Suggested Answers to the Questions in Chapter 5

1. Which are the main arguments that a defendant can bring forward against allegations for copyright infringement?

The good answer will:

- Offer an overview of the breadth of claims that can be brought by a defendant to combat allegations against copyright infringement;

- Explain that the arguments open to the defendant are as follows:

  a. to deny that the claimant is the owner or licensee of the copyright work, in other words, they are not entitled to sue. An example of this argument succeeding can be found in *Beloff v Pressdram Ltd* [1973] RPC 765, where the copyright work in question (an internal office memorandum) was held to belong not to the claimant but to her employer, as it had been written in the course of employment.

  b. to deny that the work in question is entitled to United Kingdom copyright protection. This denial raises a number of separate points. First, that what has been taken is not a work but a mere idea (*Baigent & Lee v Random House Group Ltd* [2007] FSR 579) or is everyday factual information (*Cramp v Smythson* [1944] AC 329) or else falls below the threshold of copyright protection (*Francis Day v Twentieth Century Fox* [1940] AC 112); second, that even if it is a work, it is not original (*Interlego v Tyco* [1989] AC 217); next, even if it is an original work, it has not been recorded in permanent form (*Creation Records v News Group Newspapers* [1997] EMLR 444); next, that the author of the work did not qualify for protection under United Kingdom law; or, lastly, that even if all the other elements for the subsistence of copyright were satisfied, the term of protection has expired. The defendant may raise one or more of these arguments in the alternative.

  c. in relation to primary infringement, to deny that any infringing conduct has been committed. One particular aspect of such denial is to plead that the defendant's work was independently created and therefore was not derived from that of the claimant. Alternatively, if infringing conduct is admitted, the defendant may deny that what was taken amounted to a substantial part of the work, or argue that what was taken was not the expression but the idea.

  d. in relation to secondary infringement, to deny that the infringing conduct has been committed, or if this is admitted, to deny that the defendant had the requisite knowledge and/or that the articles dealt with by the defendant were infringing copies.

  e. to claim that their allegedly infringing conduct falls within any of the acts permitted by copyright.

  f. last, if entitlement to sue, subsistence of copyright, and infringing conduct are all admitted, or are found by the court to be established, the defendant may seek to rely

on one or more of the myriad statutory defences to copyright infringement set out in the CDPA, or else to plead one or more of the more general, non-statutory defences.

Suggested Answers to the Questions in Chapter 5

2. Which are the statutory and non-statutory defences against copyright infringement?

The good answer will:

- Start by offering an overview of the defensive claims under copyright law.
- Indicate that general statutory defences include the fair dealing provisions listed in ss.28-31 CDPA and refer to some indicative case law that has offered interpretative guidance on their scope (e.g. *Pro Sieben Media AG v Carlton UK Television Ltd*).
- Explain that statutory defences also include a set of miscellaneous provisions, such as s. 58 CDPA on the use of notes or recordings of spoken words, s.70 on time-shifting, or educational defences offered under ss.32-36 CDPA. There are also defences including incidental inclusion (s.31) and the public interest (s. 171(3)) and there is a wealth of case law further explaining their scope of application.
- Discuss the relevant non-statutory defences, e.g. acquiescence, public policy, implied license, and exhaustion and refer to the case-law that has interpreted their scope.
- Include broader reflective remarks on the 2014 copyright reform in the UK and the policy reasons explaining the expansion of the scope of some pre-2014 defences and the introduction of new defences, such as that allowing text mining and data analytics.

Suggested Answers to the Questions in Chapter 5

3. Which are the key elements of fair dealing defences? How is fairness to be determined under established case law?

The good answer will:

- Explain that 'fair dealing' is a legal term used by reference to the assessment of the lawfulness of a use of copyright work that would otherwise amount to infringement. There is no legal definition of what is fair or unfair in this context, but as Lord Denning once remarked (in *Hubbard v Vosper* [1972] 2 QB 84 at p. 94), what is 'fair' is a question of degree, adding that ultimately it is a matter of impression.

- Indicate that, from the Court of Appeal's decision in *Pro Sieben,* it is possible to identify a number of factors to be considered. None is conclusive, but all form part of the assessment of fairness. Depending on the circumstances of the case, some factors may weigh more heavily than others.

- Consider *Ashdown v Telegraph Group Ltd* ([2001] EWCA Civ 1142; [2002] RPC 5; [2002] ECDR 32), where the three most important factors have been identified to be: (1) The degree to which the alleged infringing use competes with exploitation of the copyright work by the owner; (2) Whether the work has been published or not; (3) The extent of the use and the importance of what has been taken.

- Considering these in more detail, note that the amount taken is not conclusive one way or the other. In *Hubbard v Vosper*, Megaw LJ suggested that taking the whole of a short work might be fair in certain cases of criticism or review.

- Explain that whether the defendant's use competes with the claimant's exploitation of the work is a key factor. In *Sillitoe v McGraw Hill* [1983] FSR 545 the court concluded that the use made by the defendant of extracts of contemporary novels as part of its study guides was driven by the commercial imperative of making money. The defendant's motives equally can have a bearing: in *Associated Newspapers v News Group Newspapers* [1986] RPC 515 the only motive in publishing private correspondence of the Duke and Duchess of Windsor was to boost newspaper sales, whereas in *Pro Sieben* the court accepted that the defendant's motives had been to expose the evils of cheque book journalism.

Suggested Answers to the Questions in Chapter 5

4. The case law interpreting the CDPA provisions on infringement of copyright and the defences thereto fails to strike a reasonable balance between the rightholder and those who wish to make use of the work. Discuss.

The good answer will:

- Start by giving an overview of the meaning of infringement under copyright law and by summarising the statutory provisions on infringement.
- Follow this with an overview of the principal defences to copyright infringement, noting how numerous, detailed and fact-specific these defences are and how they may be compared with the broad-brush 'fair use' defence under USA law.
- Consider in detail the case law which has applied the defences, noting in particular the criticisms advanced by Burrell that the interests of the user of the copyright work are often overlooked and the criticisms of Griffiths that too much emphasis is placed on the interests of the right holder.
- Note the impact of digital technology, which means that it has become relatively easy for even an unskilled person to manipulate text and pictures so as to create a new work. The answer would consider whether, even though this would amount to infringement, it could be justified in the interests of encouraging creativity.
- Consider whether the changes of the Hargreaves Report to the CDPA meet the objective of making copyright law 'fit for purpose' or whether it might have been better, for example, to make use of the 'three-step test' found in both the Berne Convention and the WIPO Copyright Treaty. There would also be consideration of whether the adoption of a less detailed statutory régime would actually encourage judicial flexibility (Burrell argues to the contrary).
- Consider what else needs to be done if a fairer balance between the owners and users of copyright in the digital era is to be achieved.

Suggested Answers to the Questions in Chapter 5

5. Is the closed list of available defences an efficient mechanism in the online context or an open ended test for judicial interpretation would be a preferable solution?

The good answer will:

- Explain the policy discussions arguing for more flexibility in copyright law.
- Discuss some of the relevant proposals, such as the proposal made by the so-called Wittem Group which has proposed a half-open structure of copyright limitations that follows the wording of the three-step test but is adjusted in a way that makes the test suitable for judicial examination (Wittem Group, European Copyright Code, 2010, available at http://www.jipitec.eu/issues/jip- itec-1-2-2010/2622/wittem-group-european-copyright-code.pdf). Explain that this can be seen as a proposal that combines the advantages of legal security and predictability associated with the 'closed list' of exceptions and limitations and exceptions under the UK and EU legal tradition with the flexibility and adaptability to technological change that the US fair use doctrine offers.
- Indicate that the European Parliament urged for an evaluation of the Information Society Directive in the area of exceptions and limitations, proposing the introduction of a flexible tool such as the fair use test in EU copyright (European Parliament, Committee on Legal Affairs, Draft Report on the Implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the Information Society, 15 January 2015, 2014/2256(INI)).
- Critically reflect on the relevant policy discussions.