Copyright and Digital Cultural Heritage: The Permitted Acts—Exceptions to Copyright
Copyright and Digital Cultural Heritage: The Permitted Acts—Exceptions to Copyright

Every copyright regime limits an owner’s rights by allowing certain things to be done with her work without the need for the owner’s permission. These permitted acts (or, exceptions to copyright) represent an attempt to strike a balance between the economic interests of the owner and use by others considered to be socially, culturally, politically or economically beneficial.

In this commentary, we consider how the European copyright regime has shaped UK law regarding exceptions to copyright. We then consider various exceptions that have general applicability within the UK.
This commentary is structured as follows:

1. Copyright exceptions in Europe and the UK ................................................................. 4
2. Fair dealing ......................................................................................................................... 4
3. Sufficient acknowledgement ............................................................................................ 5
4. Copyright exceptions and contract .................................................................................. 5
   4.1. Contract override and statutory fraud ................................................................. 6
5. General exceptions ......................................................................................................... 8
   5.1. Research and private study (s.29) ........................................................................... 8
   5.2. Copies for text and data analysis for non-commercial research (s.29A) ....... 9
   5.3. Quotation, criticism and review (s.30(1)) ............................................................ 10
      5.3.1. Is the work being used for the purposes of criticism and review? .......... 11
      5.3.2. Has the work been made available to the public? .................................. 13
      5.3.3. Contract override ......................................................................................... 14
   5.4. Reporting current events (s.30(2)) ....................................................................... 14
      5.4.1. The public reporting of current events ......................................................... 15
   5.5. Parody (s.30A) .......................................................................................................... 16
   5.6. Enabling access and use for disabled persons (ss.31A–31F) ......................... 17
      5.6.1. Accessible copies for the personal use of a disabled person (s.31A) .... 17
      5.6.2. Making and supplying accessible copies by authorised bodies (s.31B) .... 20
   5.7. Use of certain anonymous works ............................................................................ 21
      5.7.1. Literary, dramatic, musical and artistic works (s.57) ................................. 21
      5.7.2. Films (s.66A) ................................................................................................. 22
   5.8. Public recitation or reading (s.59) ............................................................................ 22
6. Exceptions for education and instruction ....................................................................... 25
7. Legal materials and bibliography .................................................................................. 25
   7.1. Legislation ................................................................................................................ 25
   7.2. Cases .......................................................................................................................... 25
   7.3. Bibliography ............................................................................................................ 26
1. COPYRIGHT EXCEPTIONS IN EUROPE AND THE UK

As with other aspects of British copyright law, exceptions to copyright have been subject to a certain degree of pan-European harmonisation. Article 5 of the Information Society Directive 2001 prescribes various situations in which a member state can or must provide for an exception to copyright. The 2001 Directive was implemented in the UK by the Copyright and Related Rights Regulations 2003.

Article 5 contains only one mandatory exception (A.5(1)) which concerns making transient and incidental copies as part of a communication network (that is, to facilitate the operation of the internet). Articles 5(2) and 5(3) set out different categories of optional exceptions. There is no obligation on member states to implement any of these exceptions in national law; however, neither are member states entitled to provide for any exceptions that fall outside the scope of 5(2) and 5(3).

The exceptions permitted under A.5(2) only relate to the reproduction right (as defined by A.2 of the Directive). The exceptions permitted under A.5(3) relate to both the reproduction right and the communication right (as defined by A.3 of the Directive). For example, whilst an archive is permitted to make a copy of a broadcast for preservation purposes under A.5(2)(d) it is not permitted to communicate that copy to the public (for example, online) under the same provision. By contrast, under A.5(3)(a) material can be copied and communicated to the public (online or otherwise) for the purposes of illustration for teaching or scientific research.

At present, the CDPA contains an extensive suite of exceptions, set out in sections 28-76. There are general exceptions designed to facilitate the use of a work by anyone, for example, for the purposes of research and private study (s.29), for criticism or review, quotation or for reporting current events (s.30). Other exceptions are intended to enable the use of copyright material within certain institutional contexts, for example, by educational institutions (ss.32–36A), by libraries and archives (ss.40A–43A), or to facilitate parliamentary or judicial proceedings (s.45).

In this commentary, we address various exceptions that anyone can rely upon, as well as the exceptions relating to educational institutions. In the commentary that follows we deal specifically with exceptions for libraries, archives and museums (see Exceptions for Libraries, Archives and Museums).

2. FAIR DEALING

Some exceptions to copyright allow for the use of the entire copyright work without qualification; for example, performing a literary, dramatic or musical work before an audience of teachers and pupils at an educational establishment (s.34). Other types of permitted act, such as reporting current events (s.30(2)), are dependent on the notion of fair dealing, which may or may not permit the use of the work in its entirety; much will depend on the context, when determining whether it is fair to make use of an entire work or just part of that work. We have already addressed the concept of fair dealing in Economic Rights and Infringement. However, it will prove useful to recap that commentary here.

While the concept of fair dealing is not defined within the CDPA it will generally be relevant to consider the alleged infringer’s purpose in using the work, the proportion of the work she
makes use of, her motive in using the work, and the status of the original copyright work. The courts will not allow a defence of fair dealing if they consider that the real motivation behind the alleged infringer’s use of the work is in fact to produce a commercially competitive product. It is not possible to provide precise guidelines as to what will or will not be considered fair. However, the courts will test the question of fairness objectively; as Lord Justice Aldous put it in *Hyde Park*: ‘the court must judge the fairness [of the use] by the objective standard of whether a fair minded and honest person would have dealt with the copyright work [in that manner]’. 

### 3. SUFFICIENT ACKNOWLEDGEMENT

In many cases, the exception in question will only apply if there has been an adequate attribution of the work, or a ‘sufficient acknowledgement’. ‘Sufficient acknowledgement’ is defined in s.178 to mean an acknowledgement identifying the work in question by its title or other description and identifying the author, unless:

- in the case of a published work, it is published anonymously, or
- in the case of an unpublished work, it is not possible to ascertain the identity of the author by reasonable inquiry.

It is important to note that the acknowledgement concerns the identification of the author of the work only. It does not apply to the current owner of the copyright in the work (if that is no longer the author). Nor would it require attribution or acknowledgement of the company the author worked for when the work was created. For further commentary, see *Express Newspapers v. News (UK) Ltd* (1990).

### 4. COPYRIGHT EXCEPTIONS AND CONTRACT

When the CDPA was revised in 2014, the government introduced a contract override provision into many—but not all—of the exceptions to copyright. For example, the exception for non-commercial research and private study states:

To the extent that a term of any 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 (s.29(4B))

Effectively, this means that whenever someone tries to rely on a term of a contract to prevent someone else making a copy of work for the purposes of the relevant exception, that contract term is rendered null and void. These exceptions cannot be bargained away. Any attempt to restrict them by contract will fail.

For example, imagine that the terms and conditions on a publicly accessible website state as follows:

This website and its contents are owned and operated by Company Z. By accessing this website and downloading or otherwise viewing any images or other content from this website, you will be deemed to have agreed to the following:

Any use of the images on this site is subject to written permission from Company Z. In particular, but without limitation, no images may be reproduced, communicated to the public, distributed, re-used or extracted from this website for any purpose (including without limitation any storage, reproduction, linking or indexing for the purposes of any search engines) without the prior written consent of Company Z.
Whether these terms and conditions would be enforceable against someone who is simply browsing Company Z’s website is not settled in law. However, let’s assume that a contract has been established between Company Z and the user, because the user is browsing the website in full knowledge of those stated terms and conditions. The contract tries to impose an obligation on the user to secure ‘prior written consent’ from Company Z for ‘[a]ny use of the images on the site’. But, this absolute prohibition on use without express permission cannot stand. For example, if I make of copy of an image (or part of an image) from the website for the purposes of non-commercial research or private study, the attempt to prevent me from doing so by relying on the contract would fail: to the extent that the contract tries to prevent or restrict my reliance on s.29 of the CDPA the contract is deemed to be unenforceable. I am not breaching the contract by making copies from the website for the purposes of non-commercial research, so long as all the other relevant criteria in the exception are met (fair dealing and sufficient acknowledgement).

The exceptions that include a contract override provision are as follows:

- non-commercial research and private study (s.29(4B))
- text and data analysis for non-commercial research (s.29A(5))
- quotation (s.30(4))
- caricature, parody or pastiche (s.30A(2))
- enabling access and use for disabled persons (s.31F(8))
- illustration for instruction (s.32(3))
- copying by librarians (ss.41(5), 42(7), 42A(6))
- recording of a broadcast for archival purposes (s.75(2))

4.1. CONTRACT OVERRIDE AND STATUTORY FRAUD

The introduction of these contract override provisions is to be welcomed, and copyright owners should not underestimate their significance. For example, in England and Wales, there is a credible argument that attempting to rely on website terms and conditions to prevent someone engaging in any of the exceptional activities listed above could be deemed to be fraudulent, if the intention on the part of the copyright owner is to encourage someone to secure a licence (for payment) to do what they are otherwise lawfully entitled to do.

To explain further: the Fraud Act 2006 introduced a single, broadly based offence of statutory fraud which can be committed in three different forms: fraud by false representation; fraud by failing to disclose information; and, fraud by abuse of position. In this context, we are concerned with fraud by false representation.

The key to this form of statutory fraud is a dishonest false representation. To be a false representation a representation must be ‘untrue or misleading’. To be guilty of a fraud offence, the person or company making the representation must know that they have made a false or misleading statement or must be aware that the statement might be true or misleading. A representation means any representation as to fact or law and may be express or implied. To constitute fraud, the person making the representation must intend to make a gain for herself. The gain must take the form of money or property.

The most salient feature of this statutory offence is that it takes an inchoate form. That is, the offence can be complete without proof that any person was defrauded. It is enough
that a dishonest, false representation was made with the requisite intent.

Consider again the imaginary terms and conditions from the previous section. Company Z asserts on its website that ‘no images may be reproduced, communicated to the public, distributed, re-used or extracted from this website for any purpose … without the prior written consent of Company Z’. As it stands, this misrepresents the current law. Legally, because of the existence of the contract override provisions, we know that permission is not required to copy images for the purposes of non-commercial research and private study, data mining, quotation, parody, enabling access and use for disabled persons, illustration for instruction, and so on.

Now consider an academic who wishes to reproduce an image from Company Z’s website for the purposes of quotation. Having read Company Z’s terms and conditions, she is induced to believe that permission is required. When she contacts Company Z for permission, they are prepared to grant permission but only contingent on paying a licence fee. The academic is not conversant in copyright law, and assumes that the contract is non-optional if she wants to reproduce the work. As such, she signs the contract and pays the fee.

Almost all the requisite ingredients to constitute an offence of statutory fraud are present: a misrepresentation about the law that is untrue or misleading; reliance on that misrepresentation, resulting in an individual agreeing to a contract that is not necessary; a transfer of money in reliance on that misleading misrepresentation. But, are the actions of Company Z dishonest?

Dishonesty is undefined in the Act. Usually the need to prove dishonesty will be satisfied by proof that a false representation was made, that the maker was aware of its falsity or the risk of falsity and intended by way of the representation to make a gain in money or property. In this scenario, implying that a contract was necessary and making a demand for payment could be considered illegitimate if Company Z was aware of a substantial risk that the demand for payment was legally unfounded. An inference of dishonesty could well be drawn subject to proof of the other elements of the statutory fraud offence. We do not suggest such activities do constitute statutory fraud, we simply suggest they might constitute statutory fraud.

Statutory fraud is a serious criminal offence, punishable with up to 10 years’ imprisonment. The types of terms and conditions we have discussed above are commonplace on commercial websites. They represent a claim to total dominion over copyright content, whether made available online or otherwise. The suggestion that any use of that content always requires permission is total and uncompromising. But, when commercial entities make this kind of totalising claim they misrepresent the law. This, in turn, gives rise to a risk of criminal liability. Much will depend on the circumstances of each case, and on the person or the company’s familiarity with the copyright landscape. But for companies who deal in copyright works, whose business turns on monetising copyright content, the risk is genuine. This risk could be mitigated easily if copyright owners adopted more nuanced copyright policies: policies that are more forthright about the role that copyright exceptions play in enabling use of copyright material without the need for permission, and especially in relation to exceptions protected from contract override. Ensuring that their copyright policies are legally accurate, that they do not misrepresent the law, would help insulate commercial entities from any unwelcome accusations of statutory fraud.
5. GENERAL EXCEPTIONS

Although many of the exceptions discussed below do not directly relate to the digitisation and dissemination of cultural heritage collections, we take the view that librarians, archivists and museum curators often play an active (and extremely important) role in educating members of the public about copyright, about the importance of respecting copyright, and about the opportunity that copyright exceptions allow for use without the need for permission. As such, we think it is useful to provide an overview of various exceptions that are generally relevant to members of the public. In Exceptions for Libraries, Archives and Museums we deal with exceptions that are specific to the cultural heritage sector.

5.1. RESEARCH AND PRIVATE STUDY (s.29)

Fair dealing with a work for the purposes of non-commercial research does not infringe copyright in the work, provided it is accompanied by a sufficient acknowledgement (s.29(1)) (see section 3); fair dealing with a work for the purposes of private study does not infringe (s.29(1C)).

Both provisions apply only if the copying can be considered ‘fair dealing’. As discussed in section 2, and in Economic Rights and Infringement, courts will often consider a range of factors when determining whether the use of someone’s work was fair or not.

Both provisions are also tethered to non-commercial activity only. Section 29 makes this explicit in relation to research, but not private study. However, s.178 defines private study to preclude ‘any study which is directly or indirectly for a commercial purpose’.

Determining what constitutes commercial as opposed to non-commercial activity will not always be easy. This issue was discussed in The Controller of HMSO v. Green Amps Ltd (2007) concerning the use of Ordnance Survey maps. The court endorsed the observation from a leading treatise on copyright that ‘[p]resumably any research which, at the time it is conducted, is contemplated or intended should be ultimately used for a purpose which has some commercial value will not be within the permitted act’. Put another way, commercial activity need not be concurrent with the research underpinning that activity to preclude reliance on the exception. So, for example, an academic undertaking research for a book that may generate royalties (however small) at some point in the future is almost certainly not engaging in non-commercial research.

Section 29(3) anticipates that the copying for research or private study need not be carried out by the researcher or the person engaging in study: it can be carried out on their behalf. However, s.29(3)(a) also specifically states that if a librarian (or someone acting on their behalf) does any copying under this exception which would not otherwise be permitted under s.42A (copying by librarians: single copies of published works), it cannot be considered fair dealing. We discuss s.42A in Exceptions for Libraries, Archives and Museums. Effectively, this means a librarian cannot make copies under s.29 for a researcher or someone engaging in private study if the copying in question does not also fall within the scope of s.42A.

But what about others who work in the heritage sector, such as archivists and museum curators? Section 29(3) is silent on whether they can or cannot make copies for others under s.29.

For example, imagine that a rare published pamphlet is held among the records in an
archive collection. Section 42A only allows the ‘librarian of a library’ to make copies of published works for someone upon request. An archivist can make copies of unpublished material for a user under s.43, but cannot make copies of published material under s.42A (in general, see Exceptions for Libraries, Archives and Museums). If the pamphlet is at risk of physical deterioration a member of the public will not be allowed to make a copy under s.29 to ensure the continued physical integrity of the work (and with good reason). So, can s.29(3) be relied upon in this instance? That is, can an archivist trained to handle and manage unique, fragile records and documents make a copy for someone else under s.29(3)?

Padfield sounds a cautionary note on interpreting the exception in this way. He argues that, because the CDPA contains special provisions for copying by librarians, archivists and museum curators, the defence of fair dealing under s.29 is unlikely to be available to an archivist ‘who supplied copies outside the terms of those special provisions’ (Padfield, 5th ed, 149). That is a perfectly reasonable interpretation, but the point has yet to be tested before the UK courts. Until it is, we prefer an alternative approach. That is, we prefer to interpret s.29(3) as enabling copying by archivists and museum curators, even if librarians are essentially precluded from doing so. This interpretation does not undermine the relevance of other exceptions specifically intended for memory institutions. Quite the contrary. It would simply supplement those existing exceptions whenever—as in our example—they fall short of enabling useful copying in line with an institution’s public mission. And of course, any copying under s.29(3) must be considered fair.

5.2. COPIES FOR TEXT AND DATA ANALYSIS FOR NON-COMMERCIAL RESEARCH (s.29A)

Section 29A(1) of the CDPA allows someone who has lawful access to a work to make a copy of the work to carry out computational analysis of anything recorded in the work for the sole purpose of research for a non-commercial purpose. Any copy that is made should be accompanied by a sufficient acknowledgement wherever practical (see section 3).

Essentially, this exception is intended to enable what is referred to as text and data mining. Text and data mining is a technique that allows researchers to select, explore and model large amounts of data or text—far more than any human being could analyse—and identify patterns, trends or connections between the data that might otherwise have gone unnoticed. As a technique, it offers great potential for advancement in a wide variety of situations, whether clinical medicine, science and engineering, business activity and processes, surveillance, and so on. However, the digital search tools used in text and data analysis often depend on making copies of the underlying works containing the data or text. The exception was introduced to ensure that copyright does not impede research of this kind.

The requirement that the researcher has lawful access to the work that is to be copied is an important one. Typically, the datasets or databases the researcher wants to mine will belong to a proprietary publisher. For example, if I wanted to search for a specific literary phrase or concept across eighteenth century book publications, the obvious corpus to mine would be Eighteenth Century Collections Online
(ECCO) which holds every significant English-language title printed in the UK between 1701 and 1800: more than 130,000 titles and over 26 million pages of text. ECCO was developed by Cengage, a global education and technology company. In 2006, HEFCE (the UK Higher Education and Further Education institutions) purchased the right to licence access to and use of the database in the UK. In turn, HEFCE licenses use of the material to UK-based higher education institutions, conditional on paying an annual access fee. If the university that I work for has subscribed to ECCO, as a member of university staff, and an authorised user of the resource, I have lawful access to the material. As such, I can make copies for the purposes of text and data analysis. However, if my institution has not subscribed, I cannot mine the database: I do not have lawful access. Importantly, if I have lawful access and do want to make copies for the purposes of text mining, neither HEFCE nor Cengage can object. This is because the exception for text and data mining is protected against contractual override, as discussed in section 4. That said, a content provider such as Cengage can impose conditions on access to ensure the security or stability of the network on which the content is housed, so long as those measures do not prevent or unreasonably restrict the researcher’s ability to make copies for mining purposes.

Finally, it is worth noting that where a copy of a work has been made under s.29A(1), that copy can also be transferred to another person who also has lawful access to the same work and who will use it for text and data analytics under s.29A(1). In effect, this means that copies made under the exception can be shared with other researchers for the same purpose (see s.29A(2)(b)).

You can find further government guidance on the exception for text and data mining [here](#).

### 5.3. QUOTATION, CRITICISM AND REVIEW (s.30(1))

Before October 2014, copyright law permitted use of a work for the purposes of criticism and review, but it did not allow quotation for other more general purposes. Now, however, the law allows the use of quotation more broadly. So, there are two exceptions to be aware of, one specifically for criticism and review and a more general exception for quotation. Both exceptions apply to all types of copyright work. It is worth quoting the exceptions in full:

**30 Criticism, review, quotation …**

(1) 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 (unless this would be impossible for reasons of practicality or otherwise) and provided that the work has been made available to the public.

(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).

Obviously, there is considerable overlap between the two exceptions. Both are
conditional on many of the same criteria; so, you can only rely on each of these exceptions if:

- the purpose genuinely is for quotation, criticism or review
- the material used is available to the public
- the use of the material is fair
- where practical, the use is accompanied by a sufficient acknowledgement

However, as well as the four criteria set out above, the exception for general quotation also depends on satisfying one additional requirement:

- use of the quotation must extend no further than is required to achieve your purpose

The relationship between this criterion and the requirement that your use is fair (see above) is obviously an important one. In theory, while your use might be regarded as fair it might still be more than is required to meet your purpose. Put another way, while the new exception for quotation gives everyone greater freedom to quote the works of others for purposes other than criticism and review, the scope for relying on this new exception is arguably narrower.

What amounts to ‘no more than is required’ is not defined in the legislation. As with determining whether use is fair or unfair, what amounts to a reasonable or proportionate quotation under this criterion is an issue that will be resolved by the courts on a case by case basis.

### 5.3.1. IS THE WORK BEING USED FOR THE PURPOSES OF CRITICISM AND REVIEW?

When relying on the quotation exception under s.30(1ZA) your reason for quoting from the work is irrelevant. As the provision states, quotation can be for ‘criticism or review or otherwise’. However, when relying on s.30(1) you must be using the work in question for the purposes of criticism and review of that work or another work or a performance of a work.

One issue worth considering is whether the criticism or review can relate to the ideas underlying the work, or ideas and events connected with the author, rather than to a work itself or a performance of the work. Different courts have taken different approaches to this question.

In *Ashdown v. Telegraph Group* (2001) The Sunday Telegraph published an article about discussions, in October 1997, between Paddy Ashdown and Tony Blair concerning a potential Labour/Liberal Democrat coalition cabinet. Ashdown had produced a Minute of the meeting, extracts from which featured in the newspaper article published in November 1999. The paper argued that the secret of the coalition talks had been kept for too long and the record should be set straight. Vice-Chancellor Morritt accepted that the expression ‘criticism and review’ was wide in scope, but continued:

> What is required is that the copying shall take place as part of and for the purpose of criticising and reviewing the work. The work is the Minute. But the articles are not criticising or reviewing the Minute: they are criticising or reviewing the actions of the Prime Minister and the claimant in October 1997. It was not necessary for that purpose to copy the Minute at all.

For Morritt VC, as the newspaper was not critiquing the Minute itself (as a literary work) their use of the work fell outside the scope of the exception. Of some significance was that Paddy Ashdown was planning to publish his political diaries including, of course, details about the Minute under discussion, and the newspaper article might have impacted the market for Ashdown’s diaries or the potential economic value of his copyright in the Minute as a copyright work. Generally, the courts will
be wary of situations in which someone is attempting to profit unfairly from another’s work while dressing up their actions as criticism or review. And certainly, this appeared to be influential when Morritt VC reached his decision.

However, the idea that s.30(1) can only be relied upon when criticising or reviewing a work or a performance of a work, and in no other circumstances, involves a very literal interpretation of the exception. Other courts have adopted a more generous or purposive approach. That is, they have looked beyond the literal wording of s.30(1) to identify the general purpose underpinning the exception, and have sought to apply and interpret the exception in the context of that purpose. For example, in *Time Warner Entertainment v. Channel Four Television* (1994) Channel 4 produced a documentary, *Forbidden Fruit*, about the enduring appeal behind Stanley Kubrick’s *A Clockwork Orange* and his decision to prohibit its broadcast within the UK (at that time). The Channel 4 documentary has been uploaded onto You Tube, in two parts, [here](#) and [here](#).

The programme was just 30 minutes and contained 12 clips from the Kubrick’s film, varying in length but totalling just under 13 minutes of footage (or just under 10% of the film itself). Most of the programme was concerned with Kubrick’s decision to withdraw the film from circulation, rather than critiquing the film or its content. In the Court of Appeal, the use of the footage was held to fall within the meaning of criticism and review for the purposes of s.30(1). It was also deemed to be fair dealing. Lord Justice Henry commented:

[I]t seems to me that the fair dealing defence may apply equally where the criticism is of the decision to withdraw from circulation a film in the public domain, and not just the film itself ... That decision is clearly a suitable matter for public debate and so for public criticism, and it is clearly highly relevant to that criticism to illustrate by excerpts relevant qualities, whether positive or negative, of the film, so the public may form a view of the decision criticised and of what they are missing or rightly being spared ... I am satisfied that the section 30 defence would be available to these defendants.

A similar purposive approach was adopted, again by the Court of Appeal, in *Pro Sieben Media v. Carlton* (1998). In *Pro Sieben* the claimants owned the rights to broadcast a television interview with a woman who was enjoying some celebrity after becoming pregnant with octuplets. The defendant broadcast a current affairs programme that was critical of the phenomenon of ‘chequebook journalism’. The defendant’s programme contained a 30-second clip from the television interview.

In the High Court, Mr Justice Laddie held that the defendant was not criticising the work in question (the claimant’s television interview) and as such the exception did not apply. That is, he adopted a literal interpretation of s.30(1) in a similar manner to Morritt VC in *Ashdown v. Telegraph Group*. However, this was overturned on appeal. In the Court of Appeal, Lord Justice Robert Walker concluded that the defendant’s programme was critical of ‘various works representing the fruits of chequebook journalism,’ of which the interview was just one example. In coming to this decision, he commented as follows: ‘[c]riticism of a work need not be limited to criticism or style. It may also extend to the ideas to be found in a work and its social or moral implications.’ He continued:

“Criticism or review” and “reporting current events” are expressions of wide and indefinite scope. Any attempt to plot their
precise boundaries is doomed to fail. They are expressions which should be interpreted liberally.

5.3.2. HAS THE WORK BEEN MADE AVAILABLE TO THE PUBLIC?

Section 30 provides its own definition of making available when relying on the exception. In relation to both criticism and review (s.30(1)) and quotation (s.30(1ZA)) work has been made available to the public ‘if it has been made available by any means’ including:

- the issue of copies to the public
- making the work available by means of an electronic retrieval system
- the rental or lending of copies of the work to the public
- the performance, exhibition, playing or showing of the work in public
- the communication to the public of the work

This is an open-ended and non-exhaustive definition. From both an intellectual and pragmatic perspective, we take the view that if a work—whether a document, record, or other item of historic value—has been accessioned to an institution’s collection and has been catalogued such that any member of the public can identify that the item is held within the institution’s permanent collection, the work had been made available to the public (unless, that is, access restrictions are in place for data protection reasons, or otherwise).

However, s.30(1A) states that when determining whether a work has been made available to the public ‘no account shall be taken of any unauthorised act’. In relation to a copyright work, an ‘unauthorised act’ is defined to mean anything done ‘otherwise than by or with the licence of the copyright owner’ (s.178).

Consider, for example, the following scenario: X deposits an unpublished document by an unknown author with archive Y. Clearly there is no breach of copyright in simply depositing the document. Y catalogues the document, and makes it available to the public on request in its search room. None of these activities involves copyright infringement: depositing the work, cataloguing the work, allowing a member of the public to access the work. But, are these activities unauthorised acts?

If we interpret the definition of an unauthorised act literally, then they are unauthorised acts: that is, they are activities carried out in relation to the work without ‘the licence of the copyright owner’. In this case, legally speaking, the work will not have been made available to the public.

But, another interpretation is possible. One might interpret the definition of an unauthorised act carried out in relation to refer to only to the acts restricted by copyright, as defined in ss.16-21 of the CDPA (see Economic Rights and Infringement). That is, these are the types of activity typically licensed by the copyright owner. Moreover, this is an interpretation that aligns with the enabling provision of the Information Society Directive: that is, A.5(3)(d) of the 2001 Directive permits an exception for quotation provided the work in question ‘has already been lawfully made available to the public’ (emphasis added). On this interpretation, unpublished material that is accessioned and catalogued will have been made available to the public, and the exceptions in s.30 will apply.

This issue has not been considered by the courts. However, the literal interpretation is probably to be preferred. That is, we should probably presume that material accessioned and catalogued without the permission of the
copyright owner has not, in law, been made available to the public.

But this interpretation has other important implications for the use and reuse of material held in memory institutions. The example we used above concerned X depositing an unpublished document by an unknown author in archive Y. But, what if X is depositing her own unpublished works: correspondence, manuscripts, and so on. In this scenario, there is no unauthorised act. That is, the work has been deposited, accessioned and catalogued with X’s permission. So: have these works been made available to the public for the purposes of s.30? In line with our comments above, we suggest that they have. As such, from the perspective of s.30, unpublished work deposited with a memory institution falls into two categories: work deposited by the copyright owner, and everything else. Work deposited by the copyright owner will fall within the scope of s.30; everything else will not.

Adopting a literal interpretation also highlights some of the peculiarity, and internal inconsistency, of the copyright regime. Imagine, for example, a memory institution chooses to digitise some orphan works from its collection (see Orphan Works). The institution has no information about the author or copyright owner of the works in question. They carry out a diligent search for the copyright owners, but to no avail. In turn, they make the works available online in accordance with s.44B of the CDPA. These works have been made available online lawfully but without the permission of the unknown, unlocatable copyright owners. But, they have not been made available from the perspective of s.30. In other words, while making the works available online under s.44B is lawful, it remains an unauthorised act under s.30. The notion that work has been made available lawfully for anyone to read online and yet no one (in the UK) is permitted to copy from the work for the purposes of quotation, criticism or review will strike many as absurd. But, this represents the logical conclusion of adopting a literal interpretation of the concept of ‘unauthorised act’.

5.3.3. CONTRACT OVERRIDE

Finally, following our previous discussion in section 4 about the relationship between contract and copyright exceptions, it is worth drawing attention to the fact that the contract override provision in section 30 only applies to the quotation exception (that is, s.30(1ZA)). It does not apply to the exception permitting criticism and review (under s.30(1)). Why the legislature would draw this distinction between quotation (protected against contract override) and criticism and review (not protected against contract override) is unclear. Certainly, we see no meaningful reason for distinguishing between these two activities on this issue.

5.4. REPORTING CURRENT EVENTS (s.30(2))

Section 30(2) of the CDPA states that fair dealing with a work, other than a photograph, for the purposes of reporting current events does not infringe copyright in the work, so long as it is accompanied by a sufficient acknowledgement whenever reasonably practical to do so (see section 3).

Unlike the exceptions for quotation, criticism and review, this exception is not limited to work that has been made available to the public. So, any work, published or unpublished, deposited with an archive or otherwise, falls within the scope of this exception. That said, while the published or unpublished status of the work will not be relevant when determining if the use
of the work was for the purposes of reporting current events, it may still be relevant when deciding if the use was fair (see section 2 and Economic Rights and Infringement).

In Pro Sieben Media v. Carlton (1998) Lord Justice Robert Walker commented that the words ‘reporting current events’ are ‘of wide and indefinite scope’ and should be interpreted liberally. Although the events must be ‘current’ (as a result, newsworthy matters of historical significance do not fall within the exception), the courts have indicated that the exception is not restricted to very recent events. For example, in Pro Sieben the claimant tried to argue that the application of the exception should be limited to events that were less than 24 hours old; this argument was rejected by the court. Moreover, it is clear the work itself need not have been produced recently; rather, it needs only to be used in reporting current events.

5.4.1. THE PUBLIC REPORTING OF CURRENT EVENTS

It seems clear that to fall within the scope of the exception, one should be **publicly** reporting current events (although the literal wording of s.30(2) does not make this a formal requirement). This matter was discussed in Newspaper Licensing Agency Ltd v. Marks and Spencer (2001) in which the defendant (M&S) subscribed to a press cuttings agency. The Agency paid the claimant (the NLA) a fee for the right to copy articles from newspapers to forward to its client, M&S. Once M&S received the cuttings, they made further photocopies for internal distribution within the company. The NLA alleged that M&S were guilty of infringement. M&S argued that their actions fell within the scope of s.30(2): that is, in photocopying the cuttings and distributing them within the company they were simply reporting current events (the events that were the subject of the press cuttings). This argument was rejected by the court. Lord Justice Peter Gibson observed that s.30(2) was intended to achieve ‘a proper balance between protection of the rights of a creative author or the wider public interest, of which free speech is a very important ingredient’. He continued that the language of the subsection ‘connotes the public reporting of a recent newsworthy event’ (emphasis added). In Ashdown v. Telegraph Group (2001) Lord Phillips made a similar observation: ‘[t]he defence provided by section 30(2) is clearly intended to protect the role of the media in informing the public about matters of current concern to the public’.

The importance of the **public nature** of the reporting was also underlined in Newspaper Licensing Agency v. Meltwater (2010). Meltwater operated an online commercial media monitoring service, scraping websites for newspaper articles of interest to its clients. Reports produced for clients were either emailed to them or the client was given access to the report on Meltwater’s website. Each report included hyperlinks to the location of each article (the text of the link incorporated the headline of the article), the opening words of each article, and an extract from the article relating to the client’s search interests. In the Court of Appeal, Lord Justice Jackson rejected as ‘absurd’ the argument that Meltwater were reporting current events by disseminating links to and excerpts from online news stories to their list of commercial clients who would subsequently report those events to their end-users. In the High Court, Mrs Justice Proudman rejected the applicability of s.30(2) in simpler terms: ‘Meltwater News is not intended for public consumption’.
5.5. PARODY (s.30A)

In October 2014, the UK government introduced a new exception for parody, caricature or pastiche. Section 30A provides simply that: ‘Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work.’

Notice that the only relevant criterion here is that your parodic use must be fair. There is no need for sufficient acknowledgement. Nor is the scope of the exception limited to published work, or work that has been made available to the public. The parody exception applies to every copyright work. Moreover, this is an activity that is protected against contractual override, as discussed in section 4.

IPO guidelines on the new parody exception provide some examples of activity that would fall within the scope of the 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; whereas it would not be considered “fair” to use an entire musical track on a spoof video’. You can find the government’s guide on exceptions to copyright for ‘Caricature, Parody or Pastiche’ here.

The meaning of parody was considered by the CJEU in Deckmyn and Vrijheidsfonds v. Vandersteen (2014) which concerned a modified version of a comic book cover that satirised the mayor of Ghent: the mayor was portrayed distributing government funds to a multi-ethnic public (Image 1). Johan Deckmyn, a member of the right-wing Flemish nationalist party, created the satirical work. The copyright owners of the comic sued for copyright infringement. Deckmyn claimed that his work was a parody, and as such was protected under the relevant exception in Belgian copyright law.

The CJEU held that the essential characteristics of a parody are, first, to evoke an existing work while being noticeably different from it, and
second, to constitute an expression of humour or mockery. If these two criteria are satisfied, then the work in question is a parody. (Of course, the creation of the parody still might not be considered fair.)

Perhaps the most significant aspect of the CJEU’s decision in Deckmyn concerned an argument about the applicability of the exception to different types of parody. For example, some would argue that the exception for parody should only apply when the work that is being used is also the target of the parody itself. Images 2 and 3 provide a good example of so-called ‘target parody’. Here, the image of Leslie Nielsen is clearly intended to lampoon the Vanity Fair cover of Demi Moore photographed by Annie Leibovitz. The parody borrows from the original work to make fun of the original work. Deckmyn, however, was engaging in so-called ‘weapon parody’. The original work was not the subject of the parody. Instead, Deckmyn was using the work as a weapon, to mock the Mayor of Ghent.

The CJEU rejected the idea that the scope of the exception should be limited to target parody only. Instead, the court explicitly acknowledged that a parody need not be concerned with the original work itself. That is, a work can be used under the exception by a parodist to mock or lampoon someone or something else.

5.6. ENABLING ACCESS AND USE FOR DISABLED PERSONS (ss.31A–31F)

5.6.1. ACCESSIBLE COPIES FOR THE PERSONAL USE OF A DISABLED PERSON (S.31A)

The CDPA permits a disabled person to make an accessible copy of the whole or part of a work, so long as that person has ‘lawful possession or lawful use’ of the work (s.31A(1)), and so long as the copy is made for their personal use. The accessible copy can be made either by the disabled person or by another person acting on their behalf. The exception applies to all types of work, whether published or unpublished, but it does not apply if accessible copies of the work are already commercially available on reasonable terms (s.31A(2)). However, the CDPA does not define what constitutes ‘reasonable terms’.

A disabled person is defined as a person who has a physical or mental impairment which presents them from enjoying a copyright work to the same degree as a person who does not have that impairment (s.31F(2)).

An accessible copy is defined as a version of the work which enables the fuller enjoyment of the work by disabled persons (s.31F(3)). So, for example, this might involve adding sub-titles to films or broadcasts for the deaf or hard of hearing, or making large-print copies of books, newspapers and other copyright content for the visually-impaired. Importantly, copies can also be made on behalf of the disabled person (s.31A(2)(a)).

Section 31A requires that the disabled person have ‘lawful possession or lawful use’ of the work to be copied, but does not define the concept of ‘lawful use’. The IPO provides guidance on s.31A as follows: ‘You are only able to make an accessible-format copy of a work if you have lawful possession of or lawful access to the material in question (for example, if you bought a copy of a book, film, etc)’ (emphasis added). Notice that while the legislation refers to ‘lawful use,’ the IPO guidance refers to lawful access. Should we read these terms as synonyms within the context of s.31A? For example, does the fact that a member of the public, whether disabled or not, enjoys access to a library or an archive mean they have lawful
Chapter 7/15
Copyright and Digital Cultural Heritage: The Permitted Acts—Exceptions to Copyright

Image 2
Promotional poster for the film Naked Gun 33 1/3
Image 3
Original photograph by Annie Leibovitz
use of the material held therein? Where this question potentially is of real significance is in relation to making accessible copies of unpublished material.

As you will see in the next section, the CDPA also enables certain designated institutions to make and supply accessible copies for the personal use of a disabled person (s.31B); however, that exception only applies to published work. As such, it has very limited relevance for archives and other memory institutions with collections of unpublished works. So, can someone working in an archive make an accessible copy of unpublished material from its collection for a user with a disability under s.31A, that is, as someone acting on behalf of the person with a disability? We suggest that they can. Previously we argued that s.29(3), concerning non-commercial research and private study, should be interpreted to enable an archivist or museum curator to make a copy of work on someone else’s behalf (even if librarians are essentially precluded from this provision) (see section 5.1). We suggest that the same logic applies here too (although within the context of s.31A librarians would also be permitted to make copies), however, we will return to this issue in the next section.

If we assume that libraries, archives and museums can make accessible copies on behalf of the disabled person under s.31A, it is worth noting that any charge made must not exceed the cost of making and supplying the copy (s.31A(3)).

5.6.2 MAKING AND SUPPLYING ACCESSIBLE COPIES BY AUTHORISED BODIES (S.31B)

The CDPA also expressly provides that educational establishments or other bodies not conducted for profit (including libraries and archives) are permitted to make and supply accessible copies of work for the personal use of disabled persons (s.31B(1)). An educational establishment conducted for profit can rely upon the exception, but any copies made must only be used for educational purposes (s.31B(6)). The exception applies to all types of copyright work although it does not apply if accessible copies of the work are already commercially available on reasonable terms (s.31B(2)). As noted in the previous section, the CDPA does not define what constitutes ‘reasonable terms’.

As we also noted, unlike s.31A, this exception only applies to published work. We suggested in the previous section that under s.31A a librarian or an archivist could make an accessible copy for use of a person with a disability as if they were acting on their behalf. But, does s.31B not preclude such an interpretation? That is, if s.31B expressly permits institutions such as libraries and archives to make accessible copies does this mean that copying carried out by librarians or archivists should fall under s.31B and not s.31A? We don’t think it does. The difference is one of individual rather than institutional activity, and that difference also has a significant impact on how the accessible copies can be subsequently used. For example, whereas copies made under s.31A are only available to be used by a person with a disability, an accessible copy made under s.31B can also be supplied by the designated institution to another authorised body which is entitled to make accessible copies under the same section (s.31B(9)).

One further issue is worth considering: imagine that an institution makes an accessible copy of a work in their collection under s.31B in 2015. Two years later, the library discards their print copy of the book. Should they also discard the accessible copy that was made in 2015?
There are different ways to approach this question. One could argue, so long as the accessible copy was made at a time when the institution had lawful possession of a copy of the work (which they did), there is no reason why it should not retain and make use of the accessible copy. Certainly, the CDPA does not expressly tether the subsequent use and supply of an accessible copy to the continued possession of the print copy. On the other hand, it might be argued that making and supplying an accessible copy under s.31B(1) are two distinct activities both of which depend on the institution having lawful possession of a copy. That is, even if the institution can retain possession of their accessible copy, they cannot supply it to a relevant user as they no longer have lawful possession of the work (the print copy). We prefer the former interpretation.

5.7. USE OF CERTAIN ANONYMOUS WORKS

In Duration of Copyright we discuss the impact of the so-called 2039 rule on the duration of copyright in works created before 1 August 1989. In brief, the transitional provisions in Schedule 1, 12 of the CDPA state that the duration of copyright in many unpublished literary, dramatic, musical and artistic works, films and sound recordings, continues until 50 years from the end of the calendar year in which the CDPA came into force (that is, until 31 December 2039). Moreover, these provisions apply regardless of when the works in question were created or when their authors died.

In the context of anonymous works, there are two exceptions that help to mitigate the impact of the 2039 rule on the use of historic and archive material. The first, s.57 concerns literary, dramatic, musical and artistic works. The second, s.66A concerns films. We deal with each in turn.

5.7.1. LITERARY, DRAMATIC, MUSICAL AND ARTISTIC WORKS

Section 57 of the CDPA states that copyright in a literary, dramatic, musical or artistic work is not infringed by anything done at a time when it is not possible by reasonable inquiry to ascertain the identity of the author of the work, and it is reasonable to assume either that copyright in the work has expired or that the author died 70 years or more before the beginning of the calendar year in which the act is done (or relevant arrangements have been made).

Notice two things: first, the exception depends on making reasonable inquiry to identify the author, not the copyright owner. Compare, for example, the obligation under the orphan works exception to conduct a diligent search for the copyright owner (see Orphan Works for further discussion). Second, the exception applies to both published and unpublished works. This exception has real potential in relation to anonymous works that remain in copyright because of the 2039 rule but for which it is reasonable to assume that the author has died more than 70 years ago.

Consider, for example, an unpublished letter dated 1817 but unsigned. The work remains in copyright until 31 December 2039, because of the 2039 rule. A reasonable inquiry has failed to reveal who the author of the letter might be. It is however safe to assume that the author died more than 70 years ago. As such, we can do any of the things that copyright normally prohibits without infringing copyright in the work. So, the letter could be digitised and made available online with impunity.

This begs another question: when will it be reasonable to assume that the author of an anonymous work died more than 70 years ago? For this, we suggest a pragmatic approach
drawing on data generated by longitudinal studies of average life expectancy within the UK. At the time of writing (2017), for s.57 to apply, an unknown author must have died before 1 January 1947. The Human Mortality Database (the HMD) provides researchers, students, policy analysts and others with detailed mortality and population data relating to 38 different countries. Data available in the HMD indicates that men born in 1900 in the UK had an average lifespan of 44.35 years. That is, one might expect the average man born in 1900 to have died before 1947. For women, the average life expectancy is (always) slightly longer. The HMD indicates that one might expect the average woman born in 1895 to have died before 1947, based on an average lifespan of 47.30 years. We provide further information, based on data available in the HMD, in Tables 1 and 2. For the figures provided in Tables 1 and 2, we assume that the author was born on 31 December of the relevant year.

Of course, when dealing with an anonymous work it is unlikely that you will know the birth date of the author. In this case, how might one proceed? If the document or record indicates a year of creation, one way forward would be to assume that the work in question was created by a person 18 years of age. This is a conservative presumption, as in most instances this will underestimate that actual age of the author. But, assuming the author to be 18 years old in each case, Table 3 indicates how Table 1 might be adjusted. It suggests that anything created by a male author around 100 years ago or more can reasonably be presumed to fall within the scope of s.57. For a female author the relevant threshold (at the time of writing) would be 1914 (see Table 4).

Finally, it is important to note that the presumption regarding works by authors who died more than 70 years ago does not apply to a work protected by Crown copyright (s.57(2)(a)). That is, it does not matter when the author of the work might have died, s.57 will only be applicable if it is reasonable to assume that copyright in the work has expired. This also applies to a work in which copyright originally vested in an international organisation by virtue of s.168 of the CDPA and in respect of which an Order under that section specifies a copyright period longer than 70 years (s.57(2)(b)).

5.7.2. FILMS

Section 66A of the CDPA states that copyright in a film is not infringed by anything done at a time when it is not possible by reasonable inquiry to ascertain the identity of any of the four persons referred to in s.13B(2) (that is: the director, the author of the screenplay, the author of the film dialogue and the composer of any specifically created film score), and it is reasonable to assume either that copyright in the work has expired or that the last to die of those persons died 70 years or more before the beginning of the calendar year in which the act is done (or relevant arrangements have been made).

Obviously, this exception mirrors s.57 and, as with s.57, the presumption regarding works by authors who died more than 70 years ago does not apply to a work protected by Crown copyright (s.66A(2)(a)).

5.8. PUBLIC RECITATION OR READING (s.59)

Section 59(1) of the CDPA states that the reading or recitation in public by one person of a reasonable extract from a published literary or dramatic work does not infringe any copyright in the work provided it is accompanied by a
Table 1
Possible applicability of s.57 for anonymous male authors by year

<table>
<thead>
<tr>
<th>Birth Date</th>
<th>Average life expectancy</th>
<th>Possible death date</th>
<th>When might s.57 apply?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1896</td>
<td>45.67</td>
<td>1942</td>
<td>now</td>
</tr>
<tr>
<td>1897</td>
<td>45.30</td>
<td>1943</td>
<td>now</td>
</tr>
<tr>
<td>1898</td>
<td>45.14</td>
<td>1944</td>
<td>now</td>
</tr>
<tr>
<td>1899</td>
<td>44.24</td>
<td>1944</td>
<td>now</td>
</tr>
<tr>
<td>1900</td>
<td>44.35</td>
<td>1945</td>
<td>now</td>
</tr>
<tr>
<td>1901</td>
<td>45.94</td>
<td>1947</td>
<td>2018</td>
</tr>
<tr>
<td>1902</td>
<td>47.09</td>
<td>1950</td>
<td>2021</td>
</tr>
<tr>
<td>1903</td>
<td>48.45</td>
<td>1952</td>
<td>2023</td>
</tr>
<tr>
<td>1904</td>
<td>47.21</td>
<td>1952</td>
<td>2023</td>
</tr>
<tr>
<td>1905</td>
<td>48.96</td>
<td>1954</td>
<td>2025</td>
</tr>
</tbody>
</table>

Table 2
Possible applicability of s.57 for anonymous female authors by year

<table>
<thead>
<tr>
<th>Birth Date</th>
<th>Average life expectancy</th>
<th>Possible death date</th>
<th>When might s.57 apply?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1892</td>
<td>47.05</td>
<td>1940</td>
<td>now</td>
</tr>
<tr>
<td>1893</td>
<td>46.42</td>
<td>1940</td>
<td>now</td>
</tr>
<tr>
<td>1894</td>
<td>49.91</td>
<td>1944</td>
<td>now</td>
</tr>
<tr>
<td>1895</td>
<td>47.30</td>
<td>1943</td>
<td>now</td>
</tr>
<tr>
<td>1896</td>
<td>49.02</td>
<td>1946</td>
<td>now</td>
</tr>
<tr>
<td>1897</td>
<td>49.05</td>
<td>1947</td>
<td>2018</td>
</tr>
<tr>
<td>1898</td>
<td>48.72</td>
<td>1947</td>
<td>2018</td>
</tr>
<tr>
<td>1899</td>
<td>47.94</td>
<td>1947</td>
<td>2018</td>
</tr>
<tr>
<td>1900</td>
<td>48.21</td>
<td>1949</td>
<td>2020</td>
</tr>
<tr>
<td>1901</td>
<td>49.79</td>
<td>1951</td>
<td>2022</td>
</tr>
<tr>
<td>Date of creation</td>
<td>Presumed birth date</td>
<td>Average life expectancy</td>
<td>Possible death date</td>
</tr>
<tr>
<td>------------------</td>
<td>--------------------</td>
<td>------------------------</td>
<td>---------------------</td>
</tr>
<tr>
<td>1914</td>
<td>1896</td>
<td>45.67</td>
<td>1942</td>
</tr>
<tr>
<td>1915</td>
<td>1897</td>
<td>45.30</td>
<td>1943</td>
</tr>
<tr>
<td>1916</td>
<td>1898</td>
<td>45.14</td>
<td>1944</td>
</tr>
<tr>
<td>1917</td>
<td>1899</td>
<td>44.24</td>
<td>1944</td>
</tr>
<tr>
<td>1918</td>
<td>1900</td>
<td>44.35</td>
<td>1945</td>
</tr>
<tr>
<td>1919</td>
<td>1901</td>
<td>45.94</td>
<td>1947</td>
</tr>
<tr>
<td>1920</td>
<td>1902</td>
<td>47.09</td>
<td>1950</td>
</tr>
<tr>
<td>1921</td>
<td>1903</td>
<td>48.45</td>
<td>1952</td>
</tr>
<tr>
<td>1922</td>
<td>1904</td>
<td>47.21</td>
<td>1952</td>
</tr>
<tr>
<td>1923</td>
<td>1905</td>
<td>48.96</td>
<td>1954</td>
</tr>
</tbody>
</table>

Table 3
Possible applicability of s.57 for anonymous male authors by year, presuming the work was created at the age of 18

<table>
<thead>
<tr>
<th>Date of creation</th>
<th>Presumed birth date</th>
<th>Average life expectancy</th>
<th>Possible death date</th>
<th>When might s.57 apply?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1910</td>
<td>1892</td>
<td>47.05</td>
<td>1940</td>
<td>now</td>
</tr>
<tr>
<td>1911</td>
<td>1893</td>
<td>46.42</td>
<td>1940</td>
<td>now</td>
</tr>
<tr>
<td>1912</td>
<td>1894</td>
<td>49.91</td>
<td>1944</td>
<td>now</td>
</tr>
<tr>
<td>1913</td>
<td>1895</td>
<td>47.30</td>
<td>1943</td>
<td>now</td>
</tr>
<tr>
<td>1914</td>
<td>1896</td>
<td>49.02</td>
<td>1946</td>
<td>now</td>
</tr>
<tr>
<td>1915</td>
<td>1897</td>
<td>49.05</td>
<td>1947</td>
<td>2018</td>
</tr>
<tr>
<td>1916</td>
<td>1898</td>
<td>48.72</td>
<td>1947</td>
<td>2018</td>
</tr>
<tr>
<td>1917</td>
<td>1899</td>
<td>47.94</td>
<td>1947</td>
<td>2018</td>
</tr>
<tr>
<td>1918</td>
<td>1900</td>
<td>48.21</td>
<td>1949</td>
<td>2020</td>
</tr>
<tr>
<td>1919</td>
<td>1901</td>
<td>49.79</td>
<td>1951</td>
<td>2022</td>
</tr>
</tbody>
</table>

Table 4
Possible applicability of s.57 for anonymous female authors by year, presuming the work was created at the age of 18
sufficient acknowledgement. Note that this provision only applies to published works.

Section 59(2) further states that making a sound recording of the reading, or communicating it to the public, does not infringe copyright in the work, so long as the reading or recitation of the work is not the principal focus of the recording or communication. That is, the recording or communication should consist mainly of other material (for example, original material or material for which permission has been granted), and not material falling within the scope of the exception.

6. EXCEPTIONS FOR EDUCATION AND INSTRUCTION

The CDPA provides various exceptions that permit the use of all types of work for certain educational purposes (sections 32-36A). These permitted acts include, for example, reproducing a short passage from a published literary or dramatic work in a collection which is intended for use in an educational establishment (s.33), and performing, playing or showing certain works for the purposes of instruction before an audience of teachers and pupils at an educational establishment (s.34).

Perhaps the most important exception for education permits the use of any work for the sole purpose of illustration for instruction, which includes setting examination questions (s.32). The exception only applies, however, when the purpose of the use is non-commercial, when it is accompanied by a sufficient acknowledgement (wherever practical), and when the use is fair.

Importantly, this exception applies to all types of teaching and instruction, not just teaching that takes place within a traditional educational institution or environment. So, libraries, archives and museums that maintain an education outreach programme, or deliver instruction and training of some kind, are entitled to rely upon the exception just as well as those working within the education sector.

Also, the exception draws no distinction between analogue and digital copying in this context. That is, posting material on an interactive whiteboard, or within a virtual learning environment, is permitted under the exception. Moreover, this is an activity that is protected against contractual override (s.32(3)), as discussed in section 4.

7. LEGAL MATERIALS AND BIBLIOGRAPHY

7.1. LEGISLATION


7.2. CASES

Ashdown v. Telegraph Group [2001] EWCA Civ 1142

Express Newspapers plc v. News (UK) Ltd [1990] FSR 43
Hyde Park Residence Ltd v. David Yelland [2000] EWCA Civ 37
Newspaper Licensing Agency Ltd v. Marks and Spencer [2001] UKHL 38
The Controller of HMSO v. Green Amps Ltd [2007] EWHC 2755 (Ch)
Time Warner Entertainment v. Channel Four Television [1994] EMLR 1
Deckmyn and Vrijheidsfonds v. Vandersteen, Case C-201/13 (22 May 2014)

7.3. BIBLIOGRAPHY

Padfield, T., Copyright for Archivists and Records Managers, 5th ed (Facet Publishing, 2015)
Image Credits


Image 2: Promotional poster for the film Naked Gun 33 1/3, created by the Dazu advertising agency for Paramount Pictures, 1994. The poster was the subject of litigation in the US: Leibovitz v. Paramount Pictures Corp, 137 F.3d 109

Image 3: Demi Moore, Annie Leibovitz, 1991

Table Credits

Table 1, Possible applicability of s.57 for anonymous male authors by year

Table 2, Possible applicability of s.57 for anonymous female authors by year

Table 3, Possible applicability of s.57 for anonymous male authors by year, presuming the work was created at the age of 18

Table 4, Possible applicability of s.57 for anonymous female authors by year, presuming the work was created at the age of 18
RIGHTS AND REUSE

All content created for the Copyright Cortex is licensed under a Creative Commons CC BY-NC 4.0 licence, found at https://creativecommons.org/licenses/by-nc-sa/4.0/legalcode. This means you can make use of this material for any non-commercial purpose, so long as you credit the author.

When making use of work from the Copyright Cortex, please cite as follows: Author, Title (Date), The Copyright Cortex, URL

We are also happy to grant permission for the use and reuse of content from the Copyright Cortex for commercial purposes. However, before we do, we would like to know how you plan to make use of our material. So, if you have plans to commercialise this content, or if you are uncertain about whether your intended use amounts to commercial or non-commercial use, then please contact us at: info@copyrightcortex.org

www.copyrightcortex.org