

# Copyright Exceptions: Small Islands in a © of Rights?

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# Plan

- The CDPA (as enacted)
- The Recognition of a Problem - *Gowers* and *Hargreaves Reviews*
- The New (and Old) Exceptions considered
- The Importance of the CJEU
- What Is on the Horizon?

# Dreyfuss and Frankel (2015)

“intellectual property rights were islands in a sea of the public domain until domestic laws expanded ...and turned the public domain into a pond surrounded by a continent of rights.”

(attributing the metaphor to Jerry Reichman)

# The 1988 Act (as enacted)

- Chapter III, sections 28-76
- In *Pro Sieben*, [1998] FSR 43 at 48Laddie J described

“Chapter III of the Act consists of a collection of provisions which define with extraordinary precision and rigidity the ambit of various exceptions to copyright protection...”

# Fair Dealing: CDPA s 29-30 (as enacted)

- CDPA 1988 had three fair dealing defences: research/private study; criticism/review; reporting current events
- If not for purpose, no defence. Cf 'fair use'
- Others identified by sector or type of work: education (ss 32-36); libraries (ss37-44); public bodies (ss45-50); designs (ss 51-3); typefaces (ss 54-55); works in electronic form (s 56); miscellaneous (ss 57-75)

# British “Fairness”: An Over-riding Public Benefit...

- But courts have emphasised need for
- “some overriding element of public advantage which justifies the subordination of the rights of the copyright owner (*NLA Ltd v. M&S plc* [2001] Ch 257, 280 (Chadwick LJ))
- “the defence...should lie where the public interest in learning the very words written by the owner of the copyright is such that publication should not be inhibited by the chilling factor of having to pay damages or account for profits” (*Ashdown*, CA)

# EU Impact

- CP and DB Directives: ss 50A-50C; s 50D
- ISD Directive 2001/29/EC, Art 5(1), 5(2)(a)-(e), 5(3)(a)-(o).
- 21, 1 mandatory, remainder optional but exhaustive
- In 2003, SO 2003/2498, implementing ISD, adding further conditions
- Subsequently OWD, 2012/28/EU, Art 6

# Recognition of a Problem

- **Over-regulation:** many were simply too narrow.
- **Complexity:**
- **Inflexibility:** inability to respond (eg to new technologies in classroom).
- **Arbitrariness:** exceptions applying to some works but not others (eg fair dealing for research)
- **Overridability:** esp where digitally distributed subject to contract



# Gowers Review (Dec 2006)

## **Flexibility**

**Recommendation 8:** Introduce a limited private copying exception by 2008 for format shifting for works published after the date that the law comes into effect. There should be no accompanying levies for consumers.

**Recommendation 9:** Allow private copying for research to cover all forms of content. This relates to the copying, not the distribution, of media.

**Recommendation 10a:** Amend s.42 of the CDPA by 2008 to permit libraries to copy the master copy of all classes of work in permanent collection for archival purposes and to allow further copies to be made from the archived copy to mitigate against subsequent wear and tear.

**Recommendation 10b:** Enable libraries to format shift archival copies by 2008 to ensure records do not become obsolete.

**Recommendation 11:** Propose that Directive 2001/29/EC be amended to allow for an exception for creative, transformative or derivative works, within the parameters of the Berne Three Step Test.

**Recommendation 12:** Create an exception to copyright for the purpose of caricature, parody or pastiche by 2008.

**Recommendation 13:** Propose a provision for orphan works to the European Commission, amending Directive 2001/29/EC.

## *Hargreaves Review*, Recommendation 5

“Government should firmly resist over regulation of activities which do not prejudice the central objective of copyright, namely the provision of incentives to creators. Government should deliver copyright exceptions at national level to realise all the opportunities within the EU framework, including format shifting, parody, non-commercial research, and library archiving. The UK should also promote at EU level an exception to support text and data analytics. The UK should give a lead at EU level to develop a further copyright exception designed to build into the EU framework adaptability to new technologies.

# The 2014 Reforms

- The Copyright and Rights in Performances (**Research, Education, Libraries and Archives**) Regulations 2014, SI 2014/1372 (introducing s 29A on data-mining, and reforming education and library exceptions)
- The Copyright and Rights in Performances (**Disability**) Regulations 2014, SI 2014/1384 (a systematic reworking, ss 31A-31F);
- The Copyright and Rights in Performances (**Public Administration**) Regulations 2014, SI 2014/1385 (extending s. 47)
- The Copyright and Rights in Performances (**Personal Copies for Private Use**) Regulations 2014, SI 2014/2361 (introducing CDPA s 28B) (private copying exception with no levy, reviewed by Green J in *BASCA v SS for BIS*, [2015] EWHC 1723(Adm));
- The Copyright and Rights in Performances (**Quotation and Parody**) Regulations 2014, SI 2014/2356 (fair dealing for quotation (s 30(1ZA)), as well as parody, caricature and pastiche, s 30A)

# How Much Liberalisation Has Occurred?

- Some backtracking
- Much is narrow
- More technological/subject matter neutrality)
- Some quite broad.

# CDPA s 28B (personal copies)

- The Copyright and Rights in Performances (**Personal Copies for Private Use**) Regulations 2014, SI 2014/2361 (introducing CDPA s 28B)
- private copying exception with no levy
- judicial reviewed by Green J in *BASCA v SS for BIS*, [2015] EWHC 1723(Adm));
- Government had relied on harm being “minimal”, but had not adequately sought evidence of this

# Then quashed: *BASCA v SS for BIS*, [2015] EWHC 2041(Adm)

- Quashed, but prospectively
- No reference on how to calculate harm (lost sales, or licensing)
- SoS “to reflect further and in due course take a view as to whether, and in what form, any further factual enquiries should be carried out and whether a new private copying exception should be introduced...”



# CDPA s 29 Research – amendments by SI 2014/1372

- S 29(1) Fair dealing with a ~~literary, dramatic, musical or artistic~~ work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.
- 1C Fair dealing with a ~~literary, dramatic, musical or artistic~~ work for the purposes of private study does not infringe any copyright in the work.
- (4B) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable

# CDPA s 29A: Text and Data Mining

(1) The making of a copy of a work by a person who has **lawful access** to the work does not infringe copyright in the work provided that—

(a) the copy is made in order that a person who has lawful access to the work may carry **out a computational analysis** of anything recorded in the work for the sole purpose of **research for a non-commercial purpose**,  
and

(b) the copy is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).

....

(5) To the extent that a term of a contract purports to prevent or restrict the making of a copy which, by virtue of this section, would not infringe copyright, that term is unenforceable.”.



# CDPA s 30A

## 30A Caricature, parody or pastiche

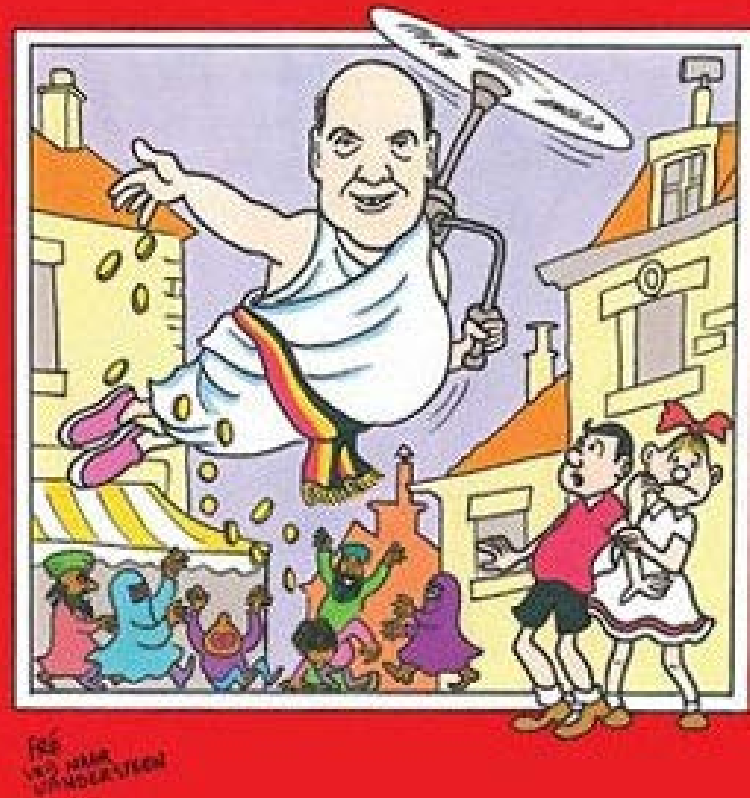
(1) Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work.

(2) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.

# Case C-210/13, *Deckmyn* (GR Ch, 3 Sept 2014)



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# Case C-210/13, *Deckmyn* (GR Ch, 3 Sept 2014)

[20] ‘the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery’

[27] the application, in a particular case, ...must strike a fair balance between, on the one hand, the interests [of rightsholders], and, on the other, the freedom of expression of the user

# Fair Dealing By Use of a Quotation

## Exception: CDPA s 30 (1ZA)

Copyright in a work is not infringed by the use of a quotation from the work (whether for criticism or review or otherwise) provided that—

- (a) the work has been made available to the public,
- (b) the use of the quotation is fair dealing with the work,
- (c) the extent of the quotation is no more than is required by the specific purpose for which it is used, and
- (d) the quotation is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise)."

# CDPA s 30(1ZA)

Copyright in a work is not infringed by the use of a quotation from the work (whether for criticism or review or otherwise) provided that—

- (a) the work has been made available to the public,
- (b) the use of the quotation is fair dealing with the work,
- (c) the extent of the quotation is no more than is required by the specific purpose for which it is used, and
- (d) the quotation is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).

# Features

- InfoSoc Dir, 2001/29/EC, Art 5(3)(d); BC, Art 10(1)
- “use” for a “specific purpose”
- ...whether for criticism or review or otherwise...
- of “a quotation from the work”
- the extent of the quotation is “no more than is required by the specific purpose”
- the use of the quotation is “fair dealing with the work”

## An important liberalisation

- Fair dealing for criticism or review required criticism/review *of* a work or performance of a work
- So quotation would **not** be permitted if criticism or review was not of **a work** (but rather eg of political decision, behaviour etc: *Ashdown v Telegraph Group Ltd* [2001] Ch 685, [24] (Morritt VC) [2002] Ch 49, [61] (CA); *IPC Media Ltd v. News Group Newspapers Ltd* [2005] EWHC 317 (Ch) (Hart J)).

A narrow conception of quotation: Case C-145/10,  
*Eva Maria Painer/Standard VerlagsGmbH, AG*  
Trstenjak

[AG210] ‘natural language usage’

- third-party intellectual property is reproduced without modification in identifiable form.
- There must also be a material reference back to the quoted work in the form of a description, commentary or analysis. The quotation must therefore be a basis for discussion.
- [AG213] Could be whole (in case of photographs)



The ECJ? Case C-145/10, *Eva Maria Painer/Standard VerlagsGmbH* (1 Dec 2011)

[134] Article 5(3)(d) of Directive 2001/29 is intended to strike a fair balance between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.

Points towards broad understanding?

# CDPA, s 32: Reporting Current Events

- 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 (subject to subsection (3)) it is accompanied by a sufficient acknowledgement.

# *England and Wales Cricket Board & Sky v Tixdaq & Fanatix* [2016] EWHC 575 (ch)

- C – owned © in TV broadcasts of cricket matches
- From 2015, D evolving platform that would allow users to upload 8 second clips, with instructions to ‘caption with attitude’ and attribute. Max 2 clips/hr. Clips removed after 24 hrs. Algorithm regulating users.
- Ads displayed. D had 18,292 active daily users: [32]
- Relied of FD for reporting current events, esp *BBC v BSB* [1991] Ch 141 and ‘Sports News Access Code of Practice’ (‘SNAC’) (linear TV broadcasts; permits 60 secs, no more than 6 showings, no more than 6 min per hour)

## *Fanatix* (ctd)

- Substantial part?
- Does part exploit the investment made by the broadcaster?
- Not purely quantitative.[66]
- Work – “each session” [98]. But highlights: “each clip substantially exploited the C’s investment in producing the relevant broadcast.” [99]

## *Fanatix (ctd)*

- Current Events – need not be “very recent” [80]; but not in issue [106]
- Not limited to reporting in a general news programme: *BBC v BSB* (“Sportsdesk”, 30 mins, 3/day)
- Favours broad, “living”, interpretation: [112]-[113]. Citizen journalism can be: [114]
- But is this reporting? Brochures referred to “sharing” and facilitating debate
- No: not to “inform” but “for consumption because of their intrinsic interest and value.” D’s purpose “purely commercial rather than genuinely informative”: [129]

## *Fanatix* (ctd)

- Fairness: old domestic authorities must be treated “with a degree of caution”: [74]
- Fair? Cf Art 5(3)(c) “to the extent justified by the informatory purpose”. Arnold J, [70], “an important consideration” in assessing fairness
- 3 step test: “essentially the same factors as fair dealing” – [89]
- Begins with “conflict with normal exploitation”: [137]-[147]. There is conflict.
- Not justified by informatory purpose: [149]

# The Importance of the CJEU

- The shift from narrow (Case C-5/08, *Infopaq I*, [56]-[57]) to purposive construction (Case C-403/8, *FAPL*, [163])
- The constitutionalisation of the analysis: post 2010 Charter is used as basis for more and more of the interpretation/application eg *Deckmyn*, [26]; *Fanatix*, [73] (“balance”, “proportionality”)
- The question of the 3 step test: how constraining is it? When is it relevant? (Arnold & Rosati)

# What Is on the Horizon? UK

- **Repeal of CDPA, s 52** (exception that had the effect of limiting the term of protection for artistic works that were mass produced): The Enterprise and Regulatory Reform Act 2013 (Commencement No. 10 and Saving Provisions) Order 2016, SI 2016/593, from July 28 2016
- **Amendment of CDPA, s 72: Copyright (Free Public Showing or Playing) (Amendment) Regulations 2016**, SI 2016/565, from June 15, 2016 (excluding film from the exception in the light of FAPL)



# CDPA, s 72 Amendments

“The showing or playing in public of a broadcast. . . to an audience who have not paid for admission to the place where the broadcast. . . is to be seen or heard does not infringe any copyright in—

- (a) the broadcast; **or**
- (b) any sound recording (except so far as it is an excepted sound recording) included in it; **or**
- ~~(c) any film included in it.]~~

# What Is On The Horizon?

- *A Digital Single Market Strategy for Europe* COM(2015) 192 final, (6.5.2015), [2.4]: text and data mining; research; education.
- *Towards a More Modern, more European Copyright Framework* COM(2015)626 final (9.12.2015), [3] (education, disability, TDM, library consultation, museum preservation, panorama)
- Mandatory; ensure they “function across borders”. Autumn package?
- March 2016: consultation on freedom of panorama