Suggested Answers to the Questions in Chapter 7

1. Do the provisions of the CDPA with regard to performers' moral rights adequately fulfill the United Kingdom's obligations under the WPPT?

The good answer will:

- Start by explaining that, although there is no Directive on moral rights for performers, Recital 19 to the Information Society Directive (2001/29/EC) makes clear that it regards Member States as bound by all the obligations of the WPPT. As a result, the United Kingdom Government took the view that the WPPT was in effect an EU Treaty, so that moral rights for performers could be introduced by secondary legislation under the European Communities Act 1972.

- Offer a brief overview of the moral rights of performers as available under the CDPA and the WPPT.

- Indicate that, when passing The Performances (Moral Rights etc.) Regulations 2006, the United Kingdom Government took the opportunity to restructure Part II of the CDPA into Chapters dealing with economic rights of performers (this category being divided into non-property and property rights) and their moral rights.

- Explain that, under the WPPT, the protection for a performer's moral rights is limited to live aural performances. This means that visual performances are not protected, although the word 'aural' suggests that the right is not limited to music and so would apply to the aural part of a dramatic performance. Be that as it may, the CDPA is not so constrained. Because of the wording of Chapter 1 of Part II, the definition of 'performance' in s. 180(2) must apply to all sections dealing with a performer's rights, so the CDPA is wider than the WPPT.

Suggested Answers to the Questions in Chapter 7

2. What is the meaning of substantial investment as a requirement for the subsistence of the database right? Which are the key cases that have discussed its meaning?

The good answer will:

- Offer a brief overview of the legal protection afforded to the database right.
- Explain that database protection is conferred to the investment in the obtaining, verification and presentation of the contents of a database. The investment as a requirement for protection may be in respect of financial, human or technical resources and/or the expenditure of time, effort and energy. The database right is not meant to protect the investment deployed in the creation of the materials that form the contents of a database. This important distinction has been highlighted in a number of cases that have been brought before the CJEU.
- Discuss *Fixtures Marketing Ltd v Oy Veikkaus Ab* (Case C-46/02, [2004] ECR I-10365), where the CJEU held that the investment in the creation of a database may consist in the deployment of human, financial or technical resources. To be protected by the database right, investment has to be substantial both qualitatively and quantitatively, meaning that it is both quantifiable resources and efforts that cannot be measured, such as intellectual effort or energy, that are taken into account. However, the mere creation of data does not fall within the ambit of substantial investment in the obtaining of the contents of the database and does not qualify for *sui generis* database protection.
- Discuss *British Horseracing Board Ltd and Others v William Hill Organisation Ltd* (Case C-203/02, [2004] ECR I-10415), where the CJEU held that the resources used to draw up a list of horses in a race and to carry out checks in that connection do not constitute investment in the obtaining and verification of the contents of the database in which that list appears. As a result, the Court drew a distinction between the resources used in the *creation* of materials contained in a database and the *obtaining* of such materials. The *sui generis* database right is afforded only to the latter activity.
- Explain that CJEU followed the same distinction in *Fixtures Marketing Ltd v AB Svenska Spel* (Case C-338/02, [2004] ECR I-10497), where it held that the notion of 'investment . . . in the obtaining of the contents' referred to the resources used to seek out existing independent materials and to collect them in the database. It did not cover the resources used for the *creation* of materials making up the database's contents.

Suggested Answers to the Questions in Chapter 7

3. What is your opinion about the press publisher right? For which reasons has it been criticised by scholarly literature?

The good answer will:

- Elaborate on Art.11 of the proposed Directive on Copyright in the Digital Single market.
- Explain that this related right to press publications is meant to address concerns on the so-called 'newspaper crisis'.
- Indicate that the proposed right will have the effect that news aggregators will not be able to copy hyperlinked headlines or snippets, i.e. short extracts, of news items without clearing permission from press publishers.
- Offer an overview of various relevant national initiatives. In Belgium, France and Italy, for instance, Google and national press publishers have concluded special agreements on the use of newspaper articles in Google News. In other Member States the issue was addressed with the introduction of new legislation (e.g. Germany and Spain that have regulated the online exploitation of news content through the so-called 'Google tax' laws).
- Discuss the criticisms that national initiatives have attracted and indicate that there is a referral before the CJEU regarding the lawfulness of the German ancillary right (*VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google Inc*, C-299/17, OJ C 309, 21–22, 18 September 2017).
- Explain that Art.11 has attracted criticism for lacking sufficient justification and not being adequate in meeting its stated objectives. Criticism has focused on the argument that the proposed right is unnecessary, undesirable, fundamentally misconceived, and unlikely to achieve anything apart from adding to the complexity and cost of operating in the copyright environment (see e.g. L. Bently et al, 'Response to Article 11 of the Proposal for a Directive on Copyright in the Digital Single Market, entitled 'Protec- tion of Press Publications concerning Digital Uses' on behalf of 37 Professors and Leading Scholars of Intellectual Property, Information Law and Digital Economy' [2016] 1).