purpose of the use, *ie* whether the use was necessary at all to make the point in question; and (iv) proper acknowledgment of the author of the work.[49] It would appear that the *Channel 4* case pushed the exception (at least in the pre-2014 context) to the extreme. In another case, *Ashdown v Telegraph*[50] (*Ashdown*), the Court of Appeal of England and Wales held that publication of the memorandum of the meeting between the UK politicians Paddy Ashdown and Tony Blair was not for criticism of 'the work' but rather of the political events described/recorded therein. As such, the defence of fair dealing for criticism or review did not apply.

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[44] Cornish et al. (2013), p. 494.

[45] *Per* Lord Denning MR, *Hubbard v Vosper* [1972] 2 QB 84, [94].

[46] Bently and Sherman (2014), p. 210; Davies et al. (2016), §9.52.

[47] But see, critically, Aplin and Davies (2017), §4.3.2.3., referring to *Pro Sieben Media AG v Carlton UK Television* [1999] 1 WLR 605.

[48] *Time Warner Entertainment Ltd v Channel 4 Television Corporation Plc* [1994] EMLR 1.

[49] As clarified by Section 178 CDPA, "'sufficient acknowledgement' means an acknowledgement identifying the work in question by its title or other description, and identifying the author". *See* also *Express Newspaper Plc v News (UK) Ltd* [1990] FSR 359, [367].

[50] *The Right Honourable Paddy Ashdown, MP PC v Telegraph Group Ltd* [2001] EWCA Civ 1142.

4.4.2. NEWS REPORTING

Section 30(2)-(3) provides that fair dealing with a work (*other than* a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that it is accompanied by sufficient acknowledgement. No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film or broadcast where this would be impossible for reasons of practicality or otherwise. A recent instance in which applicability of the exception for news reporting was considered is the 2016 decision in *Tixdaq*.[51]

The claimants in this case own the copyrights in TV broadcasts (and films incorporated therein) of most cricket matches played by the England men's and women's cricket teams. The defendants operated a website, www.fanatix.com, and various apps whose features have changed over time. By using screen capture technology the defendants, their contractors and members of the public uploaded clips of the claimants' broadcasts lasting up to 8 seconds. These clips were also available on their social media accounts. The claimants sued for copyright infringement, with the defendants denying infringement on grounds that their activities were protected – among other things - as fair dealing for the purpose of reporting current events within s30(2).

Arnold J noted at the outset that section 30(2) CDPA must be construed in accordance with Article 5(3)(c) of the InfoSoc Directive.[52] The expression "for the purpose of reporting currents" in section 30(2) is very close to the expression "in connection with the reporting of current events" in Article 5(3)(c), but Article 5(3)(c) permits use "to the extent justified by the informatory purpose" whereas section 30(2) permits use which is 'fair dealing'. It follows that "an important consideration in the assessment of fair dealing is whether the extent of the use is justified by the informatory purpose."[53] Arnold J considered the various elements of the defence in section 30(2) CDPA, and noted that domestic authorities "must be treated with a degree of caution, since they were mostly decided prior to the implementation of the [InfoSoc] Directive and all of them were decided well before the recent jurisprudence of the CJEU concerning the interpretation of that Directive."[54]

The question whether the use was 'for the purpose of' reporting current events is to be judged objectively. Arnold J noted that although Recital 34 of the InfoSoc Directive refers to 'news reporting', there is no warrant for interpreting 'reporting current events' as being restricted to 'news reporting'. This said, "there has been very little consideration in any of the case law of what amounts to "reporting" a current event"[55], although in *BBC v BSB*[56] Scott J held also news of a sporting character could fall within the scope of the defence. Arnold J held that a contemporaneous sporting event would amount to a current event for the sake of the defence.[57] The core of the question was, however, whether the reproduction and communication to the public of the clips by the defendants could be considered for the purpose of reporting those events. The judge reviewed relevant evidence, and held that the clips were reproduced and communicated for the purposes of: (i) sharing the clips with other users, and (ii) facilitating debate amongst users about the sporting events depicted.[58] However, (i) was the primary or predominant purpose: users added comments to the clips they uploaded, they did not create a report to which they added clips. Equally, the clips were presented to viewers accompanied by the comments, rather than reports being presented to viewers illustrated by clips. As such, use of the claimants' works was not for the purpose of reporting current events: "The clips were not used in order to inform the audience about a current event, but presented for consumption because of their intrinsic interest and value."[59] The judge

[51] *England and Wales Cricket Board Limited and Others v Tixdaq Limited and Another* [2016] EWHC 575 (Ch), [88]-[92].

[52] *Ibid*, [68].

[53] *Ibid*, [70]

[54] *Ibid*, [74].

[55] *Ibid*, [81]

[56] *Ibid*, [82].

[57] *Ibid*, [106].

[58] *Ibid*, [128]

[59] *Ibid*, [129].

decided to address nonetheless whether – assuming that the purpose was to report current events – the dealing at hand could be considered fair. He concluded in the negative, also holding that the defendants' activities were commercially damaging to the claimants and conflicted with a normal exploitation of their works and that the amount and importance of the works taken could not be justified by any informatory purpose.

4.5. FAIR DEALING

A substantial number of UK copyright defences are framed within the concept of 'fair dealing'. The CDPA does not contain a definition of 'fair dealing', nor does it stipulate what factors are to be considered when assessing whether a certain dealing with a work is to be considered fair. The notion of 'fair dealing' has been thus developed though case law from the perspective of a "fair-minded and honest person"[60], and has been traditionally considered a matter of degree and impression.[61] A number of considerations may inform the decision whether a certain use of a work is fair, although the relative importance of each of them will vary according to the case in hand and the dealing at issue.[62]

In *Ashdown*, citing with approval a passage from leading UK copyright treatise on *The Modern Law of Copyright* and Design by Laddie, Prescott and Vitoria, Lord Phillips noted the impossibility of laying down

> "any hard-and-fast definition of what is fair dealing, for it is a matter of fact, degree and impression. However, by far the most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor's exploitation of the copyright work, a substitute for the probable purchase of authorised copies, and the like ... The second most important factor is whether the work has already been published or otherwise exposed to the public ... The third most important factor is the amount and importance of the work that has been taken. For, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances the taking of an excessive amount, or the taking of even a small amount if on a regular basis, would negative fair dealing."[63]

4.6. OTHER CONSIDERATIONS

When assessing whether a certain exception would be applicable to the case at hand, a number of considerations other than those addressed above may require to be undertaken. These include, among other things, the issue of contractual override; moral rights; and technological protection measures.

4.6.1. CONTRACTUAL OVERRIDE

Further to the recommendations included in the Hargreaves Review, the initial position of UK Government appeared to be in the sense of favouring a broad prohibition of contractual override of exceptions.[64] More explicitly (and subject to the responses to be received by means of a public consultation), Government stated to be committed to introducing "a clause, applying to every exception provided by the [CDPA], which would make clear that any contract term purporting to prohibit or restrict the use of an exception is unenforceable."[65] Government's response in December 2012 excluded the feasibility of a blanket ban on contract overriding copyright, although "the general principle that contracts should not be allowed to erode the benefits of permitted acts is accepted."[66] The result was that only the drafting of exceptions relating to (the now defunct) private copying, education, quotation, text and data analysis, parody, research and private

[60] *Hyde Park Residence Ltd v Yelland and Others* [2001] Ch 143.

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

[62] Bently and Sherman (2014), p. 224. See also Arnold and Rosati (2015), p. 748; Jacques (2015), p. 703.

[63] *The Right Honourable Paddy Ashdown, MP PC v Telegraph Group Ltd* [2001] EWCA Civ 1142, [70].

[64] HM Government (2011a), p. 8.

[65] HM Government (2011b), §7.249

[66] HM Government (2012), p. 19.

study, disabilities, preservation, public administration, and reporting was accompanied by a clause preventing contractual override.

4.6.2. MORAL RIGHTS

Moral rights have never received a particularly strong protection in the UK. Formally acknowledged only since 1988, their scope is arguably narrower than in continental, *droit d'auteur*-like traditions, especially as far as the right of integrity is concerned. While French law apodictically[67] states that the author has the perpetual right "au respect … de son oeuvre"[68], the UK right of integrity (section 80 CDPA) requires a 'treatment' of the work in question. In this sense, section 80 CDPA appears even narrower than what is provided under Article 6*bis* of the Berne Convention[69], that encompasses not just any distortion, mutilation or other modification of a work, but also any other derogatory action. Overall, it would seem that UK right of integrity does not protect against non-transformative uses of one's work.[70]

While UK understanding of the right of integrity appears narrower than other jurisdictions, UK law currently lacks a statutory defence rooted within freedom of expression.[71] This means that alleged infringers of the right of integrity (but the same also applies to other moral rights) may not be able to rely on defences like fair dealing for caricature, parody or pastiche, or fair dealing for criticism, review and news reporting. It is however worth recalling that section 171(3) states the enforcement of copyright can be prevented or restricted on grounds of public interest or otherwise. In *Hyde Park Residence v Yelland* Aldous LJ reviewed a number of authorities, and concluded that section 171(3) could be used to prohibit the enforcement of copyright in the case of a work that is: "(i) immoral, scandalous or contrary to family life; (ii) injurious to public life, public health and safety or the administration of justice; (iii) incites or encourages others to act in a way referred to in (ii)."[72] Having said so – even if the existence of a public interest defence could be inferred from relevant statutory provisions and case law – its relevance would be residual, in the sense that it could only add to statutory exceptions in limited situations.[73]

4.6.2.1. THE CASE OF PARODY

With particular regard to caricature, parody and pastiche (section 30A CDPA), the scope of the exception (yet to be applied at the judicial level) may be potentially narrow. The need to introduce a specific exception pursuant to Article 5(3)(k) of the InfoSoc Directive was acknowledged by the Hargreaves Review and, prior to this (unsuccessfully), the Gowers Review. In accepting the recommendation of the Hargreaves Review, UK Government observed[74] that the InfoSoc Directive does not require to frame this exception within fair dealing. However, UK legislature decided not to go for an "unlimited"[75] exception (but no exception would be unlimited, as compliance with the three-step test would be still required, especially if one accepts that Article 5(5) of the InfoSoc Directive is addressed at national legislatures and courts alike[76]). Although using a "minimalistic" wording (eg without including references to the parodied work being

[67] Dietz (1994), p. 179.

[68] IPC, Article L121-1.

[69] Griffiths (2005), p. 222.

[70] Adeney (2006), p. 406.

[71] See Griffiths (2005), p. 223, explaining that omission of a defence based on freedom of expression from the drafting of section 80 CDPA was justified on fear of excessive complexity of the law.

[72] *Hyde Park Residence Ltd v Yelland and Others* [2000] EWCA Civ 37, [66]. According to Mance LJ, instead, it would not be possible to categorise the possible scenarios that would trigger section 171(3): see [83].

[73] In this sense, Laddie et al. (2011), §21.22

[74] HM Government (2014a), p. 9.

[75] HM Government (2014b), p. 1.

[76] In this sense, Arnold and Rosati (2015).

published and receiving sufficient acknowledgement)[77] when drafting section 30A, Government decided to include a reference to the need for a fair dealing with the original work, so to minimise the potential harm to relevant copyright owners. Section 30A CDPA provides that "[f]air dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work."

Relevant guidance on section 30A released by the UK Intellectual Property Office explains that further to the introduction of this new exception a comedian may use a few lines from a film or song for a parody sketch; a cartoonist may reference a well known artwork or illustration for a caricature; an artist may use small fragments from a range of films to compose a larger pastiche artwork.[78] Overall fair dealing only allows you to make use of a limited, moderate amount of someone else's work. This means that any dealing that is not fair will still require a licence or permission from the copyright owner.[79] While this might be acceptable for, say, a literary work, one could wonder whether the same could be possible in relation to a parody of an artistic work that did not reproduce a substantial part – if not the whole – of it. Leading copyright treatise *Copinger & Skone on Copyright* observes that, "[a]s parody depends upon recognition of the work being parodied, the substantial part requirement will sometimes be satisfied".[80] If one considers the corresponding exception under French law, Article L 122-5 No 4 IPC apodictically states that once a work has been divulged, the author cannot prevent "[l]a parodie, le pastiche et la caricature, compte tenu des lois du genre." At first sight, the wording of the French *right* to parody[81] appears broader than that employed by the new UK exception.

Furthermore, the changes to the CDPA have had no impact on the law or libel or slander, and left unaffected the regulation of UK moral rights, including the right of integrity. More often than not, a caricature, parody or pastiche involves a treatment of an earlier work. Such treatment might be prejudicial to the honour or reputation of the author of the original work. As expressly recognised by the CJEU in *Deckmyn*[82], there might a legitimate interest in objecting to a disparaging parody. More specifically, in this reference for a preliminary ruling concerning the understanding of 'parody' within Article 5(3)(k) of the InfoSoc Directive, the CJEU held that it follows from Recital 31 in the preamble to that directive that freedom of parody as an expression of one's own opinion is not unlimited. A parody that conveys a message that is discriminatory/racist may not be eligible for protection under Article 5(3)(k). To state otherwise would contradict the requirement for a fair balance between the rights and interests of the author of the parodied work and the rights of the parodist. It follows that in these instances the person who holds the rights to a work has a "legitimate interest in ensuring that the work protected by copyright is not associated" with the message conveyed by its parody.[83]

Finally, as mentioned section 80 CDPA is drafted in such a way that there can be no defence based on freedom of expression against a claim brought on integrity grounds.[84]

4.6.3. TECHNOLOGICAL PROTECTION MEASURES

In line with EU law (Article 6 of the InfoSoc Directive), also UK law allows rightholders to implement technological protection measures (TPMs) on their works and represses related circumventions (sections 296 to 296ZD CDPA). At the same time, the presence of a TPM may prevent uses of a work that are instead authorised by the law by means of relevant exceptions. To this end, where the application of any effective technological measure to a copyright work other

[77] Griffiths (2017), p. 69, observing that "[t]he minimalistic drafting of section 30A reflects the text of Article 5(3)(k) of the [InfoSoc] Directive. However, it also recognizes the realities of cultural practice. Parodists do not generally adapt unpublished works, and parodies are rarely accompanied by explicit acknowledgment of source" (footnote omitted).

[78] UK Intellectual Property Office (2014a), p. 5.

[79] UK Intellectual Property Office (2014b), p. 6.

[80] Davies et al. (2016), §9.63.

[81] Speaking of a "droit de parodie", see Vivant and Bruguière (2016) ,§651, also highlighting that this right is not limitless.

[82] *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, C-201/13, EU:C:2014:2132.

[83] *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, C-201/13, EU:C:2014:2132, [32]. For discussion of how such 'legitimate interest' may be qualified, see Rosati (2015b), pp 523-528.

[84] Griffiths (2005), p. 223. But see Davies et al. (2016), §11.51, suggesting instead a narrow reading of the potential of the right of integrity in relation to caricatures, parodies and pastiches.

than a computer program prevents a person from carrying out a permitted act in relation to that work, section 296ZE allows that person or a person being a representative of a class of persons prevented from carrying out a permitted act may issue a notice of complaint to the Secretary of State. To be eligible for the complaints process it is also required that the person has lawful access to the protected copyright work, or where the complainant is a representative of a class of persons, the class of persons have lawful access to the work (section 296ZE(10)).

5. ASSESSMENT OF THE UK SYSTEM OF COPYRIGHT EXCEPTIONS

The 2014 reform has introduced into UK copyright law new exceptions the necessity of which had been long advocated, eg parody and private copying. While the latter was short-lived and UK Government does not appear intentioned to re-introduce it – even as a modified version – in the near future, the former has yet to be tested in court. However, similarly to the case of quotation (the presence of which is particularly important due to the narrow wording and interpretation of pre-existing exceptions, notably criticism or review), also parody is subject to a number of limitations that might reduce its actual scope. In particular, the circumstance that section 30A is framed within 'fair dealing' and leaves the laws on libel and slander – as well as the application of moral rights – unaffected, might result in a narrow judicial interpretation.

As far as UK copyright is concerned, the forthcoming exit of the UK from the EU (Brexit) might present challenges but also open up opportunities for reform. This might be so especially in case of 'hard' Brexit, ie a scenario in which the UK is neither part of the EU nor the European Economic Area. In such instance, in fact, the UK would be no longer bound by the EU *acquis* in the area of copyright, including the closed system of exceptions and limitations within Article 5 of the InfoSoc Directive. The UK might thus decide to reform its copyright law, and inject some additional flexibility into its own system of copyright exceptions. This might be so by means of: (i) an open-ended clause in addition to existing exceptions that would encompass uses that could not fall within the scope of the other exceptions and employ the language of the three-step test[85]; or even (ii) introducing a system of fair use similar to that in place in jurisdictions like the US.[86] The High Court of England and Wales has recently interpreted and applied §107 of the US Copyright Act in *Sony/ATV Music Publishing v WPMC*[87], a case concerning a documentary on the first concert of The Beatles in the US. Among other thing, the dispute required the court to determine whether the exploitation of the documentary in the US would be an infringement of the US copyrights in the works of the claimants, or whether instead the fair use defence would apply. Besides the US Supreme Court decision in *Campbell*[88], Arnold J also recalled Pierre Laval's influential article entitled *Toward a Fair Use Standard*[89], and addressed criticisms of the fair use doctrine as being "indeterminate and unpredictable".[90] The judge noted how "[o]ver the last decade, however, work by scholars such as Pamela Samuelson, Barton Beebe and Matthew Sag has demonstrated that what at first blush may appear to be an amorphous mass of individual decisions can be analysed and categorised in the same way as other areas of common law (negligence, for example)."[91]

CONCLUSION

Past application of UK copyright exceptions has not really considered the three-step test, and appeared to favour a narrow construction of exceptions. The actual scope of the new UK exceptions is yet to be tested, and the possible opportunities presented by Brexit might result in an overall re-thinking of UK approach to copyright exceptions. In particular, the rigidity of a closed system of copyright exceptions on the model of Article 5 of the InfoSoc Directive

[85] This is the proposal that the Wittem Group advanced with its model European copyright code: Wittem Group 2010, Article 5(5).

[86] In this sense see also Arnold et al., p. 7.

[87] *Sony/ATV Music PublishingLLC & Another v WPMC Ltd & Another* [2015] EWHC 1853 (Ch).

[88] *Campbell v Acuff-Rose Music*, 510 US 569.

[89] Leval (1989), pp. 1111-1112.

[90] *Sony/ATV Music PublishingLLC & Another v WPMC Ltd & Another* [2015] EWHC 1853 (Ch), [100].

[91] *Sony/ATV Music PublishingLLC & Another v WPMC Ltd & Another* [2015] EWHC 1853 (Ch), [100].

might make it arguably difficult to accommodate instances arising out of technological advancement (an instance being the *PRCA* litigation and the question of lawfulness of internet browsing). In addition, with specific regard to the UK, the lack of a defence specifically rooted within freedom of expression and the potentially narrow scope of certain exceptions (including the new ones) might result in an undue compression of fundamental rights other than copyright[92], including – notably – 'users' rights'.[93]

[92] Protection of copyright has been recognised as a fundamental – yet not limitless – right: see *Ashby Donald and Others v France* [2013] ECHR 287; *Frederick Neij and Another v Sweden* [2013] ECHR 76 (in relation to Article 10 of the European Convention of Human Rights); *Martin Luksan v Petrus van der Let*, C-277/10, EU:C:2012:65; *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, C-314/12, EU:C:2013:781; *GS Media BV v Sanoma Media Netherlands BV and Others*, C-160/15, EU:C:2016:644, [31] (in relation to Articles 11, 16 and 17(2) of the Charter of Fundamental Rights of the European Union).

[93] The CJEU itself has referred to exceptions as users' rights in *Technische Universität Darmstadt v Eugen Ulmer KG*, C-117/13, EU:C:2014:2196, [31].

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ANNEX – SHORT ANSWERS TO AND REFERENCES FOR QUESTIONNAIRE FOR QUESTION B

Questions to National Rapporteurs[94]

1. Does your jurisdiction's copyright law provide for a so-called "triple test" provision, namely a provision which reiterates the requirement of international treaties that exceptions and limitations to copyright shall only apply in certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author? If yes, please provide [an English version of] the text of this provision. If no, how does your law understand and comply with that requirement? In particular, is that requirement taken into account by the courts in individual cases and to what extent? Is there any case law which can serve as guidance? Can you refer to concrete examples used by your national scholars to illustrate that requirement and its concrete consequences? In particular, can you comment on precedents, if any, where the court found that (i) the application of the exception conflicts with the normal exploitation of the work (ii) unreasonably prejudices the legitimate interests of the author?

> **Unlike other EU jurisdictions, the UK has not adopted the language of the three-step test in Article 5(5) of Directive 2001/29 (the InfoSoc Directive) when transposing this piece of legislation into its own national law. See further above, sub §3.**

2. Does your jurisdiction's copyright law provide for a list of exceptions? If yes, is it a closed list, namely a list designed in such a way that any use which falls outside the list is not permitted - unless it is authorized by the copyright owner?

> **Similarly to all the other EU Member States, the UK system of exceptions is a closed one. In 2014 the UK reformed its system of exceptions, by taking fuller advantage of the possibilities available under Article 5 of Directive 2001/29 (the InfoSoc Directive). See further above, sub §§1 and 2.**

3. If your jurisdiction's copyright law provides for a list of exceptions, what are the fundamental rights or the objectives supporting the permitted uses which justify the exceptions? In particular, do the exceptions pursue the following fundamental rights or objectives: education, research, access to culture and knowledge, freedom of expression and right to receive and disseminate information, privacy and private use, needs of people with a disability, preservation of cultural heritage, public security, freedom of panorama? Are there fundamental rights or objectives which are overlooked or unduly minimized in the current list of exceptions?

> **The UK recently reformed its system of exceptions, so to accommodate further uses of copyright works, or broaden types of uses already covered by existing exceptions. See above, sub §§2 and 4. The UK has an exception allowing so called 'freedom of panorama' (see above, sub fn 18), but does not have a specific exception based on freedom of expression as such (see further above, sub §4.6.2).**

4. If your jurisdiction's copyright law provides for a list of exceptions, are the conditions mentioned in the provisions - in order for the use concerned to be permitted – [unduly] strict and compelling, or rather is there room for flexibility? Can you mention examples to illustrate solutions in this respect? Does the law make a distinction between (i) uses for commercial purposes and uses for non-commercial purposes (ii) uses by individuals and uses by others (e.g. companies, organizations)?

> **Generally speaking some UK copyright exceptions are limited to certain beneficiaries and/or subject-matter, while other exceptions are subject to a number of conditions, are limited to certain specified purposes (at times restrictively interpreted by courts, eg in the case of criticism or review), are framed within fair dealing, or their applicability is subject to other considerations (eg possibility of contractual override, and the role of moral rights). See further above, sub §4.**

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[94] The complete questionnaire and guidance to national rapporteurs can be viewed at https://drive.google.com/file/d/0B6d07lh0nNGNVFAtczQyWjk0LXc/view?usp=sharing.

5. If your jurisdiction's copyright law provides for a list of exceptions, are the exceptions listed mandatory or optional? Does your law make a distinction in this respect? If yes, does the distinction depend on the nature of the exception? If the exceptions are mandatory, does that mean that they cannot be ruled out by contract, even if the contract organizes an online (interactive) access to the works? Does your law make a distinction between off-line and on-line uses in this respect? Do you have any other comment concerning the mandatory or the optional character of the exceptions?

Further to the recommendations included in the 2011 Hargreaves Review, the initial position of UK Government favoured a broad prohibition of contractual override of exceptions. Eventually, however, only the drafting of exceptions relating to (the now defunct) private copying, education, quotation, text and data analysis, parody, research and private study, disabilities, preservation, public administration, and reporting was accompanied by a clause preventing contractual override. See further above, sub §4.6.1.

6. If your jurisdiction's copyright law provides for a list of exceptions, do these exceptions relate to the "reproduction right" only or to the "right of communication to the public" only, or to both? Does the law make a distinction depending on the exception concerned? If yes, what are the negative consequences in practice for the user of the work, i.e. to what extent is he prevented from making use of the work in a way that is sufficiently effective for the purpose contemplated by the legislature? Can you give some illustrations?

The UK system of exceptions is in this sense compliant with the architecture of Article 5 of Directive 2001/29 (the InfoSoc Directive).

7. If your jurisdiction's law provides for a list of exceptions, do these exceptions also affect the moral rights of the author? Is the impact on moral rights explicit or implicit? Is it legitimate and proportionate? Is there a mechanism which guarantees a minimum level for the preservation of the moral rights of the copyright owner? Conversely, is there any risk that the copyright owner could unduly invoke his moral rights to block the exception? Please give some examples.

UK copyright exceptions, including the recently introduced parody, caricature and pastiche exception, are without prejudice to moral rights protection. See further above, sub § 4.6.2.

8. Under your jurisdiction's copyright law, to what extent is there a risk that technological protection measures could prevent from enjoying the benefit of the exceptions to copyright? Is there an obligation upon the copyright owner to make available to the beneficiary of an exception the means of benefiting from that exception? Is there a distinction between the exceptions, depending on their nature? How can the individual user of a work (or a group of individual users) obtain the full and effective benefit of the exceptions?

In line with EU law, also UK law allows rightholders to implement technological protection measures (TPMs) on their works and represses related circumventions. At the same time, the presence of a TPM may prevent uses of a work that are instead authorised by the law by means of relevant exceptions. To this end, where the application of any effective technological measure to a copyright work other than a computer program prevents a person from carrying out a permitted act in relation to that work, the law allows that person or a person being a representative of a class of persons prevented from carrying out a permitted act may issue a notice of complaint to the Secretary of State. See further above, sub §4.6.3.

9. Does your jurisdiction's copyright law provide for a "catch all" exception, i.e. an exception which is worded in such a way that it can apply in various cases which differ significantly from each other (e.g. "fair use")? If yes, what is the wording of that exception and what are potential illustrations of its flexibility? What are the conditions for a successful application of this exception? What is the guidance for the application of this exception? To what extent are the effects of this exception sufficiently predictable? To what extent is this exception compliant with the triple test?

No.

10. In your jurisdiction's legal system, when you make abstraction of the exceptions mentioned in the copyright law, to what extent can other fundamental rights than copyright (e.g. freedom of expression, right to private life, right to

education) prevail above copyright so that ultimately the use of a work is permitted without the consent of the copyright owner ? Can you mention different situations where other fundamental rights can prevail and result into a permitted use of the work? Is the solution different if the use concerned is already addressed in the copyright law itself, and said use does not comply with the conditions required for the application of the exception? Is there case law which can serve as guidance?

The lack of a defence specifically rooted within freedom of expression and the potentially narrow scope of certain exceptions (including those introduced in 2014) might result in an undue compression of fundamental rights other than copyright. However, UK courts and the Court of Justice of the European Union have stressed the importance of balancing copyright protection with the protection of other fundamental rights. See further above, sub 'Conclusion'.

11. If your jurisdiction's copyright law provides for a list of exceptions, does it also provide for a compensation in favor of the copyright owner? Does the law make a distinction between the exceptions in this regard? How is the compensation calculated? Is there a mechanism to ensure that the compensation remains within certain limits, i.e. it does not result into an "overcompensation" to the detriment of some categories of users?

No. In addition, when introducing a limited exception allowing the making of personal copies for private use (private copying), UK Government held the view that this exception would not require the provision of a fair compensation mechanism. See further above, sub §2.

12. Does your jurisdiction's law provide for an exception in order to allow temporary acts of reproduction which are necessary to enable a lawful use? What is the wording (in English) of that exception? What are the conditions thereof? Is that exception sufficiently effective to enable the development of [most of] legitimate online activities/ new business models? Can you give some examples where that exception was (un)successfully applied? Is that exception mandatory?

Yes. The UK exception is modelled on Article 5(1) of Directive 2001/29 (the InfoSoc Directive). See further above, sub §4.3.

13. Does your jurisdiction's copyright law provide for exceptions in order to allow the freedom of expression? If yes, please provide [the English version of] the text of these provisions. What are the conditions for the use to be permitted? Can you give some examples where these exceptions were successfully, respectively not successfully, applied? Is there any compensation required for the benefit of the copyright owner? Are the exceptions concerned mandatory?

UK law does not envisage a defence based on freedom of expression as such. However, existing exceptions for criticism or review (see further above, sub §4.4.1), quotation (see further above, sub §4), news reporting (see further above, sub §4.4.2), and parody, caricature and pastiche (see further above, sub §4.6.2.1) can be considered as rooted within freedom of expression.

14. What are the cases (e.g. political speeches, news of the day, mere items of press information), if any, where your jurisdiction's copyright law explicitly provides that the content concerned is excluded from the benefit of copyright protection? If there is a list of such cases, is that list a closed list? Is there, in your view, any content missing in that list? Would you recommend to provide for such a list?

UK law complies with the idea/expression dichotomy, and has a fixation requirement.

15. In the context of education, what are the uses which are permitted by your jurisdiction's copyright law? What are the conditions for the uses to be permitted? Are the provisions sufficiently broad to cover distance learning? Does the law make a distinction depending on whether the user is a profit or a non-profit organization, and pursues a (non-) commercial purpose? Is there a compensation provided for the benefit of the copyright owner? How is the compensation calculated? Are the exceptions concerned mandatory?

The UK has recently broadened its education exceptions, which also cover distance learning. See further above, sub §2.

16. In the context of research, what are the uses which are permitted by your jurisdiction's copyright law? Is there an exception to support big data related activities? Is there an exception concerning "text and data mining"? What are the conditions for said uses to be permitted? Does the law make a distinction depending on whether the user is a profit or a non-profit organization and pursues a (non-) commercial purpose? Is there a compensation for the benefit of the copyright owner? Are the exceptions concerned mandatory?

In 2014 the UK introduced a specific exception allowing text and data analysis for non-commercial purposes. See further above, sub §4.1.

17. In your jurisdiction's copyright law, to what extent and under which conditions is the copyright exhausted? To what extent and under which conditions does exhaustion of copyright apply to online situations where the work has been made available by electronic means in a digital format? To what extent can the copyright owner exclude the exhaustion of copyright via the terms and conditions of an agreement?

As regards exhaustion of the right of distribution, UK law follows the EU approach. See further above, sub fn10.

18. Does your jurisdiction's copyright law provide for a panorama-exception? What are the conditions for that exception? Does the law make a distinction depending on whether the user is a profit or a non-profit organization and pursues a (non-) commercial purpose? Is there a compensation for the benefit of the copyright owner? Is the exception mandatory?

The UK has an exception allowing so called 'freedom of panorama'. See further above, sub fn 18.

19. To what extent and under what conditions does your jurisdiction's copyright law allow to make private copies? Is the private copy exception inapplicable to some critical situations (like the scanning of works by others than private individuals)? Is there a compensation for the benefit of the copyright owner? If yes, what form(s) of compensation (one single form or two forms)? Is there a risk that the compensation system could result into an "overcompensation" to the detriment of some users? Is the exception mandatory?

The UK introduced an exception allowing the making of personal copies for private use (private copying) in 2014, which was however quashed in 2015. See further above, sub §2.

20. When you make an overall assessment of your jurisdiction's copyright law, what are the risky factors which could possibly result into an imbalance between the rights of the copyright owner and the rights of (/ the fair use made by) the users of works? In particular, where do the risks come from: the absence of certain exceptions so that specific fair uses could be prevented? The wording of certain conditions for the application of specific exceptions which is unduly demanding to the detriment of some categories of users? The effect of "overcompensation" which unduly favors the copyright owner? The negative impact of some exceptions on the normal exploitation of the work or the legitimate interests of the copyright owner so that the copyright owner is unduly disfavored? What solutions do you recommend to tackle potential issues in this respect?

The 2014 reform introduced into UK copyright law new exceptions or broadened existing ones. Yet, the new exceptions, notably parody and quotation, have yet to be tested in court. This means that their scope remains to be seen. Beside exceptions that are restricted to certain beneficiaries or subject-matter, the interpretation of relevant conditions – including whether the specific purpose (if any) of the exception at issue is satisfied by the use of a certain work made – will determine the actual availability of a defence. The perspective of the UK leaving the EU might prompt a discussion around the reform of existing exceptions, including a possible departure from the EU model of a closed list. See further above, sub §§4 and 5.