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United Kingdom Copyright Decisions and Legislative Developments 2014

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Abstract This report highlights the main UK copyright decisions in 2014, which relate to the right of communication to the public, website blocking injunctions, policies implemented by Internet hosting providers to take advantage of the E-Commerce Directive's 'safe harbour' provisions, the application of European copyright case law on partial reproduction by the UK courts, and the moral right of attribution. It also discusses the new exceptions that have been introduced into the copyright statute by recent legislative amendments, as well as several existing exceptions whose scope has been extended by these amendments.

Subject Intellectual property.

Keywords Communication to the public; Competition; Contract; Copyright; Exceptions; Freedom to provide services; Legislation; Levies; Libel; Moral rights; Parody; Private copying; Quotation; Reproduction; Research; Text and data mining.

Legislation: Copyright, Designs and Patents Act 1988 (UK); Copyright (Public Administration) Regulations 2014 (UK); Copyright and Rights in Performances (Disability) Regulations 2014 (UK); Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 (UK); Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (UK); Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 (UK); European Computer Programs Directive 91/250/EEC; European Database Directive 96/9/EC; European E-Commerce Directive 2000/31/EC; European Information Society Directive 2001/29/EC; Treaty on the Functioning of the European Union 2009.

Cases *1967 Ltd v British Sky Broadcasting Ltd* [2014] EWHC 3444 (Ch); *British Sky Broadcasting Group plc v Duarte (t/a Crispin Inn)* [2014] EWHC 111 (Ch); *Deckmyn and Vrijheidsfonds VZW v Vandersteen C-201/13*; *Designers Guild Ltd v Russell Williams (Textiles) Ltd (t/a Washington DC)* [2000] 1 WLR 2416; *Football Association Premier League v British Sky Broadcasting Ltd* [2013] EWHC 2058 (Ch); *Football Association Premier League Ltd v Luxton* [2014] EWHC 253 (Ch); *Football Association Premier League Ltd v QC Leisure and Murphy v Media Protection Services Ltd C-403/08 and C-429/08*; *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch); *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd (No 2)* [2012] EWHC 1152 (Ch); *EMI Records Ltd v British Sky*

Broadcasting Ltd [2013] EWHC 379 (Ch); *Infopaq International A/S v Danske Dagblades Forening* C-5/08; *Jackson v Universal Music* [2014] EWHC 882 (QB); *John Kaldor Fabricmaker UK Ltd v Lee Ann Fashions Ltd* [2014] EWHC 3779 (IPEC); *Newspaper Licensing Agency Ltd v Meltwater BV* [2010] EWHC 3099 (Ch); *Omnibill (PTY) Ltd v Egpsxxx Ltd* [2014] EWHC 3762 (IPEC); *Paramount Entertainment International Ltd v British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch); *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd (No 2)* [2014] EWHC 937 (Ch); *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd* [2013] UKSC 18; *SAS Institute Ltd v World Programming Ltd* [2013] EWCA Civ 1482; *Svensson v Retriever Sverige AB* C-466/12; *Technische Universität Darmstadt v Eugen Ulmer KG* C-117/13; *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011] EWHC 1981 (Ch); *Twentieth Century Fox Film v British Telecommunications plc (No 2)* [2011] EWHC 2714 (Ch); *Walmsley v Education Ltd (t/a OISE Cambridge)* (Intellectual Property Enterprise Court, 13 March 2014).

1. Judicial decisions

In contrast to 2013, which saw a reference by the UK Supreme Court to the CJEU on the vital question of the lawfulness of Internet browsing,¹ 2014 was a year of relatively routine copyright jurisprudence from the UK courts. The developments that may be of greatest interest to European copyright lawyers are perhaps those that have taken place in the wake of the CJEU's decision in *Football Association Premier League Ltd v QC Leisure and Murphy v Media Protection Services Ltd*.² Two cases decided by the High Court, *British Sky Broadcasting Group plc v Duarte (t/a Crispin Inn)*³ and *Football Association Premier League Ltd v Luxton*,⁴ involved publicans who had imported and used foreign satellite decoder cards initially marketed elsewhere in the EU to receive broadcasts of Premier League football matches that were shown on foreign channels. These broadcasts were then shown to customers present in their establishments – an act which had been held in *FAPL* to constitute a potentially infringing communication to the public of the works contained in the broadcast.

The defendants in both *Duarte* and *Luxton* had made use of foreign decoder cards that were licensed solely for domestic use, which they had sourced from the Republic of Ireland and Denmark respectively. Both sets of defendants contended that the true purpose of the proceedings against them was to prevent them from using foreign decoder cards in the UK. This, they argued, was a breach of the EU rules on competition and freedom to provide services set out in articles 101 and 56 of the Treaty on the Functioning of the European Union ('TFEU'). These arguments were also made on the basis of the CJEU's decision in *FAPL*. In that case, the CJEU had

¹ *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd* [2013] UKSC 18.

² Joined Cases C-403/08 and C-429/08.

³ [2014] EWHC 111 (Ch).

⁴ [2014] EWHC 253 (Ch).

held that a national legislative prohibition against the importation, sale and use of foreign decoders constituted an unjustified restriction on the freedom to provide services in breach of article 56 of the TFEU. It had also held that exclusive territorial licence agreements entered into between the FAPL and the broadcasters of Premier League matches for each EU Member State, which contained an obligation requiring the broadcaster not to supply decoders with a view to their use outside the territory covered by the licence agreement, constituted a restriction on competition in breach of article 101 of the TFEU.

In both *Duarte* and *Luxton*, however, the High Court held that there was no nexus between the arguments raised by the defendants and the copyright claims made by the rightholders, as the claims were not founded on the fact that the defendants were using foreign decoder cards. Instead, they were founded on the fact that the defendants were using domestic decoder cards instead of commercial ones, and that these domestic cards did not give the defendants a licence to communicate the broadcasts to their customers. Although there was some evidence in both cases that the foreign broadcasters had a policy of not supplying commercial decoder cards to businesses located in the UK, which the defendants alleged to be due to their continued anti-competitive licence arrangements with the FAPL, this did not affect the outcome of the cases.

Two reported cases from the High Court, *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd (No 2)*⁵ and *1967 Ltd v British Sky Broadcasting Ltd*,⁶ concerned the right of communication to the public in the context of websites that facilitated access to infringing copies of protected works. Some of these websites accomplished this by streaming protected material hosted on other websites, some by enabling their users to download protected works through the use of the Bittorrent peer-to-peer file-sharing protocol, and others by aggregating hyperlinks to Bittorrent files stored on other websites. The claimants in these cases were rightholders seeking injunctions against the major UK ISPs to compel them to block their subscribers' access to these websites. In both of these cases, the High Court, applying the principles laid down in previous cases concerning blocking injunctions,⁷ held that the operators of these websites had communicated the works in question to the public by intervening so as to make the works available to a new audience that was not considered by the rightholders of the works when they authorised the initial communication or other act of dissemination of these works. In

⁵ [2014] EWHC 937 (Ch).

⁶ [2014] EWHC 3444 (Ch).

⁷ *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011] EWHC 1981 (Ch); *Twentieth Century Fox Film v British Telecommunications plc (No 2)* [2011] EWHC 2714 (Ch); *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch); *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd (No 2)* [2012] EWHC 1152 (Ch); *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch); *Football Association Premier League v British Sky Broadcasting Ltd* [2013] EWHC 2058 (Ch); *Paramount Entertainment International Ltd v British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch).

both cases, the court also confirmed that the recent decision of the CJEU in *Svensson v Retriever Sverige AB*⁸ did not detract from this reasoning.

In both *Paramount Home Entertainment International Ltd and 1967 Ltd*, the High Court also concluded that the acts of communication in question were targeted at the public in the UK, taking into account factors that had been established in previous cases relating to blocking injunctions. These included the fact that the default language of these websites was English; the fact that each website had a large number of visitors from the UK; the fact that much of the material available on these websites was likely to be popular or in demand in the UK; and the presence of advertising that was clearly aimed at the UK market. Similar factors – the language of the website, the number of UK visitors to the website, and the overall structure of the website – were also considered in *Omnibill (PTY) Ltd v Egpsxxx Ltd*⁹, a case decided by the Intellectual Property Enterprise Court.¹⁰ The primary issue in that case was whether photographs on a website operated for the provision of escort services in South Africa could be said to be targeted at the public in the UK. On the basis of those factors, the court concluded that there was such targeting, notwithstanding the fact that the escorts offering these services were located in South Africa and that the prices of their services were listed in South African Rand.

In order to take advantage of the ‘safe harbour’ provisions set out in the E-Commerce Directive, European ISPs that provide hosting services must, upon obtaining actual knowledge or awareness of unlawful activity or information, including activity or information which infringes copyright, act expeditiously to remove or disable access to any such information.¹¹ The policies implemented by major hosting providers in order to comply with this obligation have sometimes led to complaints from individual Internet users. This was the case in *Jackson v Universal Music*.¹² Although this was a libel action, rather than a copyright claim, it flowed directly from the ‘notice and takedown’ policy implemented by the major video hosting platform YouTube in order to maintain its ‘safe harbour’ status. The claimant in this case had created a short educational film based on his research into African and American history, which was carried out as part of his postgraduate studies. The film comprised sound recordings, video and written material. It was uploaded to YouTube, but was subsequently removed by YouTube following a complaint by Universal Music. Universal Music’s objection to the claimant’s video arose from the inclusion of parts of the Billie Holiday song ‘Strange Fruit’ in the video. In place of the claimant’s video, YouTube displayed the name of the video with the statement, ‘This video is no longer available due to a copyright claim by UMG’. The claimant contended that the statement was libellous,

⁸ C-466/12.

⁹ [2014] EWHC 3762 (IPEC).

¹⁰ The Intellectual Property Enterprise Court, successor to the Patents County Court, forms part of the Chancery Division of the High Court, and deals specifically with intellectual property disputes.

¹¹ E-Commerce Directive, art 14 (implemented in the UK by the E-Commerce Regulations, regulation 19).

¹² [2014] EWHC 882 (QB).

as it implied that he was a copyright infringer, and sought to restrain Universal Music from further publication of the statement. Universal Music's application to strike out the claim was allowed by the High Court, which held that the claimant had no real prospect of success. This was for two reasons. First, the decision to publish the statement complained of had been taken by YouTube, and not Universal Music, even though it was the ultimate result of the complaint made by Universal Music. Second, the statement did not have the defamatory meaning contended for by the claimant, as it merely stated that the fact that a copyright claim had been made, without implying that it was a good claim or implying any criticism of the person against whom it had been made.

The case of *John Kaldor Fabricmaker UK Ltd v Lee Ann Fashions Ltd*,¹³ which was also decided by the Intellectual Property Enterprise Court, involved a fairly straightforward application of the established principles relating to the subsistence and infringement of copyright in the context of a fabric design. However, the way in which these principles were explained and applied is illustrative of the UK courts' continued reluctance to reframe these principles in light of recent CJEU decisions such as *Infopaq International A/S v Danske Dagblades Forening*.¹⁴ Under the Copyright, Designs and Patents Act 1988 ('CDPA'), infringement occurs where a defendant does an act that falls within the rightholder's exclusive purview in relation to the whole or a substantial part of a protected work. In 2013, the UK Court of Appeal had made it clear that the test for determining whether a substantial part of a work has been taken must now be interpreted consistently with the definition of 'reproduction in part' given by the CJEU in *Infopaq*, namely on the basis of whether the part taken contains elements which are the expression of the intellectual creation of the author of the work.¹⁵ Notwithstanding this, in determining the question of infringement in *John Kaldor*, the Intellectual Property Enterprise Court relied mainly upon the interpretation of 'substantial part' given by the House of Lords in the pre-*Infopaq* decision of *Designers Guild Ltd v Russell Williams (Textiles) Ltd (t/a Washing DC)*,¹⁶ and made no reference to the CJEU's interpretation of 'reproduction in part' in *Infopaq*.

A third reported case from the Intellectual Property Enterprise Court, *Walmsley v Education Ltd (t/a OISE Cambridge)*,¹⁷ dealt with the oft-overlooked issue of moral rights. In this case, two photographs taken by the claimant were used without permission or attribution on a blog operated by the defendants. The defendants admitted copyright infringement, and were willing to pay damages calculated on the basis of a licence fee for a single use of each photograph. However, they resisted the claimant's further claim for additional damages for breach of his moral right of

¹³ [2014] EWHC 3779 (IPEC).

¹⁴ C-5/08.

¹⁵ *SAS Institute Ltd v World Programming Ltd* [2013] EWCA Civ 1482, [38].

¹⁶ [2000] 1 WLR 2416.

¹⁷ (Intellectual Property Enterprise Court, 13 March 2014).

attribution. Under the CDPA, the author of a work has the right to be identified as such; however, this right will not be infringed unless it has been asserted in accordance with the relevant statutory provisions.¹⁸ The court correctly stated the law on this point, and then went on to hold that the claimant had asserted his rights in the manner required. This conclusion was reached on the basis that the book in which the claimant's photographs were first published contained a rubric stating that the claimant held the copyright in the book and the photographs, and also on the basis that many of the instances of the claimant's photographs – including the two photographs that were the subject of the action – that could be found via an Internet search bore a clear watermark stating '© John Walmsley 1969 all rights reserved'. This conclusion, it is submitted, runs contrary to the statutory language of the CDPA, which provides for only a few methods by which the assertion of the author's right of attribution can be made.¹⁹ For works in general, the assertion can be made either by including in the instrument effecting the assignment of the copyright a statement that the author asserts their right to be identified, or by an instrument in writing signed by the author.²⁰ Assertions made through the first method bind the assignee and anyone claiming through the assignee, regardless of whether they have notice of the assertion, while assertions made through the second method bind any person to whose notice the assertion is brought. A copyright statement across the face of the work, as was the case in *Walmsley*, would appear to be inadequate. The decision in *Walmsley* is perhaps illustrative of the court's relative unfamiliarity with the statutory provisions governing moral rights. However, it also highlights the impracticality both of making the moral right of attribution subject to a requirement of assertion and for specifying such limited means of making the required assertion.

2. Legislative developments

Perhaps the most significant developments that occurred in UK copyright law in 2014 were legislative, rather than judicial, in nature. On 1 June 2014, the CDPA was amended to introduce a new exception permitting text and data mining for non-commercial research, and also to reformulate – and, in some cases, to expand the scope of – existing exceptions relating to research and private study, education, libraries and archives, persons with disabilities, and public administration.²¹ In October 2014, a second set of amendments came into force. These introduced two new exceptions relating, respectively, to the making of personal copies of protected works and the use of protected works for caricature, parody and pastiche.²² They also expanded the scope of the existing exception for criticism or review to permit

¹⁸ CDPA, s 77(1).

¹⁹ CDPA, s 78.

²⁰ CDPA, s 78(2).

²¹ Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 (UK); Copyright and Rights in Performances (Disability) Regulations 2014 (UK); Copyright (Public Administration) Regulations 2014 (UK).

²² Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 (UK); Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (UK).

other types of quotation from protected works.²³ These reforms largely reflect the recommendations made by the *Hargreaves Review of Intellectual Property and Growth*,²⁴ and have the stated aim of making the UK copyright framework 'more robust, modern and flexible'.²⁵ The most significant of these developments will be highlighted below.

Text and data mining

The first of the new exceptions introduced by the 2014 amendments permits the making of copies of works for the purpose of computational text and data analysis (colloquially known as text and data mining).²⁶ This is subject to three conditions: first, the person making the copy must have 'lawful access' to the work in question; second, the computational analysis must be carried out for the sole purpose of non-commercial research; and third, the copy must be accompanied by a sufficient acknowledgement, unless this would be impossible for reasons of practicality or otherwise.²⁷ This exception is predicated on article 5(3)(a) of the Information Society Directive, which allows EU Member States to enact exceptions permitting the use of works 'for the sole purpose of illustration for teaching or scientific research ... to the extent justified by the non-commercial purpose to be achieved'.

During the consultation process for the 2014 amendments, the proposal for this exception met with considerable resistance from publishers, who expressed concerns that the exception would interfere with analytics services they had already developed or were developing on their own, as well as its implications for security of access to protected works.²⁸ They also stressed the importance of voluntary licensing solutions for facilitating text and data mining.²⁹ Notwithstanding these objections, the UK Government decided to go forward with the proposed exception, taking the view that permitting text and data mining for non-commercial research was unlikely to have a negative effect on the market for or value of copyright works.³⁰ It also suggested that removing restrictions on the use of analytics technologies might even increase the value of these works to researchers.³¹

Parody

²³ Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (UK).

²⁴ Hargreaves, "Digital Opportunity – A Review of Intellectual Property and Growth" (UK IPO, Newport, 2011).

²⁵ UK IPO, "Modernising Copyright – A Modern, Robust and Flexible Framework" 7 (UK IPO, Newport, 2012).

²⁶ CDPA, s 29A.

²⁷ CDPA, s 29A(1).

²⁸ UK IPO, *supra* note 25, at 36.

²⁹ UK IPO, *supra* note 25, at 37.

³⁰ UK IPO, *supra* note 25, at 37.

³¹ UK IPO, *supra* note 25, at 37.

The second of the new exceptions introduced by the 2014 amendments allows the use of protected works for the purposes of caricature, parody and pastiche,³² taking advantage of the freedom afforded to EU Member States by article 5(3)(k) of the Information Society Directive. This new exception is expected to provide economic, social and cultural benefits by removing unnecessary restrictions on the production of parodic works, fostering creative talent, and facilitating the development of freedom of expression.³³ However, the UK's implementation of the parody exception qualifies the scope of the freedom available under the Information Society Directive by stipulating that any use of a work that is made in reliance on the parody exception must also constitute 'fair dealing'.³⁴ In assessing whether a particular dealing with or use of a work is 'fair' in this sense, the UK courts have traditionally taken into account factors such as the amount taken from the work, the use made of the work, the impact of the use upon the market for the work, whether the work was published or unpublished, the manner in which the work was obtained, and the motives underlying the use of the work. The UK Government has described the fair dealing requirement as a means of ensuring that the parody exception is not misused.³⁵ In particular, it has suggested that the copying of an entire work for the purpose of creating a parody is unlikely to be considered 'fair' where licences for such a use are already available for a fee.³⁶ The UK Government has also emphasised that the new parody exception leaves the existing moral rights regime unchanged, meaning that authors will continue to be protected against damage to their reputation or honour that results from any derogatory treatment to their works.³⁷ While the terms 'caricature', 'parody' and 'pastiche' are not defined by the statute, it seems clear that the UK courts will have to interpret them in line with the recent decision of the CJEU in *Deckmyn and Vrijheidsfonds VZW v Vandersteen*.³⁸ In that case, the CJEU made it clear that the concept of 'parody' is to be regarded as an autonomous concept of EU law, and held that it has two essential characteristics: first, it must evoke an existing work while being noticeably different from it; and second, it must constitute an expression of humour or mockery.

Personal copies for private use

Article 5(2)(b) of the Information Society Directive permits EU Member States to enact exceptions permitting reproductions of protected works 'made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation'. Many Member States

³² CDPA, s 30A.

³³ UK IPO, *supra* note 25, at 31.

³⁴ CDPA, s 30A(1). Many of the existing exceptions under the CDPA are also subject to a fair dealing requirement, including the exceptions for research and private study, criticism or review, and news reporting: see CDPA, ss 29 and 30.

³⁵ UK IPO, *supra* note 25, at 31.

³⁶ UK IPO, *supra* note 25, at 31.

³⁷ UK IPO, *supra* note 25, at 31.

³⁸ C-201/13.

have taken advantage of this freedom by implementing broad private copying exceptions, typically coupled with the imposition of a levy on products that are used for making such copies, such as blank CDs, MP3 players, printers and personal computers, in order to provide compensation to rightholders.³⁹

Prior to the coming into force of the 2014 amendments, the CDPA did not contain a general exception permitting such private copying.⁴⁰ This meant that activities such as the format-shifting of lawfully purchased copies of works from one device to another constituted infringement, notwithstanding the widespread belief among consumers that these activities were fair, reasonable and lawful.⁴¹ In order to resolve this mismatch between the legal position and reasonable and widespread consumer behaviour,⁴² the CDPA was amended to introduce a narrowly-tailored exception permitting individuals to make personal copies of works for their own private use.⁴³ The availability of this exception is subject to the following conditions: first, an initial copy of the work must have been lawfully acquired by the individual in question;⁴⁴ second, the initial copy must have been acquired on a permanent basis, rather than rented, borrowed, broadcast or streamed;⁴⁵ third, the copying must be done for the individual's own private use;⁴⁶ and fourth, the copying must be done for ends that are neither directly nor indirectly commercial.⁴⁷ Personal copies made by an individual under this provision may not be transferred to a third party, including family and friends.⁴⁸

It should be noted that this new personal copying exception does not provide for the payment of 'fair compensation' to rightholders, whether by way of levy or otherwise. The UK Government has taken the view that such compensation is 'neither required nor desirable', as the narrow scope of the provision means that it will cause no harm, or only very minimal harm, to rightholders.⁴⁹ Justification for this position can be found in recital 35 to the Information Society Directive, which states that 'where the prejudice to the rightholder would be minimal, no obligation for payment may arise'. Nevertheless, this aspect of the personal copying exception has proved to be controversial. On 25 November 2014, three UK music industry bodies – the Musicians' Union, the British Academy of Songwriters, Composers and Authors and

³⁹ See Kretschmer, "Private Copying and Fair Compensation – An Empirical Study of Copyright Levies in Europe" (UK IPO, Newport, 2011).

⁴⁰ It did, however, contain limited-purpose exceptions which permitted some degree of private copying for the purpose of private study, the making of back-up copies of computer programs, and time-shifting of broadcasts: see CDPA, ss 29, 50A and 70.

⁴¹ UK IPO, *supra* note 25, at 22.

⁴² UK IPO, *supra* note 25 at 25.

⁴³ CDPA, s 28B.

⁴⁴ CDPA, s 28B(2)(a).

⁴⁵ CDPA, s 28(4).

⁴⁶ CDPA, s 28(1)(b). This includes the making of back-up copies, format-shifting, and private 'cloud' storage: CDPA, s 28B(5).

⁴⁷ CDPA, s 28B(1)(c).

⁴⁸ CDPA, ss 28B(6) and (7).

⁴⁹ UK IPO, *supra* note 25, at 23 – 24.

UK Music – filed an application for judicial review of the exception, arguing that it contravenes the Information Society Directive in failing to provide fair compensation to rightholders affected by it.⁵⁰

Quotation

Prior to the 2014 amendments, the CDPA contained an exception permitting fair dealing with protected works for the purpose of criticism or review of that work, of another work, or of a performance of a work, provided that the work had already been made available to the public and that the dealing was accompanied by a sufficient acknowledgement.⁵¹ The scope of this exception was thus significantly narrower than that permitted by article 5(3)(d) of the Information Society Directive, which allows ‘quotations for purposes *such as* criticism or review, provided that ... their use is in accordance with fair practice, and to the extent required by the specific purpose’.⁵² Accordingly, on 1 October 2014, the exception was extended so as to permit other types of quotation from protected works, subject to the following conditions: first, the work must have been made available to the public; second, the use of the quotation must constitute fair dealing with the work; third, the extent of the quotation must be no more than that required by the specific purpose for which it is used; and fourth, the quotation is accompanied by a sufficient acknowledgement.⁵³ This amendment takes full advantage of the flexibility offered by the Information Society Directive, and permits legitimate uses of quotations that might not necessarily fall within the scope of the narrower exception for criticism or review, such as the use of titles and short extracts from protected works in academic research papers, bibliographies, blogs and tweets.⁵⁴

Providing access to works via dedicated terminals

Following the 2014 amendments, cultural institutions – a term that encompasses libraries, archives, museums, galleries and educational establishments⁵⁵ – are now permitted to communicate or to make works available to the public by means of dedicated terminals located on their premises.⁵⁶ This provision makes use of the freedom offered by article 5(3)(n) of the Information Society Directive. Following the decision of the CJEU in *Technische Universität Darmstadt v Eugen Ulmer KG*,⁵⁷ it is

⁵⁰ UK Music, “Government Facing Judicial Review Challenge Over Failure to Compensate in Private Copying Exception” (*UK Music*, 26 November 2014) <<http://www.ukmusic.org/news/privatecopyingexception>> accessed 9 January 2015.

⁵¹ CDPA, s 30 (pre-1 October 2014).

⁵² Emphasis added.

⁵³ CDPA, s 30(1ZA).

⁵⁴ UK IPO, *supra* note 25, at 26, 28. For cases acknowledging the possibility that the copying of titles and short extracts might amount to infringement, see *Infopaq International A/S v Danske Dagblades Forening* C-5/08; *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch).

⁵⁵ CDPA, ss 40B(2) and 43(3).

⁵⁶ CDPA, s 40B.

⁵⁷ C-117/13.

now clear that the exception would also permit the initial digitisation of works for the purpose of making them available on dedicated terminals, but would not extend to the printing or downloading of works by individual users of these terminals. The exception is subject to four further conditions, which reflect the restrictions contained in article 5(3)(n) itself: first, the work or a copy of the work must have been lawfully acquired by that institution; second, the work must be communicated or made available only to individual members of the public; third, the work must be communicated or made available to the public only for the purposes of research or private study;⁵⁸ and fourth, the work must be communicated or made available in compliance with any purchase or licensing terms to which it is subject.⁵⁹

Contractual overridability of exceptions

Aside from a few mandatory exceptions relating to computer programs⁶⁰ and databases,⁶¹ the European Directives on copyright have left it up to individual Member States to determine the extent to which the effect of copyright exceptions can be excluded or restricted by contract.⁶² In enacting the 2014 amendments, the UK Government accepted as a general principle that contractual restrictions should not be allowed to erode the benefits of exceptions established by copyright law.⁶³ Accordingly, many of the exceptions that were introduced or reformulated by the 2014 amendments are now expressed to be incapable of being overridden by contract. The new exceptions relating to text and data mining, parody and personal copying, as well as the expanded exception for quotation, all contain a provision stating that any contractual terms purporting to exclude or restrict their availability will be unenforceable.⁶⁴ This is also the case for many of the existing exceptions that were reformulated by the amendments, in particular those relating to non-commercial research and private study,⁶⁵ education,⁶⁶ libraries and archives,⁶⁷ and accessible copies made by, on behalf of or for persons with disabilities.⁶⁸ However, the prohibition against contractual overriding has not been extended to existing exceptions that were not directly dealt with by the 2014 amendments, in particular the key public interest exceptions permitting fair dealing for the purposes of criticism or

⁵⁸ This condition might preclude, for instance, the making available of works on dedicated terminals at a public exhibition, where members of the public might be present for purposes of recreation or entertainment rather than research or study: see Bently and Sherman "Intellectual Property Law" 258 (4th ed. OUP, Oxford, 2014).

⁵⁹ CDPA, s 40B(3).

⁶⁰ Computer Programs Directive, art 8.

⁶¹ Database Directive, art 15.

⁶² See for e.g. Information Society Directive, art 9

⁶³ UK IPO, *supra* note 25, at 19.

⁶⁴ CDPA, ss 28B(10), 29A(5), 30(4) and 30A(2).

⁶⁵ CDPA, s 29(4B).

⁶⁶ CDPA, ss 32(3) and 36(7).

⁶⁷ CDPA, ss 41(5), 42(7), 42A(6) and 75(2).

⁶⁸ CDPA, s 31F(8).

review and news reporting. Pending further legislative reform, it appears that these exceptions will continue to be susceptible to contractual limitation.⁶⁹

⁶⁹ Bently and Sherman, *supra* note 58, at 229 (4th ed, OUP, Oxford, 2014).