

## Chapter 5: Defences

March 2020 update

### Copyright exceptions and Brexit

As a result of the exit of the United Kingdom from the European Union, there will be some changes on UK copyright law from 1 January 2021 onwards. An outline of the relevant changes is offered on the website of the UK Intellectual Property Office.<sup>1</sup> By reference to defences to copyright infringement, the most notable changes will impact on the copyright exception for orphan works and the exception on accessible format copies of copyright protected works.

In terms of the orphan works exception, from 1 January 2021, licensees under the UK's orphan works licensing scheme will no longer need to consult the EUIPO orphan works database as part of the diligent search. No other changes will be made to the diligent search requirements or the licensing scheme in general.

With regards to the exception allowing access to copyright works for visually impaired people, the UK has implemented Directive 2017/1564 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled. The UK's implementation of the Directive through the Copyright and Related Rights (Marrakesh Treaty etc.) (Amendment) Regulations 2018 will be retained in UK law after the end of the transition period.

### Copyright exhaustion and ebooks

In *Tom Kabinet*, C-263/18, ECLI:EU:C:2019:1111, the CJEU offered definitive insights on whether eBooks can be lawfully resold online. The case concerned the lawfulness of an online service consisting in a virtual market for 'second-hand' eBooks. The CJEU held that the supply of an eBook to the public by downloading for permanent use is an act of 'communication to the public' (in particular: an act of 'making available to the public')

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<sup>1</sup> <https://www.gov.uk/guidance/changes-to-copyright-law-after-the-transition-period#orphan-works-copyright-exception>, last accessed 20 March 2020.

within the meaning of Article 3(1) of the Information Society Directive 2001/29/EC. The case is interesting as it outlines the benefits of the exhaustion rule to society, economy and EU principles, such as freedom of movement. It does however foreclose the application of copyright exhaustion to the right of communication to the public and in this result it affirms that the so-called 'digital exhaustion' is only applicable to software as per *Usedsoft*.

### **Copyright exceptions and fundamental rights**

Can a defendant rely directly on a fundamental right underpinning a copyright exception in order to build a defence against allegations for copyright infringement? On July 2019, the CJEU held that fundamental rights, such as freedom of information and of the press cannot justify a derogation from the rights of copyright holders beyond what exceptions and limitations to copyright permit. In *Funke Medien*, C-469/17, ECLI:EU:C:2019:623, the owner of a website of a German newspaper requested from competent Germany authorities access to classified, weekly military status reports and the application was rejected for reasons of public security. Funke Medien obtained a portion of the aforementioned documents from an undisclosed source and published individually scanned pages online. The Federal Republic of Germany brought proceedings, requesting the removal of the materials on grounds of copyright infringement. The CJEU held that

'freedom of information and freedom of the press, enshrined in Article 11 of the Charter of Fundamental Rights of the European Union, are not capable of justifying, beyond the exceptions or limitations provided for in Article 5(2) and (3) of Directive 2001/29, a derogation from the author's exclusive rights of reproduction and of communication to the public, referred to in Article 2(a) and Article 3(1) of that directive respectively.'

### **The quotation exception**

The quotation exception was discussed by the CJEU in *Spiegel Online*, C-516/17, ECLI:EU:C:2019:625 and in *Pelham*, C-476/17, ECLI:EU:C:2019:624. Both cases were delivered on the same day.

Subject to discussion in *Spiegel Online* was the compatibility with EU law of an open-ended general copyright exception like the German 'free use'. The CJEU held that

'the exception for quotations applies only if the quotation in question relates to a work which has already been lawfully made available to the public. That is the case where the work, in its specific form, was previously made available to the public with the rightholder's authorisation or in accordance with a non-contractual licence or statutory authorisation.'

In addition, the Court shed light on the scope of the exception and held that there is no need for the quoted work to be inextricably integrated (e.g. through insertions) into the subject matter citing it. Quotations may also be made through a hyperlink to the quoted work.

In *Pelham*, C-476/17, ECLI:EU:C:2019:624, the question was whether sampling, i.e. copying of the sounds fixed in a phonogram, requires a licence from the relevant phonogram producer. The CJEU held that unauthorized samples, however short, may infringe a phonogram producer's rights. The reason is that they are considered to be reproductions 'in part' of the original work. As the CJEU remarked 'where a user, in exercising the freedom of the arts, takes a sound sample from a phonogram in order to embody it, in a modified form unrecognisable to the ear in another phonogram, that is not a "reproduction".' When samples are extracted with a view to create a new and distinct work from the original phonogram they do not amount to an act of copying. Short extracts may qualify for the quotation exception to the extent that they are able to identify the original work but in cases where the original is no longer recognizable the use in question cannot benefit from the quotation exception.

### **Copyright exceptions and the DSM Directive**

The DSM Directive, now Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, entered into force on 20 June 2019. The Directive includes a number of new copyright exceptions and limitations, including education-related exceptions and permitting certain uses by reference to out-of-commerce works. It also contains a controversial press publishers' right (discussed in Chapter 7 on

Related Rights) and a system of primary liability for information society service providers. Member States have 24 months, i.e. until 7 June 2021, to transpose the Directive into their own laws. It has been reported that the UK will not implement the Directive into UK law in the light of Brexit.