COPYRIGHT AND USER FREEDOM

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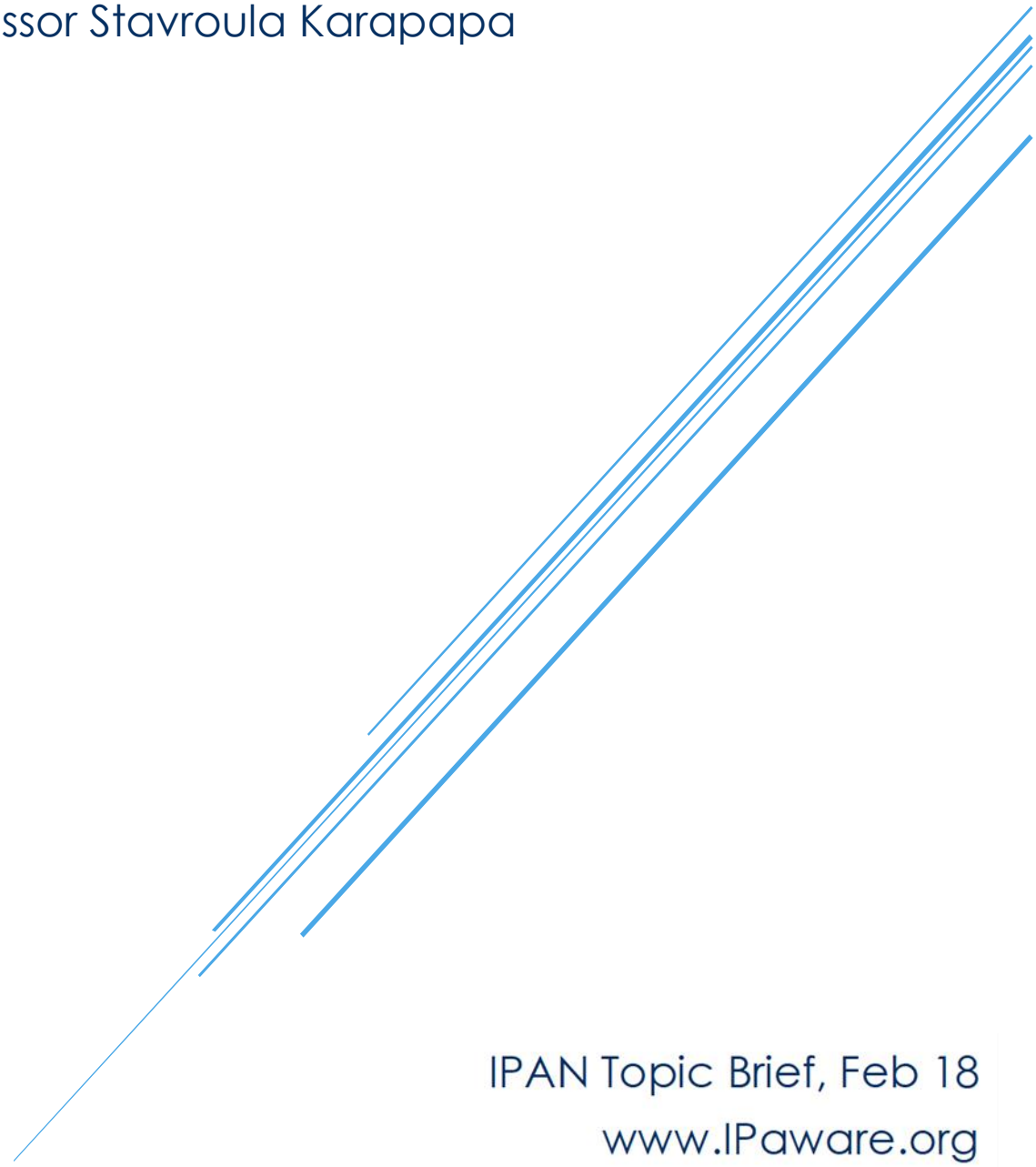

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Copyright and User Freedom

What Is Permitted to do with a Protected Work Without Authorisation?

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Copyright

Copyright is the legal protection that covers the original expression of ideas, instead of the ideas themselves. There is no requirement of formalities (e.g. registration) for copyright to subsist in a work and original works are protected automatically. Authors are given exclusive rights on authorising or prohibiting certain activities by reference to their works. These include the right to stop the unauthorised copying, distribution, performance, rental and lending of their works, the making available of their works to the public on the internet, and making unauthorised alterations to their works, such as dramatisations or orchestrations. Anyone who carries out these activities without seeking permission from the relevant right owners is in principle liable for copyright infringement, unless copyright law expressly permits that particular activity.

Copyright infringement

Copyright receives statutory protection in the UK through the Copyright, Designs and Patents Act (CDPA) 1988.[1] The Act envisages two types of copyright infringement: primary infringement and secondary infringement. Primary infringement takes place through the following activities, when these are carried out without the authorisation of the copyright holders:

- Copying the work

- Issuing copies of the works to the public
- Renting or lending the work to the public
- Performing, showing, or playing the work in public
- Communicating the work to the public
- Making an adaptation of the work or doing any of the above in relation to an adaptation

Secondary liability usually arises by reference to activities of retailers or publishers and typically covers:

- Importing infringing copies
- Possessing of or dealing with infringing copies
- Providing the opportunity for making infringing copies

Infringement will arise when any of the aforementioned activities is carried out without the permission of the copyright holders.

Whereas liability for primary infringement does not depend on knowledge or intention to infringe—in the sense that carrying out any of the aforementioned activities will not be excused due to lack of such knowledge—secondary infringement requires that the defendant knew or had reason to believe that activities they carried out are in breach of the law. This means that liability for secondary infringement is not as strict as it is by reference to acts of primary infringement. Note that secondary liability depends on a prior act of primary infringement and the latter may be carried out by a third party.

Permitted uses

The acts permitted under copyright law, otherwise called copyright exceptions and limitations, allow individuals to carry out an exclusive act by reference to a copyright work without this amounting to infringement of copyright. Although their legal basis is often the protection of fundamental rights (e.g. freedom of speech and freedom of press) or public policy objectives (e.g. educational use of copyright protected materials or preservation of materials in libraries or archives) they are not fully-fledged user rights but defences against allegations for copyright infringement. In practical terms, this means that users are not entitled to use copyright exceptions as the legal basis to bring proceedings against

rightholders because, for instance, their ability to make copies on the basis of a permitted use is disabled, e.g. by means of technological access-control tools. Academic literature has been very critical on this aspect of copyright law, with many scholars arguing in favour of recognising that certain exceptions should have the status of user rights, most notably those exceptions that are justified with a view to protect fundamental rights.

The framework of permitted uses is not based on general indications of what is permitted and what remains within the control of copyright holders. Instead, it can be said that user freedom in using copyright materials in a way that would otherwise require authorisation is fragmented in that there are well over 50 defences available in the CDPA 1988, in addition to common law defences. What is more, the available defences are subject to specific scope limitations in the sense that a conduct should squarely meet the description of the defence to be permitted. This is to be contrasted to the position available in other jurisdictions, such as the United States, where the permissibility of an activity is determined under a judicial test, the so-called fair use test,[2] which allows for more flexibility, particularly so when cases involving new technologies are assessed.

In light of EU harmonisation, the UK has revisited its existing list of permitted uses twice: in 2003 in order to implement the so-called Information Society Directive [3] and in 2014 to apply the recommendations made in the Hargreaves Report.[4] Below we examine some of the key copyright exceptions available in the UK. Note that some exceptions covering institutional users, such as libraries or educational establishments, are not examined.

Fair dealing

'Fair dealing' assesses whether the use of a copyright protected work—that would otherwise amount to infringement—is lawful. First, it needs to be established that the defendant's activity falls within the factual requirements set out by the relevant statutory provisions and, if this is the case, whether the dealing with that work is fair.[5]

Non-commercial research and private study

Section 29 CDPA 1988 lays down a fair dealing defence for research and private study that applies by reference to all categories of copyright protected works. In order for the use to be permitted, it should involve non-commercial research and/or private study, the use of the materials should fair, and it should also be limited to the use of materials from researchers or students. What is more, the source should be sufficiently acknowledged. Note that it is only non-commercial research that is permitted, meaning that research that is carried out for-profit, either directly or indirectly, is excluded from the scope of the defence. What is more, it is only researchers, students, and (under specific conditions) those making copies on their behalf, such as librarians, that can invoke the fair dealing defence for research and private study.

Text and data analysis

A recent addition to the list of permitted uses is a copyright exception allowing researchers to make copies of works for the purposes of text and data analysis. The exception that was introduced in the 2014 Copyright reform (section 29A and schedule 2(2)1D, CDPA 1988) covers computational analysis of copyright protected works. As explained in the Hargreaves Report, such analysis can enable the discovery of patterns, trends or correlations that are not possible through research and reading performed by human researchers. This could, for instance, include the use of text mining techniques on bulks of documents, including medical research files, to extract an unexpected side-effect of a drug. The exception covers non-commercial text and data analysis, subject to the condition that the sources of the materials used are sufficiently acknowledged.

Quotation, criticism, review

UK copyright law permits the use of copyright protected materials for the purposes of criticism and review. Since 2014, there is also a copyright exception covering quotations more broadly (section 30(1) CDPA 1988). These exceptions include both the quotation of a work to criticise or review the work as such or its broader philosophy. In order for these aforementioned activities to be permitted, their purpose should be

limited to quotation, criticism or review, the use of the relevant materials should be fair, and the source has to be sufficiently acknowledged. Even though the exception covers any category of protected works, these should already be available to the public. The quotation exception is also subject to the condition that the use of the quoted matter should not exceed what is required to achieve the stated purpose.

Reporting of current events

Journalists and reporters are entitled to use copyright protected content in order to report current events, insofar as the materials used do not include photographs, that the use made is fair, and the source is sufficiently acknowledged. The term "current events" is understood broadly, covering not only political events but other news events too, including events that took place in the past to the extent that they retain some topical relevance.

Parody, caricature, pastiche

In 2014, an exception allowing parody, caricature and pastiche was included in the CDPA. Before the copyright reform, parody would amount to infringement if substantial taking of the original work would be established.[6] To be permitted, a parody has to meet two conditions in the aftermath of relevant EU case law: the parody should evoke the original work while being noticeably different from it and it should be an expression of humour or mockery.[7]

As soon as the factual parameters of a specific fair dealing defence are made out, then courts look into whether the use in question was fair on the basis of an objective test. Indeed, what is fair is a question of fact and degree, ultimately a matter of impression.[8] However, there are a number of factors that can be taken into consideration in assessing the fairness of a use, including—but not limited to—the degree to which an activity comes in competition with the exploitation of the original copyright work, whether the original work has been published, and the extent of the use, including the importance of the part that was taken.[9]

Time shifting

Although a general exception for private use is not available under UK copyright, individuals are entitled to make copies of broadcasts for their private and domestic use in order to watch at a more convenient time. This flows from section 70 CDPA (as amended), which specifies that the recording must be made on domestic premises. Systematically copying materials to make a home library is not allowed. Similarly, selling or hiring, or offering for sale or hire, or communicating to the public a lawful recording is not permitted.
During the 2014 copyright reform, a broader private copying exception was introduced in UK copyright, allowing for copying made for personal use and for non-commercial purposes but, soon after, the exception was quashed in judicial review proceedings,[10] meaning that home copying beyond time-shifting is not allowed under UK copyright law.

Exhaustion of rights

Selling second-hand works, such as used books, music CDs or movie DVDs is permitted under the so-called doctrine of the exhaustion of the right to issue copies of works to the public within the European Economic Area (EEA) (Sections 18 and 27 CDPA). The meaning of the doctrine is that as soon as copyright holders place their works in the market within the EEA, their right to control subsequent re-distributions of those exact same works is exhausted. It is for this reason why exhaustion is regarded as the legal basis for the existence of second hand markets of used copyright materials. Note that the doctrine applies only by reference to the right to issue hard copies of works to the public but does not cover the communication of electronic copies of works on the internet. It is not permitted to sell used copies of copyright protected materials in electronic form. The only exception to the general rule that reselling works in electronic form is prohibited concerns software, which can legally be resold online.[11]

An important aspect of the so-called exhaustion rule is that it does not cover copies of works that have been subject to modifications and subsequently put on the market.[12] This means that selling copyright protected materials that have been de-contextualised or reworked in some way, e.g. by cutting and carving a thick book to make a sculpture or attaching copyright protected images to a different canvas for resale purposes, it not in principle allowed.

Incidental inclusion

UK copyright allows the incidental inclusion of copyright materials in other people's works, e.g. news broadcasts that inadvertently display part of a copyright protected work, such as background music, or architectural or artistic works in the background.

Contractual override and copyright exceptions

With digitisation and the internet, rightholders have the possibility to contractually forbid users from carrying out activities that would be in principle statutorily permitted. Until recently, it was not clear whether such contractual clauses are valid or not. The question became a central aspect of the 2014 copyright reform and the Government aimed to offer certainty by ensuring that licensing activities would not deprive society from the benefit arising from permitted uses. Indeed, *most* of the copyright exceptions currently available include a clear indication that contractual terms that purport to prevent or restrict any permitted activity are unenforceable.

Towards a flexible, judicial test?

Scholarly discussion has recently focused on the value of a flexible, open norm in order to address the permissibility of various activities. Most of this discussion is inspired by the introduction of a US fashioned fair-use standard that would apply at EU level,[13] or the transformation of existing international norms from legislative guides into tests suitable for assessment by the judiciary.[14] This is the case of the so-called "three step test". The latter is an international instrument featuring in the Berne Convention, the WIPO Copyright Treaty and the TRIPs Agreement, that lays down the parameters of what should be permitted at legislative level in the various Member States. This test states that legislators of the countries bound by the respective international treaties should confine limitations and exceptions to exclusive rights to (a) certain special cases which (b) do not conflict with a normal exploitation of the work and (c) do not unreasonably prejudice the legitimate interests of the rights holders.

The European Parliament has also made the suggestion to introduce an open standard towards the judicial assessment of exceptions and limitations, calling for "flexibility in the interpretation of exceptions and limitations in certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author or rightholder."[15] Such a flexible norm could better address modern uses of copyright works and, most importantly, be aligned with objectives of creativity, innovation and business growth on the internet through the development of cutting-edge business models built around uses of copyright protected materials.

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[1] The full text is available here: https://www.legislation.gov.uk/ukpga/1988/48/contents

[2] §107 of the USA Copyright Act

[3] 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, 22 June 2001

[4] Ian Hargreaves, Digital opportunity: review of intellectual property and growth, 2011, available at https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth

[5] *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605

[6] *Joy Music v Sunday Pictorial* [1960] 2 QB 60; *Williamson v Pearson* [1987] FSR 97

[7] *Johan Deckmyn and Another v Helena Vandersteen and Others Case C-201/13* ECLI:EU:C:2014:2132

[8] *Hubbard v Vosper* [1972] 2 QB 84 at 94

[9] *Ashdown v Telegraph Group Ltd* ([2001] EWCA Civ 1142; [2002] R.P.C. 5; [2002] E.C.D.R. 32

[10] *BASCA v Secretary of State for Business and Innovation* [2015] EWHC 1723, and follow-up judgment [2015] EWHC 2041

[11] This was established at EU level in *UsedSoft GmbH v Oracle International Corp*, Case C-128/11, ECLI:EU:C:2012:407

[12] *Art & Allposters International BV v Stichting Pictoright*, Case C-419/13, ECLI:EU:C:2015:27

[13] See eg P. B. Hugenholtz and M. Sentfleben, "Fair Use in Europe: In Search of Flexibilities", November 2011, available at http://www.ivir.nl/publicaties/download/912

[14] See eg the proposal of the Wittem Group: http://www.copyrightcode.eu, Art 5.5

[15] European Parliament, Committee on Legal Affairs, Draft Report on the Implementation of 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, 15 January 2015, 2014/2256(INI), point 13