THE QUOTATION EXCEPTION IN UK COPYRIGHT LAW

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ABSTRACT

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This thesis considers the copyright quotation exception in section 30(1ZA) of the Copyright, Designs and Patents Act 1988 (UK). The exception is derived from article 5(3)(d) of Directive 2001/29/EC (Infosoc Directive), and substantially mirrors its wording.

The scope of section 30(1ZA) was given limited consideration by the legislature prior to its introduction, and has not been considered by the UK courts. Yet the provision is of potentially great significance, and has attracted increasing academic attention. Its proper interpretation is therefore of some importance.

This thesis contends that section 30(1ZA) should generally be construed consistently with relevant pre- and post-Brexit case law of the CJEU. This is to a degree required, and is otherwise possible, under the European Union (Withdrawal) Act 2018 (UK).

The starting point for interpreting section 30(1ZA) must therefore be the three 2019 decisions of the CJEU which considered article 5(3)(d) Infosoc Directive. These decisions identify the 'essential characteristics' of a quotation under article 5(3)(d), but offer little analysis to support the conclusions drawn. In this context, this thesis argues for a return to the more fully explicated interpretative approach to the copyright exceptions of the Infosoc Directive outlined in Case C-201/13 *Deckmyn v Vandersteen.*

The result of applying that approach is a conception of a quotation, within the meaning of article 5(3)(d), as a reproduction of (part of) a work; that is identified as having been reproduced; and the reproduction of which is for the purpose of criticism or review, or an analogous purpose.

This conception contrasts with that supported by other copyright scholars. It is however entirely consistent with the wording and statutory context of section 30(1ZA), and is also normatively desirable. Amongst other things, it gives the exception a scope that broadly reflects a reasonable balance between the interests of copyright owners and users under UK law.

ACKNOWLEDGEMENTS

I am extremely grateful to my supervisor, Professor Justine Pila, for her invaluable guidance, support and encouragement, both in the preparation of this thesis and more generally.

I would like to thank my family, especially my husband, Owen Webb, my parents, Julie and Geoffrey Parkin, and my mother-in-law, Ann Nield, without whose great assistance and forbearance the completion of this work would not have been possible.

Finally, to all those friends and colleagues who have walked this path before me, but particularly Dr Henrietta Zeffert: thank you.

For CIEW and AWGW

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ALRC	Australian Law Reform Commission
BIRPI	Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle
CJEU	Court of Justice of the European Union
ECtHR	European Court of Human Rights
IPO	Intellectual Property Office (UK)
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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1. INTRODUCTION

'*Every book is a quotation; and every house is a quotation out of all forests, and mines, and stone quarries; and every man is a quotation from all his ancestors*'.[1]

The manner in which the term 'quotation' is deployed in the foregoing text indicates an understanding of quotations as loose references back to what has come before. Quotations do entail such references, but they are not the sum of what constitutes a quotation, when the concept is considered in a literal sense.[2] Quotations are a specific – indeed, our 'primary'[3] – 'meta-linguistic tool':[4] they demand to be understood differently than direct speech, and the application of the same conventions of understanding as are applied to direct speech will result in unintelligibility or confusion.[5]

As a species – albeit a distinctive species – of human communication, the use of quotations is indirectly regulated by laws dealing with communications more generally. For example, defamation laws, privacy laws, and laws of trade mark and passing off indirectly

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1 Ralph Waldo Emerson, 'Quotation and Originality' in Joel Porte and Saundra Morris, *Emerson's Prose and Poetry: Authoritative Texts, Contexts, Criticism* (W W Norton 2001) 319.

2 Monika Kirner-Ludwig and Iris Zimmerman suggest, diagrammatically, that quotations (along with 'citations', and 'other intertextual references/ allusions') are a subset of 'references': see Monika Kirner-Ludwig and Iris Zimmerman, 'Quoting and plagiarising-concepts of both now and then?' in Jenny Arendholz, Wolfram Bublitz and Monika Kirner-Ludwig, *The Pragmatics of Quoting Now and Then* (De Gruyter Mouton 2015) 291, 293. This thesis agrees that quotations are a species of reference but, to be clear, asserts that only one characteristic of a quotation is that it constitutes a reference.

3 Herman Cappelen, Ernest Lepore, and Matthew McKeever, 'Quotation', *The Stanford Encyclopedia of Philosophy* (Summer edn, 2020) <https://plato.stanford.edu/archives/sum2020/entries/quotation/>.

4 ibid.

5 ibid.

regulate the use of quotations.[6] Copyright laws, too, indirectly regulate the use of quotations – indeed, the copyright laws of many jurisdictions continue to regulate the use of quotations indirectly only.[7] Yet, the law of copyright is unique amongst systems of law in purporting to regulate the use of quotations directly, by way of provisions expressly aimed at governing the use of quotations from copyright materials. It is a provision of this kind with which this thesis is, largely, concerned: section 30(1ZA) of the UK Copyright, Designs and Patents Act 1988[8] directly and expressly regulates the use of quotations from copyright works.[9]

The exception for quotations – that is, the exception allowing the use of quotations from a copyright work, in circumstances in which this would otherwise constitute infringement – is 'one of the most traditional exceptions to copyright'.[10] In its present form

6 If a quotation contains defamatory or private material, then it will be regulated by the laws of defamation or privacy (as applicable). If a mark, within the meaning of the laws of trade mark and passing off, is 'quoted' (something that is possible, in accordance with the conception of quotation established by this thesis), then it may attract the application of those laws.

7 Notably, the copyright laws of the US (which, as will be discussed further below, has a general fair use exception to copyright infringement), and Commonwealth countries such as Australia, Canada, and New Zealand, indirectly regulate the use of quotations. As explained by the ALRC, '[i]n Australian copyright law, quotation is not a term of art. The *Copyright Act* does not provide a stand-alone exception for quotation. Rather, other concepts are used to govern whether a quotation infringes copyright': ALRC, *Copyright and the Digital Economy* (ALRC Report 122, 2014) para 9.9.

8 'CDPA'.

9 Section 30(1ZA) allows the use of a 'quotation' from a copyright work, for a purpose of 'criticism or review or otherwise', subject to the satisfaction of other conditions—most notably, that the use constitutes a 'fair dealing' with the work from which the quotation is derived. Schedule 2 paragraph 2(1ZA) of the CDPA provides an exception to performers' rights, allowing the use of a 'quotation' from a 'performance or recording', for a purpose of 'criticism or review or otherwise', again subject to the satisfaction of other conditions, including 'fair dealing'. Whilst acknowledging this provision, the focus of this thesis is the UK quotation exception as it applies to copyright works – namely, the exception in section 30(1ZA) CDPA.

10 Case C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] OJ C 392, Opinion of AG Szpunar, para 41 (citing French legal commentary of 1812).

since the Stockholm revision of 1967,[11] article 10(1) of the Berne Convention for the Protection of Literary and Artistic Works[12] provides as follows:

> It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.[13]

Whilst academic opinion is divided as to the significance of the language used in article 10(1), a majority of commentators appears to agree that the provision imposes on Berne Union members a mandatory obligation to exempt the use of quotations from copyright protection in domestic law[14] - whether (it would seem) by means of a dedicated, express, exception or otherwise.[15]

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11 Prior to this, the article provided that '[i]t shall be permissible in all the countries of the Union to make short quotations from newspaper articles and periodicals, as well as to include them in press summaries': see BIRPI, Preparatory Documents in *Records of the Intellectual Property Conference of Stockholm* (World Intellectual Property Organisation 1971) vol I, 117. At Stockholm, there was a vote in favour of adopting the new text: BIRPI, Preparatory Documents in *Records of the Intellectual Property Conference of Stockholm* (World Intellectual Property Organisation 1971) vol II, 861. It was recognized in the preparatory documents that domestic laws already had in place 'exceptions in favour of various public and cultural interests', where '[t]he exceptions most frequently recognized in domestic laws seem[ed] to relate to [various] works or methods', including 'quotation': BIRPI, Preparatory Documents in *Records of the Intellectual Property Conference of Stockholm* (World Intellectual Property Organisation 1971) vol I, 111-112.

12 (Adopted 9 September 1886, entered into force 19 November 1984) 828 UNTS 221 ('Berne Convention').

13 Berne Convention, art 10(1).

14 See, for example, Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: the Berne Convention and Beyond* (3rd edn, OUP 2022) 764; Paul Goldstein and P Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice* (3rd edn, OUP 2013) 392. This view is also consistent with the wording of art 10(1) in English (which provides that it 'shall' be permissible to make 'quotations', in contrast with other provisions—for example, art 10(2)—which use the formulation 'It shall be a matter for legislation in countries of the Union … to permit …'), and even more so with the wording of art 10(1) in French (which states that '*[s]ont licites les citations tirées d'une œuvre*'). (Although see comments by Blomqvist suggesting that these matters of wording are not conclusive as to the mandatory character of art 10(1): Jørgen Blomqvist, *Primer on International Copyright and Related Rights* (Edward Elgar 2014) 159).

15 As noted at n 7, above, the copyright laws of the US, and Commonwealth countries such as Australia, Canada, and New Zealand, indirectly regulate the use of quotations and do not have dedicated quotation exceptions despite being (in the case of the latter, longstanding) members of the Berne Union: see WIPO, 'Contracting Parties, Berne Convention' (WIPO) <https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15> accessed 5 October 2022. The UK is also a Berne Union member: it signed the Berne Convention on 9 September 1886, ratified on 5 September 1887, and the Convention took effect in the UK on 5 December 1887. Prior to

The obligation under article 10(1) interacts – at least insofar as national copyright quotation exceptions purport to allow the unauthorised reproduction of copyright works[16] – with the so-called 'three-step test' in article 9(2) of the Berne Convention, allowing Berne Union members to permit the reproduction of copyright works: i) in 'certain special cases', provided that ii) such reproduction does not conflict with a normal exploitation of the work, and provided that iii) such reproduction does not unreasonably prejudice the legitimate interests of the author.[17]

2014, the obligation contained in article 10(1) Berne Convention was, arguably, satisfied in the UK through its existing system of copyright exceptions, including, of foremost relevance, the exception for fair dealings for the purpose of 'criticism or review', in section 30(1) of the Copyright, Designs and Patents Act 1988 (CDPA): the commentary in the second edition of Ricketson and Ginsburg's treatise on the Berne Convention suggested that the UK 'criticism or review' fair dealing exception, considered prior to the enactment of s 30(1ZA), was a valid vehicle for addressing the matter of 'quotation' in domestic law. The authors noted that 'provision [for quotation] is made in most national laws', and the footnote to this statement cited as examples 'the French Law of 1957, art 41; German Law of 1965, art 51; UK Copyright Act 1956, s 9', the last of these being the predecessor of CDPA, s 30(1) (and seemingly cited in error, given the intervening enactment of the CDPA). See Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd edn, OUP 2006) 783. The UK legislature also appeared to consider that the UK had a statutory 'quotation exception', even prior to the introduction of s 30(1ZA). For example, the Cameron Government's 2011 Consultation on Copyright noted that '[m]any other countries have wider quotation exceptions than the UK's': IPO, *Consultation on Copyright* (14 December 2011) para 7.180. However, if art 10(1) is read as requiring that the use of quotations for any purpose is allowable in domestic copyright law, then the UK must be considered to have been in breach of that requirement at least prior to 2014, as the extant fair dealing exceptions—including, in particular, s 30(1)—allowed uses of copyright materials for certain purposes only. This is, in effect, the conclusion reached by Aplin and Bently, who argue that 'adding conditions [to those expressly recognised in the text of art 10(1), in domestic implementations of the provision] breaches international law': Lionel Bently and Tanya Aplin, 'Whatever Became of Global, Mandatory, Fair Use? A Case Study in Dysfunctional Pluralism' in Susy Frankel (ed), *Is Intellectual Property Pluralism Functional?* (Edward Elgar 2019) 8, 21.

16 See Berne Convention, art 9(2), which states in full that '[i]t shall be a matter for legislation in the countries of the Union *to permit the reproduction* of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author' (emphasis added).

17 ibid. Aplin and Bently dispute that the three-step test embodied in article 9(2) of the Berne Convention applies to article 10(1) of the Convention, meaning that, as they argue, 'when it comes to national implementation of Article 10(1), countries do *not* have the additional burden of considering compliance with the three-step test': Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use* (Cambridge University Press 2020) 60.

Since 2002, EU Member States have been permitted – although not required – to provide domestic copyright exceptions for quotations in the terms outlined by the EU Information Society Directive.[18] Article 5(3)(d) of the Infosoc Directive states that:

> Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
>
> […]
>
> (d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose.[19]

Articles 2 and 3 of the Infosoc Directive require Member States to provide the authors of copyright works with rights of reproduction, and rights of communication to the public, respectively.[20]

With some differences in wording,[21] article 5(5) of the Infosoc Directive replicates the requirements of the Berne Convention three-step test, stating that:

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18 Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2002] OJ L167/10 ('Infosoc Directive').

19 Infosoc Directive, art 5(3)(d).

20 Article 2 states that 'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: (a) for authors, of their works; (b) for performers, of fixations of their performances; (c) for phonogram producers, of their phonograms; (d) for the producers of the first fixations of films, in respect of the original and copies of their films; (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite': Infosoc Directive, art 2. Article 3(1) states that 'Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them': Infosoc Directive, art 3(1). Article 3(2) provides for a right of making available to the public, and states that 'Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them (a) for performers, of fixations of their performances; (b) for phonogram producers, of their phonograms; (c) for the producers of the first fixations of films, of the original and copies of their films; (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite': Infosoc Directive, art 3(2).

21 Article 9(2) Berne Convention provides that '[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in [those circumstances where the three steps apply':

> [t]he exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 [of article 5] shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.[22]

Against the background of these international and supranational regulations, in 2010 the Cameron government asked Professor Ian Hargreaves to conduct a review of UK intellectual property law.[23] Of the Hargreaves Review's ten recommendations, one was directed to the particular matter of copyright exceptions.[24] The report recommended that the UK Government should 'deliver copyright exceptions at national level to realise all the opportunities within the EU framework'.[25] Accepting this recommendation, the Government ultimately determined that this was to include creating 'a more general permission for quotation of copyright works' as allowable under article 5(3)(d) Infosoc Directive,[26] by 'widen[ing]' UK copyright exceptions so that 'uses of extracts' other than those already

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Berne Convention, art 9(2). Article 5(5) Infosoc Directive provides that '[t]he exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 *shall only be applied* in [those circumstances where the three steps apply]': Infosoc Directive, art 5(5) (emphasis added).

22 Infosoc Directive, art 5(5). Article 5(5) makes clear that its three steps are to apply to all national exceptions and limitations implemented pursuant to article 5, paragraphs 1 to 4, of the Infosoc Directive, with the effect that exceptions and limitations to the reproduction right *and* the rights of communication to the public of works and making available to the public are affected (cf. article 10(1) Berne Convention, which only relates to the reproduction right): Infosoc Directive, art 5(5).

23 IPO, 'Independent review launched to ensure IP system promotes growth' (*Intellectual Property Office*, 4 November 2010) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/about/press/press-release/press-release-2010/press-release-20101104.htm> accessed 12 July 2017.

24 Namely, recommendation 5 (on 'Limits on copyright'): see Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (18 May 2011) ('Hargreaves Review') 8.

25 ibid.

26 IPO, *Modernising Copyright: A modern, robust and flexible framework* (20 December 2012) ('Modernising Copyright') 4.

covered by the CDPA's fair dealing exceptions for 'criticism or review' and 'reporting current events'[27] would be permitted.[28]

In reliance on article 5(3)(d) of Infosoc Directive,[29] in October 2014 a dedicated quotation exception was introduced into the CDPA.[30] Section 30(1ZA) of the CDPA provides that:

> 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).[31]

Two things are of immediate note about this provision. The first is its omission of any definition of 'quotation' itself. In particular, there is no indication of the features or quantity of a copyright work that may be used as a quotation, notwithstanding that first, by virtue of the substantiality test for infringement,[32] a qualitatively (and, to a lesser extent,

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27 Section 30(1) of the CDPA provides that '[f]air 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': CDPA, s 30(1). The words in italics were added in 2014: see Quotation and Parody Regulations, regs 1, 3. Section 30(2) provides that '[f]air dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection (3)) it is accompanied by a sufficient acknowledgement': CDPA, s 30(2).

28 Impact Assessment, Exception for use of quotations or extracts from copyright works (13 December 2012) 1.

29 See Transposition note for Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ No L 167, 22.6.2001, p.10) 2.

30 See Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356 ('Quotation and Parody Regulations'), regs 1, 3 and 4.

31 CDPA, s 30(1ZA).

32 See CDPA, s 16. Section 16(3)(a) provides that '[r]eferences … to the doing of an act restricted by the copyright in a work are to the doing of it in relation to the work as a whole or *any substantial part* of it' (emphasis added).

quantitatively[33]) significant part of a work must be used before there is any need to consider the availability of the exception;[34] and secondly, there must be a relationship of proportionality between the extent of the quotation and its purpose.[35]

The second matter of note is the provision's omission of any express limitation on the purpose for which a 'quotation' may be used, in contrast to the quotation exceptions of some other jurisdictions.[36] That is, a quotation covered by section 30(1ZA) may ostensibly be made for the purpose of criticism, or of review, or for any other purpose.

At the time of writing,[37] section 30(1ZA) CDPA has not yet been considered by a UK court. However, the Court of Justice of the European Union (CJEU) has in recent years provided guidance on the application of article 5(3)(d) Infosoc Directive, in three 2019 decisions issued in response to preliminary referrals by the German *Bundesgerichtshof* (Federal Court of Justice) – namely, Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland*,[38] Case C-476-17 *Pelham and Others v Ralf Hütter and Florian Schneider-Esleben*,[39] and Case C-516/17 *Spiegel Online GmbH v Volker Beck.*[40]

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33 A court's assessment as to 'substantial part' is a question of quality, more than of quantity: *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL), 276.

34 As will appear from the discussion below, the exception in s 30(1ZA) is of practical relevance only if a 'substantial part' of a copyright work has been implicated by the doing of a restricted act. Therefore, a 'quotation' under s 30(1ZA) must be, at minimum, a 'substantial part' of a copyright work.

35 See CDPA, s 30(1ZA)(c). The proportionality test and the mandated 'fair dealing' assessment in s 30(1ZA) import considerations of the magnitude, and relative importance, of a quotation with respect to its source: see CDPA, ss 30(1ZA)(c) and 30(1ZA)(b).

36 See, for example, the Italian quotation exception in art 70(1) of Legge 22 aprile 1941, n 633 (Italian Copyright Act), and the French quotation exception in art L122-5(3)(a) of the Code de la propriété intellectuelle (version consolidée au 17 mars 2017) (although note that the limitation, in the French provision, is derived from the nature of the works in which a quotation may be used, namely works that have a 'critical, polemic, educational, scientific or informatory nature' (quotations are permitted where justified by '*le caractère critique, polémique, pédagogique, scientifique ou d'information de l'oeuvre*')).

37 12 April 2024.

38 [2019] OJ C 382 ('*Funke Medien*').

39 [2019] OJ C 347 ('*Pelham*').

40 [2019] OJ C 392 ('*Spiegel*').

As a matter of interpretative method, the Court in *Pelham* and *Spiegel* followed the approach outlined in its earlier decision in Case C-201/13 *Deckmyn and Vrijheidsfonds VZW v Vandersteen and Others*,[41] stating that:

> [s]ince [the Infosoc Directive] gives no definition of the term "quotation", the meaning and scope of that term must, according to the Court's settled case-law …, be determined by considering its usual meaning in everyday language, while also taking into account the legislative context in which it occurs and the purposes of the rules of which it is part.[42]

The Court then held in both *Spiegel* and *Pelham* (with slight variations in *Pelham*, shown in square brackets) as follows:

> As regards the usual meaning of "quotation" in everyday language, it should be noted that the essential characteristics of a quotation are the use, by a user other than the copyright holder, of a work or, more generally, of an extract from [*of*] a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user[, *since the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into "dialogue" with that work*].[43]

The usual meaning of the term 'quotation' as construed by the CJEU is, therefore, qualified almost exclusively by the purpose to which the relevant work, or extract from a work, is put ('illustrating an assertion', 'defending an opinion', or 'allowing an intellectual comparison'[44]).

Whilst at the time of its enactment, UK courts were obliged in accordance with the *Marleasing* principle to interpret section 30(1ZA) consistently, 'as far as possible', with any

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41 [2014] OJ C16/3 ('*Deckmyn*'). This decision concerned Infosoc Directive, art 5(3)(k).

42 *Pelham* (n 39) para 70; *Spiegel* (n 40) para 77 (citing *Deckmyn* (n 41) in each case).

43 *Pelham* (n 39) para 71; *Spiegel* (n 40) para 78.

44 ibid.

relevant EU law,[45] and specifically article 5(3)(d),[46] the UK's intervening 'exit' from the EU leaves an open question as to the continuing relevance of these and other CJEU decisions (including future CJEU decisions) to the interpretation of section 30(1ZA) in its current form.

Dismissed at the time of its introduction as a 'minor' amendment,[47] and paid correspondingly little attention in the pre-legislative materials, the proper interpretation of section 30(1ZA) CDPA has come to be a matter of great significance in UK copyright law. Three related developments are central to this conclusion. The first is the CJEU's surprising recognition in Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [48] that an extract from a work, such as a sentence from a literary text, may itself be accorded protection against copyright infringement (a conclusion that has been interpreted by the UK High Court as suggesting that such an extract may, in some cases, constitute a copyright work in its own right[49]).[50] Whilst *Infopaq* was decided before the introduction of section 30(1ZA) into UK statute, it appears that the implications of the decision for the operation of the provision were not fully explored prior to its enactment.[51] And, whilst the future status of the

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45 Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4157, para 8. See also Case C-14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1892, para 26.

46 Given the derivation of section 30(1ZA) CDPA from article 5(3)(d) Infosoc Directive: see Transposition note for Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ No L 167, 22.6.2001, p.10) 2.

47 'Modernising Copyright' (n 26) 28.

48 [2009] ECR I-06569 ('*Infopaq*').

49 See *Newspaper Licensing Agency v Meltwater Holding BV* [2010] EWHC 3099 (Ch) [71].

50 *Infopaq* (n 48) para 47.

51 As will be discussed in Chapter 2 at text to n 228 – n 232, whilst pre-legislative materials implicitly acknowledged the impact upon the operation of the proposed quotation exception of the CJEU's decision in *Infopaq*, they did not appear to take full account of the necessary consequences of the *Infopaq* decision, namely, that an extract of a work may itself constitute a copyright work, with the effect that in some circumstances, the entirety of a copyright work may constitute a 'quotation' under the quotation exception.

Infopaq decision in UK copyright law is uncertain,[52] its effects may continue to reverberate, altering courts' assessments of the nature of a copyright work and, necessarily thereby, what it means to be 'quotation from' a copyright work under section 30(1ZA).[53]

Assuming the continuing significance of *Infopaq*, it must be accepted that under section 30(1ZA) CDPA it will in some instances be necessary and permissible for use of a 'quotation' to entail use of the whole of a copyright work, consistent with the CJEU's acknowledgement that use of the whole of a copyright work may in some circumstances constitute lawful use of a quotation under article 5(3)(d) Infosoc Directive.[54] This belies the assumption made by UK lawmakers, prior to the introduction of section 30(1ZA), that a statutory copyright quotation exception would apply only to small extracts of works - and would thereby impact minimally on the economic interests of copyright owners.[55] Even if it was correct that only small extracts could qualify as 'quotations' within the meaning of copyright legislation, it could not be assumed that these are necessarily of limited economic significance to the copyright owner. For a second relevant development is that extracts – that is, small parts of copyright works or materials – are increasingly of potential importance to both copyright owner and user. By way of example, Advocate General Szpunar highlighted in his Opinion preceding the CJEU's judgment in *Pelham* that '[p]roducers can [now] exploit phonograms in other ways than by selling copies, such as authorising sampling and

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52 Whilst it is unclear, following Brexit, whether UK courts will ultimately depart from the 'EU concept of the "author's own intellectual creation"', derived from *Infopaq*, in favour of a return to the 'old "skill, labour and judgment' standard"' of originality derived from pre-existing UK case law, the 'own intellectual creation' standard has continued to be adopted by UK courts in early post-Brexit case law: see, for example, *Shazam Productions Ltd v Only Fools the Dining Experience Ltd* [2022] EWHC 1379 (IPEC) [94] – [113].

53 Recall that section 30(1ZA) provides that '[c]opyright in a work is not infringed by the use of *a quotation from the work* (whether for criticism or review or otherwise) provided that …': CDPA, s 30(1ZA) (emphasis added).

54 See *Pelham* (n 39) para 71; *Spiegel* (n 40) para 78.

55 For a discussion of these assumptions, see text to n 193 – n 206.

generating income therefrom',[56] and that sampling had 'became a significant source of revenue for its authors, performers and producers'.[57] The decision of the UK High Court in *England and Wales Cricket Board Ltd v Tixdaq Ltd*[58] similarly demonstrates the potential value of short (in that case, 8 second) clips of a broadcast or film.[59]

Thirdly, the category of things that might be considered quotations, as a matter of ordinary meaning, continues to expand. New practices continue to emerge, often as the result of the development of new technologies, which bear the hallmarks of use of a quotation – for example, a 'retweet' on the platform formerly known as Twitter arguably bears the hallmark of a quotation and is intelligibly described as such. As there is – appropriately – a strong correlation between ordinary meaning and meaning in law, discussed further in the body of this thesis,[60] these practices are likely to be recognised as uses of quotations within the meaning of copyright quotation exceptions, including section 30(1ZA) CDPA.[61] And again, it is not necessarily clear that the consequences of this were fully interrogated by the UK legislature prior to the introduction of section 30(1ZA) CDPA – or, relatedly, by the EU legislature prior to the enactment of article 5(3)(d) Infosoc Directive.[62]

Consideration of the proper interpretation of section 30(1ZA) CDPA is a matter of importance not only to the application, effect and coherence of UK copyright law, but more

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56 *Pelham* (n 39), Opinion of AG Szpunar, para 33.

57 ibid para 4.

58 [2016] EWHC 575 (Ch).

59 As Arnold J noted, "[q]uantitatively, 8 seconds is not a large proportion of a broadcast or film lasting two hours or more. Qualitatively, however, it is clear that most of the clips uploaded constituted highlights of the matches… Thus most of the clips showed something of interest and hence value': ibid [66].

60 At text to n 615 – n 647.

61 One such practice, namely, hyperlinking, has already been recognised by the CJEU as a possible use of a quotation within the meaning of article 5(3)(d): see *Spiegel* (n 40) para 80. However, arguably, policy reasons – in particular, the necessity of hyperlinks to the functioning of internet – were a strong factor in the decision.

62 See discussion at text to n 206 – n 214.

broadly also. Nations without dedicated copyright quotation exceptions are, perhaps unsurprisingly,[63] considering proposals for the introduction of provisions similar to section 30(1ZA) – or at the least, that rely partially on a concept of quotation to define their scope.[64] Specifically, the ALRC and later Australian Government recently conducted public consultations in which the introduction of new copyright exceptions for the use of 'quotations' was proposed.[65] Concerningly, in these consultations some imprecision in the language used to discuss quotations in law, evident in the UK reform materials,[66] persisted.[67]

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63 Given the mandatory nature of article 10(1) Berne Convention, increased scholarly attention on copyright quotation exceptions, the enactment of the UK quotation exception, and recent case law at EU level.

64 It should be acknowledged that those nations without dedicated quotation exceptions, but with open-ended fair use exceptions (such as the US, in 17 U S Code § 107) are unlikely to consider the introduction of dedicated quotation exceptions, based on the understanding that instances of quotation would fall within the scope of fair use. Although note that the fair use provision in the Israeli Copyright Act 2007 lists 'quotation' as an illustrative purpose: Israeli Copyright Act, 2007, s 19(a).

65 Following a public consultation, in 2014 the ALRC proposed the introduction into the Australian *Copyright Act 1968* (Cth) of a fair use provision with 'quotation' as an illustrative purpose; in the alternative, it proposed the introduction of a new fair dealing exception for the purpose of 'quotation': ALRC, *Copyright and the Digital Economy* (ALRC Report 122, 2014) para 9.3, para 9.7. In 2021, the Australian Government released a draft Bill for comment, including a new fair dealing exception for the use of 'quotations' by 'certain public bodies, organisations and individuals for non-commercial purposes' for non-commercial purposes. 'Quotation' was not defined, but it was proposed that the term be given its ordinary meaning: see Australian Government, *Discussion paper—Exposure Draft Copyright Amendment (Access Reform) Bill 2021 & Review of Technological Protection Measures Exceptions* (December 2021) 16.

66 Imprecision in the characterisation of quotation – whether as something 'taken' from a copyright work or, instead, as a possible purpose of the use of what is taken – pervades discussions about copyright exceptions for the use of quotations. For example, discussing the (then proposed) UK copyright quotation exception, the IPO stated that '[t]he exception permits *the use of a quotation from a work* for purposes such as criticism and review. In one dimension this slightly narrows the current criticism and review exception by permitting use *only for the purpose of quotation*. In another it slightly widens it by *allowing such quotations* to be used for purposes other than, but similar to, criticism and review': IPO, *New exception for quotation* (2013) para 1 (emphasis added). Even this short passage evidences conflicting characterisations of quotation. Further, it begs the question: if 'quotation' can itself be a purpose for which copyright materials (or part thereof) might be used, what are the characteristics of such a purpose?

67 In its 2013 report the ALRC recommended, in the first place, the enactment into Australian copyright statute a fair use exception listing 'quotation' as an illustrative purpose, and, as an alternative, the introduction into the same statute of a new fair dealing exception 'for the purpose of quotation' (the latter modelled on that suggested in the scholarly work of Adeney): ALRC, *Copyright and the Digital Economy* (Report 122) 2 December 2013, para 9.7. (The IPO's report of the same year is quoted at paragraph 9.72: see ALRC, *Copyright and the Digital Economy* (Report 122) 2 December 2013, para 9.72) In so doing, the ALRC acknowledged that '[p]roviding quotation as an illustrative purpose may … be criticised on the basis that without further reference to a particular purpose, such as criticism or review, the term quotation may lack sufficient meaning. That is, without further context it may refer

Jurisdictional differences notwithstanding,[68] it is therefore critical that the scope of the UK quotation exception, as it is required in law to be read, is better understood. In particular, the scope of the concept of quotation, central to that provision, must be considered in greater detail. Whilst other scholars have, relevantly, examined the nature and breadth of the concept of quotation in copyright law, they have considered the concept as it appears in the relevant German,[69] Dutch,[70] EU,[71] and international law provisions.[72] Further, and as discussed in the following section,[73] the most lengthy examination of article 10(1) Berne Convention to date adopts a methodological approach to the interpretation of that provision that is at odds with the interpretative approach advanced by this thesis as necessary. Perhaps accordingly, the conclusions there reached as to the effect of the quotation exception in international copyright law, and especially as to the scope of the concept of quotation within it, are inconsistent with the conclusions of this thesis as to quotation exception in UK law.

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simply to the act of using any part, rather than the whole, of a work': see ALRC, *Copyright and the Digital Economy* (Report 122) 2 December 2013, para 9.47. This is indeed valid basis for criticism.

68 It is acknowledged that the overlay of EU law, still relevant in the UK, is not relevant in Australia, for instance. Nonetheless, the international context provided by the Berne Convention is the same in all Berne Union countries, and much of the interrogation of the concept of quotation conducted by this thesis is relevant to non-EU jurisdictions.

69 See Elizabeth Adeney, 'Appropriation in the name of art' (2013) 23 *Australian Intellectual Property Journal* 142; Elizabeth Adeney and Christoph Antons, 'The Germania 3 decision translated: the quotation exception before the German Constitutional Court' (2013) 35 EIPR 646.

70 See Martin Senftleben, 'Quotations, Parody and Fair Use', in P Bernt Hugenholtz, Antoon Quedvlieg and Dirk Visser (eds), *1912 – 2012: A Century of Dutch Copyright Law – Auteurswet 1912 – 2012* (Amstelveen: deLex 2012) 360.

71 See Stavroula Karapapa, 'The quotation exception under EU copyright law: Paving the way for user rights' in Eleonora Rosati (ed), *The Routledge Handbook of EU Copyright Law* (1st edn, Routledge 2021) 247. See also P Bernt Hugenholtz and Martin Senftleben, 'Fair Use in Europe: In Search of Flexibilities' (Amsterdam Law School Research Paper 2012/39, Institute for Information Law Research Paper 2012/33, 2012); 'Memorandum of Understanding Concerning the Interpretation of the Right of Quotation' (*A2KNetwork*, September 2012) <http://a2knetwork.org/sites/default/files/memorandum_on_quotations.pdf> accessed 24 October 2016.

72 See Ricketson and Ginsburg (n 14); Ricketson and Ginsburg (n 15). See also Lionel Bently, 'What Became of Global, Mandatory Fair Use?' (ATRIP Congress, Krakow, 28 June 2016); Tanya Aplin, 'The Case for Global, Mandatory Fair Use' (Conference on Comparative Dimensions of Limitations and Exceptions in Copyright Law, Singapore, 22 July 2016); Lionel Bently, 'The Law of Quotation' (Cambridge Art History Research Seminar, Cambridge, 8 March 2017); Bently and Aplin (n 15); Aplin and Bently (n 17).

73 See text to n 91 – n 173.

It is only once sufficient consideration is given to the proper interpretation of section 30(1ZA), and to its resulting scope, that the appropriateness of the scope of the exception may be assessed. Importantly, for the purposes of this assessment, section 30(1ZA) cannot be viewed in isolation; notwithstanding its potential significance, in the context of UK copyright law it is but one rule in an ecosystem of interrelated legal standards, including those concerning copyright infringement. Nonetheless, an assessment of scope is opportune, not only because of moves in other jurisdictions to introduce similar provisions, but because of the uniqueness of the present moment in UK law, post-Brexit.

Following this introduction, Chapter 2 of this thesis establishes the importance of considering the proper interpretation of section 30(1ZA) CDPA, querying its characterisation as a 'minor' amendment to UK copyright statute. It recounts some of the pre-legislative history of section 30(1ZA), recalling statements made as to its intended scope and practical effect. In particular, it notes several statements made as to the insignificance of the exception to the economic interests of copyright owners (some of which echoed prior statements of the EU legislature in respect of article 5(3)(d) Infosoc Directive). The chapter then turns its view outside the law, to consider the history of quoting practices and the development of these practices to encompass present-day acts which might ordinarily be described as uses of 'quotations'. This is done to demonstrate that mistaken assumptions about the nature of those things denoted by the term 'quotation' in ordinary language – and, thereby, in law – were central to the (limited) pre-legislative considerations of the scope of section 30(1ZA) CDPA.

Chapter 3 of this thesis turns to outline the approach that must, as a matter of law, be taken to the interpretation of section 30(1ZA) CDPA. The pre-legislative materials considered in Chapter 2 evidence a clear view, on the part of the UK legislature, that the scope of section 30(1ZA) CDPA would mirror that of article 5(3)(d) Infosoc Directive, the provision from which it was derived. Together with the mistaken assumptions described in

Chapter 2, this perhaps explains the limited consideration given to the UK quotation exception prior to its introduction into statute. In this context, this thesis contends that it is both appropriate and necessary, as a matter of law, that a UK court asked to apply section 30(1ZA) should look to pre- and post-Brexit decisions of the CJEU on the meaning of article 5(3)(d) Infosoc Directive to give meaning to section 30(1ZA). Such an approach is possible – indeed, in certain cases, mandated – under the European Union (Withdrawal) Act 2018,[74] as recently amended by the Retained EU Law (Revocation and Reform) Act 2023.[75] This contention is limited by one caveat: if, unexpectedly, post-Brexit decisions of the CJEU deviate from the meaning to be given to article 5(3)(d) Infosoc Directive, as advanced in Chapter 5 of this thesis, then these decisions should not be followed.

Accordingly, Chapters 4 and 5 outline the lessons to be drawn from decisions of the CJEU, as applicable to the interpretation of section 30(1ZA) CDPA. These lessons relate not only to the 'essential characteristics' of the concept of quotation in article 5(3)(d) Infosoc Directive, as identified in the CJEU's decisions in *Pelham* and *Spiegel*,[76] and discussed in Chapter 4, but also to the interpretative approach adopted by the CJEU in identifying those characteristics, as outlined in Chapter 5. This interpretative approach, derived from the CJEU's decision in *Deckmyn*, is that the concept of quotation must be treated as an 'autonomous concept' of EU law,[77] and interpreted in accordance with the corresponding

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74 'Withdrawal Act'.

75 'Revocation and Reform Act'. For so long as the provision remains in its current form, section 30(1ZA) CDPA must be construed by lower UK courts in accordance with relevant EU case law existing immediately prior to the completion of the UK's transition out of the EU, including *Funke Medien*, *Pelham* and *Spiegel*: see Withdrawal Act, s 6(3). See also Withdrawal Act, s 1B(6) (definition of 'IP completion day'). Whilst the Supreme Court, the High Court of Justiciary in certain circumstances, and any other courts and tribunals prescribed by regulation are not required to follow pre-Brexit precedent of the CJEU (see Withdrawal Act, s 6(4)), they may depart from such precedent in limited cases only: see Withdrawal Act, s 6(5). Further, UK courts and tribunals considering section 30(1ZA) CDPA may have regard to post-Brexit decisions of the CJEU concerning article 5(3)(d) Infosoc Directive so far as these are 'relevant': Withdrawal Act, s 6(2).

76 *Pelham* (n 39) para 71; *Spiegel* (n 40) para 78.

77 See *Deckmyn* (n 41) para 15.

term's 'usual meaning in everyday language, whilst also taking into account the context in which it occurs and the purposes of the rules of which it is part'.[78] More specifically, this approach involves consultation of dictionary definitions of 'quotation' (and its equivalents) in multiple languages to inform the 'usual meaning in everyday language' of the term.[79] Reliance on dictionaries to discern the usual, or ordinary, meaning of a term is not without difficulty. Nonetheless, this thesis contends that seeking dictionary evidence remains the preferable approach to discerning ordinary meaning – especially as some of the attendant challenges can be overcome by considering the nature of concepts which neighbour that concept denoted by the term for which meaning is sought.

Consistent with the CJEU's conclusions as to the 'essential characteristics' of the concept of quotation in *Pelham* and *Spiegel*,[80] in Chapter 5 it is concluded that application of the interpretative approach outlined in *Deckmyn* results in a conception of quotation under section 30(1ZA) CDPA that requires a reproduction; that is identified as such; and that is for a purpose of criticism, or review, or an analogous purpose.

Chapter 6 considers the implications of the application of this conception for the interpretation of section 30(1ZA) CDPA. The remaining requirements of section 30(1ZA), especially the requirement for 'fair dealing',[81] should be interpreted consistent with their interpretation in other UK cases involving domestic copyright exceptions (including those implementing provisions of article 5 Infosoc Directive). Importantly, the conception of quotation advanced in this thesis as necessary allows the 'fair dealing' requirement to be so interpreted.

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78 ibid para 19.

79 ibid, Opinion of AG Cruz Villalón, paras 47 - 70.

80 *Pelham* (n 39) para 71; *Spiegel* (n 40) para 78.

81 See CDPA, s 30(1ZA)(b).

In Chapter 7, the facts of four case studies are considered against the provisions of the CDPA, allowing the resulting scope of section 30(1ZA) to be demonstrated. It is concluded that in Case Study 1, based on the facts of *Ashdown v Telegraph Group*,[82] there would, relevantly, be use of a quotation under section 30(1ZA) CDPA – but that the provision would nonetheless be inapplicable (and none of the CDPA's other fair dealing exceptions would apply). In Case Study 2, based on the Australian case *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Limited*,[83] there would be use of a quotation within the meaning of section 30(1ZA), but again, the provision would nonetheless be inapplicable (and again, none of the CDPA's other fair dealing exceptions would apply). In Case Study 3, based on the US case *Cariou v Prince*,[84] there would not be use of a quotation within the meaning of section 30(1ZA), and accordingly, the provision would be inapplicable. It is possible that the exception in section 30A CDPA would apply on the basis that there was a 'fair dealing' for the purpose of pastiche. Finally, in Case Study 4, based on the US case *Faulkner Literary Rights v Sony Pictures*,[85] there would be use of a quotation under section 30(1ZA), and the quotation exception would likely apply – subject to the statutory requirement for 'sufficient acknowledgement' being made out. None of the CDPA's other fair dealing exceptions would apply, with the possible exception of section 30(1).

In Chapter 8, the scope of section 30(1ZA) CDPA, as demonstrated in the preceding chapter, is assessed. The yardstick used to assess the scope of the provision is the extent to

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82 [2001] EWHC 28 (Ch) ('*Ashdown 1*'). See also the decision of the Court of Appeal in *Ashdown v Telegraph Group* [2001] EWCA Civ 1142 ('*Ashdown 2*').

83 [2010] FCA 20. See also the judgment of the Full Federal Court on appeal: *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* [2011] FCAFC 47.

84 714 F.3d 694 (2d Cir 2013) ('*Cariou 2*'). See also the earlier decision of the United States District Court for the Southern District of New York: *Cariou v Prince* 784 F Supp 2d 337 (SDNY 2011) ('*Cariou 1*').

85 *Faulkner Literary Rights LLC v Sony Picture Classics Inc* 953 F Supp 2d 701 (ND Miss 2013) ('*Faulkner*').

which the quotation exception, within the context of UK copyright law as a whole, maintains an appropriate balance between the rights and interests implicated by uses of quotations. To a lesser degree, the assessment takes account of the extent to which the socially valuable purposes of quotations may be realised under current UK copyright laws (noting that the two means of assessment are related). It is noted that two of the statutory requirements of section 30(1ZA) – namely, that the relevant copyright work has been 'made available to the public'[86] and that there is 'sufficient acknowledgement' of this source[87] - limit its applicability, even where a quotation within the meaning of the provision is present. Taking into account, *inter alia*, author rights against compelled speech, it is concluded that the scope of section 30(1ZA), as advanced by this thesis, assists to maintain an appropriate balance between the relevant rights and interests, and sufficiently supports the socially valuable purposes of quotations, notwithstanding these limitations. However, this conclusion is contingent upon a flexible approach to the 'sufficient acknowledgement' requirement, which recognises the unique challenges of source acknowledgement in non-textual media.

Finally, in Chapter 9 of this thesis, the implications of this conclusion are considered. The UK quotation exception in operation has received a good 'report card' in empirical studies[88] and, relatedly, from the UK Government[89] – although the understanding of the provision that is relied upon to inform these assessments is unclear. The assessment of the provision made in this thesis, on the basis of the interpretation outlined in Chapter 5, is also largely positive. Nonetheless, a decade on from the introduction of the UK quotation exception, there is now a unique moment to revisit the provision, given the possibility of

86 See CDPA, s 30(1ZA)(a)

87 ibid s 30(1ZA)(d).

88 See Emily Hudson, Tanya Aplin and Robert Burrell, Submission to the IPO Consultation: post-implementation review of 2014 copyright changes (2019), 5.

89 See IPO, Post Implementation Review – Copyright exceptions (for various purposes), 1.

legislating outside the bounds of the 'EU framework' within which the 2011 recommendations of the Hargreaves Review were made.

Existing literature

Consideration of the copyright quotation exception raises broader issues which have received substantial and longstanding academic attention, including the proper approach to be adopted in statutory interpretation (and especially, the significance to be afforded to the ordinary meaning of statutory terms in this context, as well as the manner in which such ordinary meaning is to be discerned[90]).[91] Consideration of the quotation exception also, naturally, responds to and furthers broader discussions concerning the proper role and scope of exceptions to copyright infringement, particularly in the digital environment.[92]

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90 On this, see Kevin Tobia, 'Testing Ordinary Meaning' (2020) 134(2) Harvard Law Review 726, in which Tobia reports the results of empirical studies done to test the extent to which dictionaries and corpora actually reflect ordinary meaning (that is, ordinary people's judgements about meaning). The extent to which sources purporting to reflect ordinary meaning do so in reality plays into the related discussion about the significance to be afforded to ordinary meaning in statutory interpretation. In this respect, see Anita Krishnakumar, 'Meta Rules for Ordinary Meaning' (2020) 134(3) Harvard Law Review 167, 175 (suggesting that, on the basis of Tobia's conclusion that dictionaries and corpora tend to suggest diverse ordinary meanings, '[o]ne solution, or response, … is … to urge that interpreters … consult other contextual clues, such as statutory purpose, alongside [dictionaries and corpora] to determine whether a statutory term should be given its prototypical or legalist meaning (dictionary or corpus meaning)').

91 Much of this attention has arisen in the US, recently inspired by what Eskridge, Slocum and Tobia call Justice Scalia's 'new textualism' and its converts on the US Supreme Court (contrasting this approach with a 'traditional pragmatic approach'): see William Eskridge Jr, Brian Slocum and Kevin Tobia, 'Textualism's Defining Moment' (2023) 123 Columbia Law Review 1611, 1612, 1614. Nonetheless, many similar considerations arise in other democracies in which the proper approach to statutory interpretation is debated.

92 An increasing focus on copyright exceptions can be perceived in Sam Ricketson, 'The boundaries of copyright: its proper limitations and exceptions: international conventions and treaties' (1999) Intellectual Property Quarterly 56, 58 (writing that 'the balancing of [others' interests against those of the author] seems to be unavoidable', in part because of the 'continuing impact of technological development'). One year later, Griffiths described 'considerable recent international interest in the "exceptions or restrictions" to the rights of the copyright holder': Jonathan Griffiths, 'Preserving judicial freedom of movement – interpreting fair dealing in copyright law' (2000) Intellectual Property Quarterly 164, 164. On the advent of the digital era as a prompt to reconsider copyright exceptions, see further Ricketson and Ginsburg (n 14) 239; Adeney and Antons (n 69) 646.

Yet, until recently, the so far limited scholarly treatment of the copyright quotation exception occurred largely in the context of broader analysis of the Berne Convention.[93] The character of the treatment of article 10(1) in the second, 2006, edition of Ricketson and Ginsburg's *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*[94] was largely descriptive. Although the authors acknowledged that certain aspects of article 10(1) import uncertainty,[95] they appeared to treat article 10(1) as an uncontroversial – perhaps even unnoteworthy – provision of international copyright law with commonly understood concepts, accepted domestic implementations, and substantially known implications for practice in Berne countries.[96]

Whilst noting that the term 'quotation' is not defined in article 10(1), the authors commented, citing the *Concise Oxford English Dictionary* definition, that 'this usually means the taking of some part of a greater whole – a group of words from a text or speech, a musical passage or visual image taken from a piece of music or a work of art – where the taking is done by someone other than the originator of the work'.[97] Acknowledging that lengthy quotations may in some instances be necessary, 'in order to ensure that [the work from which the quotations are taken] is presented correctly, as in the case of a critical review or a work of scholarship',[98] the authors did not exclude the possibility that in some instances, quotations of the whole of a work may be justifiable.[99]

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93 This is highlighted in Emily Hudson, *Drafting Copyright Exceptions* (Cambridge University Press 2020) at 276. See also Silke von Lewinski and Michel M Walter, 'Information Society Directive' in Michel M Walter and Silke von Lewinski (eds), *European Copyright Law: A Commentary* (2nd edn, OUP 2010) 1050.

94 Ricketson and Ginsburg (n 15).

95 For example, the meaning of 'quotation' under article 10(1) and the length of quotations allowable under the provision: ibid 788.

96 This is evidenced in part by the relatively little space dedicated to article 10(1) in the text.

97 Ricketson and Ginsburg (n 15) 788.

98 ibid.

99 ibid.

The second edition of Ricketson and Ginsburg did not state the outer limits of permissible purposes of quotation under article 10(1) – or, indeed, expressly state a position on whether there is such a limit.[100] Rather, the text indicated certain purposes as within the scope of article 10(1) (whether on the basis of the *travaux préparatoires* or otherwise) – namely, 'scientific, critical, informatory or educational purposes',[101] illustration or the provision of evidence in 'historical or other scholarly writing',[102] 'judicial, political, and entertainment purposes',[103] and 'artistic effect'.[104]

On the eve of the introduction of section 30(1ZA) into the CDPA,[105] the scholarship of a decade ago turned to consider the copyright quotation exception – as expressed in the Berne Convention, Infosoc Directive, and in national laws – in further detail. During this period, there was an aptly described 'upsurge of interest in the quotation exception'.[106]

In 2013, Elizabeth Adeney published two works considering the copyright quotation exception. The first of these, co-authored with Christoph Antons, provided a translation of the German Constitutional Court's decision in *Bundesverfassungsgericht* ('*Germania 3*'),[107] using this as a basis for discussion of the German quotation exception in section 51 of the Urheberrechtsgesetz (German Copyright Act).[108] The second of these also considered the

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100 Note that, unlike article 5(3)(d) Infosoc Directive and section 30(1ZA) CDPA, article 10(1) of the Berne Convention is silent as to purpose, other than stating that the 'extent' of the relevant quotations must 'not exceed that justified by the purpose': Berne Convention, art 10(1).

101 Ricketson and Ginsburg (n 15) 786.

102 ibid.

103 ibid.

104 ibid 787.

105 The Quotation and Parody Regulations, which introduced section 30(1ZA) into the CDPA, were passed on 29 July 2014.

106 Adeney and Antons (n 69) 647.

107 (1 BvR 825/98) Unreported July 29, 2000 (Germany).

108 Gesetz über Urheberrecht und verwandte Schutzrechte (Copyright Act), s 51. See Adeney and Antons (n 69).

German quotation exception, but as part of a broader discussion concerning the copyright quotation exception (and specifically, its capacity to apply to artistic uses).[109] In this publication, Adeney proposed a quotation exception for inclusion in the Australian *Copyright Act 1968* (Cth), in which provision 'quotation' was to be defined as 'the reproduction in material form, or communication, of part or the whole of the quoted work for the purpose of supporting an intellectual commentary or artistic idea contained in the quoting work or other subject matter'.[110] This model was later given support by the ALRC.[111]

Increased interest in the copyright quotation exception at this time is also evidenced by the 2012 draft 'Memorandum of Understanding Concerning the Interpretation of the Right of Quotation', prepared by Professor Martin Senftleben following convened discussions on the topic by copyright owners, intermediaries, consumers and European Parliamentarians.[112] With a view to 'reduc[ing] legal uncertainty as to the scope and reach of the right of quotation' and 'contribut[ing] to the consistent application of the right of quotation across EU Member States',[113] this Memorandum proposed a 'fundamental role' for the so-called 'right of quotation'[114] and suggested a 'broad' conception of quotation.[115] Although it confined the purposes for which quotations are permissible in copyright law, these were expansive and relatively flexible categories of 'criticism, comment and review', 'including pre-existing protected material in a new cultural creation', inclusion 'in the context of an announcement', and purposes 'comparable to' the foregoing.[116]

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109 Adeney (n 69).

110 Adeney (n 69) 156.

111 ALRC (n 65) 221 – 224.

112 'Memorandum of Understanding Concerning the Interpretation of the Right of Quotation' (n 71).

113 ibid.

114 ibid.

115 ibid.

116 ibid.

The Memorandum thus proposed an aspirational conception of quotation identified as 'in line with', and that 'perhaps goes even further than', the conception relied upon in the Dutch case *Zoekallehuizen.nl*,[117] a decision lauded elsewhere by Senftleben as evidencing the adaptation of the Dutch quotation exception to the 'new era of text and data mining in the digital environment', thus 'strengthen[ing] the role of the right of quotation as a means of securing the proper balance between copyright protection and freedom of expression and information in the digital environment'.[118]

This view evidences a burgeoning contemporary perception of the quotation exception as a vehicle through which to pursue a broader movement focussed on the search for 'flexibilities' in copyright law.[119] Nonetheless, it is important to note that at this stage the quotation exception was perceived as only one such vehicle – a mechanism that would operate together with, and not to the exclusion of, other mechanisms (principally, other limitations and exceptions) existing within copyright law. For example, in 2012 Hugenholtz and Senftleben wrote that the flexibility inherent in many of the exceptions of article 5 Infosoc Directive, including article 5(3)(d), had not been fully exploited by EU Member States.[120] Arguing for the general importance of flexibility in copyright law, the authors therefore proposed that Member States should take full advantage of this, by 'including literal copies of [*all* of the article 5] prototypes in the Information Society Directive in national law'.[121] Doing so, they argued, would '[i]n combination with the open criteria of the three-step test [in article 5(5) of the Infosoc Directive], … [lead] to a semi-open norm that comes

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117 Court of Appeals of Arnhem, 4 July 2006, "Zoekallehuizen.nl", *Tijdschrift voor auteurs-, media- en informatierecht* 2007, cited in 'Memorandum of Understanding Concerning the Interpretation of the Right of Quotation' (n 71).

118 Senftleben (n 70) 360.

119 See, for example, Lionel Bently, 'Exploring the Flexibilities Available to UK Law' (Submission to Hargreaves Review, 3 March 2011); Hugenholtz and Senftleben (n 71).

120 Hugenholtz and Senftleben (n 71) 14.

121 ibid 17.

close to open-ended defences, such as the US fair use doctrine'.[122] That is, only if EU Member States took full advantage of *all* of the exceptions allowable under article 5, *including* the quotation exception, would the scope of copyright exceptions in those Member States approach the scope of the US fair use exception.

Yet, at a similar time, Professor Lionel Bently advanced the view that the breadth of article 5(3)(d) alone went 'well beyond the [then] current definition of 'fair dealing for criticism or review' under UK law,[123] and that 'many of the activities that would fall within the US conception of fair use could be described as a "quotation"'.[124]

In recent years, Professor Bently, together with Professor Tanya Aplin, has expanded upon this argument, developing the most detailed examination of the copyright quotation exception to date.[125] As recently outlined in book length,[126] the expanded version of this argument is that article 10(1) of the Berne Convention should be read as granting a right to quote copyright works that is 'global' in nature, by virtue of being mandatory in all Berne Convention countries.[127] This right, it is said, is so broad that it may be described as a right of fair use – although not, the authors make clear, one entirely equivalent to that in 17 U.S. Code § 107.[128] As a consequence of this, the perceived importance of article 10(1) is elevated

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122 ibid. See also a similar argument made by Justine Pila and Paul Torremans that '[t]aken together, [the] purpose-limited exceptions [in Article 5] can be read as comprising an EU "proportionate use" exception, corresponding to the "fair use" exception of other jurisdictions, including the United States': Justine Pila and Paul Torremans, *European Intellectual Property Law* (OUP, 2016) 330.

123 Bently (n 119) para 29.

124 ibid.

125 Bently, 'What Became of Global, Mandatory Fair Use?' (n 72); Aplin (n 72); Bently, 'The Law of Quotation' (n 72); Bently and Aplin (n 15).

126 See Aplin and Bently (n 17).

127 ibid 2-3.

128 ibid 2. This provision states that '[n]otwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the

– it is contended, for example, that the provision read thus provides 'a fresh lens through which to view national copyright exceptions [which] has the potential to displace the dominance of the three-step test in this arena'.[129] With its perceived ability to 'shape permitted uses of copyright material',[130] article 10(1) as a 'global mandatory fair use' provision is proposed as not merely one, but perhaps the most promising, vehicle for the flexibilities sought in copyright law.

The third, 2022, edition of Ricketson and Ginsburg[131] devotes substantially more space to discussion of article 10(1) than did the second edition. One of the reasons for this may be discerned in the authors' comments that, '[w]ith the development of new technologies, means of reproduction and dissemination of works in recent years', copyright exceptions 'have become of ever greater importance, and their scope is in need of some clarification'.[132] Responding to Aplin and Bently's suggestion that the significance of article 10(1) has been thus far overlooked, Ricketson and Ginsburg agree both that considerations of the three-step test in article 9(2) of the Berne Convention have dominated in recent history, and that the implications of the mandatory nature of article 10(1) 'have been neglected by international and national policymakers to date'.[133] They further suggest that 'the Aplin-

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factors to be considered shall include— (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors': 17 U.S. Code § 107.

129 Aplin and Bently (n 17) 4. An aspect of this argument is that article 10(1) exceptions are not themselves subject to the requirements of the three-step test in article 9(2) of the Berne Convention – see further discussion at n 17.

130 ibid 5.

131 Ricketson and Ginsburg (n 14).

132 ibid 239.

133 ibid 772.

Bently approach highlights aspects of article 10(1) that have been, up to now, little recognized'.[134]

Nonetheless, whereas Aplin and Bently see in article 10(1) of the Berne Convention an international norm that has the 'potential to displace the dominance of the three-step test',[135] Ricketson and Ginsburg understand article 10(1) as having a more limited role. Whilst noting on multiple occasions the potential for 'overlap' between the uses covered by article 9(2) and those covered by article 10(1),[136] the authors perceive as clear from the Stockholm Conference *travaux*, including the reference of the Report of Main Committee I to the principle of *lex specialis*,[137] that 'discrete fields of operation were envisaged for both provisions'.[138] They therefore argue that, 'while article 10(1) should be sovereign in its own domain of quotation', 'it cannot operate as a Trojan horse that moves in to occupy territory that belongs properly to article 9(2)'.[139] That is, article 10(1) is confined to covering only those 'certain special cases' that involve 'quotation' – namely, 'the taking of a part of the whole of a protected work for a particular purpose'.[140]

This begs the question, as the authors themselves acknowledge,[141] of the scope of the 'domain of quotation', which excludes those other uses, potentially covered by article 9(2), which do not fall within this domain. Whilst the authors suggest that 'close analysis, case by case, may suffice to identify the proper sphere of operation for articles 10(1) and 9(2), allocating what may properly be called "quotations" to the former and non-quotation uses to

134 ibid 773.

135 Aplin and Bently (n 17) 4.

136 Ricketson and Ginsburg (n 14) 773, 774.

137 ibid 773-4.

138 ibid 773.

139 ibid 774.

140 ibid.

141 ibid.

the latter',[142] this question is not necessarily answered in the most recent edition of their text.

As did the second edition, the third edition of Ricketson and Ginsburg relies primarily on the definition given by the *Concise Oxford English Dictionary* to indicate the meaning of 'quotation' under article 10(1),[143] and similarly notes that – dictionary definition notwithstanding – quotations of the whole of a work may be justifiable in some instances.[144] Beyond this, the text makes two further comments on the meaning of 'quotation' under article 10(1). First, it expresses doubt as to the Aplin-Bently analysis of this meaning, which substantially relies on examples of use of the term 'quotation' in relation to transformative artistic practices in the fields of visual art, film and music,[145] noting that such examples do not necessarily qualify as quotations under article 10(1).[146] Secondly and relatedly, in discussing the discrepancies between the English and French language versions of article 10(1),[147] it makes clear that 'the making of [a] summary is not the same thing as the making of a quotation'.[148] It appears, therefore, that in contrast to the Aplin-Bently conception, in the Ricketson-Ginsburg conception there is a clear limit to the extent to which words from a copyright work can be altered before they cease to constitute a quotation under article 10(1). Indeed, Ricketson and Ginsburg suggest that it 'can … be argued that extension of the concept of quotation, as advocated by Aplin and Bently, goes beyond what is contemplated by article 10(1)'[149] – however, the authors proceed to provide a 'counterargument' to this,

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142 ibid.

143 ibid 770.

144 ibid 771.

145 ibid 771. See Aplin and Bently (n 17) 72 – 138.

146 Ricketson and Ginsburg (n 14) 771.

147 Specifically, the reference to '*revues de presse*' in the French version, and the translation of this as 'press summaries' in the English: ibid 769 – 70.

148 ibid 769.

149 ibid 772.

ultimately concluding that 'any overreach in the scope of article 10(1) will be tempered by the conditions of fair practice and justification by purpose'.[150]

Thus, the Ricketson and Ginsburg third edition does provide some support for a broader interpretation of 'quotation' under article 10(1), and indeed article 10(1) more generally, than has traditionally prevailed – whilst also insisting that implementations of article 10(1) must always be anchored to 'use by way of "quotation"'.[151] In contrast with the second edition,[152] the third edition directly addresses the scope of permissible purposes under article 10(1), stating that 'the nature of [a quoter's] purpose is deliberately left open-ended, albeit qualified by the requirement of "fair practice"'.[153] Yet, the third edition emphasises the importance of purpose to the proportionality assessment under article 10(1),[154] and clearly contemplates that some purposes of quotation will be *impermissible* under the provision, 'fair practice' considerations aside. As it explains:

> The link between quotation and purpose is critical, as the latter sets the "extent" of the former … This suggests a shifting scale that will vary from case to case, meaning that in one instance a brief quotation will be all that is required, while in others the quotation of more or even the whole may be justified … *Quotation as a smokescreen for some other purpose* – where the quoter is really trying to achieve a free ride – *would not therefore be within the scope of article 10(1)* and, in any event, would scarcely constitute "fair practice".[155]

Implicit in these comments is that there might be a 'hierarchy' of purposes - some more desirable, some less desirable, reaching as far as the wholly impermissible - which indirectly determines the lawful 'extent' of a quotation under article 10(1).

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150 ibid 772.

151 ibid 774.

152 It will be recalled that the second edition of Ricketson and Ginsburg neither stated the outer limits of permissible purposes of quotation under art 10(1) nor a position on whether there is such a limit.

153 Ricketson and Ginsburg (n 14) 769.

154 That is, the assessment of whether the 'extent' of the relevant quotations exceeds what is 'justified by the purpose': see Berne Convention, art 10(1).

155 Ricketson and Ginsburg (n 14) 769 (emphasis added).

The Ricketson and Ginsburg third edition also eschews reliance on the factors set out in article 9(2) Berne Convention to inform the meaning of 'fair practice' under article 10(1),[156] and instead provides support, but for two caveats, for Aplin and Bently's identification of the factors, bearing 'considerable kinship to the US fair use factors',[157] that should be considered as aspects of the 'fair practice' test.[158] One of the caveats raised by Ricketson and Ginsburg is that – contrary to the contentions of Aplin and Bently – 'the intent of the quoter does seem relevant to the determination of what is "fair practice"'.[159]

Accordingly, whilst disagreeing with Aplin and Bently about the capacity of article 10(1) to assume the role thus far reserved to article 9(2), Ricketson and Ginsburg cautiously state that 'article 10(1) may fall to be interpreted more widely than might have been traditionally thought to be the case (as Aplin and Bently argue)'.[160] Given the authors' reservations about an expanded concept of quotation under article 10(1),[161] the view reflected in this statement is perhaps best understood as relying on a broad (if not, actually, entirely open-ended) conception of permissible purposes, as well as a flexible approach to the 'fair practice' test, under the provision.[162]

Certainly, an expansive interpretation of article 10(1) as approximating an open-ended, and largely discretionary, fair use defence to copyright infringement, and the

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156 ibid 767.

157 ibid 768.

158 ibid.

159 ibid.

160 ibid 774.

161 As noted above, Ricketson and Ginsburg state that it 'can … be argued that extension of the concept of quotation, as advocated by Aplin and Bently, goes beyond what is contemplated by article 10(1)', but that any 'overreach' can be tempered by the requirements of fair practice and justification by purpose: ibid 772.

162 This understanding derives from the circumstance that the scope of the concept of quotation, the scope of permissible purposes, and the fair practice test (together with the justification by purpose test) are the principal vehicles through which the scope of art 10(1) is expanded or confined: see Berne Convention, art 10(1).

consequences of this for the interpretation of both article 5(3)(d) Infosoc Directive and national copyright quotation exceptions such as section 30(1ZA) CDPA,[163] is likely to be attractive to scholars in search of flexibilities in copyright law. Indeed, some copyright scholars have already supported the interpretation of article 10(1) as providing for 'global mandatory fair use'.[164]

This thesis does not dispute certain aspects of the Aplin-Bently approach to article 10(1) Berne Convention – that it should be read as providing for global, mandatory fair use of authorial works. It is clear, for example, that article 10(1) extends in principle to quotations from *all* authorial works to which the Berne Convention applies,[165] and similarly, that article 5(3)(d) of the Infosoc Directive and section 30(1ZA) of the CDPA apply to quotations from all such works (as well as quotations from such other subject-matter as is specified in each case).[166]

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163 Namely, that an interpretation of article 5(3)(d) Infosoc Directive or a national quotation exception that is more restrictive (whether because of the express wording of the provision or otherwise) is inconsistent with article 10(1) Berne Convention. For example, Aplin, Bently and Hudson contend, on the basis that article 10(1) is to be read expansively, that '[t]he mandatory nature of Art. 10(1) also makes it inappropriate for a Berne Union member to introduce limiting purposes' (on a provision that purports to allow quotation): Tanya Aplin, Lionel Bently and Emily Hudson, Submission to Australian Government: Department of Infrastructure, Transport, Regional Development and Communications on the Discussion Paper – Exposure Draft Copyright Amendment (Access Reform) Bill 2021 (24 February 2022) [5]. See also Aplin and Bently (n 17), 69-70.

164 For example, Karapapa notes that '[t]he quotation exception available under international copyright law has been convincingly argued to introduce global mandatory fair use': Stavroula Karapapa, 'The quotation exception under EU copyright law: Paving the way for user rights' in Eleonora Rosati (ed), *The Routledge Handbook of EU Copyright Law* (1st edn, Routledge 2021) 247, 250. Geiger and Izyumenko provide some support for the global mandatory fair use argument, naming it a 'valuable contribution to the search for improvements of European copyright', but proposing instead a more open European 'fair use' exception grounded in freedom of expression: Christophe Geiger and Elena Izyumenko, 'Towards a European "Fair Use" Grounded in Freedom of Expression' (2019) 35 Am U Int'l L Rev 1, 32.

165 This is sufficiently clear on the face of art 10(1) Berne Convention, which reads in part 'It shall be permissible to make quotations from *a work* that has already been made available to the public …' (emphasis added), with no further limitation on the type of work from which quotations may be taken: Berne Convention, art 10(1). The Berne Convention provides protection for the rights of authors in their 'literary and artistic works': Berne Convention, art 1.

166 Under art 5(3)(d) of the Infosoc Directive, quotations must 'relate to *a work or other subject-matter* which has already been lawfully made available to the public' (emphasis added), with no further limitation on the type of work or subject-matter to which the quotations must relate: Infosoc Directive,

However, the authors' suggested consequences of this uncontentious point are more problematic, as the conclusion that article 10(1) applies to all Berne works is the authors' starting point for their analysis of the meaning of 'quotation' in the provision. In short, and as highlighted in the third edition of Ricketson and Ginsburg,[167] Aplin and Bently contend that the 'question of interpretation posed by Article 10(1) is what is the ordinary understanding of quotation across the cultural fields to which that provision applies'[168] – and as '[t]hese fields include art, film, music and architecture'[169] (based on the provision's application to 'literary and artistic works', as defined in the Berne Convention[170]), it is appropriate to examine how the term 'quotation' is used 'in a variety of cultural contexts', by 'commentators and scholars operating in those fields'.[171]

As will be discussed further in Chapter 5, this thesis contends by contrast that the question of interpretation posed by article 10(1) – and more particularly, by article 5(3)(d) of the Infosoc Directive and section 30(1ZA) of the CDPA – should not be answered by reference to uses of the term 'quotation' by cultural commentators and scholars. Rather, this thesis contends that the task of determining the ordinary meaning of the term 'quotation', as used in article 5(3)(d) (and thereby, in section 30(1ZA)[172]), is appropriately undertaken by reference to dictionary definitions of the term.

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art 5(3)(d). Quotations under s 30(1ZA) of the CDPA must be 'from a work', with no further limitation on the type of work from which the quotations must be taken: CDPA, s 30(1ZA).

167 Ricketson and Ginsburg (n 14) 771.

168 Aplin and Bently (n 17) 88.

169 ibid.

170 Namely, as 'every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression', including 'musical compositions', 'cinematographic works', and 'works of drawing, painting, architecture, sculpture, engraving and lithography': Berne Convention, art 2(1).

171 Aplin and Bently (n 17) 88.

172 Under the provisions of the European Union (Withdrawal) Act 2018, s 30(1ZA) of the CDPA must be interpreted by lower UK courts in a manner consistent with pre-Brexit decisions of the CJEU concerning art 5(3)(d) of the Infosoc Directive. Higher courts are to depart from this authority in limited cases only. Further, this thesis argues, it is appropriate – with one caveat – that UK courts

The application of this interpretative approach results in certain limitations on the conception of a quotation, and, consequently, on the range of acts permitted, under article 5(3)(d) and section 30(1ZA). The first is that a quotation within the meaning of EU and UK copyright law is not merely a reproduction, but rather entails an intentional 'nod' to the fact of the reproduced material's derivation from another source. The second is that, even thus defined, quotations in law are permissible only for certain critical or similarly expressive purposes. In turn this means that the 'fairness' criterion is not the primary means of constraining the operation of the copyright quotation exception, as this thesis contends it must be interpreted.

interpret s 30(1ZA) in a manner consistent with any *post*-Brexit CJEU decisions concerning art 5(3)(d), adopting largely the same approach to determining the meaning of 'quotation' under s 30(1ZA) as is adopted by the CJEU in relation to the meaning of 'quotation' under art 5(3)(d). On this, see further discussion in Chapter 3.

2. THE UK QUOTATION EXCEPTION: A 'MINOR' AMENDMENT?

The process of policy development that began with the Hargreaves Review[173] ended, in a sense, in December 2012, with the UK Government's statement of its copyright law reform agenda in 'Modernising Copyright'.[174] In this document, the government set out its intention to, amongst other things, introduce a fair dealing exception for parody, caricature and pastiche,[175] and to 'create a more general permission for quotation of copyright works'.[176] In respect of the latter, the Government made limited comments, noting, *inter alia*, that:

> The Government will amend the Copyright Act to permit the use of quotations for ['fair purposes' other than criticism or review or reporting current events]. This *minor amendment* will remove unnecessary restrictions to freedom of expression and comment and will better align UK law with international copyright standards. The exception will continue to require that a quotation is accompanied by a sufficient acknowledgement of its source, and it will only apply if the use of the quotation is fair.[177]

In support of the characterisation of the future section 30(1ZA) as a 'minor amendment', it was stated that '[t]he majority of uses that will be permitted by a quotation exception are … likely to be already permitted under the existing exception for criticism and review [in section 30(1) CDPA]'.[178] Elsewhere in the same document, it was stated that the broadened permission to use quotations from copyright works would allow ''*[m]inor uses* of

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173 Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (18 May 2011) ('Hargreaves Review').

174 IPO, *Modernising Copyright: A modern, robust and flexible framework* (20 December 2012) ('Modernising Copyright').

175 ibid 4.

176 ibid.

177 ibid 28 (emphasis added).

178 ibid 28.

copyright materials, such as reference and citations in academic papers, quotation as part of educational activities and short quotations on internet blogs or in tweets';[179] references were also made to the proposed amendment permitting '*de minimis* quotation'[180] and fair 'minimal' uses such as the 'citation of a title or short extract' where this constituted *prima facie* copyright infringement.[181]

Other policy materials published prior to the introduction into law of section 30(1ZA) CDPA evidence a similar view of the expected effect of the provision. Whilst it was certainly expected that the new exception would in principle allow the use of 'quotations' from non-textual, as well as textual, works, including 'film, broadcasts, and sound recordings',[182] the examples of uses highlighted as likely to fall within the scope of the new exception were overwhelmingly textual in nature. These included '[e]xtracts … in formal works, such as academic and scholarly texts, historical accounts, biographies and documentaries, as well as more informal works, such as blogs and social media, to help illustrate arguments and engage in comment and debate';[183] short quotations in academic publications;[184] citation of a title or a short extract;[185] 'reference and citations in research papers, the use of titles to identify sources in a bibliography, and the use of titles and short extracts to identify hyperlinks in internet blogs and tweets';[186] and '[a]n academic paper or student essay which quotes a title of a journal, book or film, or uses a short extract to ensure proper citation'.[187] The pre-legislative

179 ibid 4 (emphasis added).

180 ibid 26.

181 ibid 27.

182 Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356, Explanatory Memorandum ('Explanatory Memorandum'), para 7.9.5.

183 Impact Assessment, Exception for use of quotations or extracts from copyright works (13 December 2012) ('Impact Assessment') 3.

184 ibid 4 (said to constitute 'many' of the range of quotations allowable under the new exception).

185 'Modernising Copyright' (n 174) 27.

186 ibid 46.

187 HL Deb 29 July 2014, vol 755, col 1557.

materials accordingly demonstrate an assumption that the new provision would largely serve to legitimise a narrow range of existing (and accepted) practices,[188] such as the use of extracts in academic publications, rather than to make lawful a broad range of new uses.

The assumed limited economic significance of the UK quotation exception

Relatedly, the pre-legislative materials provided repeated assurances that the 'fundamental purpose' of the copyright system – the provision of incentives to creators – would be respected in the introduction of new copyright exceptions, including the intended quotation exception.[189] These assurances were likely based, in part, on the assumption that the uses of copyright works expected to be covered by the new exception, being by nature 'minor', were of minimal economic significance to copyright owners.

By way of example, the 2011 *Consultation on Copyright*, issued by the IPO,[190] emphasised the limited economic significance of a copyright exception for quotations. Whilst acknowledging that copyright owners might otherwise derive income from the licensing of quotations from their works,[191] it noted that, as a general proposition, a copyright quotation exception is for 'minor uses of copyright works that are likely to have minimal impact on the incentives that copyright provides to creators'.[192] Significantly, it was assumed in the *Consultation* that 'fair dealing means that only extracts of a work can be copied' under any expanded 'fair dealing' exceptions.[193]

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188 See the discussion of existing practices, regarding the use of quotations, in the publishing industry: Impact Assessment (n 183) 5.

189 See, for example, Impact Assessment (n 183) 3.

190 IPO, *Consultation on Copyright* (14 December 2011).

191 ibid para 7.190.

192 ibid para 7.186.

193 ibid para 7.179.

In ‘Modernising Copyright’, the UK Government noted that some respondents to the IPO’s 2011 Consultation were against the introduction of a copyright exception for quotations, on the basis that ‘significant damage to their businesses would arise from scenarios such as: organisations ceasing to buy clips from news agencies and film archives; and news aggregators and cutting agencies extracting and distributing content without a need for a licence’.[194] In itself, this concern demonstrates the existing and burgeoning economic significance of ‘extracts’ to copyright owners. The Government concluded, however, that it was ‘highly unlikely that any of these uses would be permitted by the proposed fair dealing exception’, on the basis that ‘[t]he fair dealing requirement will mean that the exception will not apply if the use of such a clip would conflict with its normal exploitation or cause unreasonable harm to rights holders, so would take into account whether a clip is available commercially from a news agency or film archive’.[195] It further noted that ‘[t]he courts have already ruled that news aggregation of the type cited by these respondents is not fair dealing for criticism, review or reporting current events and it is therefore unlikely that it would be considered fair dealing under a quotation exception’.[196] Finally, it observed that ‘quotation exceptions appear to operate effectively in other countries without these projected problems’.[197]

Consistent with its nature, the Impact Assessment relating to the then proposed ‘Exception for use of quotations or extracts of copyright’ emphasised economic considerations – in particular, it suggested that the exception would ‘reduce or remove the administrative and licensing costs [for both users and copyright owners] associated with

194 ‘Modernising Copyright’ (n 174) 27.

195 ibid.

196 ibid.

197 ibid.

using extracts of existing copyright works in new works'[198] whilst creating 'minimal costs' to copyright owners.[199] Indeed, the cost of the exception to owners of copyright in literary works was estimated by the Impact Assessment at £10,200 per annum in foregone licence fees, based on assumption that licensed extracts are on average 50 words long.[200]

Similar to the pre-legislative reform materials, the Explanatory Memorandum to the Quotation and Parody Regulations emphasised the limited economic significance of the copyright exception for quotations.[201] The perceived 'socially valuable purposes' of quotations,[202] considered relative to the perceived limited economic significance of allowing uses of copyright materials for such purposes, meant that in the view of the legislature the copyright quotation exception allowed a 'reasonable balance … between the interests of creators, owners, performers, consumers and users of copyright works' to be maintained.[203]

The assumptions made by the UK legislature as to the minimal economic impact of a copyright quotation exception echo those of the EU legislature, prior to the coming into effect of the Infosoc Directive. Whilst the Infosoc Directive was clearly proposed to respond to changes that had occurred, and were predicted to occur, in the digital environment,[204] the Infosoc Directive Explanatory Memorandum appears to have overlooked the burgeoning significance of quotations and the implications of this for the new article 5(3)(d). It acknowledged that '[t]echnological developments have made it possible to make protected works and other subject matter available in new ways which differ significantly from

198 Impact Assessment (n 183) 1.

199 ibid.

200 ibid 5.

201 Explanatory Memorandum (n 182), para 7.9.2.

202 ibid para 2.1.

203 ibid.

204 'Explanatory Memorandum' in Commission, 'Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society' COM (97) 628 final ('Infosoc Directive Explanatory Memorandum'), 3.

traditional methods of exploitation',[205] and in relation to the reproduction right noted that 'a substantial degree of uncertainty exists as regards the precise acts of reproduction which are protected - notably with respect to the new electronic environment'.[206] Even more relevantly, with respect to new article 5(3)(a) (modelled indirectly on article 10(2) of the Berne Convention[207]), it suggested that 'Member States will have to take due account of the significant economic impact [a national exception implementing this provision] may have when being applied to the new electronic environment',[208] with the consequence that its 'scope of application may have to be even more limited than with respect to the "traditional environment" when it comes to certain new uses of works and other subject matter'.[209] Yet, the Infosoc Directive Explanatory Memorandum emphasised the 'limited economic significance' of a copyright exception for quotations[210] - characterised by the Proposal for a directive as an exception 'for information purposes'.[211] That is, the Infosoc Directive Explanatory Memorandum presented a view of the copyright quotation exception as justifiable because of its limited impact upon the interests of copyright owners. Accordingly, article 5(3)(d) was not dealt with in any detail.

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205 ibid 16. It also noted: 'New communication technologies will provide new opportunities to exploit works or other subject matter, notably in the framework of the on-line services which are being developed on the networks': ibid, 19.

206 ibid 12.

207 ibid 32.

208 ibid.

209 ibid.

210 ibid 13.

211 Commission, 'Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society' COM (97) 628 final, 32.

Assumptions as to the scope and effect of the UK quotation exception

The discussion in the preceding paragraphs makes clear that in the UK, the introduction of a quotation exception was thought by the legislature to be a 'minor amendment' to existing copyright law, extending only slightly upon the scope of acts already permitted under the CDPA, to legitimise uses of copyright works that were minimal and, therefore, of little economic significance to the copyright owner. Given the derivation of section 30(1ZA) CDPA from article 5(3)(d) Infosoc Directive,[212] it is perhaps unsurprising that a similar assessment had previously been made by the EU legislature in relation to article 5(3)(d).

This thesis contends that several of the assumptions founding this assessment were mistaken, either because of contrary facts, or because of misplaced certainty about the manner in which section 30(1ZA) CDPA would be read (some of which flew in the face of existing and applicable CJEU case law[213]).

Let us deal first with the UK Government's suggestion, in Modernising Copyright, that uses of clips from news agencies and film archives, and of snippets by news aggregators and cutting agencies, would not be covered by a new quotation exception.[214] Whilst the legislature's own statements as to the intended scope of the provision to some extent determine its interpretation,[215] not all of the assumptions founding this suggestion can stand. These assumptions were that i) 'the fair dealing requirement will mean that the exception will not apply if the use of such a clip would conflict with its normal exploitation or cause

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212 See Transposition note for Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ No L 167, 22.6.2001, p.10) 2.

213 See discussion at text to n 222 – n 226.

214 'Modernising Copyright' (n 174) 27.

215 For example, it is relevant both that the legislature expected the provision to cover those uses described at text to n 179 – n 188, and that it expected the scope of the provision to match the scope of article 5(3)(d) Infosoc Directive (as discussed in Chapter 3).

unreasonable harm to rights holders';[216] ii) the fact that news aggregation had been judged by courts as not fair dealing for criticism, review or reporting current events meant it was 'unlikely that it would be considered fair dealing under a quotation exception';[217] and iii) the fact that 'quotation exceptions appear to operate effectively in other countries' meant that a UK quotation exception would not impact on the business models of news agencies, film archives, and publishers.[218]

The first of these assumptions appears have been based on an understanding that the application of the 'fair dealing' test under the new quotation exception would involve consideration of the three steps in the 'three step test' of article 5(5) Infosoc Directive,[219] and that the application of the second and third of these steps ('conflict with its normal exploitation or cause unreasonable harm to rights holders') would 'take into account whether a clip is available commercially from a news agency or film archive'.[220] Whilst, as subsequently shown by the decision in *England and Wales Cricket Board v Tixdaq*,[221] this assumption was not wholly unreasonable,[222] it was an overstatement to suggest that a use cannot be a 'fair dealing' if it is determined to conflict with the normal exploitation of the relevant copyright work or cause unreasonable harm to the relevant rights holders: these are but two considerations in the global 'fair dealing' assessment.[223]

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216 'Modernising Copyright' (n 174) 27.

217 ibid.

218 ibid.

219 Recall that article 5(5) provides that 'the exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder': Infosoc Directive, art 5(5).

220 'Modernising Copyright' (n 174) 27.

221 [2016] EWHC 575 (Ch) ('*Tixdaq*').

222 In that case, Arnold J held that the second step of the three stept test 'requires consideration of potential future ways in which the copyright owner might extract value from the work as well as the ways in which the copyright owner currently does so': ibid [91].

223 See, for example, the 'fair dealing' assessment as applied in *Tixdaq*: ibid [137] – [150].

The second assumption, unsupported by cited case law, was inconsistent with the reality that the quotation exception was clearly intended to apply to a different scope of conduct than the 'criticism or review' and 'reporting current events' exceptions in sections 30(1) and 30(2) of the CDPA – with the effect that conclusions drawn about the application or otherwise of these provisions could not be assumed without further consideration to pertain to the quotation exception.

Similarly, in respect of the third assumption, it could not be assumed that the application or otherwise of the quotation exceptions of other jurisdictions – some of which contain quite different statutory requirements[224] – was necessarily predictive of the application or otherwise of the UK quotation exception to the same or similar conduct.

'Modernising Copyright' implicitly acknowledged the impact upon the operation of the proposed quotation exception of the CJEU's decision in *Infopaq* (stating that some respondents had 'noted that a newspaper headline or a title may enjoy copyright, to the extent that it reflects the creativity of its author, so could be considered a substantial part of a work when copied',[225] and that '[a] quotation exception would provide a defence for this type of minimal use, provided such use is fair'[226]). Yet, the IPO's Consultation preceding this – and to an extent, 'Modernising Copyright' itself[227] – did not appear to take full account of the necessary consequences of the *Infopaq* decision, namely, that an extract of a work may itself

224 For example, under the French quotation exception in art L122-5(3)(a) of the Code de la propriété intellectuelle (version consolidée au 17 mars 2017) quotations are permitted where justified by '*le caractère critique, polémique, pédagogique, scientifique ou d'information de l'oeuvre*' (the 'critical, polemic, educational, scientific or informatory nature of the work' in which they are used).

225 'Modernising Copyright' (n 174) 27.

226 ibid.

227 As indicated by the fact that in 'Modernising Copyright', the consequences of *Infopaq* were described as having the effect that a newspaper headline or a title might constitute 'a substantial part of a work when copied': ibid.

constitute a copyright work,[228] with the effect that in some circumstances, the entirety of a copyright work may constitute a 'quotation' under the quotation exception.

Finally, the UK pre-legislative materials demonstrate a mistaken assumption that the new quotation exception would apply, and would be capable of applying, to a relatively well-known and broadly accepted category of practices only. Whilst some of these materials made reference to practices such as tweeting and hyperlinking, they do not appear to have suggested that a retweet, or use of a hyperlink, might in itself constitute a quotation as ordinarily described or in law – rather, that a 'traditional' quotation might be used in these non-traditional contexts (for example, 'short quotations' might be used in 'internet blogs or in tweets',[229] or 'titles and short extracts' might be used to 'identify hyperlinks in internet blogs and tweets'[230]). As such, they likely underestimated the potential range of uses that might be legitimately understood as quotations, both as a matter of ordinary language and in law.

All of these assumptions contributed to the legislature's assessment that the new copyright quotation exception would be of minimal economic significance to copyright owners. Yet, even if it had been correct to assume that the exception would apply to limited excerpts from copyright works only, it was not correct to conclude therefore that the exception would be of minimal economic significance to copyright owners: new technologies and related economic and social changes, including new business models for the exploitation of works, mean that parts of works that were previously of little value to copyright owners are now (and were already in the 2010s) of significant potential value. The news aggregation and

228 As recognized in *Newspaper Licensing Agency v Meltwater Holding BV* [2010] EWHC 3099 (Ch) at [71].

229 'Modernising Copyright' (n 174) 4.

230 ibid 28.

cutting agency services highlighted by respondents to the IPO's *Consultation on Copyright* provide examples of this.

This chapter now turns its view outside the law, to consider historical uses of quotations and developments in quoting practices, as well as the modern significance of quotations. This is done to demonstrate both that the UK legislature underestimated the potential range of uses that might be legitimately understood as quotations, as a matter of ordinary language, and thereby, in law,[231] and that quotations (including practices properly in the digital sphere described as quotations) have greater significance than assumed – to individual users, as well as to copyright owners.

Use of quotations through history and today

The practice of quoting has a long history – indeed, 'people have been quoting people from time immemorial'.[232] Whilst, as will be described, some of the 'forms and functions' of quotations have changed over time,[233] and 'language users' understanding of and attitude towards quoting and quotation have undergone striking metamorphosis',[234] 'some characteristics (formal and functional) of quoting have remained stable over the centuries'.[235] Further, past quoting practices 'still cast their influence over how we quote'.[236] Accordingly,

231 The significance of the ordinary meaning of 'quotation' to the meaning of the term in law is explained further below, at text to n 612 – n 644.

232 Wolfram Bublitz, 'Introducing Quoting as a Ubiquitous Meta-communicative Act' in Jenny Arendholz, Wolfram Bublitz and Monika Kirner-Ludwig, *The Pragmatics of Quoting Now and Then* (De Gruyter Mouton 2015) 1.

233 ibid 14.

234 ibid.

235 ibid 20.

236 Ruth Finnegan, *Why Do We Quote? The Culture and History of Quotation* (OpenBook 2011) 255.

a glance at historical uses of quotations provides helpful insights into contemporary understandings and uses of the quotation as a unique communicative phenomenon.

In Greek and Roman antiquity, the use of extracts from textual authorities was a 'common practice'.[237] Whilst there is no mention of the concept of quotation in ancient literary commentary,[238] and repeated material did not always closely conform to contemporary understandings of the quotation (due, in particular, to the degree to which reproduced text often diverged from the original[239]), Sabrina Inowlocki contends that the typographical marks present in many manuscripts 'indicate that ancient readers/ writers were aware that they were dealing with a specific literary technique [in repeating the words of others[240]]'.[241] Certainly, the concept of plagiarism existed as early as the first century AD,[242] although it is not clear that this bore the same relationship to the concept of quotation as it does today.

In ancient Greek texts, a graphic mark known as the *diple* (used in variations such as >, ⸗, and ·>[243]) often appeared in the margins, to indicate 'something noteworthy in the text',

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237 Monika Kirner-Ludwig and Iris Zimmerman, 'Quoting and plagiarising-concepts of both now and then?' in Jenny Arendholz, Wolfram Bublitz and Monika Kirner-Ludwig (eds), *The Pragmatics of Quoting Now and Then* (De Gruyter Mouton 2015) 300 ('[R]eferring back to an authority by citing or quoting them … appears to have been a common practice in the Middle Ages as it had also been in Greek and Roman antiquity'). See also Sabrina Inowlocki, *Eusebius and the Jewish authors his citation technique in an apologetic context* (BRILL 2006) 37.

238 Inowlocki (n 237) 33.

239 ibid 40 – 45.

240 Note that Inowlocki uses 'citation' not 'quotation', but for various reasons (including that she originally wrote in French, in which 'quotation' translates as '*citation*'), it is understood that the concept intended was that of quotation.

241 Inowlocki (n 237) 47. But see Finnegan (n 236) 80, who suggests the *diple* was just for marking text out for attention.

242 Kirner-Ludwig and Zimmerman (n 237) 306. See also McGill, who suggests that '[t]he absence of a distinct word for plagiarism does not imply that the Romans any more than the Greeks lacked the concept of it, which corresponds to ours in ways that allow us to use the modern term for it': Scott McGill, *Plagiarism in Latin Literature* (Cambridge University Press 2012) 9.

243 It is clear that these symbols are the forerunner of the European « , indicating quotation.

or more particularly ‘passages for comment’.[244] As these passages were ‘sometimes drawn from classical authors like Homer or Plato’[245] (and in later periods, from the Bible and the writings of theological authorities[246]), the use of the *diple* was at times ‘akin to marking quotation but within a more general role’.[247] In the absence of, or alongside, marginal signs, other techniques were frequently used to indicate the repetition of another’s words in ancient texts. These included breaks in the justification of text;[248] indentation;[249] the use of different inks or fonts;[250] and the use of linguistic markers, whether a *verbum loquendi* (such as ‘the poet says …’ or ‘Homer says …’) [251] or ‘different grammatical constructions’.[252] In some cases, quoted passages were not expressly marked but one can hypothesize that ‘readers were expected to notice them spontaneously’[253] – perhaps especially so in the case of extracts from poetry, particularly Homeric poetry which ‘educated people often knew by heart’,[254] because ‘the rhythm, language and, in some cases, the content of the verses were sufficient to identify the quotation’.[255] The demands of poetic metre,[256] and public awareness of successful poems,[257] meant, too, that content reproduced from poetry was less likely to be altered by its user,[258] and more likely to be faithful to original (to the extent that this was possible, in an age

244 Finnegan (n 236) 86.

245 ibid.

246 ibid 86 – 89.

247 ibid 86.

248 Inowlocki (n 237) 36.

249 ibid.

250 ibid.

251 ibid. Also *verbum dicendi* – see Kirner-Ludwig and Zimmermann (n 237) 304.

252 Inowlocki (n 237) 36.

253 ibid.

254 ibid 35.

255 ibid.

256 ibid 42.

257 ibid.

258 ibid.

of largely inaccurate duplication[259]). This was similarly the case for religious texts, the sacredness of which may have been thought to require reverent reproduction.[260]

The *diple*, in the diverse forms of 'varied squiggles',[261] continued to be used throughout the Middle Ages. As had been the case in ancient manuscripts, the *diple* and its various iterations in the mediaeval period primarily functioned not to signal that text had been reproduced from elsewhere (although often it had been), but rather, to highlight a passage as worthy of discussion.[262] In line with the period's atmosphere of 'overwhelming reverence for *auctoritas*, "authority"', above all the Bible and church sources',[263] the passages highlighted were typically 'scriptural citations',[264] and the writings of the '"fathers of the church"'.[265]

Despite the concept of, and some language describing, 'literary theft' having existed for the Romans,[266] neither a term equivalent to 'plagiarism',[267] nor one equivalent to 'quotation',[268] appears to have existed in Middle English.[269] Yet, there are numerous examples of the use of quotations in mediaeval texts. As in classical texts, these were sometimes introduced by *verba dicendi*, and sometimes marked by certain 'syntactical

259 ibid.

260 ibid 41.

261 Finnegan (n 236) 89.

262 ibid.

263 ibid 226-7.

264 ibid 89.

265 ibid.

266 See McGill (n 242) 3 – 9. '[P]lagiarism was a coherent and fully realized concept across different texts and periods in ancient Rome': McGill (n 242) 4 – 5. Both McGill and Kirner-Ludwig and Zimmermann note Martial as first using the term '*plagiarius*' ('thief') to describe someone 'stealing' textual material: McGill (n 242) 9; Kirner-Ludwig and Zimmermann (n 237) 307.

267 Kirner-Ludwig and Zimmermann (n 237) 307.

268 ibid 315.

269 Or Middle German: ibid 307.

constructions' or otherwise indicated.[270] In Chaucer's *The Miller's Tale*, a line reproduced from the Middle English poem and song *Alysoun* was not expressly identified either by a *verbum dicendi* or a reference to the source, yet Chaucer 'made sure that his intertextual references were comprehended as such'[271] – for example, by naming the main female character of his story Alysoun.[272]

Therefore, whilst different prevailing understandings of texts and original authorship meant that the medieval concept of a quotation differed from what is now denoted by the term 'quotation',[273] it appears that there was such a concept, as some mediaeval writers consciously engaged in the use of extracts reproduced from earlier texts.[274] The reasons for engaging in this practice may have been – like those of Chaucer – creative, but frequently they were related to the user's foregrounding of reliance on earlier authorities, something that positioned him[275] as a legitimate and trustworthy writer.[276]

Quotations were used similarly into the Renaissance, a period in which '[t]he skilled [not merely slavish] imitation of earlier formulations and models was admired',[277] making the

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270 Finnegan (n 236) 90. Finnegan notes that 'throughout the centuries another strategy for indicating quoting in its various senses was to complement or bypass graphic markers and instead use a verb of speech or writing, name of the original source, some recognised introductory word, or syntactical constructions that in themselves indicated reported speech': Finnegan (n 236) 90

271 Kirner-Ludwig and Zimmermann (n 237) 304.

272 ibid.

273 ibid 305. The authors note that '[t]he lack of clear-cut concepts of author and text [in the medieval period] results in the conceptual vagueness of quotation – which is consequently true for plagiarism as well': ibid 305.

274 ibid 301. As the authors note, 'medieval quotes still share a number of formal and functional features with quotes in our modern understanding of them'. Although, 'explicit quotational and citational references are relatively small in number when drawing a comparison with modern texts, and this is on the grounds of obvious reasons [namely, space, access and inaccuracy]': ibid 301.

275 As users of quotations in the period would typically have been male.

276 Kirner-Ludwig and Zimmermann (n 237) 309, 310, 313, 315, 316. Something which, as Kirner-Ludwig and Zimmermann point out, 'holds true for scientific quotations of today'. Kirner-Ludwig and Zimmermann (n 237) 301

277 Finnegan (n 236) 201.

'notion of imitation … central in early Renaissance literary theory'.[278] In this context, source attributions by a writer were neither morally due nor acknowledgements of proprietorship (for the idea that literary creations might not form part of the public domain had not yet taken hold[279]), but rather, a means of evidencing a chain of authority ending in that writer.[280] This was in line with the continued use of marginal marks, such as the *diple*, to highlight important passages of text, particularly a 'revered or pleasing text, something known and worth commemorating from the great classical … authorities of the past'.[281]

It was only from the end of the fifteenth century, and into the sixteenth and seventeenth centuries, that quoting practices began to change and the prevailing concept of quotation began to coalesce with the concept now denoted by the term 'quotation'.[282] Indeed, we see this in the etymology of the term 'quotation', which from the early seventeenth century underwent a 'semantic broadening'[283] to indicate for the first time '[a] passage quoted from a book, speech, or other source', in addition to the earlier senses of 'a marginal reference' and 'an observation' (now both obsolete).[284] This development may have been due in part to the

278 ibid 228.

279 This came later, with the advent of the first copyright law in The Copyright Act 1709 8 Anne c. 21 ('Statute of Anne') – see text to n 292 – n 295.

280 Whereas in the past references had been to the Bible and the writings of church figures, in the Renaissance 'the authors of classical antiquity [became] enlisted as allies in the clash of authorities': Stefan Morawski, *'The basic functions of quotation'*, in J Agirdas Greimas, Roman Jakobson, M R Mayenowa, S K Saumjan, W Steinitz and S Zolkiewski (eds), *Sign, language culture* (Mouton 1970) 690, 690.

281 Finnegan (n 236) 98.

282 ibid 90. As Burrow explains, '[t]he meaning of the word 'quotation' also began to change around 1600. In earlier usage it usually referred to what now would be called a 'citation' – a page reference, or chapter and verse. A 'quotation' then came to be the text identified by such a reference. That no doubt helped to build the concept of accurate citation into the emerging concept of a 'quotation', since the same word meant both a set of words taken from an earlier source and the means of locating those words': Colin Burrow, 'Think outside the bun' *London Review of Books* (8 September 2022) <www.lrb.co.uk/the-paper/v44/n17/colin-burrow/think-outside-the-bun> accessed 10 April 2024.

283 Kirner-Ludwig and Zimmermann (n 237) 296.

284 See 'quotation, n' (*OED Online*, July 2023) <https://www.oed.com/dictionary/quotation_n?tab=meaning_and_use#27196917> accessed 1 March 2024. See also Finnegan (n 236) 96 ('It is not difficult to see the developing connection between the idea of identifying text by a marginal mark or number, and that of the modern "quoting". But it was not

advent of the printing press (from the fifteenth century in Europe[285]), as the new printing devices could not easily place marks in the margins of text.[286] Rather, 'comma-shape quotation marks, successors of the *diple*, were being cut in metal type',[287] and by the late sixteenth and into the seventeenth century, these 'inverted commas' were 'being brought within the print measure, often repeated at the start of each line throughout the quotation'.[288] Whilst for a time other markers of reproduced content, such as italics and indentation, continued to be used,[289] printing allowed the increasing standardization of typographical marks,[290] and by the eighteenth century 'graphic symbols, now incorporated within the line, became the main device' for indicating quotations.[291]

Diffusion of the printing press brought increased literacy[292] and regulation of the written word, including the enactment of the Statute of Anne, the first copyright statute, in the early eighteenth century.[293] With changing ideas about authorship and originality,[294] quotation

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until around the seventeenth century that the meaning of "quote" was apparently moving from marking a reference or citation by a marginal signal to that of reproducing words from elsewhere, or the term "quotation" used to refer to the act of quoting or the quoted passage itself'; 'It was only then that "quotation" was taking on something like the modern sense'); Kirner-Ludwig and Zimmermann (n 237) 296.

285 Finnegan (n 236) 249.

286 ibid 90.

287 ibid.

288 ibid 91. Burrow, too, notes that around 1600, 'what we call a 'quotation mark' ("), the descendant of the diplē (>), which had been used to mark notable passages in manuscripts, began to be used to mark *sententiae*, or memorable phrases, in vernacular works: Burrow (n 282).

289 Finnegan (n 236) 92 ('Inverted commas could be replaced or combined with other signals like italics, indenting, dashes, brackets or footnoting, often among other things adding to the decorative effect on page'; 'Verbs of speech were commonly inserted between brackets or commas in the text, with or without other indicators').

290 ibid 90.

291 ibid 92.

292 Kirner-Ludwig and Zimmermann (n 237) 305.

293 The Statute of Anne was passed in 1710.

294 Finnegan (n 236) 201 ('The eighteenth- and nineteenth-century romantic movement's vision of 'originality' and individual genius meant deploring the imitation of others – and especially of classical or neo-classical models – in favour of spontaneity, emotion and individual self-expression'). See also Kirner-Ludwig and Zimmermann (n 237) 305 ('Presumably with the introduction of printing in the late

marks came increasingly to signal 'not common ground open for public use but an assertion of private ownership over roped-off words'.[295] Relatedly, the everyday words of 'ordinary mortals'[296] (whether real, or as in the case of novels, imagined) were more frequently reproduced and enclosed in quotation marks,[297] signalling the decline of the 'institutional aspect' of quotation.[298] This meant that, during the sixteenth and seventeenth centuries, '[t]he important point [became] not FROM WHOM a quotation was taken, but ON WHAT BASIS and in what way',[299] with particular emphasis on 'archival fidelity'.[300]

If developments through the nineteenth century 'more and more firmly entrenched the position of the quotation',[301] by the twentieth century the accepted notion of the quotation was, perhaps, being questioned. In this period, intertextuality was emphasized, [302] challenging the Romantic notion of the author.[303] Alongside this, quoting practices were observed to change in some contexts, notably in some works of literature.[304] And, whereas once a

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15th century and the resulting mass production and circulation of documents, the number of literates slowly grew and an understanding of author, text and quotation began to gain shape').

295 Finnegan (n 236) 98.

296 ibid.

297 ibid 92, 98.

298 Morawski (n 280) 690 ('In tracing the historico-cultural background of the term ['quotation'] it readily becomes apparent that the institutional aspect [for example, the ecclesiastical aspect] was the dominant one for centuries').

299 ibid.

300 ibid. Note however Kirner-Ludwig and Zimmermann (n 237) 292 ('a growing fixation on the authority of texts and their producers [is] a circumstance fostered by the invention of printing and the mass-distribution of texts').

301 Morawski (n 280) 690.

302 Finnegan (n 236) 199.

303 As Ginsburg highlights, there is now recognition that the 'the Romantic figure … of the genius "*auteur*" … is neither so virtuosic, nor so individual, as the "Romantic" vision suggests': Jane Ginsburg, *The Concept of Authorship in Comparative Copyright Law* (2003) 52 DePaul L Rev 1063, 1065. On the relationship between the decline of the Romantic notion of the author and the rise of intertextuality, see Lionel Bently, 'Copyright and the Death of the Author in Literature and Law' (1994) 57 *The Modern Law Review* 839, 839.

304 James Joyce's *The Waste Land* is often cited as evidence of this change: see, for example, Morawski (n 280) 699. See also Finnegan for discussion of the writings of Joyce more generally: Finnegan (n 236) 49, 102, 199).

quotation may readily have been understood (at least in Western cultures) as a 'chunk of words'[305] in one sense or other anointed by the academy[306] (an understanding borne out by the tradition of quotation collections, especially those published up until the early- to mid-twentieth century[307]), a growing rejection of the authorised literary 'canon'[308] may be connected with the partial demise of this conception.[309]

Quotations in the digital environment

In the twenty-first century, quotations continue to be used 'offline'[310] – but it is online, through web-based tools, that the greatest changes in quoting practices have occurred. Initially, the use of quotations in online contexts – for example, in online newspapers – resembled to a large degree the use of quotations in their offline counterparts.[311] However,

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305 To use the phrase often used by Finnegan – see Finnegan (n 236) 43, 63, 146, 151, 197; 113 ('chunks of wordage'); 55 ('chunks of language'); 151 ('verbal chunks'); xi, 160, 207 – 208, 217, 231, 263 ('chunks of text'); 164 ('chunk of someone's words').

306 This attitude towards quotations was alive in 1953. Reviewing the second edition of *The Oxford Dictionary of Quotations*, G.S. Fraser commented that the use of quotations 'implies a belief that there is a common cultivated taste, a body of educated opinion, to which the writer can appeal': G. S. Fraser, 'Quotation' *Times Literary Supplement* (6 November 1953) <link.gale.com/apps/doc/EX1200097607/TLSH?u=oxford&sid=bookmark-TLSH> accessed 25 February 2024.

307 See Michael Caines, 'Keep the scissors' *Times Literary Supplement* (30 January 2015) <link.gale.com/apps/doc/XNXZBE932072520/TLSH?u=oxford&sid= bookmark-TLSH> accessed 25 February 2024.

308 That is, an anointed group of works championed, for example, by Harold Bloom as 'authoritative in our culture': Harold Bloom, *The Western canon: the book and school of the ages* (Houghton Mifflin Harcourt 1994) 1. As Bloom acknowledged in the same text, there was at the time a strong and growing movement against the dominance of the canon (including on the grounds that it is monocultural): see Harold Bloom, *The Western canon: the book and school of the ages* (Houghton Mifflin Harcourt 1994) 1, 4, 7, 22.

309 The belief that quotations must in some sense be 'authorised by high culture' does persist, to a degree, today: see Finnegan (n 236) 64.

310 In this context, too, there are changes. See, for example, Bublitz (n 232) 14 ('[o]utside internet-based communication, new forms and patterns of introducing and thus marking quoted speech ("quotatives") [such as "like" and "went"] are also permanently emerging').

311 Cornelius Puschmann, 'The form and function of quoting in digital media', *Discourse Context and Media* 7 (2015) 38, 36 ('[A]pproaches to quoting in computer-mediated communication … initially echoed established conventions in terms of form').

increasingly, online tools and platforms have allowed new uses of reproduced content, which differs in its form and function from anything previously recognised as a quotation.[312]

The technological developments of this century have made analysis of the use of quotations all the more important,[313] given the increasing frequency with which people engage in such use. Indeed, it has been argued that 'highly frequent and excessively exact quoting (accomplished by ingenious software) has become a characteristic (and arguably even constitutive) feature of the more interactive forms of computer-mediated communications'.[314] This has continued the trend, in evidence throughout the history of quoting practices, of the democratization of written quotation – taking it 'beyond specific communities of practice' to the wider community.[315]

Therefore, a 'new dynamic' in quoting now exists.[316] This is largely due to new 'technological means of reproduction – "copy and paste" in older forms of computer-mediated communications, and buttons that allow easy sharing, retweeting and reblogging in contemporary social media platforms'.[317] 'Copy and paste' or 'cut and paste' digital reproduction, like the printing press in earlier times,[318] has had a notable impact on the use of

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312 ibid 29 (The 'affordances of a new technology' include 'countless functions that allow the redistribution of content through the push of a button').

313 And the phenomenon is attracting attention. See, eg, Bublitz (n 232) 14 ('The recounted technological developments … and changing communicative conventions … have not only incited much interest in neighbouring disciplines (and, with regard to the blurry distinction between quoting and plagiarizing, even in the general public). They have first and foremost alerted linguists').

314 Bublitz (n 232) 12. The scholarly literature on 'computer-mediated communications' defines the term to mean 'any human communication achieved through, or with the help of, computer technology': Crispin Thurlow, Laura Lengel and Alice Tomic, *Computer Mediated Communication: Social Interaction and the Internet* (Sage 2004) 15.

315 Puschmann (n 311) 28: 'While technically available to anyone, the proliferation of written quotation beyond specific communities of practice seems to be a recent phenomenon'.

316 ibid.

317 ibid.

318 ibid 28 (Noting that '[o]ver time, 'technology has … changed the way in which a piece of writing can be copied, from mechanical reproduction (i.e. in photocopying) and digitization (scanning and optical character recognition to digitize printed text) to digital reproduction (i.e. use of an operating system's

quotations in this century: not only has it increased the ease of quoting,[319] but it has created a 'previously unknown degree of formal congruence',[320] allowing a description of many digital quotations as 'literal quotations'.[321] Somewhat paradoxically, though, technological tools have also created greater potential for user manipulation, by way of alteration of reproduced content (cutting or cropping reproduced content, enhancing or minimising certain features of reproduced content, and so on).

Content sharing functions, too, have changed contemporary quoting practices. One feature of the digital environment is the degree to which communication can be reliant on increasingly automated processes of reproduction, meaning that participants cannot easily interact with one another on certain platforms without reproducing content.[322] For example, both email platforms and online discussion fora involve 'semi-automatized quoting',[323] whilst social networking sites in some cases involve 'fully automatized quoting'[324] (for example, when a user posts a link on Facebook, a preview of the linked website automatically appears on the user's timeline). The content reproduced by (semi-) automated processes in these contexts has the potential to represent a new species of quotation – albeit that there is a question as to whether it is properly characterized as a quotation at all.[325]

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copy and paste function), and, finally, content sharing functions such as liking, retweeting and reblogging').

319 Marjut Johansson, 'Digitial and Written Quotations in a News Text: The Hybrid Genre of Political Opinion Review', in Patricia Bou-Franch and Pilar Garcés-Conejos Blivitch (eds), *Analysing Digital Discourse: New Insights and Future Directions* (Palgrave Macmillan 2019) 141 ('[Q]uoting is different in digital texts, as copy-pasting makes it easy').

320 Bublitz (n 232) 11.

321 Johansson (n 319) 154.

322 Bublitz (n 232) 11 ('It is scarcely possible to contribute to blogs, tweets or message boards without quoting, i.e. without using the integral "quote" function').

323 ibid. For example, the 'reply' function on email platforms includes reproduction of the email to which one is replying.

324 ibid.

325 ibid 12. Bublitz notes here that '[t]he various stages [of automation] can be ranked according to their level of technical reproductivity … and to their degree of what one could call *quoter intentionality* or *command of the act of quoting*'.

Both ‘cut and paste’ and content sharing functions have also enabled quotations to be identified in new ways.[326] Significantly, ‘the mere posting of a link can’, perhaps, ‘be one kind of quote’,[327] in which the diverse online locations of the link and the linked content make clear to their audience that the linked content originates in a person other than the poster of the link. In the context of an online news report, a ‘digital quotation’ may be constituted by a ‘copy-pasted’ tweet, where the ‘tweet text template functions as a quotative or reporting frame’ and ‘the journalist relie[s] on Twitter’s own identification affordances, previously selected by the user’ – namely, the user’s profile photo and Twitter account name.[328] Tools such as this, in which ‘arrangement and layout’ function to signal the presence of a quotation,[329] mean that in online media it is sometimes easier to mark the ‘boundaries of a quote’, ‘in particular where it ends’, than in traditional, offline, media.[330]

In matters of form, one of the most characteristic features of quotations used in computer-mediated communications – as of computer-mediated communications more broadly – is ‘multimodality’. As noted by Patricia Bou-Franch and Pilar Garces-Conejos Blitvich, ‘[a]ll human communication is multimodal but digital technologies are almost always, and are becoming increasingly, vastly multimodal by combining writing, images,

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326 ibid 14 (‘Over the last two or three decades, new technology and media have bred alternate ways of quoting (e.g., by activating hyperlinks that automatically display “quoted material”) and *new formats (among them quote frames)*’). See also Puschmann (n 211) 28 (‘A range of strategies are used to represent quotation in print, such [as] different kinds of quotation marks, indentation, font style and color, and yet more are common in computer-mediated communication’).

327 Johansson (n 319) 141

328 ibid 147.

329 Bublitz (n 232) 11 (‘Depending on mode and medium, quoting rests on a variety of different formal devices. In spoken discourse we mostly find verbs of saying and prosodic signalling, in written discourse there are graphic as well as lexical and syntactic indicators, while electronically mediated communication also resorts to arrangement and layout’).

330 ibid 12 (‘While in traditional media it is not always easy to specify the boundaries of a quote, in particular where it ends, this is different in computer-mediated communication where quotes are precisely indicated by a variety of means (frames, indentation, etc)’).

sounds, and other semiotic modes'.[331] As text, images, sound and video files and are all susceptible to being copied and pasted, or shared using content sharing buttons, quotations in the twenty-first century are, it can be concluded, more likely to be constituted by non-textual material than in the past.[332]

Finally, '[t]he traditional stock of functions performed by quoting in speech and writing has grown considerably with the advent of internet-based forms of communication'.[333] Whilst 'long-standing functions' are still performed by digital quotations, 'communication in the age of the internet has fostered new and strengthens some old (rarely exercised) functions'.[334] In particular, uses of quotations in computer-mediated communications tend to reinforce the contemporary view of discourse as 'social practice',[335] as in computer-mediated communications '[q]uoting has taken on a broader role, emphasizing phatic and sociocommunciative aspects in addition to argumentative and informational needs'.[336]

Studies have accordingly found that quotations in online news texts not only have enhanced factual function, due to journalists' ability to embed source material (such as videos and transcripts of speeches, as well as newsworthy documents) into their reports,[337] but 'can have several functions [beyond disseminating information] and can consequently contribute to

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331 Pilar Garcés-Conejos Blivitch and Patricia Bou-Franch, 'Introduction to Analyzing Digital Discourse: New Insights and Future Directions', in Patricia Bou-Franch and Pilar Garcés-Conejos Blivitch (eds), *Analysing Digital Discourse: New Insights and Future Directions* (Palgrave Macmillan 2019) 5.

332 Indeed some quotations in computer-mediated communications will be oral (as where sound or video files are reproduced) – but uniquely, may be embedded in written text. See Bublitz (n 232) 17 ('Due to new technology, computer mediated texts can and regularly do combine oral with written and even (typo)graphical features, thus instigating a rich, previously impossible variety of quoting practices').

333 ibid 11.

334 ibid.

335 As distinct from 'language in use': Blivitch and Bou-Franch (n 331) 3-4.

336 Puschmann (n 311) 36.

337 Daniela Landert, 'Reportable Facts and A Personal Touch', in Jenny Arendholz, Wolfram Bublitz and Monika Kirner-Ludwig (eds), *The Pragmatics of Quoting Now and Then* (De Gruyter Mouton 2015) 40, 42.

several discursive processes', such as 'construct[ing] a dialogue that has not actually taken place between the quoted persons'.[338]

Similarly, an analysis of the practice of 'retweeting' on X (formerly Twitter)[339] found that it functions both as a means of information diffusion[340] and as a way to 'discursively act out an identity',[341] 'validate and engage with others' and 'display connection with others or to signal influence'.[342] As 'content sharing in social media platforms generally creates a visible link between the quoter and quotee', and thereby an affiliation between the two,[343] the reasons why a person might retweet include 'to recognize or refer to less popular people or less visible content', or 'to gain followers'.[344] This gives rise to the idea of a market in content, in which there is currency in content sharing and – to the extent to which the practices are aligned – quoting.[345] Accordingly, it appears correct to conclude that '[w]hile quoting in formal print genres such as journalism and scholarship serves primarily informational and argumentative purposes, content sharing in locally configured online communities is a component of [the "gift economy of the Web"]'.[346]

338 Johansson (n 319) 155.

339 Something that might well be an act of quotation.

340 Puschmann (n 311) 29.

341 ibid 30.

342 ibid 29.

343 ibid 29.

344 ibid 30.

345 ibid 36 ('Digital content sharing and quoting no longer just take place between quoter, quote and reader, but have become an important source of data in this preferential economy').

346 ibid 30.

Conclusions

The foregoing discussion allows two related conclusions to be drawn: first, that whilst quotations have long had a social function, including by allowing the quoter to position him or herself as associated with the person quoted, this social function is brought to the fore by some aspects of the digital environment, and on some online platforms specifically. Secondly, uses of quotations (consistent with communications more generally) have undergone a long process of democratisation – whereas quotations were once the preserve of the academy, people are now quoting and being quoted in increasingly greater numbers. This may be due in part to an understanding of quotations as a 'constitutive' feature of some computer-mediated communications, whether or not the (semi-) automated processes of reproduction that occur in the use of several online platforms may properly be described as uses of quotations. Certainly, if it is accepted that posting a hyperlink is use of a quotation,[347] this would of itself both enlarge the category of things understood as quotations, and simultaneously increase the significance of quotations, given the critical importance of hyperlinks to the functioning of the internet.[348]

Regardless of the conclusion on hyperlinks, it is clear that the use of quotations is ever more frequent and has (perhaps ever-increasing) significance in today's digital environment. Relatedly, the category of activities that bear the hallmarks of uses of quotations is expanding. Because of the strong relationship between ordinary meaning and meaning in law,[349] the implication of this for section 30(1ZA) CDPA – and, indeed, all statutory provisions that invoke the concept of quotation – is that the category of activities that might qualify, in law,

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347 See Johansson (n 319) 141.

348 As David Harvey describes, 'a link is an enabling tool' – and not a '"mere" tool', but an '"essential" tool' in today's digital environment: David Harvey, *Collisions in the Digital Paradigm: Law and Rule-marking in the Internet Age* (Hart 2017) 60.

349 See text to n 615 – n 647.

as uses of quotations is also expanding. In dismissing the quotation exception in section 30(1ZA) as a ‘minor amendment’ to existing copyright law, based on several mistaken assumptions, the UK legislature failed to consider these matters. Whilst this failure might be explained by the origins of section 30(1ZA), as discussed in the following chapter, it has the consequence that the provision must be urgently re-considered.

3. THE PROPER APPROACH TO INTERPRETING THE UK QUOTATION EXCEPTION

In 2011, the Hargreaves Review recommended that the UK Government should 'deliver copyright exceptions at national level to realise all the opportunities within the EU framework'.[350] The recommendations of the Hargreaves Review were endorsed by the Cameron Government in the same year.[351] Importantly, it was said in 'Modernising Copyright' that the gains from, amongst other things, 'allowing creators greater ability to quote fairly from works', 'must come within the strong European legal framework that protects the interests of creators and rights holders'.[352] In light of this, it is clear that in drafting section 30(1ZA) CDPA, the intention of the UK legislature was to replicate as closely as possible the scope of article 5(3)(d) Infosoc Directive, to gain 'as wide a quotation

350 Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (18 May 2011) ('Hargreaves Review') 8.

351 HM Government, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' (3 August 2011), Foreword. Specifically, the Government 'agree[d] with the Review's central thesis that the widest possible exceptions to copyright within the existing EU framework are likely to be beneficial to the UK, [subject, *inter alia*, to adherence with EU law and international treaties]': HM Government, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' (3 August 2011) 7.

352 IPO, *Modernising Copyright: A modern, robust and flexible framework* (20 December 2012) ('Modernising Copyright') 8.

exception as is permitted by EU law'.[353] Beyond this, it is unclear whether the boundaries of the new exception were fully explored prior to its implementation.[354]

Section 30(1ZA) CDPA was derived from article 5(3)(d) Infosoc Directive.[355] Therefore, at the time of its enactment, UK courts were obliged in accordance with the *Marleasing* principle to construe it consistently, 'as far as possible', with any relevant EU law,[356] specifically article 5(3)(d). This chapter seeks to explain why, even following the process popularly known as 'Brexit', [357] section 30(1ZA) CDPA must – continue to be interpreted in a manner consistent with the prevailing interpretation of article 5(3)(d) Infosoc Directive, namely, that set out in Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland*,[358] Case C-476-17 *Pelham and Others v Ralf Hütter and Florian Schneider-Esleben* [359] and Case C-516/17 *Spiegel Online GmbH v Volker Beck*[360]

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353 Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356, Explanatory Memorandum ('Explanatory Memorandum'), para 3.4.3. Whilst s 30(1ZA) of the CDPA incorporates a test of fair dealing, which is not present in art 5(3)(d) of the Infosoc Directive, this does not of itself preclude an intention to match the scope of art 5(3)(d) in s 30(1ZA): see the discussion of *Risk Management* in *The USA v Nolan* [2015] UKSC 63 [14]. In *Risk Management* itself, it was noted that the domestic provisions did not adopt the definitions of the corresponding EU directive, but rather, were 'couched in terms of domestic contract law, in the interests of greater certainty': *R (Risk Management Partners Ltd) v Brent London Borough Council* [2011] UKSC 7. Accordingly, the Supreme Court's conclusion that the domestic provisions were intended to match the scope of the European provisions was not invalidated. In the case of s 30(1ZA) it was considered similarly prudent, in the interests of certainty, not to depart from established 'fair dealing' jurisprudence: 'Modernising Copyright' (n 352) 14.

354 Despite the fact that the Quotation and Parody Regulations were born out of a reform process lasting over three years, and which involved a public consultation lasting from December 2011 to March 2012.

355 See Transposition note for Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ No L 167, 22.6.2001, p.10) 2.

356 Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4157, para 8. See also Case C-14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1892, para 26.

357 On 23 June 2016, by referendum, the British public voted to withdraw from the EU (in a process popularly known as 'Brexit'): Anushka Asthana, Ben Quinn and Rowena Mason, 'UK votes to leave EU after dramatic night divides the nation' *The Guardian* (London, 24 June 2016) <www.theguardian.com/politics/2016/jun/24/britain-votes-for-brexit-eu-referendum-david-cameron> accessed 29 May 2023.

358 [2019] OJ C 382 ('*Funke Medien*').

359 [2019] OJ C 347 ('*Pelham*').

360 [2019] OJ C 392 ('*Spiegel*').

(and to a lesser extent, Case C-145/10 *Painer v Standard VerlagsGmbH and Others*[361]). Not only this, but UK courts should continue to have reference, as necessary, to the interpretative method applied by the CJEU in its interpretation of the provisions of article 5 Infosoc Directive. This is possible under the provisions of the European Union (Withdrawal) Act 2018,[362] as this chapter will explain.

Section 30(1ZA) CDPA: a provision sitting 'back-to-back' with article 5(3)(d) Infosoc Directive[363]

Through a choice of wording largely mirroring that of article 5(3)(d) of the Infosoc Directive, it is clear that the concept of quotation—and, to the extent that this can be distinguished, the scope of permissible purposes—intended to be invoked in section 30(1ZA) of the CDPA are those inherent in article 5(3)(d).[364] This intention can be traced back to the 2011 report of the Hargreaves Review.[365] The Hargreaves Review was commissioned in 2010 by then-Prime Minister David Cameron, who asked it to consider 'how the UK's intellectual property framework can further promote entrepreneurialism, economic growth and social and commercial innovation'.[366] In particular, the Prime Minister asked the review to consider

361 [2011] ECR I-12533 ('*Painer*'). Each of these cases was decided prior to IP completion day, 31 December 2020 at 11.00 pm: see European Union (Withdrawal) Act 2018, s 1B(6); European Union (Withdrawal Agreement) Act 2020, s 39(1).

362 'Withdrawal Act'.

363 The phrase 'back-to-back' is used to convey the notion that the scope of s 30(1ZA) was intended to exactly match that of art 5(3)(d). It was used, in the decision in *The USA v Nolan,* to describe the relationship between the domestic measure and corresponding European Directive considered in *Risk Management* (n 353): *The USA v Nolan* (n 353) [14], [23].

364 The words 'or otherwise' in s 30(1ZA) were 'intended to ensure that UK copyright law offers as wide a quotation exception as is permitted by EU law': Explanatory Memorandum (n 353) para 3.4.3. This indicates that the words 'criticism or review or otherwise', used in s 30(1ZA), were intended to extend the scope of permissible purposes under that provision as far as allowed (and *only* as far as allowed) by the words 'such as criticism or review' in art 5(3)(d) of the Infosoc Directive.

365 Hargreaves Review (n 350).

366 ibid 101 (Annex A, Terms of Reference).

'what the UK can learn from the US's "fair use" rules'.[367] Ultimately, the Hargreaves Review concluded that the introduction of fair use was unlikely to be possible within the EU framework,[368] but that this framework presented other, unrealised, opportunities for the introduction of copyright exceptions.[369] It recommended (in a report later endorsed by the Cameron Government[370]) that the UK should 'deliver copyright exceptions at national level to realise [all of these opportunities]'.[371] This set the UK legislature on a course that resulted, in part, in the introduction of section 30(1ZA)[372]—a provision intended to allow 'as wide a quotation exception as is permitted by EU law'.[373]

Beyond the certain intention to have section 30(IZA) replicate as closely as possible the scope of article 5(3)(d) of the Infosoc Directive, it appears that the boundaries of the new exception were not fully considered, prior to its introduction.[374] This may have been because of an assumption that the new provision would largely serve to legitimise a narrow range of existing (and accepted) practices,[375] such as the use of extracts in academic publications,

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367 IPO, 'Independent review launched to ensure IP system promotes growth' *Intellectual.Property.Office* (4..November..2010) <www.webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/about/press/press-release/press-release-2010/press-release-20101104.htm> accessed 12 July 2017.

368 Hargreaves Review (n 350) 5, 46.

369 ibid 5.

370 In August 2011, the Cameron Government indicated 'broad acceptance' of the Hargreaves Review's recommendations, and, specifically, the Review's 'central thesis' that 'the widest possible exceptions to copyright within the existing EU framework are likely to be beneficial to the UK' (in an economic sense): HM Government, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' (n 351) 7.

371 Hargreaves Review (n 350) 8.

372 For the genesis of the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 SI 2014/2356 (Quotation and Parody Regulations), reg 3 of which introduced s 30(1ZA) into the CDPA, in the Hargreaves Review, see Explanatory Memorandum (n 353) para 7.1; HL Deb 29 July 2014, vol 755, col 1553.

373 Explanatory Memorandum (n 353) para 3.4.3.

374 See discussion at text to n 188.

375 For a discussion of existing practices regarding the use of quotations in the publishing industry, see Impact Assessment, Exception for use of quotations or extracts from copyright works (13 December 2012) ('Impact Assessment') 5.

rather than to make lawful a broad range of new uses. Indeed, an assumption of this nature may be evident in the conclusion of the Cameron Government that '[t]he majority of uses that will be permitted by a quotation exception are … likely to be already permitted under the existing exception for criticism and review [in section 30(1) of the CDPA]'.[376] Certainly, to the extent that pre-legislative materials canvassed the types of use expected to fall within the scope of the new exception, these were, as discussed in the previous chapter,[377] by nature minor and overwhelmingly textual.[378] Accordingly, and whilst it is clear that section 30(1ZA) was intended to apply, in principle, to the use of all manner of copyright works,[379] there is little evidence that the practical capacity of the new exception to apply to non-textual works was considered in much detail.

Another explanation for this omission may be provided by the clear European origins of section 30(1ZA), as traced through the conclusions of the Hargreaves Review: the new exception was simply expected to operate 'within the strong European legal framework that protects the interests of creators and rights holders',[380] and to allow precisely the same range of uses as it was permitted to allow, under article 5(3)(d) of the Infosoc Directive.

The expected continuing influence of EU law on the scope of the provision is demonstrated by statements of the UK Government. In 'Modernising Copyright', the

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376 'Modernising Copyright' (n 352) 28.

377 See text to n 182 - 188.

378 Namely, '[e]xtracts … in formal works, such as academic and scholarly texts, historical accounts, biographies and documentaries, as well as more informal works, such as blogs and social media, to help illustrate arguments and engage in comment and debate'; short quotations in academic publications: Impact Assessment (n 375) 3–4; '*[m]inor uses* of copyright materials, such as reference and citations in academic papers, quotation as part of educational activities and short quotations on internet blogs or in tweets'; citation of a title or a short extract; 'reference and citations in research papers, the use of titles to identify sources in a bibliography, and the use of titles and short extracts to identify hyperlinks in internet blogs and tweets': 'Modernising Copyright' (n 352) 4, 27, 46; '[a]n academic paper or student essay which quotes a title of a journal, book or film, or uses a short extract to ensure proper citation': HL Deb 29 July 2014, vol 755, col 1557.

379 Explanatory Memorandum (n 353) para 7.9.5.

380 'Modernising Copyright' (n 352) 8.

Government responded to concerns of copyright owners about the introduction of the new quotation exception, stating that the 'fair dealing' test in the provision would apply to exclude certain uses from the operation of the provision.[381] As discussed in the previous chapter,[382] these comments were based on an overstatement of the determinativeness of the second and third steps of the three-step test[383] as aspects of the 'fair dealing' standard. Nonetheless, and despite the fact that the Government did not refer expressly to the three-step test, these comments demonstrate an assumption that the steps of the three-step test – as expressed in article 5(5) of the Infosoc Directive[384] – would continue to be incorporated into the assessment of 'fair dealing' under the new quotation exception, contributing to the definition of its scope. Naturally, at that time no thought was given to whether the 'fair dealing' test – or, indeed, the other criteria controlling the scope of the exception – would at some point need to be given substance by UK law alone.[385]

In these circumstances, and despite concerns about the 'appropriate influence of retained case law [including retained EU case law] in the continuing development of domestic case law',[386] section 30(1ZA) cannot and should not be understood without

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381 ibid 27.

382 See text to n 219 - n 223.

383 As will be recalled, these are that the relevant use does 'not conflict with a normal exploitation of the work' and does 'not unreasonably prejudice the legitimate interests of the rightholder': Infosoc Directive, art 5(5). (See also Berne Convention, art 9(2)).

384 Whilst, as stated, no express reference was made by the Government to the three-step test (whether as expressed in the Infosoc Directive or otherwise), it appears that it was the three-step test as expressed in article 5(5) Infosoc Directive to which the Government was referring. By contrast with article 5(5) Infosoc Directive, article 9(2) Berne Convention applies only to the framing of national copyright exceptions and not to their application.

385 'Modernising Copyright' was released in 2011. The 'Brexit' referendum was announced on 20 February 2016: Rowena Mason, Nicholas Watt, Ian Traynor and Jennifer Rankin, 'EU referendum to take place on 23 June, David Cameron confirms' *The Guardian* (20 February 2016) <www.theguardian.com/politics/2016/feb/20/cameron-set-to-name-eu-referendum-date-after-cabinet-meeting> accessed 11 April 2024.

386 A matter sought to be addressed through the introduction of intervention and reference procedures regarding points of law or arguments that arise on retained case law: Explanatory Note to the Retained EU Law (Revocation and Reform) Act, para 39.

reference to EU case law, as it continues to develop. As will be seen in Chapter 5, this comprises giving the term 'quotation' within section 30(1ZA) a meaning that is partly based on understandings of the term's equivalents in languages other than English. It is emphasised that this conclusion applies to section 30(1ZA) in its current form, and that, should the UK legislature exercise its power to amend section 30(1ZA), then reconsideration would be necessary in view of the nature of the amendments.

One further caveat applies. The interpretation of article 5(3)(d) advanced in *Funke Medien*, *Pelham* and *Spiegel*, building upon the interpretative principles set out in *Deckmyn*, is entirely consistent with the wording of section 30(1ZA) and its statutory context.[387] However, it is possible – if, perhaps, unlikely – that the CJEU will depart from this interpretation. Taking this example to its extreme, it is possible that the CJEU will in future adopt an interpretation of article 5(3)(d) Infosoc Directive which is somehow clearly *in*consistent with the wording of section 30(1ZA) or the UK domestic legislative framework. In such a case, it is submitted, UK courts should not (assuming no statutory obligation to do so) interpret section 30(1ZA) CDPA in accordance with the principles of post-Brexit CJEU case law, as so modified. Even during the UK's tenure as a member of the EU, the prevailing obligation of harmonious interpretation derived from the decision in Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA*[388] required UK courts to construe section 30(1ZA) in conformity with article 5(3)(d) only 'so far as possible',[389] recognising that there may be circumstances in which the wording of a statutory provision, or its context, is at odds with the interpretation suggested by the underlying EU law (and

387 This will be discussed further in Chapter 6: see text to n 815 – n 840.

388 [1990] ECR I-4157 ('*Marleasing*').

389 ibid para 8.

accordingly, in which that interpretation need not be adopted unreservedly).[390] It is therefore appropriate, following the UK's withdrawal from the EU, that the same limitation applies to the generally required approach, as contended by this thesis, of construing section 30(1ZA) in accordance with both pre- and post-Brexit decisions of the CJEU, where these are relevant.

The European Union (Withdrawal) Act 2018

The approach advanced by this thesis – that is, the continuing reference by UK courts, in their interpretation of section 30(1ZA) CDPA, to pre- and post-Brexit decisions of the CJEU – is consistent with current requirements as to statutory interpretation under UK law. The provisions of the 2018 Withdrawal Act, as amended by the Retained EU Law (Revocation and Reform) Act 2023,[391] make clear the continuing relevance of both pre-Brexit decisions and post-Brexit decisions of the CJEU to the interpretation of EU-derived domestic legislation.

Continuing relevance of pre-Brexit decisions of the CJEU

Under the provisions of the Withdrawal Act, EU-derived domestic legislation, such as section 30(1ZA) of the CDPA,[392] that has remained unmodified since Brexit must be interpreted by UK courts (other than the Supreme Court, the High Court of Justiciary in certain circumstances, and any other courts and tribunals prescribed by regulation, including the

390 At a minimum, national courts are not obliged to adopt an interpretation that is *contra legem*: Case C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos* [2006] ECR I-6091, para 110.

391 'Revocation and Reform Act'.

392 See Withdrawal Act ss 6(7), 2(1) and 1B(7) (definition of 'EU-derived domestic legislation').

Court of Appeal[393]) in accordance with relevant EU and domestic case law principles existing immediately before 'IP completion day'.[394] Accordingly, for so long as it remains in its current form,[395] section 30(1ZA) must be construed by lower courts in accordance with relevant EU case law existing immediately prior to the completion of the UK's transition out of the EU, including *Painer*, *Funke Medien*, *Pelham* and *Spiegel* - and, this thesis contends, Case C-201/13 *Deckmyn and Vrijheidsfonds VZW v Vandersteen and Others*.[396]

Under section 6 of the Withdrawal Act, as it stands at the date of writing, each of the Supreme Court, High Court of Justiciary and Court of Appeal has the power to depart from such case law,[397] but only on the same basis that it has power to depart from one of its own precedents.[398] And, as recently noted by Arnold LJ in *Warner Music UK Ltd v TuneIn Inc*,[399] the Supreme Court has 'consistently stated' that the power to depart from one of its own precedents, or one of the House of Lords, is 'to be exercised with great caution'.[400]

The test to be applied by higher courts in deciding whether to depart from retained EU case law[401] is likely to change imminently. The Revocation and Reform Act, section 6 of which amends section 6 of the Withdrawal Act,[402] was enacted in June 2023 and the

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393 ibid ss 6(4), 6(5A); European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, SI 2020/1525 ('Retained EU Case Law Regulations'), reg 3.

394 Withdrawal Act, s 6(3). See also Withdrawal Act, s 1A(6) (definition of 'IP completion day').

395 Section 6(3) of the Withdrawal Act applies to retained EU law 'so far as that law is unmodified on or after IP completion day': ibid s 6(3).

396 [2014] OJ C 189 ('*Deckmyn*').

397 Withdrawal Act, s 6(4); Retained EU Case Law Regulations, reg 3.

398 In deciding to depart from CJEU authority under s 6(5), a court 'must apply the same test as it would apply in deciding whether to depart from its own case law': Withdrawal Act, s 6(5).

399 [2021] EWCA Civ 441 ('*TuneIn*').

400 ibid 59.

401 Note that whilst the terminology used in the Withdrawal Act has changed by virtue of the amendments made by the Revocation and Reform Act (principally, 'retained' law is now referred to as 'assimilated' law), the original terminology of the Withdrawal Act will be used here.

402 Revocation and Reform Act, s 6.

operation of many of its provisions – excluding section 6 – has now commenced.[403] The commencement date of section 6 of the Revocation and Reform Act has not yet been set.[404]

When it does commence operation, its effect will be that a higher court, deciding whether to depart from any assimilated EU case law, will be required (amongst other things) to have regard to three factors, namely:

> (a) the fact that decisions of a foreign court are not (unless otherwise provided) binding;
> (b) any changes of circumstances which are relevant to the retained EU case law;
> (c) the extent to which the retained EU case law restricts the proper development of domestic law.[405]

As noted in the Explanatory Note to the Revocation and Reform Act, these 'reflect some of the factors which the Court of Appeal in England and Wales took into account in deciding whether to depart from retained EU case law in the case of [*TuneIn*]'.[406]

In that case, the Master of the Rolls applied, at the urging of the appellant, the 'Supreme Court approach of departing from its own decisions [only] where the earlier ones "were generally thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy"',[407] finding that a departure from retained EU law was 'both unnecessary and undesirable' on this basis.[408] Approaching the task of interpreting the meaning of 'communication to the public' under section 20 of the

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403 ibid s 22; Retained EU Law (Revocation and Reform) Act 2023 (Commencement No. 1) Regulations 2023, S1 2023/1363, reg 3.

404 Together with the amendment of section 6(5) effected by section 6(3) of the Revocation and Reform Act, section 6 of the Revocation and Reform Act will insert into section 6 of the Withdrawal Act subsections 6A ('References on retained case law by lower courts or tribunals'), 6B ('References on retained case law by law officers') and 6C ('Interventions on retained case law by law officers').

405 Revocation and Reform Act, s 6(3) (amending s 6(5) of the Withdrawal Act).

406 Explanatory Note to the Retained EU Law (Revocation and Reform) Act (n 386) para 118.

407 *TuneIn* (n 399) 88 (quoting Lord Reid in *Jones v Secretary of State for Social Services, Hudson v Secretary of State for Social Services* [1972] 1 All ER 145).

408 ibid 89.

CDPA,[409] implementing article 3 of the Infosoc Directive,[410] in the same case Arnold LJ set out several reasons[411] why the court's power to depart from retained EU law should not be exercised, and why instead the case should be decided by reference to the principles established by the jurisprudence of the CJEU. First, there had been no change in the relevant domestic legislation since the UK's withdrawal from the EU.[412] Secondly, there had since that time been no change to the international legislative framework – specifically, the relevant provisions of the Berne Convention, WIPO Copyright Treaty, and WIPO Performances and Phonograms Treaty[413] – under which Contracting States 'should be striving for consistency of interpretation'.[414] Thirdly, interpreting the meaning of 'communication to the public' was a 'difficult task', in view of the absence of legislative guidance on the meaning of the concept, and of the conflict between territorial copyrights and 'the global and interconnected nature of the internet', but one which the CJEU had navigated on several occasions.[415] Fourthly, the existence of academic support for (albeit in the face of some academic criticism of) the CJEU's approach to the concept of 'communication to the public'.[416] Fifthly, only limited assistance could be provided by reference to the case law of courts outside the EU, including those in Australia, Canada, and the United States, given the differences in their statutory

409 Section 20 materially provides that '[t]he communication to the public of the work is an act restricted by the copyright in—(a) a literary, dramatic, musical or artistic work, (b)a sound recording or film, or (c) a broadcast': CDPA, s 20(1).

410 Article 3 provides that 'Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them'. On the implementation of art 3 Infosoc Directive by s 20 CDPA, see the Explanatory Note to the Copyright and Related Rights Regulations 2003, SI 2003/2498.

411 Six of the list, containing eight items, are discussed below.

412 *TuneIn* (n 399) 60.

413 ibid.

414 ibid.

415 ibid.

416 ibid.

frameworks and the absence of relevant jurisprudence.[417] Sixthly, beginning the task of interpreting 'communication to the public' ab initio would 'create considerable legal uncertainty'.[418]

Conclusions in respect of section 30(1ZA) CDPA

Consistent with the contentions of this thesis, lower UK courts are indeed required to interpret EU-derived domestic legislation, including section 30(1ZA), in accordance with relevant pre-Brexit EU and domestic case law principles.[419] This has the effect that lower UK courts must interpret section 30(1ZA) CDPA in line with relevant pre-Brexit decisions of the CJEU, including *Painer*, *Funke Medien*, *Pelham*, *Spiegel* and *Deckmyn*.

Whilst higher courts such as the Supreme Court and Court of Appeal have power to depart from such case law,[420] currently they must do so only on the same basis that they depart from one of their own precedents[421] - that is, as described by the court in *TuneIn*, 'with great caution'.[422] When amendments to the Withdrawal Act made by the Revocation and Reform Act take effect, higher UK courts asked to depart from EU precedent will be required to consider the three factors set out in s 6(5) of the Withdrawal Act, as amended.[423] Broadly, these codify the considerations of the Court of Appeal in *TuneIn*, as set out above.[424]

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417 ibid.

418 ibid.

419 Withdrawal Act, s 6(3). See also Withdrawal Act, s 1A(6) (definition of 'IP completion day').

420 Withdrawal Act, s 6(4); Retained EU Case Law Regulations, reg 3.

421 In deciding to depart from CJEU authority under s 6(5), a court 'must apply the same test as it would apply in deciding whether to depart from its own case law': Withdrawal Act, s 6(5).

422 *TuneIn* (n 399) 59.

423 See Revocation and Reform Act, s 6(3) (amending s 6(5) of the Withdrawal Act).

424 See text to n 407 – n 418.

Accordingly, for so long as section 30(1ZA) CDPA remains unamended, it is unnecessary, and undesirable, for a UK court to take the unusual step of exercising any power it might have under section 6 of the Withdrawal Act in respect of pre-Brexit CJEU jurisprudence concerning article 5(3)(d) Infosoc Directive. This conclusion is not altered by considering factors concerning the proper development of the law, the avoidance of injustice, and consistency with public policy, as the Master of the Rolls did in *TuneIn*,[425] nor by considering the first factor ('the fact that decisions of a foreign court are not usually binding'[426]) that will ultimately fall to be considered under the amended section 6(5) of the Withdrawal Act.[427]

Applying the same factors as Arnold LJ did in *TuneIn*, it may be seen that first, the concept of quotation, similar to the concept of communication to the public, forms part of a UK legislative provision implementing a provision of the Infosoc Directive,[428] which in turn sits within a broader (and since Brexit unchanged) international legislative framework comprising the Berne Convention[429] and WIPO Copyright Treaty.[430] Secondly, interpreting the meaning of 'quotation' within the context of the copyright quotation exception is equally as difficult a task as that of interpreting the meaning of 'communication to the public', in

425 *TuneIn* (n 399) 89.

426 Revocation and Reform Act, s 6(3).

427 ibid.

428 Namely, art 5(3)(d) of the Infosoc Directive: see the Explanatory Note to the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014.

429 The UK signed the Berne Convention on 9 September 1886, ratified on 5 September 1887, and the Convention took effect in the UK on 5 December 1887. See 'Contracting Parties, Berne Convention' (*WIPO*) <https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15> accessed 5 October 2022.

430 (20 December 1996) WIPO Doc CRNR/DC/94 (WCT). The UK signed the WCT on 13 February 1997, ratified on 14 December 1999, and the WCT took effect in the UK on 14 March 2009: WIPO, 'Contracting Parties, WIPO Copyright Treaty' (*WIPO*) <https://wipolex.wipo.int/en/treaties/ShowResults?start_year=ANY&end_year=ANY&search_what=C&code=ALL&treaty_id=16> accessed 5 October 2022.

view of the absence of legislative guidance (and, as has been noted,[431] pre-legislative guidance) on the meaning of the term.

If, instead, a UK court was to depart from CJEU jurisprudence on the meaning of 'quotation' in copyright law, beginning the interpretative task anew, this would create great risk of legal uncertainty, given the widely divergent meanings that might be proposed to the court – even if, as this thesis seeks to demonstrate, the range of meanings that may sensibly be suggested, considering the ordinary meaning of 'quotation', is relatively confined.

Continuing relevance of post-Brexit decisions of the CJEU

Whilst under section 6(3) of the Withdrawal Act, lower UK courts are bound in their interpretation of EU-derived domestic legislation by EU case law existing immediately before IP completion day,[432] the position with respect to 'any principles laid down, or any decisions made, *on or after* IP completion day by the European Court'[433] is, under section 6(1) of the Withdrawal Act, 'exactly the opposite'[434] – namely, no UK court or tribunal is bound by such decisions following IP completion day.[435] Rather, as provided by section 6(2) of the Withdrawal Act, a UK court or tribunal 'may', subject to other provisions of section 6,[436] 'have regard to anything done on or after IP completion day by the European Court,

431 See text to n 353 – n 354.

432 Withdrawal Act, s 6(3).

433 ibid s 6(1) (emphasis added).

434 Simon Whittaker, 'Retaining European Union Law in the United Kingdom' (2021) 137 LQR 477, 482.

435 Withdrawal Act, s 6(1).

436 Namely, subsections 3 to 6 of s 6: ibid ss 6(3) – 6(6).

another EU entity or the EU so far as it is relevant to any matter before the court or tribunal'.[437]

This leads to the conclusion, as described by Whittaker, that a UK court 'merely *may* have regard to [CJEU case law made after IP completion day] but need not do so even where apparently relevant'.[438] Notwithstanding this, section 6(2) begs the question when CJEU jurisprudence will be considered 'relevant' to a matter before a UK court, as it appears that the provision permits a court to have regard to CJEU jurisprudence only where, and insofar as, such relevance is established.[439] As noted by Lady Justice Rose in *TuneIn*, '[t]he application of section 6(2) of the [Withdrawal Act] has yet to be fully worked out by courts and tribunals',[440] and this is equally true of the criterion of relevance within the provision. The Explanatory Notes to the Withdrawal Act do not assist much, for as Giliker notes they 'merely repeat that while a court may have regard to post-exit CJEU decisions, it cannot have regard to such an extent it considers itself bound by them'.[441] This is in line with the tenor of the provisions of the (more recent) Revocation and Reform Act, which reflect Government policy that 'UK courts should have greater freedom to develop case law on [retained EU law] that remains in force in ways that are not unduly constrained by the continuing influence of previous EU case law', and 'facilitat[e] domestic courts departing from retained EU case law'.[442]

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437 ibid s 6(2).

438 Whittaker (n 434) 483.

439 Section 6(2) provides that '[s]ubject to this and subsections (3) to (6), a court or tribunal may have regard to anything done on or after IP completion day by the European Court, another EU entity or the EU *so far as it is relevant* to any matter before the court or tribunal': Withdrawal Act, s 6(2) (emphasis added).

440 *TuneIn* (n 399) 86.

441 Paula Giliker, 'Interpreting retained EU private law post-Brexit: Can Commonwealth comparisons help us determine the future relevance of CJEU case-law?' (2019) 48 Common Law World Review 15, 18.

442 Explanatory Note to the Retained EU Law (Revocation and Reform) Act (n 386) para 37.

Conclusions in respect of section 30(1ZA) CDPA

In this context, the comparative study conducted by Paula Giliker provides some guidance as to the factors that might determine the in-practice relevance and persuasiveness of post-Brexit decisions of the CJEU. Examining the citation practices of Australian courts following the abolition in Australia of a right to appeal to the Privy Council (circumstances providing a comparison, if not an 'exact analogy', with those relevant in the UK vis-à-vis the jurisdiction of the CJEU following Brexit[443]), Giliker discerns four factors tending to determine the perceived relevance and persuasiveness of Privy Council decisions that would previously have been binding on Australian courts. The first of the factors is respect for the authority and prestige of the court that handed down the earlier decision, as well as respect for the quality of its reasoning.[444] The second is historical legacy, comprising aspects of common methodology and shared basic doctrines,[445] whilst the third is continuing dialogue and communication based on ties between the relevant jurisdictions.[446] Finally, the fourth factor identified is legislative change, a factor militating against the relevance and persuasiveness of precedent from another jurisdiction, as 'legislative inconsistency will force the courts to prioritize their own domestic case law'.[447] Considering these factors, Giliker concludes that it is unlikely that UK courts will continue referring to CJEU authority in the long-term: whilst, at least initially, it is difficult to imagine that the relevance of CJEU authority on questions arising under EU-derived domestic legislation would be disputed, there are reasons – such as

443 Giliker (n 441) 22.

444 ibid 31.

445 ibid.

446 ibid.

447 ibid 32.

the ‘very different methodology’ of non-common law courts such as the CJEU[448] – to consider that the persuasiveness of CJEU decisions may decline over time,[449] particularly if the UK does not seek to retain a dialogue and communication with EU law.[450]

Whilst Giliker’s study provides a basis upon which to draw conclusions about the approach that UK courts will likely take to post-Brexit jurisprudence of the CJEU, this thesis seeks to use some of the same factors (for example, historical legacy and jurisdictional ties) to make an argument about the proper approach of UK courts to post-Brexit decisions of the CJEU. In particular, this thesis contends that it is appropriate in most cases for UK courts considering section 30(1ZA) to interpret the provision in accordance not only with pre-Brexit decisions of the CJEU, but also with post-Brexit decisions of the CJEU, as they are permitted to do having determined the relevance of these decisions under section 6(2) of the Withdrawal Act.[451] In part it is appropriate that a UK court should make decisions consistent with post-Brexit case law of the CJEU when this is likely to build upon or elucidate pre-Brexit case law of the CJEU concerning the same subject-matter,[452] in circumstances in which the court is either bound by the latter or, as discussed, should be reluctant to depart from it.

Nonetheless, it is possible that UK courts may be disinclined to do this, perhaps due to what Giliker identifies as a lack of certainty about the ‘quality of the guidance’ obtained from judgments of the CJEU.[453] At the root of this uncertainty, Giliker suggests, is the ‘very

448 ibid.

449 ibid.

450 ibid 37.

451 ‘Subject to this and subsections (3) to (6), a court or tribunal may have regard to anything done on or after IP completion day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal’: Withdrawal Act, s 6(2).

452 As Arnold LJ highlighted in respect of the decision in Case C-392/19 *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* in *TuneIn*: see *TuneIn* (n 399) 62.

453 Giliker (n 441) 32.

different methodology' of the CJEU, which concerns common lawyers due partly to the fact that judgments are perceived to 'rarely engage in serious interpretative or policy analysis' and 'often make no real attempt to persuade a sceptical reader of the correctness of the result'.[454] This is a charge that could be levelled at the decisions in *Funke Medien*, *Pelham* and *Spiegel*. Yet, on a different count, the perceived difference in methodological approach between UK and EU courts has recently been identified as illusory, with the UK Bar Council noting that 'claims that EU law adopts "purposive" principles of construction of regulatory and other legislative texts while the common law does not is hard to reconcile with statements made by the UK Supreme Court and separately by Sir Richard Aikens]'.[455]

As noted by both Lord Justice Arnold in *TuneIn*,[456] and by Giliker in her comparative study,[457] legislative divergence (whether in the wording of provisions or in the relevant statutory frameworks) between the UK and EU in a particular case would militate against the relevance and persuasiveness of CJEU decisions,[458] whereas legislative similarity would suggest both the relevance and persuasiveness of the same decisions. Giliker's study shows

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454 ibid 33 (discussing the arguments made in Anthony Arnull, 'Judicial Dialogue in the European Union' in Julie Dickson and Pavlos Eleftheriadis, *Philosophical Foundations of European Union Law* (OUP, 2013) 132).

455 Bar Council, *Retained EU Law (Revocation and Reform) Bill: Bar Council written evidence and proposed / planned amendments* (November 2022) [14]. The full text states as follows: 'We note, in particular, that claims that EU law adopts "purposive" principles of construction of regulatory and other legislative texts while the common law does not is hard to reconcile with statements such as this, by the UK Supreme Court in *Uber v Aslam* [2021] UKSC 5, at §70: "The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose." Indeed, in evidence to the EU Scrutiny Committee, Sir Richard Aikens, a former judge of the Court of Appeal of England and Wales and public supporter of Brexit, when asked whether interpretation of REUL might differ from the interpretation of other domestic law, observed that he was "doubtful about whether there will be such a marked or clear distinction between interpretive methods used by judges in UK courts" and that he was "not convinced there is any great difference"'.

456 Continuing legislative convergence, and the absence of change in the international legislative framework, were cited by Arnold LJ as reasons for the continuing relevance and persuasiveness of CJEU decisions: see *TuneIn* (n 399) 60.

457 Giliker (n 441) 36.

458 Both in the context of s 6(2) and in the context of ss 6(4) and 6(5) of the Withdrawal Act: see Withdrawal Act, ss 6(2), 6(4) and 6(5).

that courts in different jurisdictions, even when 'faced with exactly the same wording, sources and interpretative tools [can] reach very different conclusions as to the meaning of a statutory provision'.[459] And as has been described, the wording of article 5(3)(d) Infosoc Directive and section 30(1ZA) CDPA, whilst very similar, is not exactly the same. Nonetheless, assuming no change to the wording of either section 30(1ZA) or article 5(3)(d), their statutory contexts, or the international legislative framework, UK courts considering section 30(1ZA) can and should – but for the caveat described above[460] – interpret the provision in accordance with any post-Brexit decisions of the CJEU concerning article 5(3)(d).

Challenges in practice

Therefore, beyond those circumstances where they are *required* to do so,[461] it is open to UK courts under the Withdrawal Act to adopt in their interpretation of section 30(1ZA) CDPA the same reading as has been adopted, and will in future be adopted, by the CJEU in its decisions in relation to article 5(3)(d) Infosoc Directive. Where statutory factors are to guide the approach to be taken to the provision's interpretation,[462] these tend to suggest the appropriateness of continuing to adopt the CJEU's interpretation of article 5(3)(d), and of the concept of quotation within it.

As will be seen in the next chapter, the CJEU's approach requires the 'meaning and scope' of that term 'quotation' in article 5(3)(d) to be 'determined by considering its usual

459 Giliker (n 441) 27.

460 See text to n 387- n 390.

461 As under Withdrawal Act, s 6(3).

462 As will be the case under Withdrawal Act, s 6(5); consider also the necessary determination of 'relevance' under Withdrawal Act, s 6(2).

meaning in everyday language, while also taking into account the legislative context in which it occurs and the purposes of the rules of which it is part',[463] where the concept denoted by the term has certain 'essential characteristics' as already determined by the CJEU.[464] Beyond this, it requires that the application, in a particular case, of a national exception derived from article 5(3)(d) 'strike[s] a fair balance between, on the one hand, the interests and rights of [authors], and, on the other, the freedom of expression of the user of a protected work' in all the circumstances of the case.[465] In the existing case law of the CJEU, the rights of relevance to the maintenance of this balance appear to be those recognised in the Charter of Fundamental Rights of the European Union.[466]

This gives rise to issues of practical application, as the Withdrawal Act expressly states that 'the Charter of Fundamental Rights is not part of domestic law on or after IP completion day'.[467] This begs the question how UK courts are to ensure the continuing consistency of their interpretations of section 30(1ZA) with the CJEU's interpretations of article 5(3)(d), when the fundamental rights recognised in the CFR, of key importance to the CJEU's understanding of article 5 exceptions,[468] no longer form part of their framework of reference.

The May Government's White Paper on *Legislating for the United Kingdom's Withdrawal from the European Union*[469] may assist: it characterises the Charter as codifying

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463 *Deckmyn* (n 396) para 19.

464 *Pelham* (n 359) para 71; *Spiegel* (n 360) para 78.

465 See *Deckmyn* (n 396) paras 26–27.

466 [2012] OJ C 326/2 ('CFR'). See, for example, *Pelham* (n 359) paras 32 – 34 (noting that reference is also there made to freedom of expression as enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms).

467 Withdrawal Act, s 5(4).

468 See *Deckmyn* (n 396) paras 26–27.

469 Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union* (White Paper, Cm 9446, 2017).

'general principles of EU law that have been recognised over time through the case law of the CJEU'.[470] It explains that 'the Charter was not designed to create any new rights or alter the circumstances in which individuals could rely on fundamental rights to challenge the actions of the EU institutions or member states in relation to EU law',[471] but was instead 'intended to make the rights that already existed in EU law more visible by bringing them together in a single document'.[472] It therefore states that the 'Government's intention [was] that the removal of the Charter from UK law will not affect the substantive rights that individuals already benefit from in the UK'.[473] It notes the sources of these rights as i) UK law; ii) international agreements to which the UK is a party, including the European Convention on Human Rights and 'also UN and other international treaties'; and iii) 'the body of EU law which we will be converting into UK law' (under the Withdrawal Agreement).[474]

Accordingly, it may be that UK courts can validly refer to the expression of various relevant rights in the Human Rights Act 1998, incorporating rights and fundamental freedoms as set out in the European Convention on Human Rights,[475] as necessary to give 'flesh' to the legislative 'bones' of the UK quotation exception,[476] even when giving the provision an interpretation in line with EU law to the extent they are obliged to do so by section 6(3) Withdrawal Act, and further as this thesis contends is required. The balancing of Convention

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470 ibid 32.

471 ibid 18.

472 ibid.

473 ibid.

474 ibid.

475 Human Rights Act 1998, s 1.

476 To adapt a phrase used in Bar Council (n 455) at [42].

rights is an exercise already familiar to UK courts, for example in considerations of common law actions for breach of confidence, or more specifically, misuse of private information.[477]

In any case, and as will be detailed in Chapter 6, the requirement to strike a 'fair balance' of rights and interests in the application of national copyright exceptions has, similar to the requirements of the three-step test in article 5(5) Infosoc Directive,[478] so far been viewed by UK courts as subsumed by the 'fair dealing' assessment (with the result that the question of 'fair balance' is not separately considered).[479]

477 In this respect, see the decision of the House of Lords in *Campbell v MGN Ltd* [2004] UKHL 22, and in particular the statements of Baroness Hale regarding the balancing of article 8 and article 10 Convention rights (for example at [132] – [141]).

478 See *England and Wales Cricket Board v Tixdaq Ltd* [2016] EWHC 575 (Ch) ('*Tixdaq*'), [88]; *Shazam Productions Ltd v Only Fools the Dining Experience Ltd* [2022] EWHC 1379 (IPEC) [155].

479 For example, in the decision in *England and Wales Cricket Board v Tixdaq* it was 'common ground that section 30(2) [CDPA] contains a balancing mechanism within it, since it requires an assessment of fair dealing': *Tixdaq* (n 478) [73].

4. LESSONS FROM THE EU: THE DECISIONS IN *PAINER*, *FUNKE MEDIEN*, *PELHAM* AND *SPIEGEL*

The previous chapter reiterated that it was the expectation of the UK legislature, prior to the introduction of section 30(1ZA) into the CDPA, that the new exception would operate 'within the strong European legal framework that protects the interests of creators and rights holders',[480] and allow precisely the same range of uses as it was permitted to allow, under article 5(3)(d) of the Infosoc Directive. In light of this, in the previous chapter it was concluded that UK courts asked to interpret section 30(1ZA) CDPA must continue, but for one caveat, to look to pre- and post-Brexit decisions of the CJEU on article 5(3)(d), adopting its conclusions on the scope of that provision. This is both permissible under, and in some circumstances required by,[481] the provisions of the European Union (Withdrawal) Act 2018.

As will be described in this chapter, the CJEU's interpretative method requires the 'meaning and scope' of the term 'quotation' in article 5(3)(d) to be 'determined by considering its usual meaning in everyday language, while also taking into account the legislative context in which it occurs and the purposes of the rules of which it is part'.[482] The concept of quotation has certain 'essential characteristics' as already determined by the CJEU in three 2019 decisions.[483]

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480 IPO, *Modernising Copyright: A modern, robust and flexible framework* (20 December 2012) ('Modernising Copyright') 8.

481 See European Union (Withdrawal) Act 2018, s 6(3).

482 See Case C-201/13 *Deckmyn and Vrijheidsfonds VZW v Vandersteen and Others* [2014] OJ C 189 ('*Deckmyn*'), para 19.

483 Namely, Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] OJ C 382 ('*Funke Medien*'); Case C-476-17 *Pelham and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] OJ C 347 ('*Pelham*'); and Case C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] OJ C 392 ('*Spiegel*'). For the Court's statement of the 'essential characteristics' of quotation, see *Pelham* para 71; *Spiegel* para 78.

The reasoning of the Court in these decisions is susceptible to criticism that it lacks a persuasive rationale, particularly in relation to the Court's identification of the 'essential characteristics' of a quotation under article 5(3)(d).[484] Further, the 'essential characteristics' of a quotation, so identified, leave some matters as to the boundaries of the concept unresolved. Yet, as the next chapter will demonstrate, the decision of the CJEU in *Deckmyn* provides a rationale supporting the Court's 2019 findings on the meaning of 'quotation' in article 5(3)(d), as well as a map for the further development of the autonomous concept of quotation within the provision.

Interpretations of article 5(3)(d) Infosoc Directive

Articles 2 and 3 of the Infosoc Directive require Member States to provide authors with exclusive rights to authorise the reproduction of their works,[485] and to authorise the communication of their works to the public.[486] Article 5(3) of the Infosoc Directive sets out a list of 'exceptions or limitations' to the rights outlined in articles 2 and 3, which Member States 'may provide for' in domestic law.[487] Of these, it will be recalled that article 5(3)(d) of the Directive allows Member States to provide an exception for:

> quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the

484 For criticism of this nature in relation to Advocate General Szpunar's Opinion in *Pelham* (later relied upon by the CJEU in the same case), see Eberhand Ortland, comment on Eleonora Rosati, 'AG Szpunar advises CJEU to rule that unlicensed sampling MAY be a copyright infringement and German free use may be contrary to EU law (*IPKat*, 12 December 2008) <www.ipkitten.blogspot.com/2018/12/breaking-ag-szpunar-advises-cjeu-to.html> accessed 19 January 2019.

485 Infosoc Directive, art 2(a).

486 ibid art 3(1).

487 'Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: …': ibid art 5(3)(d). Article 5(1) provides that 'Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and

public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose.[488]

The decision in *Painer*

Until 2019, the CJEU had considered article 5(3)(d) in one case only (and even then in limited terms). The decision in Case C-145/10 *Painer v Standard VerlagsGmbH and Others*[489] involved a tightly framed reference from the Austrian *Handelsgericht Wien* (Viennese Commercial Court) regarding the unauthorised publication of photographic portraits of a young Natasha Kampusch.[490] According to the Court in *Painer*, article 5(3)(d) is intended 'to strike a fair balance between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors',[491] by permitting the publication of 'extracts' from publicly available copyright works 'by means of quotation *accompanied by comments or criticism*'.[492]

By requiring comments or criticism, the Court's judgment demonstrated consistency with Advocate General Trstenjak's earlier view in *Painer* that a quotation under article 5(3)(d) requires a reproduction for so-called 'quotation purposes',[493] allowing a 'material reference back to the [copyright] work in the form of a description, commentary or

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which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2': Infosoc Directive, art 5(1). Article 5(2) provides that 'Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: ….': ibid art 5(2).

488 ibid art 5(3)(d).

489 [2011] ECR I-12533 ('*Painer*').

490 The Court also considered 'photo-fit' portraits based on those photographs.

491 *Painer* (n 489) para 134.

492 ibid para 120 (emphasis added).

493 Equated by the Advocate General to 'purposes such as criticism or review': ibid, Opinion of AG Trstenjak, para 209.

analysis'.[494] Merely using a copyright work (or part thereof) 'as a "teaser" to arouse the interest of readers without discussing [it]'[495] would not, in the opinion of the Advocate General, be a use for quotation purposes as required.[496]

In her Opinion preceding the Court's judgment in *Painer*, Advocate General Trstenjak discussed not only the permissible *purposes* of a quotation under article 5(3)(d) (the so-called 'quotation purposes'[497]), but also the *quantity* of a copyright work that may constitute a quotation under the provision.[498] She concluded that, whilst a 'quotation' is 'generally only a partial extract of text',[499] where the protected work is a photograph, article 5(3)(d) might permit the unauthorised use of the work in its entirety, to ensure the reproduction's ability to create a 'material reference' back to it.[500] Despite being focussed on photographs, these comments by the Advocate General are applicable to all copyright works, the reproduction of anything less than the whole of which is similarly incapable of fulfilling the expressive purpose of article 5(3)(d). Consistent with this, they effectively restate the

494 And thereby providing 'a basis for discussion': ibid para 210. It should be noted that the Court did not directly address the Advocate General's view on this issue.

495 ibid para 211.

496 In Society of Composers, Authors and Music Publishers of Canada (SOCAN) v Bell Canada, 2012 SCC 36 (Supreme Court), the Canadian Supreme Court held that the unauthorised use of musical 'previews' of copyright works, which assisted consumers in making purchasing decisions, was an instance of 'fair dealing' for the purpose of 'research' under Canadian copyright statute. Similarly, in the 'Google Books' case, *Authors Guild v Google Inc*, No 13-4829 (2d Cir: 2015) (2nd Circuit Court), the US 2nd Circuit Court held that the unauthorised use of written 'snippets' from copyright works, allowing readers to evaluate whether those works fell within their range of interest, was an instance of 'fair use' under US copyright statute. In the analysis of art 5(3)(d) of the Infosoc Directive offered by Advocate General Trstenjak, however, such uses could not constitute uses of quotations under EU copyright law. Compare, also, the decision of the German *Bundesgerichtshof* in the 'thumbnails' case (BGH, 29 April 2010, case I ZR 69/08), discussed in Martin Senftleben, 'Bridging the Differences Between Copyright's Legal Traditions—The Emerging EC Fair Use Doctrine' (2010) 57 Journal of the Copyright Society of the USA 521, 537–538.

497 *Painer* (n 489), Opinion of AG Trstenjak, para 210.

498 Note that the Advocate General did not expressly address which parts of a copyright work may constitute a quotation, in a qualitative sense.

499 *Painer* (n 489), Opinion of AG Trstenjak, para 212.

500 ibid.

proportionality test of article 5(3)(d)—namely, that a quotation may be used only 'to the extent required by the specific purpose'.[501]

At first glance, an interpretation of article 5(3)(d) as allowing, in certain circumstances, the reproduction of the whole of a copyright work as a 'quotation' might appear at odds with acceptance, in the terms used by Advocate General Trstenjak, of the 'traditional meaning' of 'quotation' as a 'partial extract of text'.[502] Further, the Court's own reference to the use of 'extracts' under article 5(3)(d)[503] might appear to foreclose the issue of whether the whole of a copyright work can be used as a quotation under the provision. However, due to the CJEU's surprising recognition in Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening*[504] that an extract from a work, such as a sentence from a literary text, may itself be accorded protection against copyright infringement (a conclusion that has been interpreted as suggesting that such an extract may, in some cases, constitute a copyright work in its own right[505]),[506] any distinction between 'extract' and 'work' otherwise required by article 5(3)(d) becomes difficult to sustain. Accordingly, and at least whilst the *Infopaq* principle applies, acceptance that a quotation is, as a matter of ordinary meaning, an 'extract' does not preclude the possibility that the whole of a copyright work might in some circumstances be used as a quotation under article 5(3)(d).

The CJEU's observations on the interpretation of article 5(3)(d) in *Painer* support the conclusion that the provision allows the use of copyright works (or parts thereof) for the purpose of making comments or engaging in criticism. Whilst not directly addressed by the

501 Infosoc Directive, art 5(3)(d).

502 *Painer* (n 489), Opinion of AG Trstenjak, para 212.

503 *Painer* (n 489) para 120.

504 [2009] ECR I-06569 ('*Infopaq*').

505 See *Newspaper Licensing Agency v Meltwater Holding BV* [2010] EWHC 3099 (Ch) [71].

506 *Infopaq* (n 504) para 47.

Court, the Advocate General's view that the whole of a copyright work might, in some circumstances, constitute a quotation under article 5(3)(d) is consistent both with the proportionality test under that provision, and with the Court's own findings in *Infopaq*. Indeed, this view was later confirmed by the Court in its decisions in *Pelham* and *Spiegel*.[507]

The decisions in *Funke Medien*, *Pelham* and *Spiegel*

On 29 July 2019, the CJEU issued three decisions on the meaning of the article 5(3)(d) quotation exception. The CJEU's decision in each of *Funke Medien*, *Pelham*, and *Spiegel* was in response to a preliminary reference to the CJEU by the German *Bundesgerichtshof*,[508] and each reference raised largely similar questions.

Advocate General Szpunar gave Opinions in all three of *Funke Medien*, *Pelham*, and *Spiegel*.[509] According to those Opinions, for any use of a copyright work or subject-matter to be use of a quotation within the meaning of article 5(3)(d) of the Infosoc Directive, it must satisfy the following conditions.[510] First, it must be 'for purposes such as criticism or review', where 'criticism or review' are to be understood as illustrative of the range of allowable

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507 The 'essential characteristics' of quotation, as outlined by the Court in these decisions, implicitly acknowledge this, in that they contemplate that a quotation is 'the use, by a user other than the copyright holder, *of a work or, more generally, of an extract [from] a work*': see *Pelham* (n 483) para 71; *Spiegel* (n 483) para 78 (emphasis added).

508 The application in *Funke Medien* was lodged on 4 August 2017; the application in *Pelham* was lodged on 4 August 2017; and the application in *Spiegel* was lodged on 25 August 2017.

509 See *Funke Medien* (n 483), Opinion of AG Szpunar; *Pelham* (n 483), Opinion of AG Szpunar; and *Spiegel* (n 483), Opinion of AG Szpunar.

510 Whilst in *Pelham* the Advocate General identifies three conditions as especially relevant, the second of these—that a lawful quotation must be both 'unaltered and distinguishable' (see *Pelham* (n 483), Opinion of AG Szpunar, para 65)—may be usefully understood as two distinct conditions. Further, in *Spiegel* the Advocate General notes first, that quotations must be identified as such by quotation marks or other appropriate means (*Spiegel* (n 483), Opinion of AG Szpunar, paras 42-43), and secondly, that a quotation within the meaning of art 5(3)(d) must not compete with the work from which it is derived (*Spiegel* (n 483), Opinion of AG Szpunar, para 46)—requirements that may be understood as posing further conditions on lawful quotations under the EU quotation exception.

purposes.[511] Secondly, it must involve the reproduction of (part of) the protected work or subject-matter in an 'unaltered' or unmodified form.[512] Thirdly, it must allow the identification of that part of the work or subject-matter it reproduces 'as a foreign element'.[513] Fourthly and relatedly, it must entail the identification of the reproduced part either by traditional textual means (such as quotation marks or italics) or by other means appropriate having regard to the nature of the protected work or subject-matter.[514] Fifthly, and as expressly required by article 5(3)(d),[515] it must acknowledge the source, unless this is impossible in the circumstances.[516] And finally – a point on which the Advocate General claimed academic legal opinion is 'unanimous'[517] – it must not compete with, in the sense of providing a substitute for, the protected work or subject-matter, so as to deprive the rightholder of the essence of his or her copyright.[518] Importantly, fundamental rights, such as freedom of expression, do not alter this conception, and nor do they support the recognition of a general exception of fair use, as stated expressly by the Advocate General himself.[519] Fundamental rights do remain central to the EU quotation exception and other article 5 exceptions to copyright, owing to the requirement that all such exceptions be applied in a manner that reflects a 'fair balance' of those rights.[520]

511 *Pelham* (n 483), Opinion of AG Szpunar, para 64.

512 ibid para 65. (Although note the Advocate General acknowledges here that 'certain amendments [have been] traditionally permitted, particularly translation').

513 ibid.

514 *Spiegel* ((n 483) Opinion of AG Szpunar, paras 41-42.

515 Article 5(3)(d) requires that 'unless this turns out to be impossible, the source [of a quotation], including the author's name, is indicated': Infosoc Directive, art 5(3)(d).

516 *Pelham* (n 483), Opinion of AG Szpunar, para 68.

517 *Spiegel* (n 483), Opinion of AG Szpunar, para 46.

518 ibid.

519 ibid paras 41, 42; *Pelham* (n 483), Opinion of AG Szpunar, para 94.

520 See *Deckmyn* (n 482) paras 26 - 27.

Whilst remaining silent on some aspects of the Advocate General's Opinions, the CJEU did not, in its decisions in *Funke Medien, Pelham* and *Spiegel,* depart significantly from this conception of quotations or the circumstances under which their use is permitted under article 5(3)(d). In each of the three decisions, the Court also adopted the same approach as the Advocate General to the relevance of fundamental rights to the transposition and interpretation of article 5(3)(d) by Member States and their courts.

Decisions in Funke Medien, Pelham *and* Spiegel*: relevance of fundamental rights*

In each of the preliminary references of the *Bundesgerichtshof* in *Funke Medien, Pelham* and *Spiegel,* the CJEU was asked to consider the relevance of fundamental rights, as set out in the Charter of Fundamental Rights of the European Union,[521] to the transposition and interpretation of the provisions of the Infosoc Directive.

In paragraphs replicated (for the large part, exactly) in each of its decisions,[522] the Court held that Member States cannot provide for copyright exceptions or limitations beyond those listed in article 5 of the Infosoc Directive (confirming that this list is exhaustive[523]). The Infosoc Directive aims to safeguard a fair balance between the rights of copyright holders and the rights of users of subject matter,[524] and the mechanisms allowing a fair balance of rights are contained in the Directive itself, in the form of provisions setting out the exclusive rights of copyright holders and exceptions and limitations to those rights,[525] as well as article 5(5), which

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521 [2012] OJ C 326/2 ('CFR').

522 See *Funke Medien* (n 483) paras 56-9; *Spiegel* (n 483) paras 41-8.

523 See *Funke Medien* (n 483) para 56; *Pelham* (n 483) para 58; *Spiegel* (n 483) para 41.

524 *Funke Medien* (n 483) para 57; *Pelham* (n 483) para 59; *Spiegel* (n 483) para 42.

525 *Funke Medien* (n 483) para 58; *Pelham* (n 483) para 60; *Spiegel* (n 483) para 43.

> contributes to fair balance, in that it requires that the exceptions and limitations provided for in Article 5(1) to (4) of the directive be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.[526]

In this context, the Court stated in each of *Funke Medien*, *Pelham* and *Spiegel*, allowing each Member State to derogate from an author's exclusive rights beyond the exceptions and limitations set out in in article 5 of the Infosoc Directive would 'endanger the effectiveness of the harmonisation of copyright and related rights effected by that directive, as well as the objective of legal certainty pursued by it', with consequences for the functioning of the internal market.[527] As inconsistent interpretation of copyright exceptions and limitations would also undermine harmonisation, legal certainty, and – accordingly – the functioning of the internal market, Member States are also required to interpret article 5 exceptions and limitations consistently.[528]

The Court therefore concluded that fundamental rights, such as the fundamental rights of freedom of information and freedom of the press, cannot justify exceptions or limitations to the exclusive rights of authors beyond those enumerated in article 5 of the Infosoc Directive. Nonetheless, as recognised by the Court in *Funke Medien*, in the first instance, and *Funke Medien* and *Spiegel*, in the second, fundamental rights have continued relevance: first, as 'in transposing the exceptions and limitations referred to in Article 5(2) and (3) of [the Infosoc Directive], [Member States must] ensure that they rely on an interpretation of the directive which allows a fair balance to be struck between the various fundamental rights protected by the European Union legal order';[529] and secondly, as 'in striking the balance which is incumbent on a national court between the exclusive rights of an

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526 *Funke Medien* (n 483) para 61; *Pelham* (n 483) para 62; *Spiegel* (n 483) para 46.

527 *Funke Medien* (n 483) para 62; *Pelham* (n 483) para 63; *Spiegel* (n 483) para 47.

528 *Funke Medien* (n 483) para 63; *Pelham* (n 483) para 64; *Spiegel* (n 483) para 48.

529 *Funke Medien* (n 483) para 67.

author … on the one hand, and, on the other, the rights of the users of protected subject matter', a national court must 'rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter'.[530]

Decisions in Funke Medien, Pelham *and* Spiegel*: scope of Member States' discretion in the transposition into national law of article 5(3)(d)*

The preliminary referrals in each of *Funke Medien*, *Pelham* and *Spiegel* also sought clarification on the extent to which certain provisions in articles 2, 3 and 5 of the Infosoc Directive allow discretion for the purposes of their transposition into national law.[531] The Court characterised this in each case as a question asking whether the relevant provisions (including, in *Funke Medien* and *Spiegel*, article 5(3)(d)) constitute measures of full harmonisation.[532]

In each of *Funke Medien*, *Pelham* and *Spiegel*, the Court noted that

> the objective of [the Infosoc Directive] is to harmonise only certain aspects of the law on copyright and related rights, of which a number of provisions also disclose the intention of the EU legislature to grant a degree of discretion to the Member States in the implementation of the directive.[533]

In *Funke Medien* and *Spiegel*, it went on to note that

> it is clear from the case-law of the Court that the scope of the Member States' discretion in the transposition into national law of a particular exception or limitation referred to in Article 5(2) or (3) of [the Infosoc Directive] must be determined on a case-by-case basis, in particular, according to the wording of that provision … , the degree of the harmonisation of the exceptions and limitations intended by the EU

530 ibid para 76; *Spiegel* (n 483) para 59.

531 See *Funke Medien* (n 483) para 14; *Pelham* (n 483) para 24; *Spiegel* (n 483) para 14.

532 *Funke Medien* (n 483) para 29; *Pelham* (n 483) para 77; *Spiegel* (n 483) para 18.

533 *Funke Medien* (n 483) para 34; *Pelham* (n 483) para 82; *Spiegel* (n 483) para 23.

> legislature being based on their impact on the smooth functioning of the internal market, as stated in recital 31 of [the directive].[534]

It is clear from the 'content' of article 5(3)(d), the CJEU held in *Funke Medien* and *Spiegel*, that it does not constitute full harmonisation of the scope of the quotation exception.[535] Rather, it is clear from the wording 'in accordance with fair practice, and to the extent required by the specific purpose', as well as the 'illustrative' words 'for purposes such as criticism or review', that under article 5(3)(d) Member States 'enjoy significant discretion allowing them to strike a balance between the relevant interests'.[536] In this, article 5(3)(d) can be contrasted with article 2(c) of the Infosoc Directive, which, when considered in *Pelham*, was held to be stated in 'unequivocal terms', allowing no latitude in its implementation, and accordingly found to constitute a measure of full harmonisation.[537]

The 'significant discretion' available to Member States in their implementation of article 5(3)(d), however, is 'circumscribed in several regards'.[538] For example, in transposing the exceptions and limitations referred to in articles 5(2) and 5(3) of the Infosoc Directive, Member States must, as noted above, ensure that transposed provisions allow a fair balance of fundamental rights to be struck.[539] Further, whilst safeguarding the effectiveness of the exceptions and limitations provided for in articles 5(2) and 5(3),[540] Member States must also ensure that the discretion enjoyed by them in implementing these exceptions and limitations

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534 *Funke Medien* (n 483) para 40; *Spiegel* (n 483) para 25.

535 *Funke Medien* (n 483) para 42; *Spiegel* (n 483) para 27.

536 *Funke Medien* (n 483) para 43; *Spiegel* (n 483) para 28. This, said the Court, is confirmed by the Infosoc Directive Explanatory Memorandum, which set only minimum conditions for the application of art 5(3)(d) and other provisions, in view of their 'limited economic importance': *Funke Medien* (n 483) para 44; *Spiegel* (n 483) para 29.

537 *Pelham* (n 483) para 84.

538 *Funke Medien* (n 483) para 45; *Spiegel* (n 483) para 30.

539 *Funke Medien* (n 483) para 53; *Spiegel* (n 483) para 38.

540 *Funke Medien* (n 483) para 51; *Spiegel* (n 483) para 36.

is not used so as to 'compromise the objectives of [the Infosoc Directive] that consist', as the CJEU recognised in *Funke Medien* and *Spiegel*, 'in establishing a high level of protection for authors and in ensuring the proper functioning of the internal market'.[541]

Decisions in Funke Medien, Pelham *and* Spiegel*: conception of 'quotations' under article 5(3)(d)*

Of the CJEU's decisions in *Funke Medien*, *Pelham* and *Spiegel*, it is the decisions in *Pelham* and *Spiegel* that include the most fulsome consideration of the meaning of the word 'quotation' under article 5(3)(d) of the Infosoc Directive. In *Pelham*, this consideration was prompted by the referring court's fourth question, asking whether there is a quotation, for the purposes of article 5(3)(d), 'if it is not evident that another person's work or another person's subject matter is being used'.[542] In *Spiegel*, this consideration was prompted by the referring court's fifth question, asking whether there is a quotation, for the purposes of article 5(3)(d), if quoted textual works or parts thereof 'are not inextricably integrated into the new text … but are made available to the public on the Internet by means of a [hyperlink]'.[543]

Answering these questions in *Pelham* and *Spiegel*, respectively, the Court began in each case by stating that

> [s]ince [the Infosoc Directive] gives no definition of the term "quotation", the meaning and scope of that term must, according to the Court's settled case-law …, be determined by considering its usual meaning in everyday language, while also taking into account the legislative context in which it occurs and the purposes of the rules of which it is part.[544]

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541 *Funke Medien* (n 483) para 50; *Spiegel* (n 483) para 35.

542 See *Pelham* (n 483) para 25.

543 See *Spiegel* (n 483) para 75.

544 ibid para 77; *Pelham* (n 483) para 70 (citing *Deckmyn* (n 482) in each case).

As will be seen below, the Court thereby purported to adopt in *Pelham* and *Spiegel* the same approach to the interpretation of the term 'quotation' in article 5(3)(d) Infosoc Directive as was adopted in relation to the interpretation of the term 'parody' in article 5(3)(k) Infosoc Directive in *Deckmyn*.[545]

Usual meaning in everyday language

Taking, first, the 'usual meaning of the word "quotation" in everyday language', the Court held in both *Spiegel* and *Pelham* (with slight variations in *Pelham*, shown in square brackets) as follows:

> As regards the usual meaning of "quotation" in everyday language, it should be noted that the essential characteristics of a quotation are the use, by a user other than the copyright holder, of a work or, more generally, of an extract from [*of*] a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user[, *since the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into "dialogue" with that work*].[546]

In *Pelham*, Advocate General Szpunar's Opinion in that case was cited in support of the notion that the user of a quotation under article 5(3)(d) must intend to enter into a dialogue with the copyright work.[547] In that Opinion, the first 'condition' of a lawful quotation under article 5(3)(d) was said to be that it is made 'for purposes such as criticism or review'[548] - where 'criticism or review' are to be understood as illustrative of the range of allowable purposes. On the basis of both the wording of the provision,[549] and the necessity to

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545 Namely, determining the 'meaning and scope' of the term 'by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part': *Deckmyn* (n 482) para 19.

546 *Pelham* (n 483) para 71; *Spiegel* (n 483) para 78.

547 *Pelham* (n 483) para 71.

548 *Pelham* (n 483), Opinion of AG Szpunar, para 64.

549 ibid.

distinguish between quotation and plagiarism,[550] the Advocate General posited in his Opinion in *Pelham* that there is a requirement, under article 5(3)(d), for 'some kind of dialogue' or 'interaction' between the quotation and the work quoted;[551] a requirement from which the Court inferred that there must be an *intention* on the part of the user of the quotation to create such an interaction.[552] Necessarily, there can be no such interaction if the quotation is 'indissociable' from any content created by its user,[553] meaning, as the Court later confirmed in its decision in *Pelham*, that it must be 'possible to identify the work concerned by the quotation at issue';[554] a requirement interpreted in the context of sampling as a requirement that the sound sample be 'recognisable to the ear'.[555]

In his Opinion in *Spiegel*, Advocate General Szpunar took the requirement of dialogue or interaction further, stating, without elaboration on this point, that for the purposes of article 5(3)(d) there must be a 'close link between the quotation and the work making it'.[556] In its decision in *Spiegel*, the CJEU referred to this statement with approval – albeit, this thesis suggests, re-characterising it by suggesting that 'the user of a protected work wishing to rely on the exception for quotations must … establish a direct and close link between the quoted work and his own reflections'.[557] This close link, the Court said, allows an 'intellectual comparison' to be made 'with the work of another', satisfying the requirement that the relevant quotation is used with the intention to 'enable criticism or review'.[558] It

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550 ibid para 66.

551 ibid para 64.

552 This was taken up by the Court in *Pelham*, saying that a sample may be a quotation provided that i) the sample is recognisable to the ear; and ii) the user 'has the intention of entering into dialogue with the work from which the sample was taken': *Pelham* (n 483) para 72.

553 *Pelham* (n 483), Opinion of AG Szpunar, para 65.

554 *Pelham* (n 483), para 73.

555 ibid paras 37, 39.

556 *Spiegel* (n 483), Opinion of AG Szpunar, para 43.

557 *Spiegel* (n 483) para 79.

558 ibid.

follows, as stated by the CJEU in its decision in *Spiegel*, that 'the quoted work must be secondary in relation to the assertions of [the user]',[559] and the quotation must not compete with the copyright work.[560] Yet, the quoted work need not be inextricably integrated into the quoting subject matter, meaning that, in answer to the referring court's fifth question, 'a quotation may ... be made by including a hyperlink to the quoted work'.[561]

Whilst framed as a discussion of the usual meaning of 'quotation' in everyday language,[562] the CJEU's analysis of the meaning of 'quotation' in *Pelham* and *Spiegel* actually veers almost immediately, through reference to the Opinions of Advocate General Szpunar in those cases,[563] into an assessment of the term's meaning within the context of article 5(3)(d), thereby fusing the analyses of usual meaning and legislative context.

The decisions of the CJEU in *Pelham* and *Spiegel* – in which the 'essential characteristics of a quotation' are purported to be identified, without reference to any sources suggesting that such characteristics do, indeed, go to the essence of the concept as ordinarily understood – leave the Court's reasoning open to criticism that it lacks a persuasive rationale. And, whilst the Court's decisions in *Pelham* and *Spiegel* rely to an extent on Advocate General Szpunar's Opinions in both cases, these Opinions also offer little by way of a foundation for an understanding of the usual meaning of 'quotation' in everyday language. Instead, and despite reference to the conceptual difference between quotation and plagiarism, the Advocate General's Opinion in *Pelham* bases its suggestion that 'a quotation must satisfy a number of conditions in order to be considered lawful' largely on the wording of article

559 ibid.

560 ibid. This also follows from Infosoc Directive, art 5(5), as stated by the Court.

561 ibid para 80.

562 ibid para 78 ('As regards the usual meaning of the word "quotation" in everyday language"), para 81 ('Such a possibility is consistent with the legislative context of which that provision forms a part').

563 *Pelham* (n 483) para 71; *Spiegel* (n 483) para 79.

5(3)(d).[564] That is, it proceeds directly to consider the characteristics of a lawful quotation under article 5(3)(d), without first considering the characteristics of a quotation, *simpliciter*.

Legislative context and purpose

After concluding, in its decision in *Spiegel*, that the wording of article 5(3)(d) Infosoc Directive and 'the concept of "quotation"' allowed for the making of a quotation by hyperlink, the CJEU ostensibly turned to then consider whether this conclusion was 'consistent with the legislative context of which [the term 'quotation' in article 5(3)(d)] forms a part'.[565] The Court answered in the affirmative, on two principal bases. First, that the Infosoc Directive 'concerns the legal protection of copyright in the framework of the internal market with particular emphasis on the information society',[566] and that 'hyperlinks contribute to the sound operation of the internet, which is of particular importance to freedom of expression and of information … as well as to the exchange of opinions and information in that network'.[567] Secondly, that the conclusion was consistent with – or more specifically, 'not undermined by' - the objective of article 5(3)(d), namely,

> to strike a fair balance between the right to freedom of expression of users of a work or other subject matter and the reproduction right conferred on authors and to preclude the exclusive right of reproduction conferred on authors from preventing the publication, by means of quotation accompanied by comments or criticism, of extracts from a work that is already available to the public.[568]

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564 Of the three conditions said to be required of a quotation and relevant to the proceedings, the Advocate General stated that '[t]he first of those conditions is expressly provided for in Article 5(3)(d) of Directive 2001/29', the 'second condition for the lawfulness of a quotation' arises 'in one way or another' from the first, and the third formal requirement is set out by article 5(3)(d): *Pelham* (n 483), Opinion of AG Szpunar, paras 64 – 68.

565 *Spiegel* (n 483) para 81. (As discussed above, in the view of this thesis, some of this assessment had already taken place in the previous step of the analysis).

566 ibid (referring to Infosoc Directive, art 1(1)).

567 ibid.

568 ibid para 82 (citing *Painer*).

The Court noted that, in order to qualify for the article 5(3)(d) quotation exception, use of a work or subject-matter made available by hyperlink must nonetheless not extend 'beyond the confines of what is necessary to achieve the informatory purpose of that particular quotation'.[569]

Conclusions

The decisions in *Painer*, *Funke Medien*, *Pelham* and *Spiegel* leave us with an understanding of quotation, as an autonomous concept within article 5(3)(d) Infosoc Directive, as requiring those 'essential characteristics' outlined in *Pelham* and *Spiegel* – namely, 'the use, by a user other than the copyright holder, of a work or, more generally, of an extract from [of] a work',[570] where that use is 'for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user'.[571] The latter of these two characteristics is consistent with the expectation, as expressed in *Painer*, that quotations under article 5(3)(d) will be 'accompanied by comments or criticism'.[572] It is also consistent with comments by the CJEU in *Pelham* and *Spiegel*, respectively, that it must be possible to identify the copyright work concerned by the quotation at issue,[573] and that there must be a direct and close link between the quoted work and the user's reflections.[574]

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569 ibid para 83 (because of the express requirements of fair practice and that use is to the extent required by the specific purpose). See also *Pelham* (n 483) para 69.

570 *Pelham* (n 483) para 71; *Spiegel* (n 483) para 78.

571 ibid.

572 *Painer* (n 489) para 120.

573 *Pelham* (n 483) para 74.

574 *Spiegel* (n 483) para 79.

Whilst the decision in *Deckmyn* was referenced on only a small number of occasions in the CJEU's decisions in *Funke Medien, Pelham* and *Spiegel*,[575] the Court did purport to adopt this method in those decisions – specifically, by purporting in *Pelham* and *Spiegel* to determine the meaning and scope of the term 'quotation' by 'considering its usual meaning in everyday language, while also taking into account the legislative context in which it occurs and the purposes of the rules of which it is part'.[576] However, as described, the decisions in *Pelham* and *Spiegel* offer little analysis of the usual meaning of 'quotation' in everyday language, and instead identify the 'essential characteristics' of a quotation with reference only to the Advocate General's Opinions as to the 'conditions' necessary for a lawful quotation under article 5(3)(d),[577] which are, in turn, largely based on the wording of the provision[578] and only to a degree on an analysis of the difference between the concepts of quotation and plagiarism, as ordinarily understood.[579]

Further, in neither *Pelham* nor *Funke Medien* did the CJEU expressly consider the legislative context of the term 'quotation' or the purpose of the Infosoc Directive as a whole. As noted above,[580] some consideration of legislative context of the term 'quotation' did occur in *Pelham*, albeit in the guise of identifying its 'usual meaning in everyday language'.

Lastly, the 'essential characteristics' of quotation as identified by the CJEU in *Pelham* and *Spiegel* leave some aspects of the concept undetermined. For example (and despite this matter having been considered by the Advocate General[581]), the Court's position on the

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575 See *Funke Medien* (n 483) paras 40, 46, 51; *Pelham* (n 483) para 28; *Spiegel* (n 483) paras 21, 25, 36, 65, 91.

576 *Pelham* (n 483) paras 70 – 1; *Spiegel* (n 483) paras 77 – 8 (citing *Deckmyn*).

577 *Pelham* (n 483) paras 68 – 73; *Spiegel* (n 483) para 79.

578 *Pelham* (n 483), Opinion of AG Szpunar, para 64; *Spiegel* (n 483), Opinion of AG Szpunar, para 45.

579 *Pelham* (n 483), Opinion of AG Szpunar, para 66.

580 See text to n 562 – n 563. See also text to n 564.

581 See *Pelham* (n 483), Opinion of AG Szpunar, para 64.

degree of formal fidelity that the extract of the copyright work (or whole of the work), as used, must bear to the original remains unclear.

It is, accordingly, necessary to return to the CJEU's decision in *Deckmyn* itself. As will be seen, a return to the first principles of *Deckmyn* has the advantage of first, providing a rationale for the CJEU's conclusions as to the meaning of the term 'quotation' in its three 2019 decisions, particularly *Pelham* and *Spiegel*, and secondly, providing a basis from which to draw conclusions about those aspects of the concept of quotation that remain unaddressed by the CJEU even following those decisions.

5. LESSONS FROM THE EU: THE DECISION IN *DECKMYN*

In its 2014 decision in Case C-201/13 *Deckmyn and Vrijheidsfonds VZW v Vandersteen and Others*,[582] the CJEU considered the 'caricature, parody or pastiche' exception in article 5(3)(k) of the Infosoc Directive,[583] and, in particular, the concept of parody central to this provision.[584] Notwithstanding the important differences between arts 5(3)(d) and 5(3)(k) of the Infosoc Directive,[585] the provisions evidence a strong correspondence, as described below. Accordingly, it is appropriate, and indeed necessary as a matter of EU law, to adopt the same interpretative method in relation to article 5(3)(d) and its central concept as to article 5(3)(k) and its central concept. As an aspect of this, it is also appropriate to adopt the definitional approach used by Advocate General Cruz Villalón in *Deckmyn*, and accordingly consult dictionary definitions of 'quotation' (and its equivalents) in multiple languages of the EU to discern common features.[586] The resulting interpretation is of the concept of quotation, within article 5(3)(d) Infosoc Directive, as a reproduction of material from another source, not necessarily 'without modification', which is identified by its user as having been reproduced, and which is used for a purpose of criticism, or review, or an analogous purpose.

582 [2014] OJ C 189 ('*Deckmyn*').

583 Article 5(3)(k) states that Member States may provide a copyright exception in national law for 'use for the purpose of caricature, parody or pastiche': Infosoc Directive, art 5(3)(k).

584 Note that it is unclear whether the Court's remarks on the characteristics of parody are to be read as applying only to 'parody', or to 'caricature, parody or pastiche' as a 'single, overarching concept': Jonathan Griffiths, 'Fair Dealing after *Deckmyn*—the United Kingdom's Defence for Caricature, Parody or Pastiche' in Megan Richardson and Sam Ricketson (eds), *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar 2017) 64, 83.

585 Principally, a difference in subject-matter, but also in the structure of the provisions: in art 5(3)(k) of the Infosoc Directive, 'parody' is expressed as a purpose of use, whereas in art 5(3)(d) of the Directive, 'quotation' is not a purpose, but an undefined 'thing' used, for a purpose 'such as criticism or review'. Notwithstanding this, in *Deckmyn* the concept of parody was treated not as a purpose of use, but as the result of use, with 'essential characteristics' as follows: 'first, to evoke an existing work while being noticeably different from it'; and 'secondly, to constitute an expression of humour or mockery', per *Deckmyn* (n 582) para 20.

586 See *Deckmyn* (n 582) Opinion of AG Cruz Villalón, paras 47 – 70.

Whilst the application of this approach accordingly results in an interpretation of article 5(3)(d), and to the term 'quotation' within it, that is entirely consistent with that outlined in the CJEU's 2019 decisions in Case C-476-17 *Pelham and Others v Ralf Hütter and Florian Schneider-Esleben*,[587] and Case C-516/17 *Spiegel Online GmbH v Volker Beck*,[588] it has the advantage of providing a cohesive rationale for findings about, in particular, the usual meaning in everyday language of 'quotation'. Further, it allows conclusions to be drawn about those aspects of the concept of quotation that remain unaddressed by the CJEU even following those decisions.

Aside from being required as a matter of law, the interpretative – and more specifically, the definitional, approach – adopted in *Deckmyn* is to be preferred in principle to alternative approaches to the interpretation of the copyright quotation exception, for the reasons outlined below.

Methodological soundness of the interpretative and definitional approaches in *Deckmyn*

The interpretative approach adopted in the CJEU's decision in *Deckmyn* entailed identification of first, the 'usual meaning in everyday language' of, in that case, 'parody',[589]

587 [2019] OJ C 347 ('*Pelham*').

588 [2019] OJ C 392 ('*Spiegel*'). This is perhaps unsurprising, given that the CJEU purported to adopt the interpretative approach of *Deckmyn* in each of these decisions: see ibid paras 28, 70; *Spiegel* para 65.

589 See *Deckmyn* (n 582) para 20.

with secondary consideration given to whether that meaning was modified by the legislative context in which it appeared and the purpose of that legislation.[590]

This approach was considered, in *Deckmyn*, to be in accordance with what 'the Court [had] consistently held' was correct as a matter of EU law.[591] Following the decision in *Deckmyn*, and the decisions in Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland*,[592] *Pelham*, and *Spiegel*, this has been confirmed as the correct approach to be applied, as a matter of law, to the provisions of article 5 Infosoc Directive and the terms within these.

Beyond this, both the interpretative and, more specifically, the definitional approach adopted in *Deckmyn* are methodologically sound, as this chapter seeks to demonstrate. Although some consideration of the context in which a term appears is necessary even for an otherwise isolated analysis of usual meaning in everyday language,[593] an approach pursuant to which the usual meaning – or 'ordinary meaning'[594] – of 'quotation' is considered, prior to then taking into account legislative context and purpose, is to be preferred to any available alternative. Further, and despite the challenges attendant upon their use, dictionaries are to be preferred as to best means available of identifying ordinary meaning.

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590 ibid paras 20 – 35.

591 ibid para 19.

592 [2019] OJ C 382 ('*Funke Medien*').

593 For example, consideration of the context in which the term 'quotation' appears in copyright law immediately indicates that some possible meanings of 'quotation'- namely those which relate to the sale of stock or commodities, or the stated price for a particular job - may be disregarded from the outset.

594 This chapter proceeds on the basis that 'usual meaning in everyday language' represents the same standard as that of 'ordinary meaning'. This has precedent in that the CJEU has itself used 'ordinary meaning', 'meaning … in ordinary language' and 'normal meaning' as apparent equivalents of 'usual meaning in everyday language': see Case 349/85 *Denmark v Commission* [1988] EU: C:1988:34 ('ordinary meaning' at para 12, 'meaning … in ordinary language' at para 13 and 'normal meaning' at para 16).

The role and relevance of ordinary meaning

Whilst the ordinary meaning of a term can be, and usually is, considered entirely in isolation from its legal meaning, the same cannot be said in reverse. The ordinary meaning doctrine has been characterized as the 'most fundamental principle of legal interpretation',[595] and ordinary meaning is agreed to be the departure point for the task of statutory interpretation in the jurisdictions with which this thesis is concerned.[596] As Slocum describes with reference to US jurisprudence, there is uniform judicial acceptance of the ordinary meaning doctrine, notwithstanding that judges subscribe to markedly different overall approaches to statutory interpretation.[597]

Courts in diverse jurisdictions, then, accept that the ordinary meaning of a statutory term is a fundamental element of its interpretation in a legal context. Yet, various aspects of ordinary meaning provoke disagreement. One is the degree to which considerations of statutory context, object and purpose – also considerations in the overall determination of

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595 Brian Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (University of Chicago Press 2015).

596 For example, the historically dominant method of statutory interpretation in the UK is that of literal interpretation. This method requires consideration of the wording of the statute: if the words used are clear, precise, and unambiguous, then the construing court must give effect to the ordinary meanings of those words: T I McCleod, *Principles of Statutory Interpretation* (B Rose 1984) 1-08. As discussed, in EU law the departure point for determining the meaning of an undefined term is the 'usual meaning in everyday language' of that term: see *Deckmyn* (n 582) para 19. It is noted that the interpretative standard has changed from '[t]he general context in which [terms] are used and their usual meaning in everyday language' (see *Denmark* (n 594) para 9), which suggests that the 'usual meaning in everyday language' might not be the starting point, to 'usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part' (see *Deckmyn* (n 582) para 19) which suggests that it is. Finally, as regards the interpretation of treaties, article 31(1) of the Vienna Convention provides 'ordinary meaning' as the starting point for interpretation: Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 UNTS 331, entered into force 27 January 1980 ('Vienna Convention'), art 31(1).

597 Slocum (n 595) 22, 100. See also Lawrence Solan and Tammy Gales, 'Finding ordinary meaning in law: The judge, the dictionary or the corpus?' (2016) 1 Intl J Legal Discourse 253, 254.

legal meaning[598] – are properly intertwined with judicial determinations of ordinary meaning. That is, a question arises as to whether the task of statutory interpretation is to be approached as a 'holistic' one, in which considerations of ordinary meaning and statutory context, object and purpose are not easily disunited,[599] or whether, instead, identification of ordinary meaning may be viewed as a preliminary step that is to some degree severable from subsequent (yet potentially determinative[600]) considerations of context, object and purpose. The answer to this question may, of course, be determined by the nature and extent of recognised judicial interpretative obligations in a particular jurisdiction.[601]

As a matter of principle, this thesis contends that the ordinary meaning of terms used in statute can and should be identified as a first step in the 'sequential process' of statutory interpretation,[602] even if this meaning is merely presumptive and may be overcome by other considerations in the ultimate determination of legal meaning. A central reason for this

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598 For example, in the interpretative approach in EU law, meaning is determined by considering, in respect of a term, its 'usual meaning in everyday language, *while also taking into account the context in which it occurs and the purposes of the rules of which it is part*': see *Deckmyn* (n 582) para 19 (emphasis added). In international law, art 31(1) of the Vienna Convention states that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*': Vienna Convention, art 31(1) (emphasis added).

599 In support of this approach, Isabelle Van Damme states that treaty interpretation is a 'holistic inquiry that takes account of the objective of the treaty (provision), its immediate and broader context and other elements that are specific to the interpretation of a written text with authority as law': Isabelle Van Damme, 'On "Good Faith Use of Dictionary in the Search of Ordinary Meaning under the WTO Dispute Settlement Understanding"—A Reply to Professor Chang-Fa Lo' (2011) 2 Journal of International Dispute Settlement 231, 233.

600 Slocum, for example, explains that the ordinary meaning doctrine represents the 'presumptive meaning of a legal text' and 'can be overcome by other considerations, including ones relating to legal concerns or evidence from an examination of the broader context': Slocum (n 595) 22.

601 For example, the interpretative standard in EU law ('usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part' – see *Deckmyn* (n 582) para 19) suggests that usual meaning is to be given pre-eminence, with context and purposes potentially modifying factors, whereas art 31(1) of the Vienna Convention ('the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' – see Vienna Convention, art 31(1)) perhaps suggests a more global assessment.

602 Slocum contends that 'a significant justification for the ordinary meaning doctrine concerns the sequential nature of judicial interpretation. A sequential process where ordinary meaning is first determined and then accepted as the legal meaning of the text or, conversely, rejected in favor of an unordinary meaning is preferable to an alternative where the communicative meaning or legal meaning is decided without considering the ordinary meaning of the text': Slocum (n 595) 99.

conclusion is that 'a presumption of ordinary meaning advances the principle that legal texts should be interpreted according to standards of communication that give texts readily discernible meanings'.[603] That is, as far as possible, 'a provision's meaning should be discernible based on a relatively limited consideration of context',[604] providing 'fair notice' to the public as to statutory allocation of liability (even if individuals cannot be expected to read relevant statutory provisions before they engage in conduct).[605] In some areas of general and direct application, such as criminal law, the notice imperative is of such force that 'a strong presumption may exist that the ordinary meaning is the legal meaning';[606] copyright law may not be such an area, yet neither is it, to the contrary, applicable only to a 'highly specialized … group'[607] or 'highly sophisticated parties, such as agencies, with a high degree of knowledge of the legislative process'.[608] Rather, dealings with copyright materials – and in particular, uses of potential 'quotations' from copyright materials – are activities in which a broad spectrum of the public, ever-increasingly,[609] engages.

Accordingly, and acknowledging that some of the law with which this thesis is concerned is addressed to states rather than individuals,[610] it is important that the meaning of 'quotation' in copyright law reflects, as much as possible, the ordinary meaning of the term.

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603 ibid 96-7.

604 ibid 97. This is, of course, a fundamental rule of law principle: Jeremy Waldron, 'The Rule of Law', The Stanford Encyclopedia of Philosophy (Fall edn, 2023), <https://plato.stanford.edu/archives/fall2023/entries/rule-of-law/>.

605 ibid.

606 ibid 100.

607 ibid 97.

608 ibid 100 (contrasting those laws, such as criminal provisions, where the 'presumption of ordinary meaning as legal meaning should be strongest', with those, concerning 'highly sophisticated parties, such as agencies', where the presumption is 'weaker').

609 See discussion at text to n 313 - 325.

610 Namely, the provisions of the Berne Convention and of the Infosoc Directive.

This necessitates a preliminary interpretative step in which the ordinary meaning is identified – absent, to a large degree,[611] considerations of statutory context, object and purpose.

In their discussion of the ordinary meaning of 'quotation' as used in article 10(1) of the Berne Convention, Aplin and Bently encourage, instead, an approach in which considerations of ordinary meaning, context, object and purpose are fused, such that a 'threshold concept'[612] of quotation is relied upon to accommodate considerations of fairness[613] – even where such considerations do not form part of the concept as ordinarily understood.[614] Whilst acknowledging that 'ordinary meaning is the prescribed starting point for interpretation of Article 10(1)' (citing article 31 of the Vienna Convention),[615] the authors go on to state that '[t]he question of interpretation posed by Article 10(1) is what is the ordinary meaning of quotation across the cultural fields to which that provision applies'.[616] This is the foundation of their argument that the term 'quotation', as used in article 10(1), must be understood as it applies in 'a variety of cultural contexts'.[617] It reveals that, even at the point of identifying the ordinary meaning of 'quotation', the statutory context in which the term is used is afforded greater significance than this thesis suggests is appropriate.

Indeed, as Aplin and Bently state:

> We see the process of determining legal meaning as involving a necessary blending of ordinary meaning and legal inference, often carried out intuitively and through iterative processes rather than a two-stage one … In the case of "quotation", there are initial contextual cues from the [Berne] Convention generally, and the structure of Article 10(1), that exclude certain (dictionary) meanings of quotation, and then certain

611 As discussed at text to n 593, the identification of ordinary meaning is not entirely acontextual - some regard for context is necessary, even at the first step of the sequential process adopted.

612 Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use* (Cambridge University Press 2020) 89.

613 Derived from the 'fair practice' criterion in Berne Convention, art 10(1).

614 Aplin and Bently (n 612) 89.

615 ibid.

616 ibid 88 (emphasis added).

617 ibid.

> other cues than enable a tribunal to select between different plausible interpretations.[618]

The impact of this approach is seen most clearly in the suggestion that interpretation of the concept of quotation should, in accordance with 'policy logic', 'be broad enough to encompass *less* intrusive or *less* egregious acts of reuse', 'even if ordinary use of the term suggested otherwise'.[619] The fact that this is to occur (it is understood) without a preliminary statement of the ordinary characteristics of the concept, which are then reconsidered in light of – stated – policy concerns, distinguishes Aplin and Bently's approach from that advanced here. With reference to the 'fairness' standard mandated by article 10(1) of the Berne Convention,[620] the authors further state that:

> where a use is subject to an open-textured 'fairness' analysis, even if the "ordinary meaning" suggested similar factors might be relevant to assessing whether the act counted as "quotation", it would seem unnecessary and potentially duplicative for similar considerations to inform a threshold analysis of whether an activity fell within that concept. Rather, for legal purposes, the threshold concept should be formulated in a free and open-ended manner.[621]

Accordingly, the authors suggest that the threshold concept of quotation in article 10(1) should be interpreted with consciousness of the remaining requirements of the provision, such that matters of fairness raised by the ordinary meaning of 'quotation' should be deferred for substantive consideration at the point at which the fairness standard is applied. This has the effect, as the authors state, that the question of whether a 'misquotation' is properly a 'quotation' (whether as a matter of ordinary or legal meaning) need not be resolved, in the knowledge that misquotation might 'make a quotation unfair' and therefore

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618 ibid (fn 24).

619 ibid 89.

620 It will be recalled that art 10(1) of the Berne Convention requires the making of quotations to be 'compatible with fair practice': Berne Convention, art 10(1).

621 Aplin and Bently (n 612) 89.

be excluded in any case from the scope of article 10(1) through application of the fairness standard.[622] (Note that if a misquotation was *not* considered unfair under the provision, the question regarding its proper characterisation as a 'quotation' (or not) could not be avoided, unless it was otherwise excluded from the scope of article 10(1)).[623]

In response to Aplin and Bently's suggestion, this thesis contends that if particular use is liable to be excluded from the scope of article 10(1) both on the basis that it is a misquotation – assuming, for argument's sake, that misquotations are not properly understood as 'quotations' for the purposes of the provision – and on the basis that it is unfair, then the 'duplication' of considering both matters is just as readily avoided through careful refinement of the concept of quotation as through application of the fairness standard. Yet, the former is preferable, as the alternative – leaving the threshold concept of quotation 'free and openended' and allowing refinement to occur through the fairness analysis – may extend the concept denoted by 'quotation' (a term that is used relatively frequently by the general public[624] and does have discernible ordinary meanings[625]) unrecognisably far beyond what is ordinarily understood as its scope. Further, as under article 10(1) the fairness of the relevant conduct can only be assessed *in light of the nature of that conduct*,[626] the nature of

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622 ibid (fn 27).

623 That is, by one of the other conditions for application of the provision, namely i) that the copyright work has already been made available to the public; and ii) that the extent of the quotation does not exceed that justified by the purpose: Berne Convention, art 10(1).

624 'Quotation' does not appear in the English Corpora word frequency list, based on the Corpus of Contemporary American English, of the 60,000 most frequently used English language 'lemmas' – see 'Word Frequency Data' (*Word Frequency*) <www.wordfrequency.info/samples.asp> accessed 4 October 2022. However, its frequency is ranked at 2863, indicating that it is less frequently used than 'mother' (at 318461), 'privacy' (at 29094) and, indeed, 'citation' (at 4307), but more frequently used than 'piston' (at 919), 'arborist' (at 154) and 'paracetamol' (at 150): 'Corpus of Contemporary American English' (*English Corpora*) <www.english-corpora.org/coca/> accessed 4 October 2022. It is acknowledged that this data comes from an analysis of American English, however, suggested that similar observations would be made in English used in the UK and more broadly.

625 As distinct from those terms which are entirely creatures of law, and the ordinary meaning of which cannot be understood without reference to legal meaning – for example, 'lease', or 'easement'.

626 Art 10(1) provides that '[i]t shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that *their making* is compatible with fair practice,

that conduct – whether it is or is not a 'quotation' for the purposes of the provision – must be understood before there is consideration of whether it is fair.

Accordingly, this thesis suggests as appropriate an interpretative approach of two stages, in which, first, the ordinary meaning of 'quotation' is identified and secondly, statutory context, object and purpose are considered, with the possibility that these considerations will modify or displace the previously identified ordinary meaning as the presumptive legal meaning of the term. Despite the challenges of identifying a singular ordinary meaning of 'quotation' in a multicultural union with 24 official languages,[627] it is appropriate that such a two-stage approach is applied to the interpretation of 'quotation' in the EU copyright quotation exception, as was done in *Deckmyn*.[628]

The dictionary as determinant of ordinary meaning

It is no accident that, in offering an alternative descriptor for the 'customary meaning' of a term, Robinson chooses 'dictionary meaning'.[629] The most reliable means of establishing the meaning customarily ascribed to a term at a given time is collating and analysing large-scale evidence of usage in a variety of contexts (described by lexicographers as an evidentiary

and *their extent* does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries': Berne Convention, art 10(1) (emphasis added). The wording of the provision thus indicates that the requirements of both fairness and proportionality are to be considered once the presence of a quotation has been demonstrated. Stated differently, it is not possible to determine whether the 'making' of quotations is 'compatible with fair practice', or the 'extent' of quotations is justified by the purpose for which they are made, without first determining that 'quotations' have indeed been 'made' (and, indeed, for which purpose).

627 Council Regulation (EEC) 1958/1 determining the languages to be used by the European Economic Community [1958] OJ P 017, art 1.

628 *Deckmyn* (n 582) para 20 – 35.

629 Richard Robinson, *Definition* (Oxford University Press 1963) 19.

'corpus'[630]) – and this, indeed, is what dictionary editors do, with the assistance of modern software tools that are fit for purpose.[631]

Reliance on dictionary definitions does have limitations: first, the translation of real-world observations as to meaning into dictionary definition format is done by the editorial team of a particular dictionary,[632] which may result – and indeed, often results – in (sometimes seemingly irreconcilable) variation as between different dictionaries' definitions of the same term.[633] This highlights that a given dictionary is a necessary, and highly functional, but indirect proxy for evidence of use – although some direct evidence of use, incidentally in the form of quotations, is also frequently provided in dictionaries.[634] When seeking the meaning of a particular term, it also necessitates consultation of the most 'authoritative' dictionaries – namely, those which may be relied upon to rigorously and impartially collect and analyse up-to-date evidence of ordinary use, and translate findings into the format of dictionary definitions[635] – whilst remaining open to evidence-based contradictory insights that may be gained from other dictionaries.

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630 'How we create language content' (*OxfordLanguages* 2024) <https://languages.oup.com/about-us/how-we-create-language-content/> accessed 29 February 2024.

631 For example, the Sketch Engine software used by the *OED* to analyse the Oxford English Corpus: see 'The Oxford English Corpus' (*Sketch Engine*) <https://www.sketchengine.eu/oxford-english-corpus/> accessed 29 February 2024. In his empirical study of the extent to which dictionaries and corpora capture ordinary meaning, Tobia found that dictionaries and corpora tend to give divergent meanings. See: Kevin Tobia, 'Testing Ordinary Meaning' (2020) 134(2) Harvard Law Review 726. This can perhaps be explained by the fact dictionary results are mediated through a highly trained interpreter, namely a dictionary editor.

632 'How we create language content' (n 630).

633 Or even a single dictionary's definition of a term - see, for example, the definition of 'multi' in the *Merriam Webster* online: 'multi-' (combining form) (*Merriam-Webster.com Dictionary* 2024) <https://www.merriam-webster.com/dictionary/multi-> accessed 28 February 2024.

634 By way of example, direct evidence of the use of the term 'quotation' is provided in the *OED* by way of the quotation 'I planned to sprinkle the magic book liberally with quotations from Faulkner': 'quotation, n' (*OED Online*, July 2023) <https://www.oed.com/dictionary/quotation_n?tab=meaning_and_use#27196917> accessed 1 March 2024.

635 See Pius ten Hacken, 'In What sense is the OED the definitive record of the English language?' in Ruth Fjeld, and Julie Torjusen, (eds), Proceedings of the 15th EURALEX International Congress (Department of Linguistics and Scandinavian Studies, University of Oslo, 2012) 835.

Secondly, in the process undertaken by dictionaries, some nuance is, necessarily, lost: the dictionary format requires that the concepts invoked by a particular term are reduced to a set of written descriptions, at a high level of generality (although again, these descriptions are often supplemented by several examples of the term in use). These written descriptions are constituted, naturally, by words which may themselves require definition.[636] Further, whilst dictionaries do provide a limited number of cross-references to related concepts,[637] and whilst simply through their alphabetical organization, dictionaries can point a reader in the direction of terms (typically with the same prefix), and thus concepts, which neighbour one another,[638] the relationship between a particular concept and other, neighbouring, concepts cannot hope to be exhaustively described, and can be explored only partially, in dictionary definitions.

Nonetheless, the charge of oversimplification is more persuasive in the case of phrases (by way of example, Aplin and Bently refer in a different context to a WTO Panel Report in which the three constituent parts of the phrase 'certain special cases' in article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights[639] were each defined individually by reference to *The New Shorter Oxford English Dictionary*[640]), in which each part of the phrase necessarily modifies the meaning of the others, than in the case of a singular word – particularly where its referent is a noun, as is the case with 'quotation'.

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636 'C]iting to dictionaries creates a sort of optical illusion, conveying the existence of certainty – or "plainness" – when appearance may be all there is. Lexicographers define words with words. Words in the definition are defined by more words, as are those words. The trail may be endless; sometimes, it is circular. Using a dictionary definition simply pushes the problem back.': A Raymond Randolph, 'Dictionaries, Plain Meaning, and Context in Statutory Interpretation ' (1994) 17 Harv J L & Pub Pol'y 71, 72.

637 For example, 'misquotation', 'self-quotation', 'quotation mark', 'block quotation': see 'quotation, n' (*OED Online*) (n 634)

638 So-called 'nearby entries', such as, in the case of 'quotation', 'quotational', 'quotative' and 'quotativeness': ibid.

639 Annex 1C of the Marrakesh Agreement Establishing the World Trade Organisation (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299 ('TRIPs Agreement').

640 Aplin and Bently (n 612) 87 (fn 17), referring to WTO Panel Report, United States – Section 110(5) of the Copyright Act 1976, (15 June 2000), WT/DS/ 160/R, [6.108]–[6.110] (defining 'certain', 'special' and 'cases' by referring to The New Shorter Oxford English Dictionary (Oxford 1993)).

And, despite only limited reference to related concepts in dictionaries themselves, the concept denoted by a term can be developed by supplementing analysis of dictionaries with examination of those concepts which are known to be, or are possibly, related. In the case of quotation these include, notably, the concept of plagiarism, which Kirner-Ludwig and Zimmerman term the 'counter-phenomenon to quoting and citing', [641] and which is distinguished from quotation by other sources[642] as well as by the dictionary definitions of the

641 Monika Kirner-Ludwig and Iris Zimmerman, 'Quoting and plagiarising-concepts of both now and then?' in Jenny Arendholz, Wolfram Bublitz and Monika Kirner-Ludwig, *The Pragmatics of Quoting Now and Then* (De Gruyter Mouton 2015) 291, 292 – 293.

642 *The Oxford Companion to the English Language* also distinguishes plagiarism from quotation, and makes clear that the aspect of plagiarism setting it apart from acts of quotation is, precisely, the absence of source identification, stating that '[i]f sources are not identified by such means as [those conventionally used when identifying quotations], and the borrowed materials is [sic] substantial and presented explicitly or implicitly as a writer's own, the person who does so may have engaged in plagiarism, the theft of someone else's words: Tom McArthur, Jacqueline Lam-McArthur, and Lise Fontaine (eds), *The Oxford Companion to the English Language* (2nd ed, OUP 2018) 55.

respective terms.[643] Related concepts also include those of allusion,[644] parody,[645] pastiche,[646] and citation,[647] amongst others.[648]

Whilst consideration of sources other than dictionaries, such as academic and other critical texts (and the *use* of the term 'quotation' therein), has been used to support an expansive reading of the copyright quotation exception,[649] this thesis contends that, in

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643 A relationship of mutual exclusion is borne out by respective dictionary definitions of the terms 'quotation' and 'plagiarism'. The *OED*, for example, defines 'plagiarism' by reference to 'the action or practice of taking someone else's work, idea, etc., *and passing it off as one's own*'; to 'plagiarize' is, according to one meaning, to 'copy (literary work or ideas) *improperly or without acknowledgement*' (emphasis added): plagiarism, n' (*OED Online*, June 2023) <https://www.oed.com/dictionary/plagiarism_n?tab=meaning_and_use#29927356> accessed 2 March 2024; 'plagiarize, v' (*OED Online*, June 2023) <https://www.oed.com/dictionary/plagiarize_v?tab=meaning_and_use> accessed 2 March 2024 (emphasis added). Recall that the action of 'quotation', by contrast, is defined in *OED* as [t]he action or an act of quoting', where the verb 'to quote' means '[t]o reproduce or repeat a passage from (a book, author, etc.); to repeat a statement by (a person)': 'quotation, n' (*OED Online*) (n 634).

644 The *OED* defines 'allusion' as '[a]n implied, indirect, or passing reference to a person or thing; (in later use more widely) any reference to someone or something. Also: the action or process of making such a reference': 'allusion, n' (*OED Online*, July 2023) < https://www.oed.com/dictionary/allusion_n?tab=meaning_and_use&show-all-quotations=true> accessed 2 March 2024.

645 The *OED* defines 'parody', as a noun, as '[a] literary composition modelled on and imitating another work, *esp.* a composition in which the characteristic style and themes of a particular author or genre are satirized by being applied to inappropriate or unlikely subjects, or are otherwise exaggerated for comic effect. In later use extended to similar imitations in other artistic fields, as music, painting, film, etc': 'parody, n' (*OED Online*, July 2023) < https://www.oed.com/dictionary/parody_n2?tab=meaning_and_use> accessed 3 March 2024.

646 The OED definition of 'pastiche', is '1a. A novel, poem, painting, etc., incorporating several different styles, or made up of parts drawn from a variety of sources. b. A musical composition incorporating different styles; a medley. 2a. A work, esp. of literature, created in the style of someone or something else; a work that humorously exaggerates or parodies a particular style': pastiche, n' (*OED Online*, July 2023) <https://www.oed.com/dictionary/pastiche_n?tab=meaning_and_use#31710475> accessed 3 March 2024. This definition is also referred to in Hudson's treatment of the concept denoted by this term – see Emily Hudson, 'The pastiche exception in copyright law: a case of mashed-up drafting?' (2017) 4 *Intellectual Property Quarterly* 346, 349.

647 The OED entry for 'citation' defines this term, relevantly, as: '[t]he action or an act of quoting or referring to a passage, text, author, legal precedent, etc., esp. as an authority or in support of an argument; quotation'; '[a] cited passage, a quotation'; and '[a] reference providing information about where a particular quotation, text, etc., is to be found; a bibliographical reference'. More generally, 'citation' may be '[t]he action or an act of mentioning or referring to something, or a series of things; [a] mention, enumeration': 'citation, n' (*OED Online*, July 2023) <https://www.oed.com/dictionary/citation_n?tab=meaning_and_use#9250693> accessed 3 March 2024.

648 Including indirect quotations, paraphrases and summaries, and misquotations.

649 See Lionel Bently, 'The Law of Quotation' (Cambridge Art History Research Seminar, Cambridge, 8 March 2017); Lionel Bently and Tanya Aplin, 'Whatever Became of Global, Mandatory, Fair Use? A Case Study in Dysfunctional Pluralism' in Susy Frankel (ed), *Is Intellectual Property Pluralism*

contrast with authoritative dictionaries such as the *Oxford English Dictionary*,[650] these sources neither reflect, nor purport to reflect, the ordinary meaning of 'quotation' in any language. Rather, they provide singular instances of use of the term 'quotation', in the often-specialised vocabulary of particular fields.[651] As such, they represent evidence of the kind that might form part of a lexicographer's corpus,[652] and thus inform analysis of ordinary meaning, as included in a dictionary, but cannot alone, in the case of a term such as 'quotation',[653] provide reliable evidence of ordinary usage.

Functional? (Edward Elgar 2019); Tanya Aplin and Lionel Bently, 'Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use' in Ng-Loy Wee Loon, Haochen Sun and Shyam Balganesh (eds) *Comparative Aspects of Limitations and Exceptions in Copyright Law* (Cambridge University Press 2018); Aplin and Bently (n 612).

650 The *Oxford English Dictionary* consciously aims to reflect the meaning of terms at a particular moment in time (namely, the present) and in the historical period leading up to that moment: see, further, the discussion of 'sinchronic' and 'diachronic' dictionaries in John Simpson, 'The *Oxford English Dictionary* and Its Philosophy' (2013) 26(3) Philosophy & Technology 341, 341. As a consciously 'descriptivist' dictionary, it may be distinguished from, notably, the *Dictionnaire de l'Académie française*, which is 'more of a prescriptivist dictionary, recording the ways in which words *should* be used': Joanna Rubery, 'Can the Académie française Stop the Rise of Anglicisms in French?' (*Oxford Dictionaries*, 20 March 2014) <www.blog.oxforddictionaries.com/2014/03/20/academie-francaise/> accessed 30 July 2018.

651 For example, in Aplin and Bently's discussion on the nature of quotation, examples are drawn from academic sources, and sources of artistic, literary, musical and film criticism (such as J Peter Burkholder, *All Made of Tunes: Charles Ives and the Uses of Musical Borrowing* (Yale University Press 1995); Anne Nesbet, 'Inanimations: Snow White and Ivan the Terrible' (1997) 50(4) Film Quarterly 20; Mikhail Iampolski and Harsha Ram (tr), *The Memory of Tiresias: Intertextuality and Film* (University of California Press 1998); Ingeborg Hoesterey, *Pastiche: Cultural Memory in Art, Film, Literature* (Indiana University Press 2001); Remei Capdevila-Werblaning, *Can Buildings Quote?* (2011) 69 Journal of Aesthetics and Art Criticism 115): see Bently and Aplin, 'Whatever Became of Global, Mandatory, Fair Use? A Case Study in Dysfunctional Pluralism' (n 649); Aplin and Bently, 'Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use' (n 649) 5-7); Aplin and Bently, *Global Mandatory Fair Use* (n 612) 115-21.

652 Although they may tend too far towards the 'literary', or 'technical', to qualify for consideration, even in this context. As explained in the second edition of the *Oxford English Dictionary*, the English language contains a 'nucleus or central mass' of 'common words', which are 'linked on every side with other words which are less and less entitled to this appellation', including those specific to particular sets, classes, trades and processes. The lexicographer must 'include [in the dictionary] all the "common words" of literature and conversation, and such of the scientific, technical, slang, dialectal, and foreign words as are passing into common use and approach the position or standing of "common words"': John Simpson and Edmund Weiner (eds), *The Oxford English Dictionary* (2nd edn, Clarendon Press 1989) xxiv.

653 Whilst reliance on sources of artistic criticism may be appropriate when considering the meaning of, for example, 'pastiche' under art 5(3)(k) of the Infosoc Directive (on which, see Hudson (n 646) 349 - 351), there is no evidence that 'quotation', as used in art 5(3)(d) of the Infosoc Directive, is intended to have anything other than its general, everyday meaning.

Instead, and despite their shortcomings as detailed here, dictionaries that are authoritative in whichever language is relevant should be used as the primary means of discerning the ordinary meaning of a term, just as was done by Advocate General Cruz Villalón in *Deckmyn*.[654] Findings drawn from dictionaries should be supplemented by considerations of neighbouring concepts – such as, most relevantly in the case of quotation,[655] the concept of plagiarism.

Deckmyn's interpretative principles and application to article 5(3)(d) Infosoc Directive

Having established the methodological soundness of the interpretative, and specifically definitional, approach taken in *Deckmyn*, this thesis now turns to consider the interpretative principles comprising that approach and to apply it to article 5(3)(d).

As noted, notwithstanding important differences between arts 5(3)(d) and 5(3)(k) of the Infosoc Directive, the provisions evidence a strong correspondence. First, in the manner of all provisions of article 5 of the Infosoc Directive, they are each derogations from the exclusive rights of the copyright owner.[656] Secondly, both contemplate *non-mandatory* derogations from the exclusive rights of the copyright owner.[657] Thirdly, the term 'quotation', like the term 'parody', is not defined in the Infosoc Directive, and neither article 5(3)(k) nor

654 *Deckmyn* (n 582), Opinion of AG Cruz Villalón, para 47.

655 See text to n 641 – n 643.

656 With the result that they must be interpreted strictly: Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-06569 ('*Infopaq*') paras 56–57. As provisions of art 5 of the Infosoc Directive, they must also, however, be interpreted in such a manner as to preserve their effectiveness: Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-09083 ('*Football Association Premier League*') para 163.

657 'Member States *may* provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases', per Infosoc Directive, art 5(3) (emphasis added).

article 5(3)(d) makes 'express reference to the law of the Member States for the purpose of determining its meaning and scope'.[658] Fourthly, and again as with all provisions of article 5 of the Infosoc Directive, both articles seek to achieve a 'fair balance' between the rights and interests of authors, on the one hand, and the rights of users of protected subject-matter, on the other.[659] Finally, article 5(3)(d), like article 5(3)(k), has a purpose of supporting freedom of expression: the 'fair balance' of rights and interests struck by the provision takes account, in particular, of users' rights to freedom of expression.[660]

Given this close correspondence it is appropriate, and indeed necessary, as a matter of EU law, to adopt the same interpretative method in relation to article 5(3)(d) and its central concept as to article 5(3)(k) and its central concept. That method, as set out by the CJEU in *Deckmyn*, entails the application of three interpretative principles. First, the central concept of the provision must be treated as an 'autonomous concept' of EU law,[661] notwithstanding that the provision contemplates a *non-mandatory* exception to the rights of the copyright owner.[662] Secondly, in the absence of a legislative definition, that concept must be interpreted in accordance with the corresponding term's 'usual meaning in everyday language, whilst also taking into account the context in which it occurs and the purposes of the rules of which it is part'.[663] Thirdly, the application, in a particular case, of a national exception derived from the provision 'must strike a fair balance between, on the one hand, the interests and

658 To adopt the phrasing used in *Deckmyn* (n 582) para 14.

659 *Deckmyn* (n 582) para 26. See also Case C-145/10 *Painer v Standard VerlagsGmbH and Others* [2011] ECR I-12533 ('*Painer*') para 132.

660 *Painer* (n 659) para 134. See also *Deckmyn* (n 582) para 26.

661 See *Deckmyn* (n 582) para 15.

662 ibid para 16.

663 ibid para 19.

rights of [authors], and, on the other, the freedom of expression of the user of a protected work' in all the circumstances of the case.[664]

To these interpretative principles should be added a general interpretative principle of EU law, not referred to in *Deckmyn*, that EU legislation must be interpreted, so far as possible, in a manner consistent with international law, in particular where legislative provisions 'are intended specifically to give effect to an international agreement concluded by the [EU]'.[665] Whilst the EU is not, unlike its individual Member States,[666] a party to the Berne Convention, it must, through its obligations under the TRIPs Agreement[667] and the WIPO Copyright Treaty,[668] comply with the substantive provisions of the Berne Convention. Accordingly, it is conventional for the CJEU to refer to the terms of the Berne Convention when interpreting provisions of the Infosoc Directive.[669]

In addition to applying the *Deckmyn* interpretative approach when determining the nature of the quotations permitted by article 5(3)(d), it is appropriate, when determining the usual meaning of the term 'quotation' pursuant to the second *Deckmyn* interpretative principle, to adopt the definitional approach used by Advocate General Cruz Villalón in *Deckmyn*, and accordingly consult dictionary definitions of 'quotation' (and its equivalents) in multiple languages.[670] This is notwithstanding that, and indeed perhaps particularly given

664 ibid paras 26–27.

665 Case C-306/05 *Sociedad General de Autores y Editores de España v Rafael Hoteles SA* [2006] ECR I-11519 ('*SGAE v Rafael*'), para 35.

666 For a full list of the signatories to the Berne Convention, see WIPO, 'Contracting Parties, Berne Convention' (WIPO) <https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15> accessed 5 October 2022.

667 TRIPs Agreement, art 9(1).

668 (Adopted 20 December 1996, entered into force with respect to the EU 14 March 2010) WIPO Doc CRNR/DC/94, art 1(4).

669 See, for example, *Painer* (n 659) paras 5-8; *Infopaq* (n 656) para 5; *SGAE v Rafael* (n 665) paras 5, 6.

670 *Deckmyn* (n 582), Opinion of AG Cruz Villalón, paras 47 - 70.

that, different languages display greater variation in meaning with respect to ‘quotation’ than with respect to ‘parody’.[671]

Quotation as an autonomous concept of EU law

In *Deckmyn*, the CJEU was asked whether parody, in article 5(3)(k) of the Infosoc Directive, is an ‘autonomous concept’ of EU law, notwithstanding the optional nature of the exception envisaged by that provision.[672] Applying established principles, the CJEU held that it is: the concept appears in a provision that does not refer expressly to national laws for the purpose of determining its meaning, and the provisions of the Infosoc Directive must be interpreted uniformly throughout the EU to support the harmonising objective of the directive.[673] The same reasoning applies *mutatis mutandis* with respect to article 5(3)(d), and requires that quotation is treated as an autonomous concept of EU law despite the optional nature of the quotation exception. The question then arises, as it arose in *Deckmyn*, of the means by which that concept is appropriately defined by the CJEU.

671 In *Deckmyn*, AG Cruz Villalón concluded that ‘[i]n addition to a common etymological origin (the Greek word παρῳδία), a comparison of [definitions of ‘parody’ in Spanish, French, German, Dutch and English] reveals that their essential features are substantially similar’: ibid para 48. By contrast, as will be seen below, definitions of ‘quotation’ and its equivalents do not so readily reveal common features.

672 *Deckmyn* (n 582) para 13.

673 ibid paras 14, 15 and 16.

The autonomous concept of quotation: usual meaning in everyday language, context and purpose

This leads to application of the second of the *Deckmyn* interpretative principles. According to the Court in *Deckmyn*, and as recognised by the Court in *Pelham* and *Spiegel*,[674] the meaning of an autonomous concept must be determined by considering, first, the corresponding term's usual meaning in everyday language, and secondly, the 'context in which it occurs and the purposes of the rules of which it is part'.[675]

Usual meaning in everyday language

In defining the usual meaning of 'parody' in *Deckmyn*, the CJEU relied on certain 'essential characteristics' of the corresponding concept.[676] The work of identifying these characteristics had been done by Advocate General Cruz Villalón, who had referred to dictionary definitions of the term in different languages in order to distil the concept's common 'structural' and 'functional' aspects.[677]

Once again, in the absence of any legislative indication that a different approach is required for 'quotation', the same interpretative method should be adopted with respect to article 5(3)(d). In particular, in the absence of evidence that the term 'quotation' is used in any specific sense in article 5(3)(d), general purpose dictionaries—and not, for example, academic sources, sources of literary or artistic criticism, or even dictionaries devoted to the

674 *Pelham* (n 587) para 28; *Spiegel* (n 588) para 65.

675 *Deckmyn* (n 582) para 19.

676 ibid paras 19 and 20.

677 ibid, Opinion of AG Cruz Villalón, paras 47–70.

vocabularies of specific fields[678]—should be used as the best reflection of the term's ordinary meaning across languages.

In the following discussion, the meaning of the term 'quotation' (and its equivalents) is considered across four languages. The languages considered—primarily English and Italian, but also French and German—are four of the current official languages of the EU, and indeed, Italian, French and German were three of the four official languages of the European Community at its inception.[679] The terms '*citazione*', '*citation*' and '*zitat*' are chosen for examination as they appear respectively in the official Italian, French and German versions of article 5(3)(d) of the Infosoc Directive.[680] The dictionaries used are chosen for their prominence and descriptive authority in the languages considered.[681]

Considering, first, the entry for the noun 'quotation' in the *Oxford English Dictionary* (*OED*),[682] we find the term defined, relevantly,[683] as follows:

> [a] passage quoted from a book, speech, or other source; (in modern use *esp.*) a frequently quoted passage of this nature; [a] short musical passage or visual image

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678 For example, dictionaries of literary terms, artistic terms or critical terms.

679 European Union, 'Official languages of the EU' (*Europa*) <european-union.europa.eu/principles-countries-history/languages_en#:~:text=The%20EU%20has%2024%20official,%2C%20Slovenian%2C%20Spanish%20and%20Swedish> accessed 11 April 2024.

680 The Italian version of art 5(3)(d) reads, in part, as follows: '[…] *quando si tratti di citazioni, per esempio a fini di critica o di rassegna…*'. The French version of art 5(3)(d) reads, in part, as follows: '[…] *lorsqu'il s'agit de citations faites, par exemple, à des fins de critique ou de revue* …'. The German version of art 5(3)(d) reads, in part, as follows: '[…] *für Zitate zu Zwecken wie Kritik oder Rezensionen* …'.

681 As indicated, in the case of *Le Nouveau Petit Robert* and *Duden*, by their use in the formation of the Advocate General's Opinion in *Deckmyn* (n 582), Opinion of AG Cruz Villalón, para 47.

682 See 'quotation, n' (n 634).

683 Given the context in which the term 'quotation' appears in article 5(3)(d) Infosoc Directive, and indeed section 30(1ZA) CDPA, focus should be squarely on the term as a noun, and especially as a thing (rather than an action). Reform and other materials which discuss 'quotation purposes' or the use of a copyright work for 'the purpose of quotation', can confuse, particularly where no further explanation is given as to the meaning of 'quotation' in this context (for an acknowledgement of such, see ALRC, *Copyright and the Digital Economy* (Report 122) 2 December 2013, para 9.47). Further, some meanings of 'quotation' may be disregarded at the outset – see n 593.

> taken from one piece of music or work of art and used in another; [t]he action or an act of quoting.[684]

From this definition, and to a lesser degree from the definition of 'quotation' provided in the *Concise Oxford English Dictionary*,[685] the following conclusions can be drawn. First, the noun 'quotation' may be used in one of (at least) two senses, namely: an *action* ('the action or an act of quoting'); or, as in article 5(3)(d),[686] a *thing*, being the result of an action ('[a] passage quoted from a book, speech, or other source'). Secondly, a 'quotation' *derives from* an origin work, originally a text or speech but now possibly a source of another type, including a piece of music or work of art.[687] Thirdly, a 'quotation' represents *only a discrete part* (and in text, typically only a short part) of that origin work, being a 'passage', 'statement', 'utterance', 'tune' or 'visual image'.[688] Fourthly, the relevant part of the origin work is 'reproduced', 'repeated', or 'copied out',[689] in order to constitute a 'quotation'.[690]

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684 'quotation, n' (n 634).

685 *Concise Oxford English Dictionary* (10th edn, Oxford University Press 2001) 1176 ('quotation'). The *Concise Oxford English Dictionary* defines 'quotation', relevantly, as '[a] group of words from a text or speech repeated by someone other than the originator; a short musical passage or visual image taken from one piece of music or work of art and used in another; the action of quoting from text, work of art, etc'. Note that this was the definition relied upon by Ricketson and Ginsburg in the authors' discussion of art 10(1) of the Berne Convention - see Sam Ricketson and Jane Ginsburg, *International copyright and neighbouring rights: the Berne Convention and beyond* (2nd ed, OUP 2006) 788.

686 Considering art 5(3)(d) of the Infosoc Directive (allowing Member State exceptions for 'quotations for purposes such as criticism or review, provided that … *their use* is in accordance with fair practice, and to the extent required by the specific purpose' (emphasis added)), it appears that the relevant sense is the second (that is, quotation as a 'thing'). Likewise, in s 30(1ZA) of the CDPA (permitting fair dealing with a copyright work through use of 'a quotation *from* the work' — compare 'the quotation *of* the work'), the term 'quotation' is used in this second sense.

687 See 'quotation, n' (n 634): '[a] passage *quoted from* a book, speech, or other source; (in modern use esp.) a frequently quoted passage of this nature'; '[a] short musical passage or visual image *taken from* one piece of music or work of art and used in another' (emphasis added). See also 'quote, v' (*OED Online*, July 2023) <https://www.oed.com/dictionary/quote_v?tab=meaning_and_use#27198422> accessed 12 April 2024: '[t]o reproduce or repeat a passage *from* (*a book, author, etc.*); 'of a musician or musical composition: to reproduce or repeat (a passage or tune *from another piece of music*)' (emphasis added).

688 See 'quotation, n' (n 634). See also 'quote, v' (n 687). The *Concise Oxford English Dictionary* defines a 'quotation', in part, as a 'group of words', 'short musical passage', or 'visual image': *Concise Oxford English Dictionary* (n 685) 1176.

689 See 'quote, v' (n 687). See also *Concise Oxford English Dictionary* (n 685) 1176.

690 Compare, for example, the partial definition of 'citation', as a 'bibliographic[al] reference' that provides 'information about where a particular quotation, text, etc., is to be found', which suggests that

Fifthly, a 'quotation' typically entails an 'indication that one is using another's words'.[691] And finally, in a musical or artistic context, a 'quotation' is a 'passage', 'tune', or 'visual image'[692] (as applicable) that is taken from one work *and used in another*, with the further assumption that the origin work and destination work will be of the same genus.[693]

Considering the Italian, French and German language definitions of '*citazione*', '*citation*' and '*zitat*' as against the *OED* definition of 'quotation', some variations in meaning arise. For example, in some of the languages considered,[694] including English, it is clear that a 'quotation' can involve the use of non-textual materials in specific circumstances.[695] Definitions in some languages[696] suggest that 'quotations' must be limited in length (in reference to text and music),[697] whilst others do not refer to, or suggest flexibility as to,

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the 'quotation' has the nature of reproduced content, whilst the 'citation' provides guidance as to the location of that content: see 'citation, n' (n 647).

691 'quotation, n' (n 634). The *Concise Oxford English Dictionary* defines a 'quotation', in part, as '[a] group of words from a text or speech repeated *by someone other than the originator*': *Concise Oxford English Dictionary* (n 685) 1176.

692 ibid.

693 ibid. The *OED* definition of the verb 'to quote' is also defined, in part, as 'of a musician or musical composition: to reproduce or repeat (a passage or tune from *another piece of music*)': 'quote, v' (n 687).

694 Namely, English and Italian. For Italian definitions of '*citazione*', see Francesco Sabatini and Vittorio Coletti (eds), *Dizionario italiano Sabatini Coletti* (Giunti 1997) 487 (*Sabatini Coletti*); Nicola Zingarelli, *Lo Zingarelli: vocabolario della lingua italiana* (Zanichelli 2008) 463 (*Zingarelli*); and *Treccani vocabolario online* <www.treccani.it/vocabolario/citazione/> accessed 12 April 2024. All translations from Italian to English are my own.

695 The *OED* defines 'quotation' in part as '[a] short musical passage or visual image taken from one piece of music or work of art and used in another': 'quotation, n' (n 634). *Sabatini Coletti* defines 'quotation' in part, in reference to 'architecture and the figurative arts', as 'an explicit or allusive reference to forms and particular contents of famous works': *Sabatini Coletti* (n 694) 487. See also the *Treccani* definition of 'quotation', which refers to the use of preceding works in 'literary, but also musical and dramatic works, or in films or figurative artworks': *Treccani* (n 694). Both the *OED* and the *Treccani* definitions suggest use of a 'quotation' may be *in* a non-textual work, without necessarily countenancing the use *of* a non-textual work as a 'quotation': see 'quotation, n' (n 634); and *Treccani* (n 694).

696 Namely, English and French. For French definitions of '*citation*', see *Le Nouveau Petit Robert: dictionnaire alphabétique et analogique de la langue française* (Dictionnaires Le Robert 2004) 440 (*Le Nouveau Petit Robert*); and *Le dictionnaire Larousse maxipoche* (Larousse 2015) 250 (*Larousse maxipoche*). I am most grateful to Christine Dowling, and Jonathan Bruton and Katherine Berhend, for assistance with translations into English from French and German, respectively.

697 The *OED* defines a 'quotation', in part, as a 'passage', 'statement', 'utterance': 'quotation, n' (n 135). The *Concise Oxford English Dictionary* also defines a 'quotation', in part, as a 'group of words', 'short

length.[698] Accordingly, no clear position on either of these points is suggested by the 'usual meaning' of the term in 'everyday language', as considered across languages.

English, French, and Italian dictionary definitions refer to a common functional element, namely that the quoted material is offered to support the argument of the work (if any) in which it is quoted.[699] This suggests a 'quotation' might by nature assist in the explanation of, or illustrate, the claims of the destination work.[700] However, this is not a feature of all of the definitions considered. Further, English and French definitions suggest that quoted material 'generally' has—that is, does not in all cases have—a function of this nature.[701] It is not, therefore, said that 'quotations' must, as a matter of 'everyday language', be provided in support of an argument or for a similar purpose.

Given the variations in meaning described in the foregoing paragraphs, the task of reducing the concept of quotation to certain common and 'essential characteristics' is less straightforward than that which confronted the CJEU in *Deckmyn*.[702] This may be, in part,

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musical passage', or 'visual image': *Concise Oxford English Dictionary* (n 685) 1176. Further, the *Le Nouveau Petit Robert* and *Larousse maxipoche* definitions in French suggest a limitation as to length, through references to a 'quoted' or reproduced passage', and to an 'extract of words or of text': see *Le Nouveau Petit Robert* (n 696) 250.

698 For example, the Italian language definition in *Zingarelli* states that a 'quotation' is 'of varying length': Zingarelli (n 694) 463.

699 For example, the *OED* defines 'citation', in part, as '[t]he action or an act of quoting or referring to a passage, text, author, legal precedent, etc., *esp. as an authority or in support of an argument*; *quotation*': 'citation, n' (n 647) (emphasis added). *Zingarelli* defines 'to quote' as '[t]o textually report another's phrases or texts *in support of one's reasons, for explicative and similar purposes*': Zingarelli (n 694) 462 (emphasis added). *Le Nouveau Petit Robert* defines 'quotation' as a 'quoted passage of an author, or of a notable person, and given as such (*generally to illustrate or support that which is claimed*)'; it defines 'to quote' in part as '[t]o report (a text) *that supports that which is claimed*': *Le Nouveau Petit Robert* (n 696) 440 (emphasis added).

700 It is possible that, in the languages other than English considered here, this reflects the origin of the verb 'to quote' (or its equivalent) in the Latin 'citare' ('summon')—see PGW Glare (ed), *Oxford Latin Dictionary* (Oxford University Press 1982) 328.

701 See *Larousse maxipoche* (n 696) 250, 440 ('*généralement*'). The *OED* definition notes that a 'citation' (in the sense of a 'quotation') is used 'especially' in support of an argument: 'citation, n' (n 647).

702 The dictionary definitions considered by the Advocate General in *Deckmyn* allowed the identification of certain common 'essential features' of 'parody' across languages: *Deckmyn* (n 582), Opinion of AG Cruz Villalón, para 48.

because of the shared etymology of 'parody' and its translations,[703] a feature not evidenced by 'quotation' and its equivalents in the languages considered.[704] Nonetheless, some commonalities of meaning can be observed. The result is a shared, natural language conception of a quotation, in the four EU languages considered, which may be taken as the 'usual meaning' of 'quotation' in 'everyday language', for the purposes of EU law – namely, a reproduction of material from another source, not necessarily 'without modification', which is identified by its user as having been reproduced.

On this basis, it is useful at this stage useful to compare the usual meaning of 'quotation' in everyday language, as identified by this thesis, with the conception supported by Advocate General Trstenjak in *Painer*—namely, one of a quotation as a reproduction of 'third-party intellectual property … without modification in identifiable form'.[705] These interpretations are broadly similar. However, the conception of a quotation proposed by this thesis differs from the Advocate General's in two important respects. First, a quotation need not, it is submitted, entail reproduction *without modification*, and further, a quotation must be *identified*, rather than *identifiable*, 'as a quotation'.

Considering English, Italian, French and German language definitions of 'quotation' (or its equivalents), it may be concluded that use of a quotation, as understood in everyday language, involves, at minimum, an act of repetition or reproduction.[706] Some dictionary

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703 ibid.

704 Whilst the Italian '*citazione*', the French '*citation*', and the German '*zitat*' have clear origins in the Latin '*citare*', the verb 'to quote' derives from the Latin '*quotare*': see 'quotation, n' (n 634).

705 *Painer* (n 659), Opinion of AG Trstenjak, para 210.

706 A 'quotation' (or '*citazione*', '*citation*', or '*zitat*') is defined variously as '[a] passage quoted from a book, speech, or other source', where 'to quote' is '[t]o *reproduce or repeat* a passage from (a book, author, etc.)': see 'quotation, n' (n 634). See also Zingarelli (n 694) 463; a 'quoted passage of an author, or of a notable person, and given as such (generally to illustrate or support that which is claimed)', where 'to quote' is '[t]o report (a text) that supports that which is claimed; to report a passage written by (someone)': *Le Nouveau Petit Robert* (n 696) 440; and 'a reference quoted verbatim': *Duden, das Fremdwörterbuch* (9th edn, Dudenverlag 2007) 1100 (*Duden*). Note that the Italian language definition of '*citazione*' as 'an explicit or allusive reference to forms and particular

definitions, in languages other than English, provide support for the view that a quotation entails reproduction 'without modification', at least insofar as the quotation is from speech or text: quoted words are 'precisely reported',[707] and quoted materials are taken 'verbatim'.[708] That the concept of quotation cannot internally accommodate alterations to the original material might be suggested by the English language concept of 'misquotation'[709] as well as by the French language concept of a '*citation déformée*'.[710] The Italian dictionary reference to the act of quotation 'by memory', which occurs 'without checking the preciseness of the quotation',[711] also suggests that in the normal course accuracy of form would be observed.

However, it is argued that a requirement for reproduction 'without modification' would obscure some nuances of the concept of quotation, at least in English. The concept of indirect quotation (for example, 'I said that he should do it'[712]) indicates that a quotation may involve something less than word-for-word (or 'note-for-note', or exact) reproduction. Notwithstanding this, in indirect textual or spoken quotations, alterations to the words

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contents of famous works' suggests that a reproduction might not be required, however, this is unclear, and in any case, the definition relates only to the use of 'quotations' in 'architecture and the figurative arts'.

707 *Sabatini Coletti* defines the verb 'to quote' (*citare*) in part as 'to precisely report the words of a speech or written work' ('*riportare esattamente le parole di un testo orale o di un'opera scritta*'): *Sabatini Coletti* (n 694) 487.

708 *Duden* (n 706) 1100. See also *Larousse maxipoche*, which refers to 'word-for-word' reproduction: *Larousse maxipoche* (n 696) 250.

709 'An incorrect or inaccurate quotation', '[i]naccuracy in quoting': 'misquotation, n' (*OED Online*, July 2023) <www.oed.com/dictionary/misquotation_n?tab=meaning_and_use#36342366> accessed 12 April 2024. Note the possibility must be countenanced that the 'inaccuracy' referred to is in attribution – rather than reproduction or form.

710 See the definition of '*citation*' in *Le Nouveau Petit Robert* and the examples given there '*citation textuelle, authentique, déformée, tronquée*'): *Le Nouveau Petit Robert* (n 696) 440.

711 *Sabatini Coletti* defines 'quotation by memory' ('*citazione a memoria*') as 'reporting something trusting only one's memory, without checking the preciseness of the quotation' ('*riportare qlco. fidando solo nella memoria, senza controllare l'esatezza delle citazione*'): *Sabatini Coletti* (n 694) 487.

712 As distinct from 'I said, "You should do it"'. The *OED* entry for 'reported speech' includes a quotation from *TESOL Quarterly*, giving examples of 'reported speech' as a 'direct quotation' ('George said: "Tomorrow we will drive out to California"') and as an 'indirect quotation' where time has elapsed ('George said (that) the next day they would drive out to California'): 'reported speech, n' (*OED Online*, July 2023) <www.oed.com/dictionary/reported-speech_n?tab=meaning_and_use#151096630100> accessed 12 April 2024.

actually written or spoken are made merely to the pronouns and tense of the verb, to suit the viewpoint of the person now reporting.[713] In this respect, the concepts of paraphrase and summary can be contrasted, as these allow substantially greater alteration to the wording of the source material.[714]

It is clear that the expressive form of reproduced material may be changed to such a degree that it no longer has the same meaning. At this point, it will no longer bear description, in an everyday sense, as a 'quotation' of the origin work. By contrast, circumstances may be envisaged in which there is no change to the form of the material quoted, yet its meaning is appreciably different, as a result of re-contextualisation. A person may, for example, complain of being 'quoted out of context',[715] due to a use of quoted material that imparts a new meaning to that material. In these cases, it is argued, there remains a quotation, despite the change in meaning, as this change results from re-contextualisation rather than from alteration of the reproduced material itself.

Therefore, whilst a quotation must remain, in essence, a reproduction, there is some tolerance within the concept for alterations, such that a quotation, whether spoken or written, need not be strictly 'without modification'. As a matter of law, this does not however preclude the possibility that use of a quotation, which is reproduced but with alterations, and

713 ibid. The *OED* entry for 'reported speech' notes that, where the 'words of one speaker [are] relayed by another', it is often in a 'subordinate clause which is (in English) governed by a reporting verb with the pronouns and tense adjusted to the viewpoint of the person reporting'.

714 A 'paraphrase' is a 'rewording of something written or spoken by someone else, esp. with the aim of making the sense clearer; a *free* rendering of a passage': 'paraphrase, n' (*OED Online*, July 2023) <www.oed.com/dictionary/paraphrase_n?tab=meaning_and_use#31903681> accessed 12 April 2024 (emphasis added); 'to paraphrase' is '[t]o adapt, appropriate, or alter the wording of (a saying or quotation) or the words of (an author or speaker) to suit one's own purpose. Similarly, summaries allow substantially greater alteration to the source material than quotations: recall the discussion by Ricketson and Ginsburg noted at text to n 148.

715 Or, equally, a 'quotation' may be used 'out of context'.

which satisfies the conditions of a quotation exception to copyright infringement, might infringe the moral rights of the author of the source work.[716]

A successful quotation—similar, it can be assumed, to a successful parody—will typically be both identified (by its user) and identifiable (by its audience) as such. Yet, the identification of material 'as a quotation' does not necessarily ensure that it will be identifiable as such, nor, conversely, does identifiability 'as a quotation' necessarily indicate that material was identified as such. For example, reproduced material may be so well-known to its audience that it is identifiable 'as a quotation',[717] yet, this does not necessarily evidence intentional identification of the reproduced material 'as a quotation': for instance, the user of the reproduced material may have copied unconsciously. Reference to identifiability also begs the question 'by whom'?

In the dictionary definitions considered, there is some support for a requirement that a 'quotation' must, by nature, be identified as such: specifically, a French language definition refers to a 'quoted passage', that is 'given as such'.[718] Further, most of the dictionary definitions considered refer to a 'quotation' as being, by nature, 'from [another] book, speech, or other source',[719] or similar.[720] It is conceded that this is not, of itself, conclusive of identification 'as a quotation' being an 'essential characteristic' of the concept of quotation

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716 Moral rights are expressly excluded from the scope of the matters regulated by the Infosoc Directive: Infosoc Directive, recital 19. Even if the conditions for the application of a national quotation are met (with the result that there is no copyright infringement), use may nonetheless give rise to infringement of moral rights, specifically, the right of integrity.

717 Assuming a particular audience, an example of this might be 'It is a truth universally acknowledged, that single man in possession of a good fortune, must be in want of a wife' (see Jane Austen, *Pride and Prejudice* (first published 1813, Oxford University Press 1929) 1), which may not require any express indication that it is derived from a foreign source.

718 A '*citation*' is a '*[p]assage cite d'un auteur, d'un personnage célèbre* et donné comme tel *(généralement pour illustrer ou appuyer ce que l'on avance)*': *Le Nouveau Petit Robert* (n 696) 440 (emphasis added).

719 'quotation, n' (n 634).

720 See Zingarelli (n 694) 463 ('*parole altrui*'); *Le Nouveau Petit Robert* (n 696) 440 ('*d'un auteur*', '*d'un personnage célèbre*', '*écrit de (qqn)*').

across languages. It is, nonetheless, submitted that material that is reproduced from another source, but that is not identified as being from another source, is not properly understood as a quotation, as a matter of common language. Where material is reproduced, but there is no indication that it has been copied from elsewhere—or, indeed, there is an expressly false indication that it is the creation of its user—then, it is suggested, this is not an instance of use of a quotation, but rather an instance of plagiarism.

As implied by Advocate General Szpunar in his Opinion in *Pelham*, quotation and plagiarism are mutually exclusive concepts[721] —a 'plagiaristic quotation' is, it is argued, an oxymoron. And, as is evident from definitions of the terms across languages, the characteristic that sets a quotation apart from plagiarism is the intentional identification, in the case of the former, of the reproduced material as originating in another source (even if that other source is not specifically identified, for example, as in cases where 'Anonymous' is used to indicate that the source of a textual quotation is unknown[722]).[723] In effect, the use of a quotation entails a 'nod' by the person responsible for reproducing the origin work, as to the fact of such reproduction, for the benefit of his or her intended audience.

Therefore, a requisite feature of a quotation, as conceived in everyday language, is that it is intentionally identified. As will be demonstrated in Chapter 7, intentional identification can be evidenced through objectively appreciated indications or signals (such

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721 This is consistent with the view of the sources discussed at text to n 641 – n 643.

722 To provide another example, in Italian the word 'cit.' (an abbreviation of 'citato', meaning 'quoted') is used, sometimes—but not always—with biographical information, and often in addition to quotation marks, to indicate that a textual extract is quoted.

723 See 'plagiarism, n' (n 643); 'plagiarize, v' (n 643). In full, the verb is defined as follows: 'Originally of writers, later also of composers, artists, etc.: to take and use as one's own (the thoughts, writings, or inventions of another person); to copy (literary work or ideas) improperly or without acknowledgement; (occasionally) to pass off as one's own the thoughts or work of (another)'. This is also borne out in definitions of plagiarism in other languages, reflecting a common origin in the Latin '*plagium*'. See, for example, the Italian '*plagio*', 'the fact of reproducing improperly, as one's own, the work of another' ('*il fatto di riprodurre abusivamente come propria un'opera altrui*'): *Treccani vocabolario on line* <treccani.it/vocabolario/plagio_(Sinonimi-eContrari)> accessed 12 April 2024.

as, in the most prototypical example, quotation marks). It is not, it is contended, necessary that material be identifiable as a quotation, as was suggested both by Advocate General Trstenjak in *Painer*,[724] and also by the CJEU in *Pelham* (translating this to a requirement, in the context of musical sampling, that the sample be 'recognisable to the ear'[725]). Nonetheless, both identification and identifiability will typically be features of successful quotations.

Legislative context and purpose

The second interpretative principle of *Deckmyn* requires consideration not only of a term's 'usual meaning in everyday language', but also its context, and the 'purposes of the rules of which it is part'.[726]

As to the context of 'quotation', it must be noted, as in *Deckmyn*, that the provisions of article 5 of the Infosoc Directive are derogations from the rights provided in articles 2 and 3 of the Directive.[727] It follows, according to established principle, that these provisions, including article 5(3)(d), must be interpreted strictly.[728] Yet, the interpretation of an article 5 provision must also be such as to 'enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed'.[729]

As to the 'purposes of the rules' of which 'quotation' forms part, following *Deckmyn*, the 'objectives of [the Infosoc Directive] in general' are to be considered.[730] In line with the practices of the CJEU, consideration of the objectives of a directive may involve reference to

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724 *Painer* (n 659), Opinion of AG Tstenjak, para 210.

725 *Pelham* (n 587) para 72.

726 *Deckmyn* (n 582) para 19.

727 *Deckmyn* (n 582) para 22.

728 ibid. See also Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* para 56.

729 *Deckmyn* (n 582) para 23. See also *Football Association Premier League* (n 656) para 163.

730 *Deckmyn* (n 582) para 25.

the directive's recitals, and to pre-legislative materials such as explanatory memoranda.[731] The aims of the Infosoc Directive, as revealed by these sources, include maintaining 'the traditionally advanced level of copyright protection in Europe whilst safeguarding, at the same time, a fair balance of rights and interests … between rightholders and users of protected material',[732] and achieving 'proper support for the dissemination of culture', without (in circumstances where this creates a conflict) 'sacrificing strict protection of rights'.[733] A 'high level' of copyright protection, within a 'rigorous, effective system', is acknowledged as essential for the independence of creators, and the fostering of creativity and investment in creation.[734] The overarching objective of the Infosoc Directive is, however, the establishment of legal certainty, and through this, the harmonisation of laws across the EU, based ultimately on the requirements of the internal market.[735] As recital 21 of the Directive states,[736] it is necessary in the interests of legal certainty that the article 2 reproduction right is defined broadly.[737]

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731 The fact that this is the typical practice of the CJEU, in identifying the objectives of EU legislation, was noted in *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2011] EWHC 1981 (Ch) [95]. See also *England and Wales Cricket Board v Tixdaq Ltd* [2016] EWHC 575 (Ch) [55].

732 'Explanatory Memorandum' in Commission, 'Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society' COM (97) 628 final ('Infosoc Directive Explanatory Memorandum'), 9.

733 Infosoc Directive, recital 22.

734 ibid recitals 9, 10, and 11.

735 ibid recitals 1, 3, 4 and 6. See also recital 5.

736 Recital 21 of the Infosoc Directive states that '[a] broad definition of [the acts covered by the reproduction right] is needed to ensure legal certainty within the internal market'. See also recital 23, which states that '[the right of communication to the public] should be understood in a broad sense covering all communication to the public not present at the place where the communication originates'.

737 On the causal relationship between a broad definition of the article 2 and article 3 rights, on the one hand and enhanced legal certainty on the other, see Lucie Guibault, Guido Westkamp and Thomas Rieber-Mohn, 'Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society', Report to the European Commission, DG Internal Market (February 2007), concluding that '[t]he broad definitions of restricted acts given by articles 2 and 3 of the Directive appear to have increased legal certainty for players in the online content industry' at 5 <www.ec.europa.eu/internal_market/copyright/docs/studies/infosoc-execsummary.pdf> accessed 26 March 2018.

Conclusions as to the autonomous concept of quotation

Notwithstanding that a conception allowing derivation from non-textual works represents a departure from the 'usual meaning' of the term 'quotation' in some of the languages considered above,[738] non-textual works (including photographs) appear to be included in the range of permissible origin works under article 5(3)(d) of the Infosoc Directive.[739] There is nothing express in article 5(3)(d) (which refers to 'quotations' as they relate to a 'work or other subject-matter'[740]), or in the Directive's recitals or pre-legislative materials, to suggest otherwise. Further, the use of the whole of a copyright work as a 'quotation' under article 5(3)(d) must be countenanced in some circumstances.

Accepting, however, that article 5(3)(d) allows the whole of any type of copyright work to be reproduced as a 'quotation', there must then be some limitation on the *purpose* for which the work may be reproduced. If there were not, a 'quotation', under article 5(3)(d), could be an exact reproduction of the whole of a copyright work (albeit with the requirement, advanced earlier in this chapter, that the quoted material is identified 'as a quotation'). And, considering the context provided by article 5(3)(d), and the objectives of the Infosoc Directive, it is clear that such an interpretation cannot be sustained.[741] There are two reasons for this.

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738 As only some language definitions contemplated that a 'quotation' could be used in a non-textual work: see text to n 694 – n 695.

739 Note that, in *Painer* (n 659), the CJEU proceeded from the referring court's assumption that photographs are permissible origin works under art 5(3)(d): paras 122–123.

740 Infosoc Directive, art 5(3)(d).

741 This is consistent with conclusions of the IP Enterprise Court in its decision on the 'caricature, parody or pastiche' exception in *Shazam*, namely, that '[i]f pastiche is too widely interpreted, to cover any imitation or reproduction of subject matter it ceases to be a "special case" of protected expression. It would encompass virtually any form of borrowing, imitation or reproduction', and that '[t]his was plainly not the intention of the European or UK legislature which created an exception for three limited specific types of use': *Shazam Productions v Only Fools the Dining Experience* [2022] EWHC 1379 (IPEC) ('*Shazam*') [189].

First, a conception of quotation that allowed the reproduction of the whole of any copyright work, notionally for any purpose,[742] would have the potential to substantially erode the reproduction right granted under article 2 of the Infosoc Directive.[743] Accordingly, it would be inconsistent with the necessarily strict interpretation of article 5(3)(d) of the Infosoc Directive.[744] Secondly, and consequently, it would result in article 5(3)(d) being interpreted in a manner inconsistent with the objectives of the Infosoc Directive, which include the maintenance of an 'advanced level of copyright protection',[745] and the pursuit of certainty and harmonisation through a broad definition of the reproduction right.

There must, therefore, be some limitation, within the legal concept of quotation itself, on the purposes for which a quotation may be used under article 5(3)(d). Certainly, article 5(3)(d) requires that a 'specific purpose' of use is identified, so that the justifiability of the extent of use may then be considered.[746] Whilst the European Commission has made clear that '[c]riticism and review are … only examples of possible justifications for quotations' under article 5(3)(d),[747] this is not inconsistent with the autonomous concept of quotation entailing

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742 Subject to the proportionality element of art 5(3)(d), requiring that use of the relevant quotation is only 'to the extent required by the specific purpose', and the further requirement that use is 'in accordance with fair practice': Infosoc Directive, art 5(3)(d).

743 In the conception of a quotation proposed by this thesis, there would, even in the absence of a limitation on permissible purposes, be a requirement to identify the quotation 'as such' — that is, as a reproduction from another source. Similarly, there is an express requirement under art 5(3)(d) to indicate the 'source', 'including the author's name', of the origin work (except where this is 'impossible'). However, in a national law context, these requirements do more to (potentially) satisfy the author's moral right to be identified as the author of the origin work (see, for example, CDPA, s 77) than to preserve his or her economic right of reproduction.

744 See *Deckmyn* (n 582) para 22.

745 Infosoc Directive Explanatory Memorandum (n 147) 9.

746 Article 5(3)(d) requires that use of quotations is 'to the extent required by the specific purpose': Infosoc Directive, art 5(3)(d).

747 Commission, *Report to the Council, the European Parliament and the Economic and Social Committee on the application of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society* (Commission Staff Working Document) SEC (2007) 1556, 6.

limitations on purpose: it is possible for the scope of permissible purposes of use under article 5(3)(d) both to extend beyond 'criticism or review', and to be limited.[748]

In these circumstances, it is contended that the autonomous concept of quotation in EU law requires not only those features deriving from ordinary meaning identified above—namely, reproduction and identification 'as a quotation'—but also use for a particular purpose—namely, a purpose of criticism, or review, or a purpose analogous to criticism or review. Permissible purposes of use under article 5(3)(d) might therefore include illustration of a point (whether about the quoted material or made through use of the quoted material), or comment or criticism through humour or mockery (with the effect that a lawful quotation under article 5(3)(d) may result in a lawful parody under article 5(3)(k)).

An inherent functional requirement of this nature is consistent with, and supported by, the purpose element of article 5(3)(d) ('for purposes such as criticism or review'): even the strictest possible reading of the phrase 'for purposes such as criticism or review', it is submitted, can tolerate the inclusion within its scope of purposes analogous to criticism or review, including the illustration of claims. Further, it is consistent with the ordinary meaning of 'quotation' in some languages, as evidenced by dictionary definitions in English, French and Italian which indicate that 'quotations' typically provide support for, or illustrate, the claims of textual argumentation.[749] Finally, it is consistent with the essential requirement of a quotation, as understood in everyday language, that reproduced material must be identified as having been reproduced. The presence of a purpose of criticism, review, or a similarly expressive purpose

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748 As the CJEU has accepted in *Pelham* and *Spiegel*: *Pelham* (n 587) para 71; *Spiegel* (n 588) para 78.

749 For example, the *OED* defines 'citation', in part, as '[t]he action or an act of quoting or referring to a passage, text, author, legal precedent, etc., *esp. as an authority or in support of an argument*; *quotation*': 'citation, n' (n 647) (emphasis added). *Zingarelli* defines 'to quote' as '[t]o textually report another's phrases or texts *in support of one's reasons, for explicative and similar purposes*': *Zingarelli* (n 694) 462 (emphasis added). *Le Nouveau Petit Robert* defines 'quotation' as a 'quoted passage of an author, or of a notable person, and given as such (*generally to illustrate or support that which is claimed*)'; it defines 'to quote' in part as '[t]o report (a text) *that supports that which is claimed*': *Le Nouveau Petit Robert* (n 696) 440 (emphasis added).

strongly suggests that a quotation will have been intentionally identified as such, for, in most cases, the purpose will be served by a clear indication that the reproduced material originates in another source.

In practice, a functional requirement for criticism, review, or a similar purpose suggests that a qualifying quotation under article 5(3)(d) will be accompanied by material, created by its user, that engages with the quotation. This is consistent with the statement of the CJEU in *Painer* that article 5(3)(d) is intended to allow quotation 'accompanied by comments or criticism',[750] and with similar comments of the Court in *Spiegel*.[751] It is not necessary, as made clear in *Painer*,[752] that this material itself enjoys copyright protection.

Whilst it is not contemplated that there is any limitation on the kinds of work from which a lawful quotation might be taken, or in which a lawful quotation might be used, it may be more difficult – if not impossible – for the reproduction of (part of) an artwork in a subsequent artwork, or, similarly, (part of) a musical composition in a subsequent musical composition, to be characterised as a quotation under article 5(3)(d), given the requirement for a purpose of criticism, or review, or a purpose analogous to criticism or review.[753] The requirement for a purpose of criticism, review, or an analogous purpose also tends to suggest that the quoted material will be secondary, or subsidiary, to the destination work. It is therefore difficult to

750 *Painer* (n 659) para 120.

751 In *Spiegel* it was noted that there must be 'a direct and close link between the quoted work and [the user's] *own reflections*, thereby allowing for an intellectual comparison to be made with the work of another, since Article 5(3)(d) of Directive 2001/29 states in that regard that a quotation must inter alia be intended to enable criticism or review', and also that 'the use of the quoted work must be secondary in relation to *the assertions of that user*, since the quotation of a protected work cannot, moreover, under Article 5(5) of Directive 2001/29, be so extensive as to conflict with a normal exploitation of the work or another subject matter or prejudices unreasonably the legitimate interests of the rightholder': *Spiegel* (n 588) para 79 (emphasis added).

752 *Painer* (n 659) para 132.

753 This is not to suggest that artworks and musical compositions (or parts thereof) may only be used as quotations in works of the same genus (contrary to the English language dictionary definitions discussed at n 687).

envisage circumstances in which a lawful quotation could represent the whole of a destination work.

Cognisant of the need, reflected in the Infosoc Directive's recitals, to maintain a 'fair balance' between the rights and interests of relevant parties, it is submitted that an interpretation of the concept of quotation that limits the purposes for which reproduced material may be used, under article 5(3)(d), in principle allows sufficient scope for the exercise of freedom of expression. Whilst the interpretation preserves to some degree the limitations on freedom of expression that are imposed by copyright, it must be recalled that freedom of expression, like copyright itself, is not absolute.[754] This is reflected in the very notion of striking a 'fair balance' between the two, and relatedly in their equal status as fundamental rights in EU law.[755]

Accordingly, the interpretation advanced by this thesis maintains the effectiveness of article 5(3)(d), as informed by its purpose of striking a fair balance between the rights and interests of relevant parties. Further, the interpretation provides 'proper support for the dissemination of culture', by allowing a (semi-open) range of expressive uses, but without 'sacrificing strict protection of rights'[756] or compromising legal certainty. In this way, it observes the objectives of the Infosoc Directive in general.

Finally and importantly, this conception is consistent with the conception supported by the CJEU in *Pelham* and *Spiegel* – and in particular, with the CJEU's determination that a quotation under article 5(3)(d) Infosoc Directive is necessarily used 'for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison

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754 As noted, for example, by Advocate General Cruz Villalón in his Opinion in *Deckmyn* (n 582), Opinion of AG Cruz Villalón, para 82. See also Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, as amended by Protocols 11 and 14 ('ECHR'), art 10(2).

755 See Charter of Fundamental Rights of the European Union [2012] OJ C 326/2 (CFR), arts 11(1) (right to freedom of expression) and 17 (right to property, including intellectual property).

756 See Infosoc Directive, recital 22.

between that work and the assertions of that user',[757] (meaning that, as stated in Pelham, 'the user of a protected work wishing to rely on the quotation exception must … have the intention of entering into "dialogue" with that work'[758]). Yet, beyond these requirements of purpose as identified in *Pelham* and *Spiegel*, the conception advanced here makes clear that certain elements of form – namely, a reproduction (not necessarily 'without modification', but with little alteration) that is identified 'as such' – are also required.

Fair balance

There remains the third interpretative principle derived from *Deckmyn*, namely that the application of a national quotation exception must in every case 'strike a fair balance between, on the one hand, the interests and rights of [authors], and, on the other, the freedom of expression of the user of a protected work' in all the circumstances of the case.[759] However, the primary responsibility for striking this balance resides with national courts in the context of domestic proceedings.[760] Accordingly, the matter of 'fair balance' need not be considered here, other than indirectly through consideration of the context of article 5(3)(d) and the objectives of the Infosoc Directive, discussed above. Having said this, it is important to note that the interpretation of the concept of quotation detailed above is clearly capable of permitting a 'fair balance' between the relevant interests and rights to be maintained under the domestic laws of each Member State. A conception of quotation that would not, by contrast, allow this would be futile to consider as an autonomous concept of EU law.

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757 *Spiegel* (n 588) para 78.

758 *Pelham* (n 587) para 71.

759 *Deckmyn* (n 582) para 27.

760 ibid.

Consistency with international law

In addition, there remains a need to ensure that article 5(3)(d) of the Infosoc Directive, and consequently, its central concept of quotation, are interpreted consistently with the wording and purpose of relevant international agreements. As noted above,[761] notwithstanding that the EU is not a party to the Berne Convention, it is conventional for the CJEU to refer to the terms of the Berne Convention when interpreting provisions of the Infosoc Directive.

It will be recalled that article 10(1) Berne Convention sets out the terms of a copyright quotation exception that '*must* rather than *may* appear'[762] in the national laws of contracting parties, as follows:

> It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.[763]

Notwithstanding the implication that a specific purpose of use will be identifiable,[764] it is evident from its text that article 10(1) does not expressly limit the purposes for which quotations may be made under national copyright laws. However, this does not, of itself, mean that the interpretation of the autonomous concept of quotation that is advanced by this thesis (which entails a limitation on the purposes for which a quotation may be used) is inconsistent with article 10(1).

As posited by Goldstein and Hugenholtz, whilst article 10(1) 'is mandatory rather than permissive', 'national legislatures are presumably free to prescribe the conditions on

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761 See text to n 669.

762 Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (3rd edn, OUP 2022) 772.

763 Berne Convention, art 10(1).

764 ibid (as the extent of the quotations must 'not exceed that justified by *the purpose*' (emphasis added)).

which quotation is permitted'.[765] Meanwhile, Ricketson and Ginsburg's 2006 commentary on the Berne Convention suggested that national exceptions that are limited as to purpose—specifically, the French quotation exception, and the UK 'criticism or review' fair dealing exception, considered prior to the enactment of s 30(1ZA)[766]—were valid vehicles for addressing the matter of quotation in domestic law.[767] This evidences a view that quotation exceptions that are limited as to purpose may constitute valid implementations of article 10(1) Berne Convention.

It is true that, in considerations at the 1967 Stockholm Intellectual Property Conference, a proposed amendment to the Conference text of article 10(1), which would have had the effect of limiting the purposes for which a quotation could be made under the provision,[768] was rejected.[769] This was most likely due to concerns that it 'did not enumerate sufficient purposes for which quotation would be justified',[770] evidencing more general apprehensions that any list of permissible purposes 'could not', in the words of Ricketson and Ginsburg, 'hope to be exhaustive'.[771]

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765 Beyond, that is, those conditions prescribed by art 10(1) itself: Paul Goldstein and P Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice* (3rd edn, OUP 2013) 392. In this conception, article 10(1) functions as a 'ceiling', setting the scope of the *widest* exception that may be provided by Berne Union members. Contrast Aplin and Bently's view of the provision, pursuant to which the obligation under article 10(1) functions as a 'floor', requiring Berne Union members to provide an exception with *at least* the scope of that set out in article 10(1), with the possibility of providing a more expansive exception: see Aplin and Bently (n 612) 31, 172 – 173.

766 Specifically, in 2006.

767 The authors note that 'provision for [quotation, as required under art 10(1) of the Berne Convention] it is made in most national laws': Ricketson and Ginsburg (n 762) 783. The footnote to this statement cites as examples 'the French Law of 1957, art 41; German Law of 1965, art 51; UK Copyright Act 1956, s 9', the last of these being the predecessor of CDPA, s 30(1) (and seemingly cited in error, given the intervening enactment of the CDPA).

768 During consideration of the Conference text of art 10(1), Switzerland proposed an amendment, suggesting that the new provision should cover quotations only 'to the extent that they serve as an explanation, reference or illustration in the context in which they occur': BIRPI, Summary Minutes (Main Committee I) in *Records of the Intellectual Property Conference of Stockholm* (World Intellectual Property Organisation 1971) vol II, 861.

769 Ultimately, the proposed Swiss amendment was rejected and the Conference text adopted: ibid.

770 See concerns raised by Sweden regarding the amendment proposed by Switzerland: ibid.

771 Ricketson and Ginsburg (n 762) 786.

The considerations recorded in the *travaux* do not, it appears, preclude that national copyright exceptions for quotations may be limited by purpose. Nor, it is submitted, do they preclude that the concept of quotation under article 10(1) of the Berne Convention may itself entail certain limiting characteristics (including as to purpose)—indeed, WIPO's *Guide to the Berne Convention* states that acts of quotation (including, impliedly, those relevant in a legal sense) '[consist] of reproducing extracts from a work either to illustrate a theme or defend some proposition or to describe or criticize the work quoted from'.[772] Rather, the considerations recorded in the *travaux* merely evidence an (understandable) resistance to enumerating all permissible purposes of quotations in article 10(1) itself.

Accordingly, the interpretation advanced by this thesis — which imposes some limitations on the autonomous concept of quotation, including as to the purpose of use—is not necessarily inconsistent with article 10(1) of the Berne Convention, and indeed by all indications is consistent with it.[773] The interpretation does not suggest a finite range of

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772 'In the dictionary sense, a quotation is the repetition of what someone else has said or written; [in art 10(1) of the Berne Convention] it is used in the sense of *including one or more passages from someone else's work in one's own*. In other words, quotation consists of *reproducing extracts from a work either to illustrate a theme or defend some proposition or to describe or criticize the work quoted from*. The use of quotation is not confined to literature: it may be from a book, a newspaper, a review, a cinematograph film, a recording or a radio or television programme': WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (WIPO 1978) para 10.2 (emphasis added).

773 Consider the nature of the quotations expressly acknowledged by art 10(1) as being allowable, namely, 'quotations from newspaper articles and periodicals in the form of press summaries' ('*les citations d'articles de journaux et recueils périodiques sous forme de revues de presse*', in the authoritative French version): Berne Convention, art 10(1). The concept of a '*revue de presse*' is established in French (and French-derived) law (and it may be assumed that this concept informs the notion of 'press summaries' in art 10(1): see Sam Ricketson and Jane Ginsburg, 'Intellectual property in news? Why not?' in Megan Richardson and Sam Ricketson (eds), *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar 2017) 39). In the 2011 decision of the Brussels Court of Appeal in *Google Inc v Copiepresse*, also discussed by Ricketson and Ginsburg, the concept of a '*revue de presse*' that was applied, 'by analogy with French law', was of a '…*comparative presentation* of various comments from different journalists concerning the same theme or event' ('une présentation … comparative *de divers commentaires émanant de journalistes différents et concernant un même thème ou un même événement*'): *Google Inc v Copiepresse*, Cour d'appel Bruxelles, neuvieme chamber, 2007/AR/1730, 5 May 2011, [32] (emphasis added). This resulted in a finding that the Google News service did not qualify for the Belgian quotation exception, as it was not a '*revue de presse*' according to this definition, but rather 'a press "panorama"', namely, 'a reproduction of extracts from press articles, classified by category, without any commentary or link between them', and which 'are not reproduced to illustrate a subject, defend an opinion or to realise a summary of a particular point' ('*une*

purposes for which a quotation may legitimately be used, but recognises that the range of permissible purposes cannot, to the contrary, be infinite.

By contrast, there is a question as to whether a quotation exception more broadly interpreted (especially if interpreted so as to rely almost exclusively on the 'fairness' criterion as a means of confining the scope of the provision) would provide an exception for 'certain special cases' only, as is required by the first step of the three-step test in article 9(2) Berne Convention.[774] Indeed, this is an unresolved question concerning statutory fair use provisions that are expressly open-ended.[775]

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reproduction de parties d'articles de presse, classes par rubrique, sans aucun commentaire ni lien entre eux … ces extraits ne sont pas reproduit pour illustrer un propos, defender une opinion ou réaliser une synthèse sur un point particulier'): *Google Inc v Copiepresse*, Cour d'appel Bruxelles, neuvieme chamber, 2007/AR/1730, 5 May 2011, [32] (emphasis added, citing the French language Wikipedia entry for 'revue de presse'). Accordingly, the interpretation of 'quotation' proposed by this thesis is, at least to the extent suggested by recent Belgian case law on '*revues de presse*' (and thereby, by French case law on the same subject), consistent with the concept of quotation inherent to art 10(1) of the Berne Convention.

774 Berne Convention, art 9(2). In this respect, note Kimbell QC's comments in *Shazam* that 'it is important to bear in mind that s 30A must be read in light of the first of the three-step tests. *If pastiche is too widely interpreted, to cover any imitation or reproduction of subject matter it ceases to be a "special case" of protected expression*. It would encompass virtually any form of borrowing, imitation or reproduction. This was plainly not the intention of the European or UK legislature which created an exception for three limited specific types of use': *Shazam* (n 741) [189] (emphasis added). The same might be said of the concept of quotation. Note, however, Aplin and Bently's contention that exceptions under article 10(1) Berne Convention are not subject to the operation of article 9(2): see Aplin and Bently (n 612) 60.

775 Such as, for example, the US fair use exception in 17 U.S. Code § 107. The ALRC alluded to this question in its 2014 report, noting that '[d]espite the fact that the US has had a fair use exception for 35 years, an often-repeated argument against the introduction of fair use [in Australia] is that it may, or would, not comply with the three-step test under international copyright law': ALRC, *Copyright and the Digital Economy* (ALRC Report 122, 2014) [4.84]. See also Hudson, *Drafting Copyright Exceptions* (Cambridge University Press 2020) 14 (citing the ALRC).

6. APPLICATION TO THE UK QUOTATION EXCEPTION

What, then, do the conclusions of the preceding two chapters mean for the UK quotation exception in section 30(1ZA) CDPA? Section 30(1ZA) operates, relevantly, within the context of UK copyright statute as a whole. Specifically, it falls within Chapter III of the CDPA, certain provisions of which provide that a 'fair dealing' with a work, for one or more of the statute's prescribed purposes[776] and subject to other applicable conditions, will not be an infringement of copyright in that work.[777] Following this structure, section 30(1ZA) itself provides that:

> 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).[778]

This chapter explains that, far from being contrary to the interpretation suggested by the express wording of the provision and the internal structure of the CDPA, the interpretation of the UK quotation exception outlined in the preceding chapters is entirely consistent with its wording and with the UK's domestic legislative framework. It then examines the implications for section 30(1ZA) of an interpretation consistent with the required reading of article 5(3)(d), with specific reference to the nature of a 'quotation' within the meaning of section 30(1ZA),

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776 Namely, research for a non-commercial purpose (CDPA, s 29(1)), private study (CDPA, s 29(1C)), criticism or review (CDPA, s 30(1)), reporting current events (CDPA, s 30(2)) and caricature, parody or pastiche (CDPA, s 30A).

777 See CDPA, ss 29, 30 and 30A.

778 ibid s 30(1ZA).

the limitations on the purposes for which a quotation, thus defined, may lawfully be used under section 30(1ZA), and the operation of the 'fair dealing' standard within the provision.

First, however, this chapter highlights the decision in *Shazam Productions v Only Fools the Dining Experience*[779] as an important post-Brexit model of the application of EU law to a UK fair dealing exception (in that case, section 30A CDPA).

A post-Brexit model for the application of EU law to a CDPA fair dealing exception

The recent decision of the Intellectual Property Enterprise Court in *Shazam* concerned the exception for caricature, parody and pastiche in section 30A CDPA, derived from article 5(3)(k) Infosoc Directive, and specifically the concepts of parody and pastiche invoked by the provision.

In respect of parody, the Court noted the definition of the term 'parody' in the Shorter Oxford English Dictionary,[780] before then summarising the CJEU's decision in Case C-201/13 *Deckmyn and Vrijheidsfonds VZW v Vandersteen and Others*[781] and noting those characteristics the CJEU had identified as 'essential characteristics' of a parody under article 5(3)(k)[782] – namely, that it must '(i) evoke an existing work (ii) be noticeably different from that existing work and (iii) constitute an expression of humour or mockery'.[783] In recognition of the fact that the CJEU's resulting definition is 'potentially very wide', the Court then

779 [2022] EWHC 1379 (IPEC) ('*Shazam*').

780 ibid [161].

781 [2014] OJ C 189 ('*Deckmyn*').

782 *Shazam* (n 799) [167], [172].

783 *Deckmyn* (n 781) para 20.

reasoned further, based on academic considerations[784] and submissions made to the Court by counsel (viewed as supported by comments made by the Advocate General in *Pelham*[785]),[786] that 'mere imitation (of a work of comedy) is not enough to constitute parody'[787] and that, further to those essential characteristics identified by the CJEU in *Deckmyn*, 'it is an essential part of parody within the meaning of the Infosoc Directive and section 30A of the CDPA that "it does express some kind of opinion by means of its imitation, but noticeable difference, from the work parodied"'.[788]

In respect of pastiche, a concept that the CJEU has not considered of itself,[789] the Court in *Shazam* similarly first noted the *Shorter Oxford English Dictionary* definition of the term 'pastiche'[790] before then reproducing comments as to the concept made by Advocate General Szpunar in a footnote in his Opinion in *Pelham.*[791] There followed a discussion of academic work on the meaning of pastiche in a copyright context,[792] which advocated beginning with the ordinary meaning of the term 'pastiche', resulting in the conclusion that 'the copyright definition of pastiche should reflect the term's essential meaning, which covers two key activities: imitation of the style of pre-existing works, and the utilisation or assemblage of pre-existing works in new works'.[793] This was endorsed by the Court, partly on the basis that the

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784 Including Jonathan Griffiths, 'Fair dealing after *Deckmyn*: the United Kingdom's defence for caricature, parody and pastiche' in Richardson M and Ricketson S (eds), *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar 2017) 64.

785 See *Shazam* (n 779) [179].

786 See ibid [176].

787 ibid [180].

788 ibid [176] (quoting counsel's submissions).

789 As Griffiths notes, it is unclear whether the Court's remarks on the characteristics of parody in *Deckmyn* are to be read as applying only to 'parody', or to 'caricature, parody or pastiche' as a 'single, overarching concept': Griffiths (n 784) 83.

790 *Shazam* (n 779) [181].

791 ibid [182].

792 Namely, Emily Hudson, 'The pastiche exception in copyright law: a case of mashed-up drafting?' (2017) 4 *Intellectual Property Quarterly* 346.

793 ibid 363 (quoted in *Shazam* (n 779) at [186]).

approach adopted was 'consistent with the approach of the CJEU to parody in *Deckmyn* which involved starting with the meaning of the term in ordinary language and identifying its essential ingredients'.[794] Nonetheless, and on the basis that pastiche, if interpreted too broadly, would 'in effect [encompass] all forms of appropriation and imitation', thereby (impermissibly) becoming a general fair use provision, counsel's submission that 'the pastiche exception must be confined to use which involves the copying of style of a work (or the creation of amalgamation of works in the form of medley)' was also accepted.[795]

Significantly, *Shazam* demonstrates the possibility of a continuing role for the interpretative principles of *Deckmyn* - 'starting with the meaning of the term in ordinary language and identifying its essential ingredients',[796] including through use of dictionary definitions,[797] - in the construction of the provisions of article 5 Infosoc Directive, and thereby those provisions of UK law derived from these. In the case of the concept of parody, it provides a model for dealing with CJEU's own pronouncements on 'essential characteristics', in circumstances where that concept was judged as in need of further refinement. It also demonstrates a clear view that article 5(3)(k) Infosoc Directive and section 30A CDPA, if read broadly so as to allow in effect any fair use, would not be consistent either with the three-step test or with the intentions of the EU or UK legislature, which 'created an exception for three limited specific types of use [namely, parody, caricature and pastiche]'.[798] This conclusion applies also in respect of article 5(3)(d) Infosoc Directive and section 30(1ZA) CDPA, and flows also from the statutory context in which both section 30A and section 30(1ZA) appear.

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794 As well as with the comments of the Advocate General's comments in *Pelham* and Guidance published by the IPO: *Shazam* (n 779) [187].

795 ibid [190].

796 ibid [187].

797 See ibid [181].

798 ibid [189].

Consistency with UK law of required reading of article 5(3)(d) Infosoc Directive and section 30(1ZA) CDPA

It was concluded in the previous chapter that article 5(3)(d), and the autonomous concept of quotation within it, must be understood through application of the principles in *Deckmyn* as requiring a reproduction (not without modification but with only some tolerance for alteration), and identification of the reproduction as such. Further, the term 'quotation' must be interpreted in a manner that limits the purposes for which a quotation from a copyright work may lawfully be used, to those of criticism, review, and analogous purposes. This reading is entirely consistent with the CJEU's identification of the 'essential characteristics' of quotation as: 'the use, by a user other than the copyright holder, of a work or, more generally, of an extract from [of] a work', where such use is 'for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user'.[799]

It follows from this, and from the conclusions in Chapter 3 of this thesis, that section 30(1ZA) and the term 'quotation' within it must similarly be interpreted so as to require a reproduction, where that reproduction is identified as such, and where the use is for a purpose of criticism, or review, or a purpose analogous to criticism or review.

As noted above,[800] the obligation of UK courts to construe section 30(1ZA) in conformity with article 5(3)(d), even during the UK's tenure as a member of the EU, was not absolute: the obligation of harmonious interpretation derived from the decision in Case C-106/89

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799 Case C-476-17 *Pelham and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] OJ C 347 ('*Pelham*') para 71; Case C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] OJ C 392 ('*Spiegel*') para 78.

800 Text to n 389- n 390.

Marleasing SA v La Comercial Internacional de Alimentacion SA[801] required UK courts to construe section 30(1ZA) in conformity with article 5(3)(d) only 'so far as possible'.[802] This caveat, inherent to the *Marleasing* principle, recognises that there may be circumstances in which the wording of a statutory provision, or its context, is at odds with the interpretation suggested by the underlying EU law (and accordingly, in which that interpretation need not be adopted unreservedly).[803]

In the instance of section 30(1ZA), however, such circumstances do not arise. First, there is nothing in the wording of section 30(1ZA) to suggest that the EU autonomous concept of quotation cannot be applied in the context of the UK provision - this is not a case, to paraphrase Mr Justice Green, in which the domestic legislation 'explicitly states that it means "blue"', and a harmonious interpretation would require it to mean 'black'.[804] To the contrary, the term 'quotation', as used in section 30(1ZA), may readily be interpreted in the manner advanced this thesis. And, indeed, the words 'criticism or review or otherwise' in section 30(1ZA) (similar to the words 'such as criticism or review' in article 5(3)(d) of the Infosoc Directive) may be seen as supportive of a reading of 'quotation' in which permissible purposes are limited to criticism, review, and analogous purposes.[805] Certainly, the requirement under section 30(1ZA)(c) that the 'extent' of the quotation used is 'no more than is required by the specific

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801 [1990] ECR I-4157 ('*Marleasing*').

802 ibid para 8.

803 At a minimum, national courts are not obliged to adopt an interpretation that is *contra legem*: Case C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos* [2006] ECR I-6091, para 110.

804 See *R (on the application of Nutricia Ltd) v Secretary of State for Health* [2015] EWHC 2285 (Admin) [120].

805 This would be particularly so if the provision were to be read in accordance with traditional UK principles of legal interpretation, including that of *ejusdem generis*. The *ejusdem generis* rule states that, where specific words in statute are followed by general words (for example, 'no tradesman, artificier, workman, labourer or other person'), then the general words ('or other person') should be construed as covering only things belonging to the same genus as those covered by the specific words: T Ian McCleod, *Principles of Statutory Interpretation* (B Rose 1984) para 2-05; Bryan Garner (ed), *Garner's Dictionary of Legal Usage* (3rd edn, Oxford University Press 2011) 309.

purpose for which it is used'[806] suggests that a specific purpose of use will be identified to enable an assessment of proportionality. This does not preclude that a specific purpose of use will be identified amongst a finite range of permissible uses under the provision.

Secondly, the EU autonomous concept of quotation, as outlined in Chapters 4 and 5, is entirely consistent with the statutory context of section 30(1ZA). As a matter of statutory structure, section 30(1ZA) forms part of the section 30 group of fair dealing exceptions, for '[c]riticism, review, quotation and news reporting'.[807] Notwithstanding that section 30(1ZA) is unique, within this group, in its wording,[808] each of the section 30 provisions—and, indeed, each of the CDPA's Chapter III fair dealing provisions—is a limited copyright exception directed at addressing specific policy objectives.[809] The requirement flowing from the autonomous EU concept of quotation, that use must be for the purpose of criticism, or review, or an analogous purpose, reflects public interest considerations consistent with those of sections 30(1) and 30(2) of the CDPA, which 'support freedom of expression and comment'[810] through exceptions for limited purposes of public value.

By contrast, this thesis contends that it is not possible to leave entirely open the meaning of 'quotation' under section 30(1ZA)—or even to construe it as requiring only a reproduction. If a quotation was viewed as requiring only a reproduction, then one could query why the term

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806 CDPA, s 30(1ZA)(c).

807 CDPA, s 30.

808 Note that section 30(1ZA) requires use of a 'thing' (the reproduced content) for a specific purpose, whereas the other provisions of section 30 are all directed at uses for specific purposes only.

809 See fair dealing exceptions for research for a non-commercial purpose (CDPA, s 29(1)), private study (CDPA, s 29(1C)), criticism or review (CDPA, s 30(1)), reporting current events (CDPA, s 30(2)), caricature, parody or pastiche (CDPA, s 30A) and illustration for instruction (CDPA, s 32).

810 IPO, *Modernising Copyright: A modern, robust and flexible framework* (20 December 2012) ('Modernising Copyright') 26. Here the freedom of expression basis of the 'criticism or review' and 'reporting current events' exceptions in ss 30(1) and 30(2), respectively, was recognised.

'reproduction', or similar, was not used in its stead in s 30(1ZA) (or, indeed, in article 5(3)(d) of the Infosoc Directive or article 10(1) of the Berne Convention).

It is, instead, clear that the term 'quotation' was used advisedly – in part, as an exception for (in the alternative conception) 'reproductions for any purpose', subject principally to requirements of 'fair dealing' (or in the context of article 5(3)(d) of the Infosoc Directive and article 10(1) of the Berne Convention, 'fair practice'[811]) and proportionality would risk being, in essence, a fair use-style exception,[812] introduced in the guise of a limited copyright exception. As a result, it would require more of 'fair dealing' in the context of section 30(1ZA) than in the context of the other fair dealing provisions in the CDPA. This is inconsistent with the intention of the legislature to include the 'fair dealing' threshold in section 30(1ZA) on the basis that it is a tested standard, and thus provides legal certainty.[813] Indeed, '[c]ourts in the United Kingdom have applied the concept of "fair dealing" in a broadly similar manner, regardless of the specific [Chapter III] fair dealing defence at issue',[814] notwithstanding that some differences in application do result from the claimed statutory purpose of the dealing, meaning that the statutory purpose to a degree colours the fair dealing assessment.[815]

811 Infosoc Directive, art 5(3)(d). See also Berne Convention, art 10(1).

812 As exists in § 107 in the US Copyright Act of 1976, 17 USC, which states in its opening clause that 'the fair use of a copyrighted work … for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright': US Copyright Act of 1976, 17 USC, § 107. Note that the purposes listed in § 107 are illustrative only.

813 See 'Modernising Copyright' (n 810) 14.

814 Griffiths (n 784) 88.

815 See, for example, the classic statement by Lord Denning that '[i]t is impossible to define what is "fair dealing". It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comments, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair': *Hubbard v Vosper* [1972] 1 All ER 1023, 1027. This indicates that the purpose of the use offers the principal criterion for determining whether the reproduced parts of copyright works are 'too many and too long to be fair'.

Outside of the wording of section 30(1ZA) and the structure of Part III CDPA, the required reading of article 5(3)(d) Infosoc Directive and accordingly, of section 30(1ZA) CDPA is consistent with the UK quotation exception's statutory context more broadly. By way of example, section 31(1) CDPA provides that 'copyright in a work is not infringed by its incidental inclusion in an artistic work, sound recording, film, or broadcast'.[816] Whether the inclusion of a work ('work A') in an artistic work, sound recording, film or broadcast ('work B') is, relevantly, 'incidental' turns on the following question: 'why – having regard to the circumstances in which work "B" was created – has work "A" been included in work "B"?'[817] As determined in case law,[818] this question is to be answered not by reference to subjective intent, but rather, to 'an objective assessment of the circumstances in which [work B] was created'.[819] This assessment can accommodate consideration of commercial, as well as aesthetic, reasons.[820] Importantly, and as held by the High Court in *Fraser-Woodward*, if the inclusion is found to be for a certain purpose – such as, in that case, criticism or review – then it cannot simultaneously be 'incidental'.[821] In the sense that the scope of section 31(1) CDPA thereby complements that of section 30(1ZA) CDPA (and, indeed, section 30(1) of the same statute), this is consistent with the required reading of section 30(1ZA) as involving the use of a quotation as an *intentional* act,[822] where steps are taken to identify the required reproduction

816 CDPA, s 31(1). Note that s 31(3) sets up a distinction between 'incidental' and 'deliberate' inclusion, at least as regards musical works: CDPA, s 31(3).

817 *Football Association Premier League Ltd v Panini UK Ltd* [2003] EWCA Civ 995 [26].

818 ibid. See also the adoption and application of the test in *Fraser-Woodward v BBC* [2005] EWHC 472 (Ch) [79] – [87].

819 *Football Association Premier League v Panini* (n 817) [27].

820 ibid [26].

821 *Fraser-Woodward* (n 818) 84.

822 Although the intentionality of the act is, as with the assessment of whether an inclusion is 'incidental', an objective and not a subjective assessment.

'as such' and the use is for one or more of a limited range of purposes (including criticism or review).

Interpreting the UK quotation exception in accordance with EU law

A UK court asked to apply section 30(1ZA) CDPA will be required to determine first, whether there is, relevantly, a copyright work, and secondly, whether there is *prima facie* infringement of that work.

Copyright subsistence in UK law

The categories of work in which copyright may subsist under the CDPA include sound recordings, films, broadcasts, and typographical arrangements of published editions,[823] as well as literary, dramatic, musical or artistic works that are 'original'.[824]

The decision of the CJEU in Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening*[825] addressed the test of originality in EU copyright law, and the principles derived from *Infopaq* have 'to some extent been embedded in UK law through domestic jurisprudence in the UK appellate courts'.[826] In *Infopaq*, the court concluded that 'the various parts of a work … enjoy protection under Article 2(1) of [the Infosoc Directive], provided that they contain elements which are the expression of the intellectual creation of the author of the work',[827] with the implication that an extract from a work, such as a sentence from a literary

823 CDPA, s 1(1).

824 ibid s 1(1)(a). 'Original' is not a statutorily defined term, and its meaning has evolved through case law.

825 [2009] ECR I-06569 ('*Infopaq*').

826 Richard Arnold and others, 'IP Law Post-Brexit' (2017) 101 *Judicature* 65, 71.

827 *Infopaq* (n 825) para 39.

text, may itself be accorded protection against copyright infringement (a conclusion that has been interpreted as suggesting that such an extract may, in some cases, constitute a copyright work in its own right[828]).[829] Whilst it is unclear, following Brexit, whether UK courts will ultimately depart from the 'EU concept of the "author's own intellectual creation"', derived from *Infopaq*, in favour of a return to the 'old "skill, labour and judgment' standard"' of originality derived from pre-existing UK case law,[830] the 'own intellectual creation' standard has continued to be adopted by UK courts in early post-Brexit case law.[831]

This has the effect that, in order to qualify as an 'original' work enjoying copyright protection under the CDPA, subject matter must be 'the author's own intellectual creation';[832] that is, it is 'both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his/her free and creative choices'.[833] Consequently, and consistent with long-standing and widely known principles of copyright law,[834] those elements which are *not* expressions of an author's creativity, such as factual or 'stock' elements, do not qualify for copyright protection.[835]

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828 See *Newspaper Licensing Agency v Meltwater Holding BV* [2010] EWHC 3099 (Ch) [71].

829 *Infopaq* (n 825) para 47.

830 Arnold and others (n 826) 71.

831 See, for example, *Shazam* (n 779) [94] – [113]. Note that this is a decision of the Intellectual Property Enterprise Court.

832 *Infopaq* (n 825) para 39. And see the decision in *Shazam* for the application of the *Infopaq* 'own intellectual creation' test as the measure of originality under the CDPA: *Shazam* (n 779) [94] – [113]. Further, 'classification as a work is reserved to the elements that are the expression of such creation', as explained by the CJEU in Case C-683/17 *Cofemel v G-Star Raw* [2020] ECDR 9 at [29] (and as noted in *Shazam* (n 779) at [94]).

833 *Shazam* (n 779) at [94], citing, inter alia, *Case C-145/10 Painer v Standard VerlagsGmbH and Others* [2011] ECR I-12533 at paras 88, 89 and 94.

834 In 2007, Jacob LJ referred to the 'dichotomy between an idea and its individual expression' as being '"well-known" … not just known to copyright lawyers of one country but well-known all over the world': *Nova Productions Limited v Mazooma Games Limited & Others* [2007] EWCA Civ 219, para 31.

835 See, for example, *Baigent and Leigh v The Random House Group Ltd* [2007] EWCA Civ 247 at [156]. In *Shazam*, it was accepted by Kimbell QC that contrary to being a 'stock' character, the character of Del Boy was 'highly distinctive and original', and satisfied the requirements for copyright protection: *Shazam* (n 779) [98] – [113].

Copyright infringement in UK law

Under the provisions of the CDPA, the owner of copyright in a work enjoys exclusive rights to undertake certain acts ('acts restricted by copyright'[836]) in relation to the work.[837] A person infringes copyright by doing an act, without the owner's permission, that is exclusively reserved to the copyright owner.[838] The statute provides that a restricted act is considered to be done, in relation to a copyright work, if it is done either in relation to the work as a whole, or to a 'substantial part' of the work.[839] Pursuant to long-standing case law in the UK, a court's assessment as to 'substantial part' is a question of quality, more than of quantity.[840] When viewed through the lens of the *Infopaq* test, it therefore becomes necessary for a court to ask whether the part of the work implicated by the doing of the restricted act(s) 'contains elements which are the expression of the intellectual creation of the author'.[841]

The decision in *Infopaq*, and its adoption in UK law, have the effect that uses of copyright materials that might previously have been allowable, because they did not constitute uses of a 'substantial part' of a copyright work under UK law, might now amount to *prima facie* copyright infringement.

836 CDPA, s 16(1).

837 ibid ss 16(1)(a), 17(1).

838 ibid s 16(2).

839 ibid s 16(3)(a).

840 *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL), 276 (Lord Reid).

841 See *Meltwater* (n 828) [69]. As the High Court there explains, '[t]here is no reference to "substantial part" in art 2 [of the Infosoc Directive]; the [CJEU] makes it clear [in *Infopaq*] that originality rather than substantiality is the test to be applied to the part extracted'. See also *Shazam* (n 779) [125].

Section 30(1ZA) CDPA

Considering, then, whether section 30(1ZA) CDPA applies, thus providing a defence to a claim of infringement of copyright in a work previously made available to the public,[842] a UK court should begin by considering whether there has been use of a 'quotation from [that] work'. As follows from the conclusions of the foregoing and of this chapter, this involves first ascertaining whether there has been use of either the whole, or a part of, the copyright work, substantially without alteration, such that the content can properly be said to be 'from' the copyright work (a 'reproduction'). Secondly and relatedly, it involves determining from objectively-appreciated indicators whether the putative quotation has been identified by the user, for the benefit of the intended audience, 'as such' – that is, as content deriving from another source ('identified as such'). This enquiry will be answered, in many cases of textual quotation in particular, by reference to the requirement in section 30(1ZA)(d) that the claimed quotation is 'accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise'.[843] Thirdly, it involves determining whether the putative quotation has been used for a purpose of criticism, or review, or for an analogous purpose (in the words of the CJEU, 'for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between [the copyright] work and the assertions of [the] user'[844]).

Whilst it is suggested here that the third enquiry, as to purpose, is an aspect of determining the existence of a 'quotation' within the meaning of section 30(1ZA), it closely resembles the task undertaken by UK copyright law judges when considering whether the fair dealing defence in any of sections 30(1) ('fair dealing with a work for the purpose of criticism

842 See CDPA, s 30(1ZA)(a).

843 CDPA, section 30(1ZA)(d).

844 *Pelham* (n 799) para 71; *Spiegel* (n 799) para 78.

or review'), 30(2) ('fair dealing with a work … for the purpose of reporting current events') or 30A ('fair dealing with a work for the purposes of caricature, parody or pastiche') is made out.[845] It avoids the need, if any, to conduct a distinct enquiry into whether use of a quotation is 'for criticism or review or otherwise' in accordance with the wording of the provision.[846]

Once a court determines that there has, indeed, been use of a 'quotation' from a copyright work within the meaning of section 30(1ZA), it should proceed to the task of determining whether the use of the relevant quotation amounts to a 'fair dealing' with the copyright work. Whilst this task resembles one very familiar to UK copyright law judges, bearing out the intention of the UK legislature that the provision should invoke known standards,[847] section 30(1ZA) does raise two unique considerations: first, it prompts a court to determine whether the use of the *quotation* represents a fair dealing with the *copyright work*,[848] whereas the CDPA's other fair dealing defences do not on their face prompt such bifurcated enquiries;[849] secondly, as the provision has its origins in the Infosoc Directive,[850] it raises questions both as to the degree of relevance of domestic 'fair dealing' authorities decided prior to the

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845 Note that whilst under section 30(1) criticism or review must be 'of that or another work or of a performance of a work' (CDPA, s 30(1)), there is no such limitation express or implied into section 30(1ZA)).

846 Even the strictest reading of 'or otherwise' could encompass purposes analogous to criticism or review, so once it is established that there is a purpose of criticism, or review, or an analogous purpose, this avoids the need to consider whether the purpose falls within 'criticism or review or otherwise'.

847 See 'Modernising Copyright' (n 810) 14.

848 See CDPA, s 30(1ZA)(b) ('the use *of the quotation* is fair dealing *with the work*' (emphasis added)).

849 See, for example, CDPA, s 30(1) ('[f]air dealing with a work for the purpose of criticism or review … does not infringe any copyright in the work'). Nonetheless, the in-practice application of the other CDPA fair dealing defences likely warrants a similar enquiry, given that 'dealings' under sections 30(1), 30(2) and 30A CDPA will not always be with the whole of a copyright work: in such circumstances, the statute asks the court to consider whether a particular 'dealing', namely, a particular use of part(s) of a copyright work, is a *fair* dealing with that work. In the context of section 30(1ZA), the enquiry may give rise to considerations of whether the use of the quotation somehow represents an unfair treatment of the copyright work, similar to those considerations that arise in an assessment of derogatory treatment under CDPA, s 80.

850 Transposition note for Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ No L 167, 22.6.2001, p.10) 2.

implementation of the Directive,[851] and as to the relationship between the fair dealing assessment mandated by UK statute and the 'fair balance', proportionality and three step tests deriving from EU law.[852]

The first of these considerations is unlikely to take the fair dealing assessment under section 30(1ZA) too far into unchartered territory. Accordingly, this assessment may, largely, proceed as is usual under the fair dealing provisions of Chapter III, CDPA – save that a court should remain conscious that, whilst the relevant quotation may only be a *part* of the work (albeit, necessarily, a 'substantial part'[853]), it is the fairness of the dealing with the copyright work (presumably, *as a whole*) that section 30(1ZA) directs the court to consider.

As to the second consideration, CJEU jurisprudence makes clear that, in applying a domestic copyright exception that implements a provision of article 5 Infosoc Directive, national courts must strike a fair balance between relevant rights and interests in all the circumstances of the case.[854] As detailed in Chapter 3, it is the contention of this thesis that this jurisprudence remains relevant to the interpretation and application of section 30(1ZA) by UK courts. How, therefore, does the obligation of UK courts to ensure a fair balance of rights and interests, and indeed, the need to ensure compliance of the exception as applied with article 5(5) Infosoc Directive[855] (which the CJEU's decisions in *Funke Medien*, *Pelham*, and *Spiegel*

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851 See, for example, the statement of Arnold J in *England and Wales Cricket Board Ltd v Tixdaq* that pre-existing domestic authorities on the interpretation and application of section 30(2) CDPA 'must be treated with a degree of caution': *England and Wales Cricket Board Ltd v Tixdaq* [2016] EWHC 575 (Ch) [74] ('*Tixdaq*').

852 For the three-step test in EU law, see Infosoc Directive, art 5(5).

853 See CDPA, s 16(3)(a).

854 *Deckmyn* (n 781) para 27.

855 It will be recalled that art 5(5) of the infosoc Directive comprises a formulation of the three-step test in art 9(2) of the Berne Convention. Art 5(5) states as follows: 'The exceptions and limitations provided for in para graphs 1, 2, 3 and 4 [of art 5] shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder': Infosoc Directive, art 5(5).

also suggest is a matter for national courts,[856] despite some uncertainty about this at UK level[857]), relate to the fair dealing assessment mandated by section 30(1ZA) itself?

UK courts have already grappled with these matters in the decision in *Tixdaq*, and more recently, in the decision in *Shazam*, albeit in the context of considering section 30(2) CDPA, derived from article 5(3)(c) Infosoc Directive, and section 30A CDPA, derived from article 5(3)(k) Infosoc Directive, respectively.

In *Tixdaq*, Arnold J held that domestic authorities on the interpretation and application of section 30(2) CDPA (fair dealing for the purpose of reporting current events), and of its legislative predecessors, 'must be treated with a degree of caution'.[858] His Honour noted that the domestic authorities cited by counsel 'were mostly decided prior to the implementation of the [Infosoc] Directive and all of them were decided well before the recent jurisprudence of the Court of Justice concerning the interpretation of the Directive'.[859] Moreover, none of the cited authorities considered the three-step test.[860]

It was acknowledged in *Tixdaq*,[861] and subsequently in *Shazam*,[862] that following the decision in *Deckmyn*, any application of a national exception derived from article 5 of the Infosoc Directive must strike a 'fair balance' between 'the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the other'.[863] The parties in *Tixdaq* agreed, in the words of Justice Arnold, that section 30(2) CDPA 'contains a balancing

856 Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] OJ C 382 ('*Funke Medien*') para 61; *Pelham* (n 799) para 62; *Spiegel* (n 799) para 46.

857 See, for example, *Tixdaq* (n 851) [72]. See also *Shazam* (n 779) [155].

858 *Tixdaq* (n 851) [74].

859 ibid.

860 ibid.

861 *Tixdaq* (n 851) [73].

862 *Shazam* (n 779) [149].

863 See *Deckmyn* (n 781) para 27.

mechanism within it, since it requires an assessment of fair dealing'.[864] Accordingly, in that case the fair dealing assessment was viewed as a vehicle adapted to undertake the necessary balancing of the defendant's rights and the claimants' intellectual property rights.

Further, the proposition in *Painer* and *Deckmyn* that courts applying national copyright exceptions must strike a 'fair balance' of rights and interests was described by Arnold J as 'consistent with' a reading of article 5(5) Infosoc Directive which sees its second and third steps as requiring a 'consideration of proportionality, and a balance to be struck between the copyright owners' legitimate interests and the countervailing interests served by the exception'.[865] In his decision in *Shazam,* John Kimbell QC (sitting as a Deputy High Court Judge) agreed with this characterisation of article 5(5).[866]

It was agreed by counsel in both *Tixdaq* and *Shazam* that article 5(5) 'requires the three-step test to be applied by national courts when deciding individual cases' (and is not merely addressed to the legislatures of Member States when framing laws),[867] despite some cases indicating to the contrary.[868] Further, it was agreed by counsel in both cases that article 5(5) requires consideration by the court of 'essentially the same factors as fair dealing'.[869]

What, then, is the nature of the fair dealing test to be applied in such cases? In applying the fair dealing standard in *Tixdaq,* Justice Arnold asked the following questions:

(i) Does the use conflict with the normal exploitation of the works?
(ii) Have the works been published?

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864 *Tixdaq* (n 851) [73].

865 ibid [92].

866 *Shazam* (n 779) [150].

867 This was agreed to be the effect of art 5(5), 'even though the United Kingdom (unlike some other Member States) has not transposed Article 5(5) into its national legislation': *Tixdaq* (n 851) [72]. See also *Shazam* (n 779) [155].

868 As discussed in *Tixdaq*: see *Tixdaq* (n 851) [72].

869 *Tixdaq* (n 851) [88]; *Shazam* (n 779) [155].

(iii) Is the amount and importance of the works taken justified by the informatory purpose?[870]

Despite Arnold J's reservations about continuing reliance on domestic authorities,[871] it may be noted that these three questions broadly correspond with the three factors of the traditional formulation of the 'fair dealing' test in *Laddie, Prescott & Vitoria*,[872] as approved by Lord Phillips in *Ashdown*.[873] In the first question, however, His Honour adopted the terminology of the second step of article 5(5),[874] whilst the third question incorporates an assessment of proportionality, through language taken from article 5(3)(c) of the Infosoc Directive.[875] In *Shazam*, Kimbell QC appeared to endorse the traditional formulation of the 'fair dealing' test in *Laddie, Prescott & Vitoria*, whilst also conflating steps two and three of the three step test with the 'fair dealing' test required by section 30A CDPA, and considering as part of the same assessment the nature of alleged infringer's expression and any fundamental rights it engaged.[876]

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870 *Tixdaq* (n 851) [137] – [150].

871 See ibid [74].

872 Namely, considering '(1) whether the alleged fair dealing is in commercial competition with the owner's exploitation of the work, (2) whether the work has already been published or otherwise exposed to the public and (3) the amount and importance of the work which has been taken': Huw Laddie, Peter Prescott and Mary Vitoria, *The Modern Law of Copyright and Designs* (3rd edn, Butterworths 2000) para 20.16.

873 *Ashdown v Telegraph Group* [2001] EWCA Civ 1142 [20].

874 That is, '[t]he exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases *which do not conflict with a normal exploitation of the work or other subject-matter* and do not unreasonably prejudice the legitimate interests of the rightholder': Infosoc Directive, art 5(5) (emphasis added).

875 That is, 'reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, *to the extent justified by the informatory purpose* and as long as the source, including the author's name, is indicated, unless this turns out to be impossible: Infosoc Directive, art 5(3)(d) (emphasis added).

876 *Shazam* (n 779) [196].

Accordingly, and as will be demonstrated in the next chapter, a UK court considering the copyright quotation exception in section 30(1ZA) may apply the 'fair dealing' standard invoked in that provision largely according to known principles, moderated to accommodate the specific foci of a fair balance of rights and interests, and compliance with the three steps of the test outlined in article 5(5) Infosoc Directive. Unlike section 30(2) CDPA, considered in *Tixdaq*, section 30(1ZA) already incorporates (in subsection (c)) a proportionality requirement expressed in language similar to that of its equivalent provision in EU law.[877] Further, section 30(1ZA) incorporates in subsection (a) a specific requirement that the copyright work at issue has been made available to the public prior to its use by the alleged infringer, addressing the second of the questions put by Arnold J in formulating the fair dealing test in *Tixdaq*.[878]

877 See CDPA s 30(1ZA)(c) ('the extent of the quotation is no more than is required by the specific purpose for which it is used') and compare Infosoc Directive, art 5(3)(d) ('to the extent required by the specific purpose').

878 Although it is acknowledged that 'make available to the public' is not the same as 'publish'.

7. DEMONSTRATING THE SCOPE OF THE UK QUOTATION EXCEPTION

In this chapter, the interpretation of section 30(1ZA) CDPA outlined in the previous chapter is applied to four case studies, each of which is based on the facts of past copyright proceedings (whether they occurred in the UK or otherwise). Canvassing each scenario, this chapter will consider first, whether the relevant use could constitute permissible use of a 'quotation' meeting the criteria of section 30(1ZA) CDPA, and secondly, whether such use would otherwise be permitted under the provisions of the CDPA.

When applying section 30(1ZA) to the facts of the case studies provided in this chapter, the reading of section 30(1ZA) advanced by this thesis as necessary will be adopted. As outlined, this imports a legal conception of quotation as a reproduction, which is identified as such, and is for the purpose of criticism, or review, or a purpose analogous to criticism or review. The fair dealing test applied in this chapter is based on traditional principles,[879] adapted as necessary to accommodate the requirements of EU law – namely, that the application of a copyright exception must, in all the facts of a case, strike a fair balance between the rights and interests of the copyright owner and those of users,[880] and must occur only 'in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder'.[881]

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879 For example, those outlined in the classic statement of the fair dealing test *Hubbard v Vosper* [1972] 1 All ER 1023, 1027, reproduced at n 815.

880 See Case C-201/13 *Deckmyn and Vrijheidsfonds VZW v Vandersteen and Others* [2014] OJ C 189 ('*Deckmyn*') paras 26 – 27.

881 That is, must comply with the three-step test as expressed in Infosoc Directive, art 5(5).

Many of the case studies in this chapter have been chosen because they test the boundaries of the quotation exception in section 30(1ZA) CDPA, with the objective that resolution of the questions that they raise will allow a better understanding of the scope of this and other exceptions for the use of quotations from copyright materials. Notwithstanding this, it will be recalled in this and subsequent discussions that, as 'rules are necessarily actually or potentially both under- and overinclusive, even the best rules will in their normal operation on occasion produce the wrong results',[882] and that 'a process that focuses disproportionately on the instances of under- or (especially) overinclusion may [lead to bad lawmaking]'.[883]

Case studies

Case Study 1 – Facts of *Ashdown v Telegraph Group*[884]

In 1997, a Member of Parliament (MP), also then leader of the Liberal Democrats, attends a meeting with the Labor Prime Minister of the UK,[885] during which they discuss the possibility of forming a coalition cabinet comprising members of Labor and the Liberal Democrats.[886] The MP takes a note of the meeting for inclusion in his private diary and circulation amongst a limited group of staff members.[887]

882 Frederick Schauer, 'Do Cases Make Bad Law?' (2006) 73 *The University of Chicago Law Review* 883, 907.

883 ibid.

884 [2001] EWHC 28 (Ch) ('*Ashdown 1*'). See also the decision of the Court of Appeal in *Ashdown v Telegraph Group* [2001] EWCA Civ 1142 ('*Ashdown 2*').

885 *Ashdown 1* (n 884) [1].

886 ibid [2].

887 ibid [1].

Around the time of the 1997 meeting, and on subsequent occasions, 10 Downing Street issues denials that a coalition between Labor and the Liberal Democrats is being considered.[888]

Two years later, the MP refers in a radio interview to the 1997 meeting, and to the possibility of publishing his diaries in the form of a book.[889] About this time, the minute of the 1997 meeting is shown in confidence to representatives of newspapers and publishing houses, with a view to concluding a contract for its publication.[890]

Shortly afterwards, the note of the 1997 meeting is disclosed, without the authority of the MP and in breach of confidence,[891] to a representative of a major newspaper.[892] Following this, the newspaper publishes a series of articles that discuss the subject matter of the 1997 meeting[893] - and with this, the actions of the then Prime Minister and the MP.[894] In doing so, the articles both paraphrase the note made by the MP, and reproduce parts of it verbatim.[895]

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888 See ibid [22] (concerning the defendant's reliance on the fact that the relevant disclosure 'contradicted the denials emanating from Downing Street').

889 ibid [2].

890 *Ashdown* [2001] EWCA Civ 1142 ('*Ashdown 2*'), [6].

891 ibid [75] ('The minute was undoubtedly obtained in breach of confidence').

892 ibid [7].

893 ibid [7]-[8].

894 ibid [10].

895 ibid [9] ('[V]ery roughly one-quarter of the text of the main article on pages 4 and 5 consisted of verbatim or almost-verbatim reproduction of the minute, and very roughly one-fifth of the minute was reproduced in this way')

Case Study 2 – Facts of *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Limited*[896]

A pop rock song is released in Australia in 1979.[897] Within two months the album of which it forms part reaches number one on the Australian charts, and later reaches number one in the American and British charts also.[898] Its lyrics address aspects of national culture.[899] Over time, the song becomes 'iconic',[900] and an expression of Australian patriotism.[901]

In 2007, the song is considered on a musical quiz TV show.[902] Contestants are asked to identify what - equally well-known, and also 'iconic'[903] - children's song is partly reproduced[904] in a short 'flute riff' that is repeated three times in the pop song.[905] One contestant

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896 [2010] FCA 20 ('*Larrikin*'). See also the judgment of the Full Federal Court on appeal: *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* [2011] FCAFC 47 ('*EMI Songs*').

897 *Larrikin* (n 896) [73]. A further recording of the song, also at issue in the proceedings in *Larrikin*, was released in 1981: *Larrikin* (n 896) [73].

898 ibid [100].

899 ibid [113] (concerning the 'Australian themes and qualities which form the basis of "Down Under"'). The Full Court judgment notes 'a number of references made in Down Under to Australian icons': *EMI Songs* (n 896) [99].

900 *Larrikin* (n 896) [2]. See also *EMI Songs* (n 896) [1], [26], [86], [180].

901 'As with Bruce Springsteen's Born In The USA, it seems destined to be an accidental patriotic tune, despite its creator's intentions. The Age calls it an "unofficial national anthem"; it was the soundtrack to Australia's 1983 Americas Cup victory as well as the closing ceremony of the 2000 Sydney Olympics and currently features in a Qantas ad and soundtracks many a movie's Antipodean location': 'Down Under-covered' (*BBC News*, 1 August 2009) <http://news.bbc.co.uk/1/hi/magazine/8178913.stm> accessed 16 February 2024.

902 *Larrikin* (n 896) [203].

903 This descriptor was used multiple times in the judgments of both the Federal Court and the Full Federal Court, and in relation to both the earlier children's song and the later pop song: see *Larrikin* (n 896) [1], [214]; *EMI Songs* (n 896) [1], [26], [86], [92], [99] ('the iconicity of *Kookaburra*'), [155], [180], [219], [232].

904 Two of the total four bars of the earlier song are included in the later song: see *Larrikin* (n 896) [2].

905 ibid [4] ('The flute riff in "Down Under" does not consist solely of the two bars of "Kookaburra". Indeed, where it first appears in the 1981 recording, immediately after the percussion introduction, the flute riff contains only the second bar of "Kookaburra") and [5] ('The flute riff is then heard at two later points in "Down Under". At those points the flute riff includes the first and second bars of "Kookaburra"').

correctly identifies the children's song,[906] which deals with traditional Australian themes[907] and was penned in 1932 by an individual for a Girl Guides Association competition.[908]

It emerges that the composers of the pop song intentionally reproduced a part of the children's song.[909] Indeed, evidence shows that the composers have in concert alluded to the inclusion of part of the children's song in their song.[910] Similarly, the music video released with the pop song alludes through imagery to the lyrics of the children's song.[911] The self-declared purpose of including the children's melody in the pop song was 'paying tribute' to the original.[912]

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906 *Larrikin* (n 896) [203]. *EMI Songs* (n 896) [153].

907 For example, the first verse of the children's song, entitled 'Kookaburra Sits in the Old Gum Tree' (often shortened to 'Kookaburra') has the lyrics 'Kookaburra sits on the old gum tree, Merry merry king of the bush is he. Laugh, Kookaburra, laugh, Kookaburra, Gay your life must be!': 'Kookaburra sits on the old gum tree' (*Words for Life*) < https://wordsforlife.org.uk/activities/kookaburra-sits-old-gum-tree/> accessed 18 February 2024 (although note that this website, published by the UK National Literacy Trust, contains lyrics that differ slightly from those referred to in the judgments in *Larrikin* and *EMI Songs*).

908 *Larrikin* (n 896) [2]; *EMI Songs* (n 896) [13], [122], [203].

909 At first instance, Jacobson J concluded that 'it is also open to me to infer that Mr Ham deliberately reproduced a part of "Kookaburra", an iconic Australian melody, for the purpose and with the intention of evoking an Australian flavour in the flute riff: *Larrikin* (n 896) [203]. On appeal, the Full Federal Court confirmed that 'the trial judge was entitled to infer that Mr Ham deliberately reproduced a part of Kookaburra, an iconic Australian melody, for the purpose and with the intention of injecting Australian flavour into the flute riff': *EMI Songs* (n 896) [206].

910 One of the composers accepted when giving evidence that 'for a period of about 2 or 3 years from around 2002, when he performed "Down Under" at concerts, he sometimes sang the words of "Kookaburra" at about the middle of "Down Under", at the point at which he reached the flute line': *Larrikin* (n 896) [111].

911 The accompanying music video 'included a shot of [one of the musicians] playing the flute riff in the middle of the song, while sitting in a tree' (recalling that the title of the earlier song was 'Kookaburra Sits in the Old Gum Tree': *Larrikin* (n 896) [105]. The song's co-composer 'now accepts that the flute riff played by [the musician] while sitting in the tree was a direct musical reference to "Kookaburra", although he did not concede that it was an obvious reference': *Larrikin* (n 896) [105].

912 See *EMI Songs* (n 896) [95]. This characterisation appeared to be accepted by the Emmett J of the Full Federal Court: *EMI Songs* (n 896) [99]. Nonetheless, as noted by Jagot J in the Full Federal Court decision, '[c]haracterising the borrowing as a tribute does not alter the fact of the borrowing: *EMI Songs* (n 896) [226].

Case Study 3 – Facts of *Cariou v Prince*[913]

A successful 'appropriation artist'[914] creates a new series of works, entitled *Canal Zone*.[915] *Canal Zone* consists of 31 artworks, 30 of which use, in whole or in part, portrait photographs (the '*Yes Rasta* photographs') by a much less successful photographer.[916] In all cases, the artist has re-contextualised or made changes to the original photographs – for example, by painting coloured additions over the original photographs in black and white.[917]

In one of the *Canal Zone* artworks, entitled *James Brown Disco Ball* and measuring 100 ½ inches by 104 ½ inches,[918] the artist places headshots from various *Yes Rasta* photographs onto 'other appropriated images' of bodies,[919] all of which are then placed on a canvas painted by the artist.[920]

In proceedings against the artist for copyright infringement, the appropriation artist gives evidence that he 'do[es]n't really have a message' and was not, in creating the *Canal Zone* series, 'trying to create anything with a new meaning or new message'.[921] Yet, he also gives

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913 714 F.3d 694 (2d Cir 2013) ('*Cariou 2*'). See also the earlier decision of the United States District Court for the Southern District of New York: *Cariou v Prince* 784 F Supp 2d 337 (SDNY 2011) ('*Cariou 1*').

914 *Cariou 2* (n 913) 700. As noted in the judgment, the Tate Gallery defines appropriation art 'the practice of artists using pre-existing objects or images in their art with little transformation of the original': see 'Art Term: Appropriation' (*Tate Gallery*) <https://www.tate.org.uk/art/art-terms/a/appropriation> accessed 17 February 2024.

915 *Cariou 2* (n 913) 698.

916 'Prince had a show at the Eden Rock hotel in St. Barth's that included a collage, titled *Canal Zone* (2007), comprising 35 photographs torn out of *Yes Rasta* and pinned to a piece of plywood … He went on to create thirty additional artworks in the *Canal Zone* series, twenty-nine of which incorporated partial or whole images from *Yes Rasta*': ibid 699. The less successful photographer was Cariou – on appeal, the 2nd Circuit court noted that Cariou's *Yes Rasta* had 'enjoyed limited commercial success': ibid 699.

917 See, for example, the images reproduced in the judgment of the Second Circuit: ibid 701.

918 ibid 700.

919 ibid.

920 ibid.

921 *Cariou 1* (n 913) 349.

evidence that his practice is to 'completely try to change [another artist's work] into something that's completely different'.[922]

Case Study 4 – Facts of *Faulkner Literary Rights v Sony Pictures*[923]

In 1951, an already successful American author publishes the sequel to an earlier novel.[924] A recurring theme of the sequel is the continuing impact of the past on the present,[925] and a line within it, which becomes its most well-known,[926] is: 'The past is never dead. It's not even past'.[927]

In 2011, a prominent director makes a film in which the past – and specifically, 'Golden Age Thinking' – is a central concern.[928] In the film, a character notes that '[t]he past is not

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922 See *Cariou 2* (n 913) 699.

923 *Faulkner Literary Rights LLC v Sony Picture Classics Inc* 953 F Supp 2d 701 (ND Miss 2013) ('*Faulkner*').

924 ibid 705. The sequel is described in the judgment in *Faulkner* as 'a cross-genre between a novel and a three-act play' (at 705); here it will be described, simply, as a novel.

925 ibid 705, 710.

926 For example, in a landmark speech given during his 2008 presidential campaign, 'A More Perfect Union', Barack Obama commented that '[a]s William Faulkner once wrote, "The past isn't dead and buried. In fact, it isn't even past"': see the transcript of this speech at 'Barack Obama's Speech on Race' (*The New York Times*, 18 March 2008) < https://www.nytimes.com/2008/03/18/us/politics/18text-obama.html?ex=1363665600&en=8cb39ddc3c890a2c&ei=5124&partner=permalink&exprod=permalink> accessed 16 February 2024. Note that this quotation, too, is not entirely faithful to the text in Faulkner's novel.

927 William Faulkner, *Requiem for a Nun* (Vintage 1996) 85. See also *Faulkner* (n 923) 705. Incidentally, the dialogue in the novel includes the statement 'Methinks she doth protest too much' (without attribution) – a phrase that would likely qualify, in the conception of this thesis, as a 'quotation' according to both its ordinary and legal meaning: see William Faulkner, *Requiem for a Nun* (Vintage 1996) 77**.** 'The past is not dead' appears in Elizabeth Knowles's collection of 'misquotations' – she explains that 'The words "The past is not dead. It is not even past", attributed to the American writer William Faulkner, form the epigraph for Peter Carey's 2001 novel about the Australian bushranger, Ned Kelly, *The True History of the Kelly Gang*. However, what Faulkner actually wrote in his 1951 novel *Requiem for a Nun* differs slightly from this: "The past is never dead. It is not even past"': Elizabeth Knowles, *What They Didn't Say: A Book of Misquotations* (OUP 2006) 170.

928 'Golden Age Thinking" pervades the film, both in plot and theme': *Faulkner* (n 923) 704.

dead. Actually, it's not even past', attributing this statement to the author of the 1951 novel and reflecting that 'he was right'.

Application of CDPA provisions to case studies

Let us suppose that each of the factual scenarios outlined above attracted the application of UK law (with corresponding adjustments made to the facts in each case[929]). If the relevant copyright works were capable of protection under UK law[930] and the uses of those copyright materials occurred in the UK today,[931] would section 30(1ZA), as this thesis contends it must be read, provide an exception to any claim of prima facie copyright infringement? Would any other of the CDPA's exceptions to prima facie copyright infringement, particularly the other fair dealing exceptions in sections 30 and 30A of the CDPA,[932] provide a defence?

Case Study 1

The facts of this case study present a 'classic' scenario of quotation, as ordinarily understood in the English language: each part of the minute published verbatim in the major newspaper

929 For example, if it is necessary to assume that the songs at issue in case study 2 deal with themes of quintessential 'Englishness', rather than 'Australianness', these adjustments should be made.

930 That is, because of sufficient geographical connection with the UK.

931 12 April 2024.

932 Whilst the focus of this chapter is certain 'fair dealing' exceptions under Chapter III of the CDPA that might readily apply to uses of quotations from copyright works, specifically, the 'criticism or review', and 'caricature, parody or pastiche' fair dealing exceptions in section 30(1) and section 30A CDPA, respectively, it should be noted that Chapter III contains several other exceptions that could, in some instances, be relevant to the use of quotations from copyright works. In particular, it is worth noting the fair dealing exceptions for 'research or private study', and 'for the sole purpose of illustration for instruction' in section 29 and section 32 CDPA, respectively; and the exceptions for inclusion in a collection for use in, and copying by or on behalf of, 'educational establishments' in section 33 and section 36 CDPA, respectively.

unquestionably constitutes a 'group of words taken from a text or speech and repeated by someone other than the original author or speaker'.[933]

Evidence given in *Ashdown*, the case from which these facts derive, showed that the minute of the 1997 meeting was a nine page document.[934] One of the *Sunday Telegraph* articles at issue in the case refers to it as 'a highly detailed account … which describes the discussions [at the 1997 meeting] vividly and with precision'.[935] This is borne out by the parts of the minute reproduced in that article.[936] On this basis, it is reasonable to conclude that copyright subsisted in the minute. Indeed, this was common ground between the parties in *Ashdown*.[937] Applying the 'author's own intellectual creation' standard[938] would not, it is suggested, alter this conclusion.

As to whether the acts done in relation to the minute constituted *prima facie* infringement, it should be noted that approximately one fifth of the minute was reproduced 'verbatim or almost-verbatim'.[939] Whilst, as the Court of Appeal noted in *Ashdown*, 'infringement of copyright is not a matter of statistics',[940] this gives some sense of the quantity of the minute that was reproduced.

The qualitative significance of what was reproduced is somewhat difficult to assess, given that the full text of the minute was not made available in court proceedings in *Ashdown*.

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933 Recall the definition of 'quotation' in the *OED*: see 'quotation, n' (*OED Online*, July 2023) <https://www.oed.com/dictionary/quotation_n?tab=meaning_and_use#27196917> accessed 1 March 2024.

934 *Ashdown 2* (n 890) [9].

935 Joe Murphy, 'Exclusive: how Blair prepared "The Full Monty" with Ashdown' *The Sunday Telegraph* (London, 28 November 1999) 4.

936 ibid 4 – 5.

937 See *Ashdown 2* (n 890) [13].

938 See Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-06569, para 39.

939 *Ashdown 2* (n 890) [9].

940 ibid.

Nonetheless, considering that the parts of the minute reproduced verbatim were introduced in the articles at issue with phrases indicating their significance (for example, 'At this point they moved to the most *politically explosive* part of the meeting'[941]), it appears, somewhat unsurprisingly, that the parts reproduced represented some of the most qualitatively significant – both in terms of the information they conveyed and, importantly, the manner in which that information was expressed. Therefore, on the basis of the evidence available, it appears that the verbatim reproduction of parts of the minute – although not those articles, or those parts of the relevant articles, that merely discussed what occurred at the 1997 meeting[942] – constituted *prima facie* infringement of copyright in the minute. This was, indeed, conceded by the defendant in *Ashdown*.[943]

Could section 30(1ZA) apply?

The question arises, therefore, whether section 30(1ZA) CDPA would allow an exception for the verbatim reproduction of parts of the minute, were the facts of *Ashdown* to occur in the UK today. The answer, quite plainly, is that it would not, for the reason that the criterion in subsection (a) of the provision (that the relevant copyright work has been 'made available to the public'[944]) is not satisfied. Section 30(1A) provides that a work has been 'made available to the public' for the purposes of section 30(1ZA) if it has been 'made available by any means'

941 Murphy (n 935) 4 (emphasis added).

942 It was 'virtually conceded' by counsel for Mr Ashdown that the parts of the articles which merely summarised what had occurred at the meeting 'would not [alone] have been actionable as copyright infringement': *Ashdown 2* (n 890) [8].

943 *Ashdown 1* (n 884) [5].

944 CDPA, s 30(1ZA)(a).

(thereafter providing a list of examples of qualifying acts,[945] none of which apply).[946] Whilst there is as yet no UK case law that considers the meaning of section 30(1ZA)(a), and only limited EU case law that considers the meaning of its counterpart phrase in article 5(3)(d) Infosoc Directive,[947] it seems clear that circulation of the note of the meeting amongst a limited group of staff members, and on the condition of confidentiality,[948] would not constitute a making available to the degree required to satisfy section 30(1ZA)(a). This conclusion is not altered by the fact that the author of the minute discussed the existence of diaries, which included the relevant note of meeting, on radio.[949]

It is worth noting that various other criteria of section 30(1ZA) would, by contrast, be made out in the first case study. Importantly, it is likely that there would, in the circumstances as outlined, be 'use of a quotation', sufficient to attract the application of the provision as this thesis contends it must be read: first, there was reproduction of a passage – indeed, passages - of the copyright work, in this case entirely without modification, such that the reproduced content can properly be said to be 'from' the copyright work. Secondly, there was identification of the reproduced content 'as such', in that all content reproduced verbatim was either placed in quotation marks or in italics, with clear introductory phrases attributing authorship (this latter aspect also satisfying the requirement of 'sufficient acknowledgement' in section

945 Namely, the making available to the public 'by any means, including (a) the issue of copies to the public; (b) making the work available by means of an electronic retrieval system' (c) the rental or lending of copies of the work to the public; (d) the performance, exhibition, playing or showing of the work in public; (e) the communication to the public of the work', where 'no account shall be taken of any unathorised act': CDPA, s 30(1A).

946 ibid.

947 See C-145/10 *Painer v Standard VerlagsGmbH and Others* [2011] ECR I-12533, paras 124 – 149.

948 See *Ashdown 2* (n 890) [5].

949 This is consistent with the conclusions of the Court of Appeal in *HRH The Duchess of Sussex v Associated Newspapers* (in which the Duchess was considered to have maintained a reasonable expectation of privacy in respect of contents of her letter to her father, despite the fact that the existence of this letter had been made public in the *People* article, and some extracts from it had been published, seemingly with her permission, in the book *Finding Freedom*): see *The Duchess of Sussex v Associated Newspapers* [2021] EWCA Civ 1810, [84].

30(1ZA)(d)[950]). Thirdly, there was likely a purpose of criticism, review, or an analogous purpose. In *Ashdown* itself, the purpose of use of the verbatim reproductions was identified by the Vice-Chancellor at first instance as 'criticising or reviewing the actions of the Prime Minister and the claimant [later, respondent] in October 1997';[951] an assessment that is borne out by consideration of the relevant articles, which use the reproduced parts of the minute (and the information contained therein) as a basis for drawing conclusions about the contemporaneous actions and intentions of those who attended the meeting.[952] As discussed below, in *Ashdown* this purpose was not viewed by the court as sufficiently connected with the work (that is, the minute) to attract the application of section 30(1) (which, it will be recalled, requires '[f]air dealing with a work for the purpose of criticism or review, *of that or another work or of a performance of a work*'[953]).[954] However, there is nothing in the text of section 30(1ZA), or in the reading of the provision advanced by this thesis, that requires such a connection. Accordingly, and perhaps unsurprisingly,[955] it is likely in Case Study 1 that there would, relevantly, be 'use of a quotation' under section 30(1ZA) CDPA.

Despite the satisfaction of this central criterion, it is, however, unlikely that in the circumstances of Case Study 1, the use of the quotations at issue would constitute a 'fair dealing' with the copyright work. Applying the longstanding 'fair dealing' test, as moderated by considerations necessarily imported from EU case law, it is relevant to consider, first, whether the relevant use of the quotations conflicted with the normal exploitation of the

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950 CDPA, s 30(1ZA)(d).

951 *Ashdown 1* (n 884) [24].

952 See for example Murphy (n 935) 4-5.

953 CDPA, s 30(1) (emphasis added).

954 The Vice-Chancellor held that 'the articles were not criticising the minute, but the actions of the Prime Minister and the leader of the Liberal Democrats' - this reasoning was endorsed in the Court of Appeal judgment: see *Ashdown 2* (n 890) [61].

955 In that the reproductions align with the ordinary meaning of 'quotation', and the statutory meaning of 'quotation' should largely match this.

copyright work.[956] Consideration of normal exploitation 'requires consideration of potential future ways in which the copyright owner may extract value from the work as well as the ways in which the copyright owner currently does so'.[957] And in *Ashdown* itself, '[t]here was evidence … that the publication in the [appellant's newspaper] destroyed a part of the value of the memoirs which it had been [the respondent's] intention to sell, and which he did, in fact, sell'.[958]

As to the 'amount and importance' of the copyright work that was taken,[959] and whether the purpose of the use provided a justification, it is recalled that approximately one fifth of the 9 page long minute was reproduced verbatim or almost verbatim, and that – to the extent that this can be assessed without reference to the full text of the minute – the parts reproduced were of particular significance within the context of the minute as a whole. In *Ashdown* itself, the purpose of the use was identified as 'criticising or reviewing the actions of the Prime Minister and the claimant [later, respondent] in October 1997',[960] with the Vice-Chancellor concluding at first instance that 'it was not necessary for that purpose to copy the minute at all'[961] – let alone (it is implied) to copy one fifth of it.

On the one hand, the correctness of this conclusion might be thought evidenced by the fact that at least one of the articles at issue in *Ashdown* was capable of achieving the identified

956 *England and Wales Cricket Board Ltd v Tixdaq Ltd* [2016] EHWC 575 Ch, [137] – [150].

957 ibid [91].

958 *Ashdown 2* (n 890) [72].

959 See Huw Laddie, Peter Prescott and Mary Vitoria, *The Modern Law of Copyright and Designs* (3rd edn, Butterworths 2000) para 20.16 (describing the 'amount and importance' of the copyright work to be the 'third most important factor' in a fair dealing assessment, following first, commercial competition and secondly, whether the copyright work had been published), and cited with approval in *Ashdown 2* (n 890) [70].

960 *Ashdown 1* (n 884) [24].

961 ibid.

purpose without the use of any verbatim reproductions from the minute.[962] Yet, equally, the verbatim extracts used in the lengthiest of the articles show that they function to provide evidence for the conclusions then drawn, in service of the same purpose of 'criticising or reviewing the actions of the Prime Minister and the claimant [later, respondent] in October 1997': the excerpts are used, variously, to evidence 'the intimacy between the diners [at the 1997 meeting]';[963] that the Prime Minister was 'deeply committed to the principle of pluralism';[964] and likewise that he was serious about 'taking the gamble' of forming a coalition.[965] That is, they function much as quotations do in scholarly and similar writings: they harness the power of 'showing' rather than 'telling'. Viewed through this lens, the Vice-Chancellor's conclusion that it was not, for the purpose of 'criticising or reviewing the actions of the Prime Minister and the claimant [later, respondent]',[966] necessary to reproduce *any* of the 1997 minute may, with respect, be questioned. Nonetheless, the amount of the copyright work taken (given that the reproduction was, indeed, extensive) was not, perhaps, justified by this purpose.

Similarly, if it is considered that the excerpts from the minute were used, in part, to 'make clear' that the denials issued by Downing Street as to the occurrence of coalition talks were 'false',[967] then a purpose – if not, perhaps, the primary purpose – of their use may have

962 This article being Matthew D'Ancona. 'Mr Blair's "Fully Monty" is revealed' *The Sunday Telegraph* (London, 28 November 1999) 33.

963 Murphy (n 935) 4-5.

964 ibid 4.

965 ibid.

966 *Ashdown 1* (n 884) [24].

967 Murphy (n 935) 5 ('Downing Street refuses to admit that Mr Blair ever dreamt of putting Liberal Democrats. In his current Cabinet. Only days ago, when Mr Ashdown insisted on radio that such a move had been on the cards, the Prime Minister's official spokesman derided the claim. The spokesman suggested that Mr Blair, in his talks with Mr Ashdown, may have been referring to a partnership in the long term. However, *as Mr Ashdown's detailed notes make clear*, this denial is false').

been the correction of falsehoods, to 'set the record straight'. In *Campbell v MGN*,[968] the House of Lords held (albeit in the context of a privacy case, dealing with a newspaper's publication of private information in part to correct a misleading impression given to the public by a celebrity as to her drug use[969]) that the publication of *some*, but not *all*, of the information published was justifiable on the basis of the public interest in the exposition of the truth.[970] Likewise it is respectfully suggested that the Court of Appeal in *Ashdown* was correct to conclude that, in the context of Downing Street's denials, it was 'arguable that the [newspaper was] justified in making limited quotation of [the minute], in order to demonstrate that [it had indeed obtained such], so that [the journalists were] in a position to give an authentic account of the meeting', but that the articles' 'extensive reproduction' of the minute was not necessary for this purpose.[971]

This leads to the conclusion that the extent of the reproduction that actually occurred was unjustified.[972] In the context of considering the potential application of section 30(1ZA) CDPA, this is pertinent not only to the assessment of whether or not the relevant dealing was fair, but also to the requirement under section 30(1ZA)(c) that 'the extent of the quotation is no more than is required by the specific purpose for which it is used'[973] – a requirement that would not, accordingly, be satisfied.

Lastly, as to the factor that in *Ashdown* was stated to be the 'second most important' in an assessment of fair dealing, it was found by the court in that case that 'the copyright work had never been published or otherwise exposed to the public before the publication in the

968 [2004] UKHL 22.

969 As to the misleading impression see ibid [24].

970 See for example ibid [124], [125].

971 *Ashdown 2* (n 890) [81] (The Court concluded that '[t]he statement by the Sunday Telegraph that they had obtained a copy of the minute coupled with one or two short extracts from it would have sufficed').

972 ibid [82].

973 CDPA, s 30(1ZA)(c).

[appellant's newspaper]'.[974] This not only militates against a finding of fair dealing, but as mentioned above, is fatal to the potential application of section 30(1ZA) to the facts, as subsection (a) of the provision is not satisfied.

Could another exception apply?

The potential application of section 30(1) or 30(2) of the CDPA was considered in *Ashdown*, these provisions being in substantially the same form then as now.[975] As noted by the Court of Appeal, 'the Vice Chancellor [at first instance] rejected the defence under s 30(1) ("fair dealing with a work for the purpose of criticism or review") in a summary way: the articles were not criticising the minute, but the actions of the Prime Minister and the leader of the Liberal Democrats'.[976] Having accepted the reasoning of the Vice Chancellor, the Court of Appeal rejected the defence equally summarily.[977]

The later case of *Fraser-Woodward v BBC*[978] stands for the proposition that the requirement under section 30(1) for a connection with a work need not be interpreted as strictly as suggested by *Ashdown*.[979] It is submitted here that there is indeed good reason for a less rigid distinction between acts undertaken in respect of the work for the purpose of criticism or review of 'the work'; and acts undertaken for the purpose of criticism or review of, for example, the

974 *Ashdown 2* (n 890) [74].

975 The requirement under section 30(1) that the relevant copyright work has already been made available to the public was inserted in 2003 by the Copyright and Related Rights Regulations 2003 (SI 2003/2498), reg 10(1)(a). The limitation on sufficient acknowledgement under this provision, namely, 'unless this would be impossible for reasons of practicality or otherwise', was inserted in 2014 by the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (SI 2014/2356), regs 1, 3.

976 *Ashdown 2* (n 890) [19].

977 ibid [61].

978 [2005] EWHC 472 (Ch).

979 ibid [43] (it being accepted in that case that there could be criticism or review of the ideas or philosophy underlying a certain style of journalism).

ideas underlying or the subject matter of the work. Maintaining a rigid distinction in this respect might, for example, require one approach in copyright law to a quotation from a literary text for the purpose of discussing its style, and another to the same quotation if used for the purpose of discussing the actions of a character as conveyed within – an outcome that is both illogical and unworkable.

Nonetheless, for the reasons discussed below in reference to section 30(2), reliance by a defendant on section 30(1) would likely still fail today.

As to section 30(2), the Vice Chancellor held at first instance in *Ashdown* that reliance on section 30(2) CDPA did not have a reasonable prospect of succeeding. The Vice Chancellor held that there was a reasonable prospect that a purpose of reporting current events could be made out,[980] a matter on which the Court of Appeal concurred.[981] This seems undeniable, on the basis, as stated by the Court of Appeal, that:

> [i]n a democratic society, information about a meeting between the Prime Minister and an opposition party leader during the then current Parliament to discuss possible close co-operation between those parties is very likely to be of legitimate and continuing public interest [despite the meeting having occurred in the past]. It might impinge upon the way in which the public would vote at the next general election.[982]

Nonetheless, it was held that the relevant use could not be considered a 'fair dealing', based partly on the circumstance that the minute had not been published, and rather, had been communicated to a limited group in strict secrecy.[983] This was confirmed on appeal.[984] For the

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980 The Vice-Chancellor held that there was a reasonable prospect of the Sunday Telegraph establishing that the copying of the minute was for the purpose of reporting current events: *Ashdown 1* (n 884) [25].

981 *Ashdown 2* (n 890) [61].

982 ibid [64].

983 *Ashdown 1* (n 884) [28].

984 *Ashdown 2* (n 890) [75].

same reason, neither the exception in section 30(2) CDPA nor that in section 30(1) CDPA would be likely to apply to the facts of Case Study 1 today.

As to the 'public interest' defence raised in *Ashdown*,[985] despite the Court of Appeal's conclusion that 'there is the clearest public interest in giving effect to the right of freedom of expression in those rare cases where this right trumps the rights conferred by the [CDPA]',[986] based in part on the provisions of the Human Rights Act 1998,[987] ultimately the court held that '[i]t will be very rare for the public interest to justify the copying of the form of a work to which copyright attaches',[988] and that it did not in the circumstances justify the extent of copying that occurred.[989] It is unlikely that the conclusion reached in *Ashdown* would be any different were the circumstances of the case to be considered today.

Case Study 2

The facts of this case study, whilst not a 'classic' scenario of quotation such as that in Case Study 1, gave rise to what was described several times, in the judgments at first instance in *Larrikin* and on appeal in *EMI Songs*, as a 'quotation'.[990]

It was accepted in those proceedings that copyright subsisted in the children's song, as a four bar, original musical work.[991] It was then held in *Larrikin*,[992] in a decision upheld on

985 A defence arising at common law, and protected under CDPA, s 171(3).

986 *Ashdown 2* (n 890) [58].

987 ibid.

988 ibid [59].

989 ibid [82].

990 *Larrikin* (n 896) 166, 169, 180; *EMI Songs* (n 896) 35, 42, 50, 58 (on three occasions), 60.

991 'The relevant original work in which copyright subsists is the 1934 version of "Kookaburra" composed by Miss Marion Sinclair and entered by her into a competition conducted by the Girl Guides Association of Victoria': *Larrikin* (n 896) 163.

992 *Larrikin* (n 896) at 191.

appeal in *EMI Songs*,[993] that copyright had been infringed. Applying the 'substantial part' test under Australian law, acknowledged as primarily qualitative in nature,[994] the Australian Full Federal Court held on appeal that the part taken was a substantial, vital and essential part of the original (applying the UK authority of *Hawkes and Son (London) Ltd v Paramount Film Service Ltd*[995]).[996] These conclusions would likely be the same if the scenario was considered under UK law today. Specifically, the response on the infringement question would be unlikely to differ if considered through the lens of the *Infopaq* test: applying the standard of set out by the High Court of Australia in *IceTV Pty Ltd v Nine Network Australia Pty Ltd*,[997] the court in *Larrikin* held that '[a] critical factor in the assessment of the quality of what is copied is the originality of the part that is copied. Originality means that the creation or production of the copyright work required some independent intellectual effort'.[998] Accordingly, the conclusion on infringement in *Larrikin* was informed by considerations arguably closer in substance to those in *Infopaq* than the traditional UK 'skill and labour' factors.[999]

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993 See *EMI Songs* (n 896) 60. Emmett J expressed 'some disquiet' about this conclusion, querying whether, accordingly, 'some of the underlying concepts of modern copyright may require rethinking': *EMI Songs* (n 896) 60.

994 *EMI Songs* (n 896) 48, 51.

995 [1934] Ch 593. See *EMI Songs* (n 896) 48.

996 The part of the earlier musical work reproduced 'though brief', was 'an important and significant part whose composition may be said to have involved skill and originality': *EMI Songs* (n 896) 57. Applying *Hawkes v Paramount*, Emmett J 'consider[ed] that those phrases constituted an essential air or melody of the copyright work': *EMI Songs* (n 896) 57.

997 (2009) 239 CLR 458.

998 *EMI Songs* (n 896) 49. The Full Federal Court also addressed the relative brevity of the copyright work at issue (a matter which was at the forefront of the decision in *Infopaq*), commenting that '[t]o the extent that the contentions of the EMI Companies and Mr Hay conflate Kookaburra's brevity and relative simplicity with a lack of originality, they ought not to be accepted': *EMI Songs* (n 896) 57.

999 That is, those factors that traditionally informed the originality assessment in UK law – for judicial expressions of this test see, for example, *University of London Press v University Tutorial Press* [1916] 2 Ch 601, 609–610; *Ladbroke (Football) v William Hill (Football)* [1964] 1 WLR 273 (HL), 277 - 278 ('as regards compilation, originality is a matter of degree depending upon the amount of skill, judgment or labour that has been involved in making the compilation').

Could section 30(1ZA) apply?

The question arises, therefore, whether section 30(1ZA) CDPA would apply, were the facts of *Larrikin* to occur in the UK today. In this second case study, as in the first, various criteria of section 30(1ZA) would be made out. Unlike the copyright work in Case Study 1, the copyright work in Case Study 2 had clearly been 'made available to the public', satisfying this limb of section 30(1ZA).[1000]

As to whether there was, relevantly, 'use of a quotation', it is noteworthy, first, that there was in the later song reproduction of a passage of the copyright work, such that the reproduced content could properly be said to be 'from' the copyright work.[1001] This is notwithstanding that the passage as reproduced involved key changes,[1002] and other minor alterations,[1003] when compared to the same passage in the copyright work.

Secondly, the reproduced passage was identified 'as such': as observed in *EMI Songs*, the reproduced passage 'was *intended to be perceived by listeners as just that, namely, a quotation, or a reproduction, of part of [the earlier song]*, and the musical genres or styles associated with [it]'.[1004] It is material that, consistent with the presence of such an intention,

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1000 See CDPA, s 30(1ZA)(a).

1001 There was in the later song, noted the Full Federal Court, 'the consistent reproduction of the melodic excerpt from [the earlier song] as a discrete whole': *EMI Songs* (n 896) 59. The excerpt as included in the later song bore 'very close similarity, if not a complete identity' to the relevant bars of the earlier song: *EMI Songs* (n 896) 59. At first instance, Jacobsen J characterised this as 'note-for-note' identity, 'save that the quoted passages in "Down Under" contain the phrase at a different pitch to the 1934 version of "Kookaburra"': *Larrikin* (n 896) 167.

1002 *Larrikin* (n 896) 169.

1003 Among them changes to tempo and rhythm, and harmony: see discussion in *Larrikin* (n 896) at 174 – 178.

1004 *EMI Songs* (n 896) 58 (emphasis added). Notwithstanding this, listeners did not in fact perceive the reproduction until some time after the 1981 release of the later song: as the Full Federal Court noted in *EMI Songs*, the similarities between the relevant passages in the earlier and later songs 'went largely unnoticed [by the public] for in excess of 20 years': *EMI Songs* (n 896) 57. This was held to be largely immaterial, as the question (relevant to the assessment as to infringement) 'is one of objective similarity' (which 'may depend somewhat upon expert evidence'): *EMI Songs* (n 896) 57. Likewise, this thesis contends that the relevant question, for the purpose of ascertaining whether there has been use of a 'quotation', is not whether the reproduction is *identifiable* as such, but rather whether it has been *identified* as such – a matter that is to be assessed according to objectively discernible factors.

'[t]he flute phrases in the [the later song] are a clear departure from the genre of a rock anthem, and *therefore distinguish the part taken from [the earlier song] from the other parts and musical elements of [the later song]*'.[1005] Stated differently, the later song employed such tools as are available in music to set the reproduced passage apart, and to mark it as different from the musical infrastructure of the later song.[1006]

Assessed objectively, the musical distinction described in the previous paragraph provides some evidence that the purpose of the use of the reproduced part was not purely parasitical – that is, pursued 'in order to save effort on the part of the composer of [the later song], by appropriating the results of [the] efforts [of the composer of the earlier song]'.[1007] It therefore suggests that the purpose of use did not fall within the category of those that are clearly impermissible under section 30(1ZA).

Yet, however 'wide' the scope of 'criticism or review',[1008] it is perhaps difficult to see how the purpose pursued in the circumstances of Case Study 2 could be perceived as either criticism or review. It is worth noting that none of the fair dealing exceptions in the Australian *Copyright Act 1968* (Cth), which are comparable to those in section 30 and 30A of the CDPA (including fair dealing for criticism or review, fair dealing for reporting news, and fair dealing for parody or satire), were raised in the case of *Larrikin* itself.[1009]

1005 *EMI Songs* (n 896) 58.

1006 The equivalent of musical parentheses, musical italics, or musical quotation marks.

1007 As Emmett J concluded, 'the better view of the taking of the melody from Kookaburra is not that the melody was taken, animus furandi, in order to save effort on the part of the composer of Down Under, by appropriating the results of Ms Sinclair's efforts. Rather, the quotation or reproduction of the melody of Kookaburra appears by way of tribute to the iconicity of Kookaburra, and as one of a number of references made in Down Under to Australian icons': *EMI Songs* (n 896) 60.

1008 See *Pro Sieben Media v Carlton Television* [1999] 1 WLR 605, 614: the expression 'criticism or review' is of 'wide and indefinite scope'.

1009 Rather, the focus of the proceedings in *Larrikin* (n 896) and *EMI Songs* (n 896) was on whether copyright had been infringed.

This begs the question how far the scope of permissible purposes under section 30(1ZA) can extend, by analogy, beyond those of criticism or review. The 'essential characteristics' of quotation, as identified by the CJEU in *Pelham* and *Spiegel*, provide the answer: permissible purposes, under article 5(3)(d) Infosoc Directive and thereby section 30(1ZA) CDPA, comprise 'illustrating an assertion, … defending an opinion …. [and] allowing an intellectual comparison between [the copyright] work and the assertions of [the] user'.[1010] These purposes are characterised by a common function, namely, engagement with the quoted passage(s) to support 'an intellectual commentary or an artistic idea' (to use Adeney's alternative formulation[1011]). Uses of copyright works (or parts thereof) as mere ornament or decoration, without any engagement of this nature, cannot, therefore, qualify.[1012] If the full circumstances of use in Case Study 2 – including the references made to the earlier song in the music video for, and in performances, of the later song[1013] - are considered,[1014] it is suggested that the use, supporting a commentary on national identity[1015] but in a manner starkly in contrast with the darker tones of the later song, may be considered use for such a purpose.

1010 Case C-476-17 *Pelham and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] OJ C 347 ('*Pelham*') para 71; Case C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] OJ C 392 ('*Spiegel*') para 78.

1011 See Elizabeth Adeney, 'Appropriation in the name of art' (2013) 23 *Australian Intellectual Property Journal* 142, 156. Adeney proposes a quotation exception for inclusion in the Australian *Copyright Act 1968* (Cth), in which provision "quotation" is to be defined as 'the reproduction in material form, or communication, of part or the whole of the quoted work for the purpose of supporting an intellectual commentary or artistic idea contained in the quoting work or other subject matter'.

1012 Consistent with the comments of Advocate General Trstenjak in *Painer* – see *Painer* (n 947), Opinion of AG Trstenjak, para 211.

1013 See discussion of these references at *Larrikin* (n 896) 168 – 169.

1014 It is suggested that such surrounding circumstances may be considered as aspects of the 'use' of a quotation under CDPA, s 30(1ZA), just as the 'sufficient acknowledgement' enquiry made pursuant to CDPA, s 30(1ZA)(d) allows, to a degree, consideration of circumstances not entirely contemporaneous with the moment at which the infringing conduct occurs.

1015 Concerning the 'Australian themes and qualities which form the basis of "Down Under"', see *Larrikin* (n 896) 169. The Full Court judgment notes 'a number of references made in Down Under to Australian icons': *EMI Songs* (n 896) 60. The use of a passage reproduced from "Kookaburra" supported this commentary by 'evoking an Australian flavour': *Larrikin* (n 896) 179.

Further, it appears likely that the use would constitute a 'fair dealing' with the copyright work. Indeed, in *EMI Songs* the Full Federal Court went almost so far as to characterise it as 'a fair use that did not in any way detract from the benefit given to [the composer of the earlier song] for her intellectual effort in producing [it]'[1016] (notwithstanding that in Australian law, as in UK law, 'fair use' has no legal meaning[1017]). The later song did not compete in a retail market with the earlier song, and did not demonstrably damage the commercial interests of the author or the owner of copyright in the earlier song. As appears from the discussion in the preceding paragraph, the purpose of use was, as objectively appreciated, to evoke aspects of national identity, thereby supporting one of the artistic ideas pursued in the later song. On this basis, the amount and importance of the part taken from the copyright work (two bars from a four bar song) was likely justified, as if less or a less significant part had been used, then recognisability would have been (further[1018]) risked, defeating the purpose of use.

For the same reason, the proportionality criterion in CDPA section 30(1ZA)(c) is satisfied.

Yet, there remains the fact that the quotation (properly so called, both in ordinary language and, as established, in law) might not satisfy the requirement for sufficient acknowledgement in section 30(1ZA)(d).[1019] In *Fraser-Woodward v BBC*, it was confirmed (in

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1016 *EMI Songs* (n 896) 60. The Full Federal Court also commented that '[t]here was no evidence before the primary judge that the EMI companies [or the composers of the later song] took any part of Kookaburra with the intention of taking advantage of the skill and labour of Ms Sinclair in composing Kookaburra, in order to save effort on their part': *EMI Songs* (n 896) 59.

1017 The Australian Copyright Act 1968 (Cth), like the CDPA, contains several purpose-limited 'fair dealing' exceptions – see Copyright Act 1968 (Cth), ss 40 – 42.

1018 Even as it was, the part taken proved unrecognisable for many years – notably, it was only in 2007 that the part taken from the earlier song was recognised as having been reproduced in the later song: *Larrikin* (n 896) [203].

1019 CDPA, s 30(1ZA)(d).

relation to an identical requirement in section 30(2) CDPA[1020]) that 'sufficient acknowledgement' requires 'an identification [of the work and its authorship]'.[1021] The identification need not be express or entirely contemporaneous with the use,[1022] although it must be 'one that can readily be seen'[1023] and must not require 'some form of hunting around or detective work'.[1024] This evidences the distinction between the requirement that a quotation under section 30(1ZA) be identified 'as such', and the statutory requirement for sufficient acknowledgement under 30(1ZA)(d): whilst there is certainly common ground between the two, the former is conceived as requiring only an indication that the reproduced passage is 'from elsewhere', whilst the latter is more onerous in requiring specification of origin. It also suggests that, whilst in the circumstances of Case Study 2 there were allusions to the title of the earlier song in the music video for the later song, and when it was performed in concert,[1025] these likely necessitated too much 'hunting around' to satisfy the requirement in section 30(1ZA)(d).

Although section 30(1ZA)(d) provides an exemption from its requirement where 'this would be impossible for reasons of practicality or otherwise',[1026] and acknowledgement might be thought 'impossible' in the circumstances of some musical uses, conventions that allow

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1020 CDPA s 30(2) requires that the fair dealing with the work is 'accompanied by a sufficient acknowledgement': CDPA s 30(2). Note that the requirement in section 30(2) is modified by the caveat in section 30(3) ('No acknowledgement is required in connection with the reporting of current events by means of sound recording, film or broadcast where this would be impossible for reasons of practicality or otherwise'): CDPA, s 30(3).

1021 The court referred to CDPA, s 178, which states that 'sufficient acknowledgement' means 'an acknowledgement identifying the work in question by its title or other description, and identifying the author [other than in certain prescribed circumstances]': *Fraser-Woodward* (n 978) [71].

1022 ibid [75].

1023 ibid [72].

1024 ibid [73]. That case of course involved a broadcast, and not a musical work, so its conclusions have to be adapted somewhat to the circumstances of case study 2.

1025 *Larrikin* (n 896) [105].

1026 CDPA, s 30(1ZA)(d).

acknowledgement to accompany musical quotations are available,[1027] and none of these was used.

Accordingly, it is unlikely that section 30(1ZA) CDPA would apply to the facts of Case Study 2.

Could another exception apply?

Further, it is unlikely that any other exception in the CDPA could provide a defence. Even taking the more expansive view of the purpose of 'criticism or review' applied in *Fraser v Woodward*,[1028] it might be difficult to maintain that the later song engaged in criticism or review of the earlier song, an idea or philosophy underlying it, or of other copyright works, or the ideas or philosophy underlying those.

Whilst the dealing with the earlier song was certainly wry, it perhaps falls short of the 'expression of humour or mockery' required of a parody under section 30A post-*Deckmyn*.[1029] Were the application of section 30A to the facts of Case Study 2 to be considered, this would also raise the question how the *Deckmyn* requirement, that a parody 'evoke[s] an existing work, while being noticeably different from it',[1030] could apply to the use of an almost entirely unaltered passage as a discrete part of material authored by the user.

1027 For example, referring to the title and/or author of the earlier work in the title of the later work.

1028 See text to n 979.

1029 See *Deckmyn* (n 880), para 20. It is possible that the use might qualify as a 'caricature' under section 30A CDPA, although as noted by Griffiths, there is some remaining uncertainty as to whether the essential features of parody set out by the CJEU in *Deckmyn* also apply to caricature and pastiche: Jonathan Griffiths, 'Fair Dealing after *Deckmyn*—the United Kingdom's Defence for Caricature, Parody or Pastiche' in Megan Richardson and Sam Ricketson (eds), *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar 2017) 64, 83.

1030 *Deckmyn* (n 880), para 20.

Case Study 3

In this case study, only the piece entitled *James Brown Disco Ball* is considered. At first instance in *Cariou v Prince*, this piece was held to be infringing, on the basis that it did not benefit from the 'fair use' exception under US law;[1031] on appeal, it was one of a group of *Canal Zone* works that was held to qualify as fair use.[1032]

Were the facts of Case Study 3 to arise in the UK, it is likely that copyright would be found to subsist in each of the *Yes Rasta* photographs, as it was in *Cariou v Prince* – that they are portraits of real people in real places does not affect this conclusion.[1033]

As to whether there would be a finding of prima facie copyright infringement, considering the use made of the *Yes Rasta* photographs by *James Brown Disco Ball*, it is noteworthy that at first instance in *Cariou v Prince*, the relevant enquiry was said to be whether there was 'copying of constituent elements of [each copyright work] that are original'[1034] (where such elements, in a photograph, may include 'posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved'[1035]). On this basis, and as the 'fair use' defence was unavailable, *James Brown Disco Ball* was judged infringing. It is unlikely that this conclusion would differ under UK law today – in particular, those elements of *Yes Rasta* identified in the US case as 'original' would, it is

1031 *Cariou 1* (n 913) 353.

1032 *Cariou 2* (n 913) 706, 712. (Those held to be not necessarily fair use were *Graduation*, *Meditation*, *Canal Zone* (2008), *Canal Zone* (2007), and *Charlie Company*).

1033 As Arnold LJ has highlighted, the decision in *Painer* (n 947) stands for the proposition that 'even a simple portrait photograph may satisfy [the *Infopaq* test for copyright protection] in an appropriate case', notwithstanding that where there is a 'low degree of creativity' the scope of copyright protection will be 'correspondingly narrow': *THJ Systems Ltd & Anor v Sheridan & Anor* [2023] EWCA Civ 1354, [23], [27].

1034 *Cariou 1* (n 913) 355.

1035 ibid 346 (quoting *Rogers v Koons* 960 F 2d 301, 307 (2d. Cir 1992)).

suggested, qualify as 'elements of the work which … expre[ss] the author's own intellectual creation' in satisfaction of the *Infopaq* test.

Could section 30(1ZA) apply?

Moving through the analysis required under section 30(1ZA), there is, relevantly, a reproduction of content 'from' the copyright work(s) – the headshots taken from the *Yes Rasta* photographs appear to have been applied to the *James Brown Disco Ball* canvas using a 'cut and paste' technique. It is true that these have then been modified such that, in the words of the appeal court in *Cariou v Prince*, the work of the photographer 'is almost entirely obscured'.[1036] However, such re-contextualisation is not, this thesis contends, fatal to the existence of a reproduction sufficient to constitute a 'quotation' under section 30(1ZA).

There would be greater difficulty in sustaining a suggestion that the reproduced content is identified 'as such'. In this sense, the facts of Case Study 3 can be contrasted with those of Case Study 2. Whilst in Case Study 2 a clear difference of (in that case, musical) style sufficed to evidence identification of the reproduced content 'as such', in the case of *James Brown Disco Ball*, a melange of visual styles, it is not sufficiently clear which content originates with the creator and which comes from elsewhere.

Likewise, it would be difficult here to make out a purpose of criticism, or review, or a purpose 'analogous to' criticism or review, demonstrated through engagement with the reproduced copyright content. Recall that the artist-creator of the *Canal Zone* series confessed that he was not 'trying to create anything with a new meaning or new message'.[1037] Consistent with this, *James Brown Disco Ball* does not appear to engage in criticism or review of the *Yes*

1036 *Cariou 2* (n 913) 700.

1037 *Cariou 1* (n 913) 349.

Rasta photograph, an idea or philosophy underlying them, or of other copyright works, or the ideas or philosophy underlying those. Neither does the *Yes Rasta* photograph appear to serve commentary, or an artistic idea, pursued by *James Brown Disco Ball* or the *Canal Zone* series more broadly.

The uses of the *Yes Rasta* photographs in *James Brown Disco Ball* therefore fail to constitute 'quotations' of those works under section 30(1ZA). By contrast, the appeal court in *Cariou v Prince* found *James Brown Disco Ball* to be an instance of transformative (and fair) use,[1038] bringing into focus the differences between the enquiries relevant to the use of quotations and those relevant to transformative use.

Whilst it is, consequently, unnecessary to consider whether such uses constitute fair dealings, it is worth noting that the appeal court in *Cariou v Prince* determined that the *Canal Zone* works did not damage either the primary or derivative market for the copyright works.[1039] This was another matter on which the appeal court deviated from the court at first instance.[1040] In any case, as no legitimate purpose for the uses can be identified under section 30(1ZA), there can be no justification for the taking of any amount of the copyright work(s).

The uses are, accordingly, unlikely to constitute fair dealings, and cannot satisfy section 30(1ZA)(c) ('the extent of the quotation is no more than is required by the specific purpose for which it is used'). Further, section 30(1ZA)(d) ('the quotation is accompanied by a sufficient acknowledgement') is not satisfied, as there is no acknowledgement of the authorship of the

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1038 *Cariou 2* (n 913) 706, 712. At first instance, it was fatal to a finding of transformative use, and thereby, fair use, that the *Canal Zone* works, including *James Brown Disco Ball*, did not engage in commentary on the original *Yes Rasta* photographs – what was required was that the 'new work in some way comment on, relate to the historical context of, or critically refer back to the original works': *Cariou 1* (n 913) 348. (The appeal court disagreed that this was a requirement, finding transformative use).

1039 *Cariou 2* (n 913) 708 – 709.

1040 The court at first instance found that Prince 'has unfairly damaged both the actual and potential markets for Cariou's original work and the potential market licenses for Cariou's original work': *Cariou 1* (n 913) 353.

Yes Rasta photographs – despite the fact that such acknowledgement would have been possible, for example, by noting author details at showings of the *Canal Zone* series (whether in gallery information displays or in event programs), or indeed in the title of the work.

Could another exception apply?

Whilst section 30(1ZA) does not, therefore, apply to the facts in Case Study 3, and neither section 30(1) nor section 30(2) is applicable, it is possible that the exception in section 30A might apply, on the basis that each of the uses in *James Brown Disco Ball* is a fair dealing with a copyright work for the purpose of pastiche. As Hudson writes: 'the defendant's artworks in the US case of *Cariou v Prince* … could reasonably be classified as instances of pastiche in the UK [given the artistic techniques employed]. Whether they would also constitute a *fair* dealing is another matter'.[1041] Indeed, it is difficult to know how fairness – and in particular, the aspect of the fair dealing test that requires consideration of whether the amount and importance of the copyright work taken is justified by the purpose of use – is to be assessed in the context of a use for the purpose of pastiche. Nonetheless, it remains a possibility that the exception in section 30A CDPA could apply, particularly as the provision does not – distinct from section 30(1ZA) – require sufficient acknowledgement of the copyright work used.

Case Study 4

The facts of this case study, based on those in the proceedings in *Faulkner*, present a scenario in which a relatively small, but qualitatively significant, part of a 1951 novel was used in a 2011 film. There was no dispute in the proceedings in *Faulkner* as to whether copyright

[1041] Emily Hudson, 'The pastiche exception in copyright law: a case of mashed-up drafting?' (2017) 4 *Intellectual Property Quarterly* 346, 347.

subsisted in the novel, and there is no cause to consider that copyright would not subsist in the novel under the CDPA, if UK law applied.

Even if, applying a traditional analysis, the use of the novel's phrase (or something similar to it)[1042] did not constitute prima facie copyright infringement, the complexion of this analysis changes if the *Infopaq* test is applied. Recall the *Infopaq* principle that copyright in a work may be infringed by reproduction of an extract (there of 11 words, compared to the 9 at issue here), if that extract 'contains an element of the work which … expresses the author's own intellectual creation'.[1043] As the phrase taken from the novel almost undoubtedly expresses the author's own intellectual creation, its use most likely constitutes prima facie copyright infringement when the *Infopaq* approach is applied.[1044]

Could section 30(1ZA) apply?

It is of note that the phrase derived from the 1951 novel is described in the judgment of the court in *Faulkner* as having been 'paraphrased' in the 2011 film. This assessment (perhaps actually an instance of linguistic imprecision) is misleading, as the difference between the novel's phrase ('The past is never dead. It's not even past') and the phrase as used in the film ('[t]he past is not dead. Actually, it's not even past') is not so great as to disqualify the latter from being a quotation – as distinct from a paraphrase – of the former, whether in ordinary

1042 Noting that the phrase used in the later film was actually a slight misrendering of the phrase from the original novel.

1043 *Infopaq* (n 938) para 39.

1044 As to whether that copyright was infringed through the use in the film of the line '[t]he past is not dead. Actually, it's not even past', the US District Court considering the facts in *Faulkner* concluded that arguments as to 'substantial similarity' and *de minimis* were 'wholly encompassed within the fair use affirmative [defence]' and so properly considered at the stage of considering the possible application of the defence: *Faulkner* (n 923) 707. Therefore, this discussion cannot benefit from any existing analysis as to the 'qualitative and quantitative significance of the copied portion in relation to the plaintiff's work as a whole' (noting that this would, in any case, have been through the lens of applicable US law).

language or in law.[1045] When compared, it is apparent that the (minor) changes to the original phrase do not themselves result in any changes of meaning – indeed, one suspects that the purpose of use would be compromised were this the case.

Further, the reproduced content is identified 'as such': the character in the 2011 said, precisely, '[t]he past is not dead. Actually, it's not even past. You know who said that? Faulkner, and he was right. And I met him too. I ran into him at a dinner party'.[1046] This is sufficient to indicate to viewers of the film that the phrase originated elsewhere (Faulkner being, aside from a character in the film, a real-life historical figure).

It is submitted here that the use of the phrase was also, relevantly, for a purpose of criticism or review or, if not this, then a purpose 'analogous to' criticism or review. Whilst not a 'traditional' instance of criticism or review, in which a person uses a copyright work to express his or her own views (distinct from those of a character), the reproduced passage is used in this instance to engage in criticism or review of the earlier work from which it is taken – or perhaps more specifically, the ideas underlying this work. Equally, and similar to the reproduced flute riff in Case Study 2, the reproduced passage can be seen to advance an artistic idea of the film, namely, the theme of the past and its impact upon the present.

Beyond qualifying, accordingly, as a 'quotation' under section 30(1ZA), it is likely that the use would be judged a 'fair dealing' with the relevant copyright work. First, it does not appear to have conflicted with the normal exploitation of the work: note that the court in *Faulkner* was 'highly doubtful that any relevant markets [had] been harmed by the use'.[1047]

1045 The conception of quotation advanced by this thesis does not require absolute fidelity to the original and tolerates some variation, such that it can be said here that there is a reproduction sufficient to constitute a quotation under section 30(1ZA). See discussion at text to n 712 – n 714.

1046 *Faulkner* (n 923) 704.

1047 ibid 711.

Secondly, although the part of the copyright work reproduced may have been of great renown (noting, however, the *Faulkner* court's pertinent observation that '[q]ualitative importance to society of a nine-word quote is not the same as qualitative importance to the originating work as a whole'[1048]), it was 'miniscule' as a quantitative proportion of the novel from which it was taken.[1049] Bearing these considerations and the purpose of the use in mind, it is likely that the purpose justifies the amount and importance of the work taken (even if, as countenanced by *Infopaq*, the copyright 'work' was characterised as the 9 word phrase itself). As in Case Study 2, it is relevant that the (artistic) purpose of the use could not be achieved unless the reproduced part was sufficiently recognisable as deriving from the copyright work – and for this, as in parodies,[1050] the amount and importance of the work taken needs to be adequate.

For similar reasons, the requirement in section 30(1ZA)(c) ('the extent of the quotation no more than is required by the specific purpose for which it is used'[1051]) is likely satisfied.

Finally, it should be noted the author of the novel is mentioned by surname. However, the title of the novel is not mentioned.[1052] This leaves unclear whether the requirement in section 30(1ZA)(d) ('the quotation is accompanied by sufficient acknowledgement') is satisfied, given that a 'sufficient acknowledgement', under section 178 CDPA, requires

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1048 ibid 710.

1049 ibid.

1050 In assessing the third fair use factor under 17 U S Code § 107, namely, 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole', the US Supreme Court in *Campbell v Acuff-Rose* noted that '[p]arody presents a difficult case. Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to "conjure up" at least enough of that original to make the object of its critical wit recognizable … What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know': *Campbell v Acuff-Rose*, 510 US 569, 588.

1051 CDPA, s 30(1ZA)(c).

1052 The line from the film in full is 'The past is not dead. Actually, it's not even past. You know who said that? Faulkner, and he was right. And I met him too. I ran into him at a dinner party': *Faulkner* (n 923) 704, 705.

acknowledgement of both title (or 'other description') and author. It may, perhaps, be argued that Faulkner's work has been sufficiently identified by reference to the author's name – or alternatively, that whilst it was possible to provide an acknowledgement of the author, it was 'impossible', within the meaning of section 30(1ZA)(d) to also provide an acknowledgement of the title of the work. As the facts of Case Study 4 meet all other requirements for the application of section 30(1ZA), and as steps have been taken to provide express acknowledgement (in contrast with the circumstances in Case Study 2), it is suggested here that section 30(1ZA) would likely apply to Case Study 4. Nonetheless, this demonstrates the potential capacity of the requirement in section 30(1ZA)(d) to substantially limit the scope of section 30(1ZA) – something that is discussed further in reference to Case Study 2.

Could another exception apply?

Plainly, section 30(2) of the CDPA would not apply to the facts in Case Study 4. Neither is section 30A likely to apply – the quotation at issue is treated with the approval of the character who utters it in the film, and its use does not constitute an expression of mockery or humour.[1053]

It is countenanced in the foregoing paragraphs that the use of the reproduced passage might properly be assessed as for a purpose of 'criticism or review'. This would have the effect that section 30(1) could apply to the facts of Case Study 4. However, the genuine purpose of the use of the quotation in Case Study 4 is perhaps better identified as an artistic one, which is 'analogous to' criticism or review: the use furthers both the narrative of the film and its themes, whilst telling the audience something about one of its characters.

[1053] As is required to qualify as a 'parody' under this provision: see *Deckmyn* (n 880) para 20.

Conclusions on scope

In conclusion, it is likely that only one of the four described uses would be allowable under UK statute without the authorisation of the relevant copyright owner and even then, only assuming flexibility under section 30(1ZA)(d). The use outlined in Case Study 4 would most likely be permissible under section 30(1ZA) only. Whilst surprising in some ways, this outcome tends to indicate that section 30(1ZA) is adapted to achieve at least one of its policy objectives, namely, providing a copyright exception for minor uses (that might not have constituted infringing acts but for the decision in *Infopaq* and its impact on UK law).[1054]

The use described in Case Study 3 would likely not, it was concluded, be allowable under any of the CDPA's fair dealing provisions. This places the outcome under UK copyright law, even following the 2014 amendments to the CDPA which saw the inclusion of both section 30(1ZA) and section 30A, at odds with the outcome under US law in *Cariou*.[1055]

It is notable that neither of the uses outlined Case Studies 1 and 2, whilst properly described – in both ordinary language and, it is argued, in law – as use of a 'quotation', would qualify for the application of the section 30(1ZA) exception. The outcome in Case Study 1 highlights that where the relevant copyright work has not been made available to the public, the applicability of the CDPA's 'fair dealing' exceptions will be substantially limited: section 30(1ZA) will not apply, due to the express statutory requirement in section 30(1ZA)(a), and this same factor will militate against a finding of fair dealing under others of the provisions. Similarly, the outcome in Case Study 2 again highlights that the statutory requirement for sufficient acknowledgement in section 30(1ZA)(d) has the capacity to prevent the application

1054 See discussion at text to n 225 – n 226.

1055 Note, however, that the Second Circuit (on appeal) was at odds with the first instance court on matters of great significance, and that the Second Circuit's decision has since been described (by the court itself) as the 'high-water mark of our court's recognition of transformative works' (also acknowledging that the decision in *Cariou* had 'drawn some criticism'): *TCA Television Corp v McCollum* 839 F 3d 168, 181 (2d Cir 2016).

of section 30(1ZA) in circumstances where the exception might otherwise apply – and that this may disproportionately impact non-textual and artistic uses, despite the built-in caveat regarding impossibility for reasons of practicality or otherwise.[1056] The implications and normative appropriateness of these outcomes will be discussed in Chapter 8.

Generally, it is noteworthy that the exceptions in Part 3 of the CDPA do not easily accommodate artistic uses of the kind described in Case Studies 2, 3 and 4. However, assuming a capacity to apply to Case Study 4, section 30(1ZA) is able to accommodate such uses better than the 'fair dealing' exceptions that pre-existed its introduction (even taking into account that the purpose requirement under the section 30(1) 'criticism or review' exception might not be so circumscribed as was suggested in *Ashdown*).

It has been noted in this chapter that those additional purposes permissible under section 30(1ZA) – namely, those described elsewhere in this thesis as 'analogous' to criticism or review – are marked by their common feature of use to 'support intellectual commentary or an artistic idea',[1057] or in the CJEU's conception to 'illustrat[e] an assertion, …[defend] an opinion or … [allow] an intellectual comparison between [the copyright] work and the assertions of [the] user'.[1058] The existence of such a purpose must, as ever,[1059] be objectively identifiable.[1060] This, however, leaves judges in the position of determining whether the use of a particular reproduced passage, derived from a copyright work, on its face supports intellectual

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1056 See CDPA, s 30(1ZA)(d).

1057 See Adeney (n 1011) 156.

1058 *Pelham* (n 1010) para 71; *Spiegel* (n 1010) para 78.

1059 See *Pro Sieben Media v Carlton Television* [1999] 1 WLR 605, 614 ('in the composite phrases "for the purposes of criticism or review" and "for the purpose of reporting current events" the mental element on the part of the user is of little more importance than in such everyday composite expressions as "for the purpose of argument" or "for the purpose of comparison". The words "in the context of" or "as part of an exercise in" could be substituted for "for the purpose of" without any significant alteration of meaning').

1060 The self-declared purposes of commentators and artists cannot, clearly, be relied upon as the exclusive form of evidence.

commentary or an artistic idea – a task which, it could be argued, they are insufficiently equipped to undertake.[1061] Regardless, where the intellectual commentary or artistic idea served through use of (part of) a copyright work is made patently clear, it must be concluded that it will be easier to attract the application of section 30(1ZA) than in circumstances where – to quote Richard Prince – the user 'do[es]n't really have a message'.[1062] This is consistent with a conclusion that acts of accidental, or subconscious, infringement can never satisfy the requirements of section 30(1ZA).

1061 As Landes comments, 'if calling a work "art" shields it from copyright liability, we can be sure that such claims would increase putting judges in the ill-suited position of having to decide what is art. And as Justice Holmes warned in his much cited phrase: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits': William Landes, 'Copyright, Borrowed Images, and Appropriation Art: An Economic Approach' (John M Olin Program in Law and Economics Working Paper No. 113, 2000) 17.

1062 See *Cariou 1* (n 913) 349.

8. ASSESSING THE SCOPE OF THE UK QUOTATION EXCEPTION

In 2014, the UK legislature stated that the 'socially valuable purposes' of quotations,[1063] considered relative to the perceived limited economic significance of allowing uses of copyright materials for such purposes, meant that the UK quotation exception would allow a 'reasonable balance … between the interests of creators, owners, performers, consumers and users of copyright works' to be maintained.[1064]

Whilst, as has been discussed,[1065] this statement was based in part on a misapprehension of the potential economic significance of allowing uses of quotations from copyright works, the 'socially valuable purposes' of quotations are not disputed. As recognised by the legislature, these include, *inter alia*, the 'dissemination of knowledge'.[1066] Considering these, this chapter assesses whether the scope of section 30(1ZA) CDPA is appropriate, when the provision is read as outlined in the preceding chapters of this thesis. This assessment will be made considering the extent to which the UK quotation exception, within the context of UK copyright law as a whole, assists to maintain the intended balance of rights and interests.

Pursuant to the CJEU's findings in Case C-201/13 *Deckmyn and Vrijheidsfonds VZW v Vandersteen and Others*,[1067] the possibility of striking a fair balance of the competing rights and interests engaged in a particular case is relevant to *setting* the scope of the EU quotation

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1063 Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356, Explanatory Memorandum, para 2.1.

1064 ibid.

1065 See discussion at text to n 189 - n 211.

1066 IPO, *Consultation on Copyright* (14 December 2011) para 7.184.

1067 [2014] OJ C16/3 ('*Deckmyn*').

exception[1068] and, thereby,[1069] the UK quotation exception. It might therefore be thought circular to use a similar method to *assess* the scope of that exception. However, it is contended that the method of assessment adopted here is distinct in various aspects.

First, this chapter asks whether the UK quotation exception, in the context of UK copyright law as a whole, allows for a reasonable balance to be struck between the full range of competing rights and interests potentially engaged through the use of a quotation from a copyright work. It therefore takes account not only those uses of copyright works that are allowable under section 30(1ZA), as it must be read, but also those that are allowable because they do not meet the threshold for copyright infringement,[1070] or because they meet the criteria for application of another CDPA exception.

Secondly, its frame of reference does not import the policy settings of either EU or UK law, other than through acceptance that copyright protection, as recognised within those legal systems, is a legitimate and appropriate vehicle for achieving its objectives.[1071] For example, it does not assume that UK copyright law must comprise a scheme of purpose-

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1068 Recall that the decision in *Deckmyn* directs national courts to strike a fair balance of rights in their application of domestic copyright exceptions: see *Deckmyn* (n 1067) paras 26 - 27. It follows that any interpretation given to a provision of article 5 Infosoc Directive, or a domestic exception based thereon, must be *capable* of allowing such a balance to be struck. Further, in the assessment of statutory context and purpose that is required as an aspect of giving meaning to 'quotation' under article 5(3)(d) Infosoc Directive (see *Deckmyn* (n 1067) para 19), some consideration of the recitals of the Directive, including recital 31 thereof which confirms the objective of a fair balance of rights and interests, is required.

1069 Given the conclusions of Chapter 3.

1070 Namely, because they do not engage, without authorisation, in any of the acts prohibited by CDPA, s 16(1), in respect of the whole or a substantial part of the copyright work.

1071 Whilst longstanding debate about the appropriate scope and duration of copyright protection continues, its in-principle validity is not often questioned. (A notable exception is a 1970 article by Breyer, which asked what would happen to book publishing if copyright were abolished: see Stephen Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs' 84 Harvard Law Review 281). This thesis accepts, in principle, that copyright protection is necessary on the basis of the two strands of argument generally made in support of its existence, namely – in Breyer's words - '[a]rguments … based upon the author's "moral rights" to reap the fruit of his labors or to control what he has created', and others based on 'the economic inducement to publication that copyright provides': at 284.

limited ‘fair dealing’ exceptions to copyright, but rather, is agnostic as to the precise means of balancing competing rights in domestic copyright laws.

Further, the assessment undertaken in this chapter can – and, it is submitted, should – take account of the consequences of protecting the rights and interests of a quoter – including, of primary importance, his or her freedom of expression – as against those of the copyright owner. Without adopting a purely consequentialist approach,[1072] this allows consideration of the rationales for protecting freedom of expression – that such protection fosters a ‘marketplace of ideas’, and is required by systems of democratic government[1073] – and reminds that the act of quoting serves each of these by facilitating the exchange of ideas and opinions, including through artistic expression and on political matters, and allowing the demonstration of accuracy or authenticity in reporting.[1074]

1072 Similar to copyright protection itself, basic rights can be understood as supported by a deontological or consequentialist framework: Samuel Freeman, ‘Problems with some consequentialist arguments for basic rights’, in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2012) 107, 107 (explaining that ‘[t]he range of conceptions that are known as “deontological” is a diverse group of positions, mainly united in their rejection of consequentialism. Many contemporary deontological conceptions assign priority over other social values to principles of justice and the basic rights and liberties that these principles protect. Or if justice and basic rights do not have priority over other values, they are among the class of fundamental moral principles and values … Consequentialists, by contrast, normally regard individual rights as secondary principles which are justifiable in so far as they are instrumental to creating greater overall good consequences’). This thesis does not subscribe exclusively to either a consequentialist or a deontological conception of rights – see also text to n 1093.

1073 Together with creating ‘autonomous and self-fulfilled individuals’, freedom of expression is said to ‘create and sustain’ other ‘social goods’, namely, ‘a “marketplace of ideas”, by which truth is discovered and disseminated, and a democratic dialogue, by which a representative government informs and is informed’: Patricia Loughlan, ‘The Marketplace of Ideas and the Idea-Expression Distinction of Copyright Law’ (2002) 23 Adelaide Law Review 29, 29.

1074 As an alternative, considerations of these socially valuable consequences can be accommodated by broadening our view of the rights and interests implicated by the use of quotations from copyright works beyond those of the copyright owner and the user of quotations, to also include those of the (potential) audience of the quotations. Whilst it has not so far been emphasised in decisions concerning the copyright quotation exception, the right to receive information is, of course, an aspect of freedom of expression, as recognised in international and supranational instruments such as the European Convention of Human Rights: see Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocols 11 and 14 (‘ECHR’), art 10(1). See also Charter of Fundamental Rights of the European Union [2012] OJ C 326/2 (‘CFR’), art 11(1).

Accordingly, this chapter considers whether the UK quotation exception, as it is to be interpreted, and within the context of the UK copyright law more broadly, allows sufficient 'breathing space'[1075] for these 'socially valuable' consequences to be realised. The case studies considered in Chapter 7 inform the answers provided.

'Altogether too constricting'

In the commentary accompanying their 2013 translation of the *Germania 3* decision, Adeney and Antons noted that:

> As the digital era has progressed and as postmodern artistic practices have entrenched themselves, legislatures around the world have been moved to take a fresh look at their exceptions to copyright infringement. The quasi monopoly of copyright has begun to seem altogether too constricting in a time when creative appropriations and the digital cutting, pasting and recycling of copyright material are commonplace activities. One area on which legislatures have been focusing is that of quotations. Should an express quotation exception be included in our copyright Acts? If so, what form should it take and how should it be interpreted?[1076]

Whilst the conclusion inherent to these statements – that '[t]he quasi monopoly of copyright has begun to seem altogether too constricting'[1077] – relies on several assumptions, it is true, as the commentary continues, that:

> When the question of quotation is raised it is important that the breadth or narrowness of the concept becomes part of the legislator's considerations, together with the mechanisms by which the concept will (or can) be applied and controlled.[1078]

Despite this, it is not at all clear, as detailed in Chapters 2 and 3, that the UK legislature gave detailed thought to the breadth or narrowness of the concept of quotation later introduced via

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1075 To adopt a description used in *Campbell v Acuff-Rose*, 510 U S 569, 579.

1076 Elizabeth Adeney and Christoph Antons, 'The Germania 3 decision translated: the quotation exception before the German Constitutional Court' (2013) 35 EIPR 646, 646.

1077 ibid.

1078 ibid 648.

section 30(1ZA) CDPA, nor to the mechanisms by which it is to be applied and controlled. This omission is, perhaps, understandable, on the basis that the legislature assumed the provision would mirror the scope of article 5(3)(d) Infosoc Directive and operate within the existing EU framework of rights and exceptions.[1079] Nonetheless, in circumstances in which other jurisdictions continue to consider the introduction of statutory copyright quotation exceptions,[1080] in reliance upon – indeed, perhaps, compliance with – article 10(1) Berne Convention[1081] – this chapter engages in an analysis of the appropriateness of the breadth of the concept of quotation, and thereby of the quotation exception, as it now sits within the ecosystem of UK copyright law.

At its outset, this thesis noted a burgeoning contemporary conception, among some commentators, of the quotation exception as a vehicle to pursue further 'flexibilities' in copyright law.[1082] This reflects a broader impetus to re-examine exceptions to copyright infringement, in light of the advent of the digital era and the entrenchment of the 'postmodern artistic practices' discussed by Adeney and Antons.[1083] Such re-examination is, it is suggested, motivated in part by an assessment of copyright protection as having become 'too constricting' in a time when, to quote Adeney and Antons, 'creative appropriations and the digital cutting, pasting and recycling of copyright material are commonplace activities'.[1084]

1079 See, for example, IPO, *Modernising Copyright: A modern, robust and flexible framework* (20 December 2012) ('Modernising Copyright') 8.

1080 As Australia has done in 2014, and more recently, in 2021: see ALRC, *Copyright and the Digital Economy* (ALRC Report 122, 2014) para 9.3, para 9.7; Australian Government, *Discussion paper—Exposure Draft Copyright Amendment (Access Reform) Bill 2021 & Review of Technological Protection Measures Exceptions* (December 2021) 16.

1081 Recall Aplin and Bently's contention that national exceptions which are explicitly purpose-limited (such as the 'fair dealing' exceptions in Australia's *Copyright Act 1968* (Cth)) do not comply with the requirements of art 10(1) Berne Convention: see Lionel Bently and Tanya Aplin, 'Whatever Became of Global, Mandatory, Fair Use? A Case Study in Dysfunctional Pluralism' in Susy Frankel (ed), *Is Intellectual Property Pluralism Functional?* (Edward Elgar 2019) 8, 21.

1082 See text to n 119.

1083 Adeney and Antons (n 1076) 646.

1084 ibid.

Underlying this assessment is a conclusion that copyright law should permit – not constrict – such activities, 'commonplace' as they are.

In recent years, commentary on and processes for the development of copyright law have at times revealed an assumption that the law should follow practice, to legitimise activities – typically in the digital sphere – that are frequently undertaken and/or expected to be lawful.[1085] There is some force to this argument, as laws that consistently fail to reflect practice and expectation risk undermining confidence in the legal system.[1086] However, it is submitted here that further examination of specific user activities, to assess their value relative to their cost, is necessary before it is possible to conclude that they should be permitted under copyright law.

The full range of competing rights and interests

The rights and interests implicated by uses of quotations from copyright works include, but are not limited to, the property rights of the copyright owner on the one hand, and the competing rights of the quoter on the other. The latter are supported by the fundamental guarantee of freedom of expression and information, whether or not they can be

1085 Indeed, reasons given for the introduction of section 30(1ZA) into the CDPA included the absence (at that time) of an ability under statute to quote from copyright works in circumstances in which the average person might reasonably have expected this to be lawful: HL Deb 29 July 2014, vol 755, col 1557. See also Australian Government, Online Copyright Infringement Discussion Paper (July 2014). In partial response to this, Pappalardo and Meese ask whether copyright law 'could better incorporate social and cultural norms around content engagement and reuse', better align[ing] law with practice: see Kylie Pappalardo and James Meese, 'In Support of Tolerated Use: Rethinking Harms, Moral Rights and Remedies in Australian Copyright Law' (2019) 42 UNSW Law Journal 98, 929, 947.

1086 As Waldron notes, 'it is sometimes said that the Rule of Law works best when what is enforced in a society can be mapped on to its members' norms of fairness and common-sense. This makes social participation in the integrity and upholding of law more likely': Jeremy Waldron, 'The Rule of Law', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2023), <https://plato.stanford.edu/archives/fall2023/entries/rule-of-law/>.

characterised, as some copyright law commentators have suggested,[1087] as 'fundamental user rights' in and of themselves.

The rights and interests of the user

In line with this, use of a quotation is typically recognised as an exercise of freedom of expression[1088] – and in some cases, of aspects of this freedom such as artistic freedom[1089] and freedom of the press.[1090]

It is, however, possible that further rights and interests of users of quotations have not as yet been recognised. As described in Chapter 2,[1091] the use of quotations has perhaps ever-increasing significance in today's digital environment (whether or not hyperlinks are correctly perceived as a species of quotation), in that it facilitates online information exchange. And, whilst as detailed in the same chapter quotations have long had a social function, including by allowing the quoter to position him or herself with respect to the person quoted, this social function is brought to the fore by some aspects of the digital

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1087 For characterisation of the copyright quotation exception as a 'right of quotation', see 'Memorandum of Understanding Concerning the Interpretation of the Right of Quotation' (*A2KNetwork*, September 2012) <http://a2knetwork.org/sites/default/files/memorandum_on_quotations.pdf> accessed 24 October 2016; Martin Senftleben, 'Quotations, Parody and Fair Use', in P Bernt Hugenholtz, Antoon Quedvlieg and Dirk Visser (eds), *1912 – 2012: A Century of Dutch Copyright Law – Auteurswet 1912 – 2012* (Amstelveen deLex 2012) 360. Speaking in the House of Lords in support of her Motion to Approve the Quotation and Parody Regulations, the then Parliamentary Under-Secretary of State, Department of Business, Innovation and Skills, also spoke of a 'right to quote', positing that '[t]he right to quote is one of the freedoms that we expect in a modern democracy': HL Deb 29 July 2014, vol 755, col 1557.

1088 See, for example, C-145/10 *Painer v Standard VerlagsGmbH and Others* [2011] ECR I-12533, para 134 (article 5(3)(d) Infosoc Directive is 'intended to strike a fair balance between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors').

1089 See C-476-17 *Pelham and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] OJ C 347, paras 34-35 (noting that sampling constitutes a form of artistic expression which is covered by freedom of the arts, being something that itself falls within the scope of freedom of expression). Elsewhere in the decision, the Court determined that sampling might in some instances constitute use of a quotation: see para 72.

1090 See C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] OJ C 392, para 45.

1091 See text to n 347 – n 349.

environment, and on some online platforms specifically. Indeed, it is arguable that it is impossible to participate fully as a user of some online platforms, such as X (formerly Twitter), without engaging in acts of quotation.[1092]

Through the lens of a 'deontologically oriented' theory of copyright exceptions, focussing on 'the role of copyright exceptions in meeting individual needs for human flourishing',[1093] the copyright quotation exception can thereby be viewed as justified to a degree by the communicative and social activities it supports, particularly in an online environment.

Similarly, it is possible to contend that the use of quotations – again, particularly online – can entail an exercise of the right to privacy. This – admittedly surprising – conclusion results not only from the centrality of online interactions (including those involving use of quotations) to daily modern life,[1094] but also from a conception of the right to privacy, as supported by the ECtHR's expansive interpretation, as protecting multiple aspects of a person's social identity' and entailing 'a right to personal development, and the right to establish and develop relationships with other human beings' and the outside world.[1095] As will be seen below, similar arguments can be made in respect of the exercise of privacy rights by an author, whose rights and interests are to be balanced against those of the user.

1092 See text to n 314.

1093 See Shyamkrishna Balganesh, Ng-Loy Wee Loon , Haochen Sun (eds), *The Cambridge Handbook of Copyright Limitations and Exceptions* (Cambridge University Press 2021) xii (description of the two theoretical bases for copyright limitations and exceptions that are considered in the volume).

1094 Consistent with arguments that freedom of expression may encompass a right to access the facilities necessary to exercise this right, principally, the internet: see, for example, Cees Hamelink, 'Human Rights in Cyberspace', in Leen D'Haenens (ed), *Cyberidentities: Canadian and European Presence in Cyberspace* (University of Ottawa Press 1999) 31, 41.

1095 See *Niemietz v Germany* (A/251-B) (1993) 16 EHRR 97 (16 December 1992) [29].

The rights and interests of the copyright owner

Whilst considerations of copyright quotation exceptions typically take into account the property rights of the copyright owner, to the extent that these must be balanced against the rights and interests of the user of the quotation, they have not tended to canvass the other rights and interests of the copyright owner.

Beyond property rights, use of a quotation from a copyright work may implicate certain other rights and interests of the author of the work (who may or may not be owner of any copyright in the material[1096]). This is demonstrated, to a degree, by the readiness of the CJEU to recognise such other rights as relevant: it will be recalled that in *Deckmyn*, the CJEU held that 'the application, in a particular case, of the exception for parody, within the meaning of Article 5(3)(k) of [the Infosoc Directive], must strike a fair balance between, on the one hand, *the interests and rights* of persons referred to in Articles 2 and 3 of that directive' – principally, authors[1097] – 'and on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k)'.[1098] In the circumstances of *Deckmyn* itself, those 'interests and rights' included 'a legitimate interest in ensuring that the work protected by copyright is not associated with [a discriminatory message]'.[1099]

A legitimate interest' of this kind could well be relevant in cases involving quotations, also.[1100] Not only this, but the decision in *Deckmyn* highlights that a broader range of rights

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1096 Just as with real property, the property rights comprised in copyright can be assigned by their original owner (typically, the author).

1097 See *Deckmyn* (n 1067), paras 26 - 27.

1098 ibid.

1099 ibid para 31.

1100 That is, it can be foreseen that a quotation from a work might be used in such a manner as to create an association between that work and a discriminatory message.

and interests – for example, an author's interest in ensuring that his or her work is not associated with a distasteful message, or, perhaps, merely one (such as a political message[1101]) with which the author does not personally agree (noting that such an interest is already protected, to a degree, by the law of passing off[1102]) – may also be relevant in quotation cases.[1103]

It is suggested here that a right against 'compelled speech' may be one additional right in such a range. The right *not* to speak, or the right against compelled speech,[1104] has been long held to be a corollary of the rights recognised in articles 9 and 10 of the European Convention of Human Rights.[1105] And indeed, in his re-conceptualisation of copyright as attaching to works as 'communicative acts', Abraham Drassinower argues that *all* unauthorised publications of copyright works or parts thereof are instances of compelled speech that impinge upon the autonomy of the author.[1106] (He concedes that this argument rests on a less stable foundation when applied to previously published works, although

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1101 This latter possibility, in particular, calls to mind circumstances in which recording artists have objected to the use of their music in political campaigns - by way of example, in 2020 the songwriter (and singer) of *Fortunate Son*, John Fogerty, objected to the use of a recording of the song by Donald Trump, on the basis that Trump was 'using [Fogerty's] words and [Fogerty's] voice to portray a message that [Fogerty does] not endorse': Tim Balk, 'John Fogerty says he is sending cease-and-desist letter over Trump's use of 'Fortunate Son' (*Chicago Tribune*, 17 October 2020) <www.chicagotribune.com/entertainment/ny-john-fogerty-fortunate-son-president-trump-20201018-lktyoheoondvrpxl4zb752352e-story.html> accessed 9 March 2024.

1102 An action in passing off relies, in part, on there being a misrepresentation (in pertinent cases, of endorsement), as well as on the complainant having established 'goodwill' in trade: see the classic statement of the 'trinity' of requirements to make out an action in *Reckitt & Colman Ltd v Borden Inc* [1990] 1 All E R 873, 880.

1103 Note that it is unclear whether a requirement of *Deckmyn* is that there is or might be a perception of *support* for the discriminatory message by the author of the copyright work, or rather whether it is sufficient that the copyright material is merely used *in connection with* a discriminatory message, so as to create an 'association' with it.

1104 'The right to freedom of expression does not in terms include the right not to express an opinion but it has long been held that it does': *Lee v Ashers Baking Company* [2018] UKSC 49 ('*Lee v Ashers*') [52].

1105 'The respondent suggests that the jurisprudence in relation in "compelled speech" has been developed principally in the United States as a result of the First Amendment … But in the light of Laramore and RT (Zimbabwe), and the Strasbourg case law on which they are based, it cannot seriously be suggested that the same principles do not apply in the context of article 9 and 10 of the Convention': ibid [53].

1106 Abraham Drassinower, *What's Wrong With Copying?* (Harvard University Press 2015) Chapter 4 (that is, not only those that have the effect of copyright work with an unintended message).

concludes that nonetheless, '[t]he fact than an author has already spoken does not mean that we are thereby entitled to force him to speak again'.[1107])

The UK Supreme Court decision in *Lee v Ashers Baking Company*,[1108] which considered whether a baker's refusal to produce for a customer a cake iced with the message 'support gay marriage' amounted to unlawful discrimination, clarified aspects of the right against compelled speech in the UK. In particular, it clarified that there is 'no requirement that the person who is compelled to speak can only complain if he is thought by others to support the message [expressed]'.[1109] Rather, it was sufficient in that case that the bakers 'were being required to express a message with which they deeply disagreed'.[1110]

Nonetheless, as noted by Jacob Rowbottom, even after *Lee v Ashers* there remain challenges in 'identifying when a right against compelled expression is engaged and where the doctrine is limited'.[1111] Rowbottom considers, and in turn dismisses as inapplicable, two further possible limitations on the right – namely, that 'the right against compelled speech applies only in relation to certain types of message, in particular where the matter touches on political or religious beliefs'[1112] (a possibility dismissed by Lady Hale in *Lee v Ashers*[1113]), and 'that the right against compelled speech is strongest when it would run counter to the

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1107 ibid 144.

1108 *Lee v Ashers* (n 1104).

1109 '[T]here is no requirement that the person who is compelled to speak can only complain if he is thought by others to support the message. Mrs McArthur may have been worried that others would see the Ashers logo on the cake box and think that they supported the campaign. But that is by the way: what matters is that by being required to produce the cake they were being required to express a message with which they deeply disagreed' ibid [54].

1110 ibid [54].

1111 Jacob Rowbottom, 'Cakes, Gay Marriage and the Right against Compelled Speech' (UK Constitutional Law Blog, 16 October 2018) <ukconstitutionallaw.org/)> accessed 9 March 2024.

1112 ibid.

1113 Bakers would be entitled to refuse the order 'whatever the message conveyed by the icing on the cake – support for living in sin, support for a particular political party, support for a particular religious denomination': *Lee v Ashers* (n 1104) [55].

underlying purpose or goals of the business or entity in question'[1114] (concluding, ultimately, that 'the Supreme Court did not accept the purpose or goal of the entity as the main limiting principle'[1115]).

This leaves Drassinower's argument with some real force. To adapt a comment of Hudson's in relation to parody,[1116] the interest of the copyright work's author is perhaps best characterised as a desire *not* to serve as a vehicle for the alleged infringer's message (whatever that may be). This goes beyond a desire not to be misunderstood as supporting such a message. However, just as the freedom of expression of the user of a quotation cannot foreclose considerations of what is an appropriate balance of rights, neither can the invocation of such an interest serve to foreclose these considerations. Rather, the author's interest must be weighed as one in the range of competing rights and interests implicated through the use of a quotation from a copyright work.

One further interest in this range is a privacy interest. As indicated above, the use of a quotation from a copyright work may implicate privacy rights, not only of the user, but also of the author of the work. For, given the ECtHR's broad interpretation of the privacy right as protecting multiple aspects of the person's social identity and entailing a right to personal development,[1117] it can be seen that the unauthorised publication of a copyright work (or part thereof) is not only, as Drassinower argues, an 'infringement of the author's autonomy',[1118] but, relatedly, an infringement of the right of the work's author to construct his or her own

1114 Rowbottom (n 1111).

1115 ibid.

1116 Emily Hudson, 'The pastiche exception in copyright law: a case of mashed-up drafting?' (2017) 4 Intellectual Property Quarterly 346, 359.

1117 See text to n 1095.

1118 Drassinower (n 1106) 120.

social identity, by taking from that author the choice of how (and in some instances, whether) to publish his or her work.

Is the scope of section 30(1ZA) CDPA appropriate?

What is the scope of section 30(1ZA) CDPA?

In the previous chapter, it was concluded that only one of the four described uses would likely be allowable under UK statute without the authorisation of the relevant copyright owner – namely, the use outlined in Case Study 4 (the circumstances of which would be permissible as use of a 'quotation' under section 30(1ZA), assuming satisfaction under section 30(1ZA)(d) – and most likely, under section 30(1ZA) only). It will be recalled that Case Study 4 described a scenario in which a character in a 2021 film uttered the words '[t]he past is not dead. Actually, it's not even past', attributing them to the author of a 1951 novel (the most well-known phrase of which was: 'The past is never dead. It's not even past'[1119]), and noting that 'he was right'.[1120]

The scenarios described in the other case studies would not, it was concluded, be allowable under UK copyright statute, unless the permission of the author was obtained. Recall that Case Study 1 described the facts of *Ashdown v Telegraph Group*, in which both paraphrasing accounts and verbatim extracts from the minute of a meeting attended by Member of Parliament and the then Prime Minister, in which they discussed a possible coalition between two major parties (a discussion which was later denied having occurred), were published by a newspaper. Despite constituting, arguably, a 'classic' case of quotation,

1119 William Faulkner, *Requiem for a Nun* (Vintage 1996) 85.

1120 *Faulkner Literary Rights LLC v Sony Picture Classics Inc* 953 F Supp 2d 701, 704 (ND Miss 2013).

and each of the verbatim extracts from the minute constituting (it was concluded) a 'quotation' within the meaning of section 30(1ZA), it was clear that section 30(1ZA) could not apply as the minute had not, relevantly, been 'made available to the public'.[1121] For primarily the same reason (and as held in *Ashdown* itself), neither the exception in section 30(1) nor the exception in section 30(2) would apply, even if the statutory purpose of criticism or review, or reporting current events, could be made out, due to the weight assigned to prior publication in the assessment of fairness under these provisions.

The conclusions drawn in respect of Case Study 1 indicate first, that in scenarios in which the relevant copyright materials have not been made available to the public, section 30(1ZA) goes no further in allowing the use of quotations than section 30(1) or section 30(2) – indeed, it may operate more restrictively, given the express requirement in section 30(1ZA)(a) for the copyright work to have been made available to the public[1122] (contrasting sections 30(1) and 30(2), pursuant to which prior publication is but one factor weighing against a finding of fair dealing[1123]). Secondly, the findings indicate that, for this reason, UK copyright law (still) does not readily permit the use of quotations from copyright works that have not previously been made available to the public, unless the permission of the author is sought. It is noted that, at least in the circumstances outlined in Case Study 1, permission would likely not have been forthcoming – recall that the author of the minute, perhaps recognising the 'explosive' nature of the information revealed by it, had been intending to publish parts of the minute in a memoir, before being 'scooped' by the newspaper which published them in 1999.

1121 See CDPA, section 30(1ZA)(a).

1122 ibid.

1123 Recall that one of the fair dealing factors weighed by UK courts is prior publication of the copyright work (that is 'whether the work has already been published or otherwise exposed to the public'): see, for example, *Ashdown* [2001] EWCA Civ 1142 [20] ('*Ashdown 2*').

Case Study 2, as considered in Chapter 7, described the facts of *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Limited*, in which part of the 'iconic' Australian children's song *Kookaburra (Sits in the Old Gum Tree)* was reproduced in a one bar flute riff of a 1980s pop rock song, which was then repeated in that song three times. The later pop rock song dealt with themes of Australian identity, motifs of which include native animals such as the kookaburra. As with Case Study 1, despite Case Study 2 arguably involving the use of a 'quotation' under section 30(1ZA), the facts of this case study fail to satisfy an express statutory requirement of the provision – on this occasion, as there was not any attempt to provide 'sufficient acknowledgement' of the quotation, for the purposes of section 30(1ZA)(d).[1124] As noted in the previous chapter, section 30(1ZA)(d) does allow for absence of acknowledgement, where this would be 'impossible for reasons of practicality or otherwise'.[1125] However, whilst conventions that allow acknowledgement to accompany musical quotations are available (if less readily applicable than those available in text),[1126] none of these was used.

It is possible that, with sufficient public education about the current requirements of statute, recording artists will be capable of ensuring that the requirements of section 30(1ZA) – and particularly, the requirement in section 30(1ZA)(d) – are met in circumstances such as those outlined in Case Study 2. Were this the case, section 30(1ZA) would in such circumstances represent broader scope for the use of (musical) quotations than section 30(1) – for example, in Case Study 2, it is difficult to see how the purpose pursued could be perceived as either criticism or review, whereas there is scope to argue that the purpose is one 'analogous to' criticism or review (in the manner described in the preceding chapter), and

1124 CDPA, s 30(1ZA)(d).

1125 ibid.

1126 For example, noting the name and/or of the quoted work in the title of the quoting work.

that the reproduced part of *Kookaburra*, accordingly, constitutes a 'quotation' under section 30(1ZA) (having the other characteristics of a 'quotation' in law).

Case Study 3 described a scenario in which an 'appropriation artist' placed headshots taken from various pre-existing photographs, taken by a photographer, onto 'other appropriated images' of bodies,[1127] all of which were then placed on a canvas painted by the artist.[1128] As distinct from the parts taken from copyright works in Case Study 1 and (likely) Case Study 2, the parts taken from the earlier photographs in Case Study 3 would not constitute 'quotations' for the purposes of section 30(1ZA): the parts reproduced from the photographs were neither indicated 'as such', nor used for a purpose of criticism, or review, or even a purpose 'analogous to' criticism or review. At this first hurdle, the facts of Case Study 3 therefore fail to attract the application of section 30(1ZA) (and further, neither the requirement of section 30(1ZA)(d)[1129] nor the fair dealing requirement are likely to be satisfied). In addition, none of sections 30(1), 30(2), or even 30A, are likely to apply – in respect of section 30A, even if a purpose of 'pastiche' could be made out, the dealing may not be considered fair.

As noted in chapter 7, the likely treatment of the facts in Case Study 3 under UK law would contrast the treatment of those same facts under US law, as demonstrated by the outcome in the decision of the Court of Appeals for the Second Circuit in *Cariou v Prince*.[1130] Case Study 3 demonstrates that the introduction of the quotation exception in

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1127 *Cariou v Prince* 714 F.3d 694 (2d Cir 2013) 700 ('*Cariou 2*').

1128 ibid.

1129 CDPA, s 30(1ZA)(d).

1130 See *Cariou 2* (n 1127). The uses were found to be transformative, and therefore instances of fair use and non-infringing: see *Cariou 2* (n 1127) 706, 712. The Second District Court noted that '[t]he law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those (criticism, comment, news reporting, teaching, scholarship, and research) identified in the preamble to the statute': *Cariou 2* (n 1127) 706.

section 30(1ZA), despite having the potential to better accommodate artistic uses than the pre-existing statutory 'fair dealing' exceptions, has not substantively extended the scope of exceptions available for artistic uses of copyright works that do not make (objectively) clear the intellectual commentary or artistic idea, if any, to which those uses are directed.

Assessment of scope: A balancing of rights and interests that takes account of consequences

Given the finding in both Case Studies 1 and 2 that there would likely be use of a 'quotation' within the meaning of section 30(1ZA), the conclusion that the UK quotation exception is nonetheless inapplicable to the circumstances of Case Studies 1 and 2 is somewhat surprising.

Let us, then, consider first the facts and findings of Case Studies 1 and 2 in determining whether section 30(1ZA), within the context of UK copyright law as a whole, assists to maintain an appropriate balance of the full range of competing rights and interests.

Conclusions drawn from Case Study 1

Recall the conclusion drawn from Case Study 1 – namely, that even after the introduction of the quotation exception in section 30(1ZA), UK copyright law does not readily permit the use of quotations from copyright works that have not previously been made available to the public, unless the permission of the author is sought. As evidenced by the facts not only of *Ashdown* (the case from which the facts in Case Study 1 are drawn), but also those of *Associated Newspapers v Prince of Wales*[1131] and, more recently, *Duchess of Sussex v*

[1131] [2006] EWCA Civ 1776 ('*Prince of Wales*').

Associated Newspapers,[1132] this conclusion has the capacity to be of broad significance. (In *Duchess of Sussex*, for example, it can be assumed that Associated Newspapers would have claimed the quotation exception in section 30(1ZA) as a defence to the Duchess's claim of copyright infringement, but for the fact that the contents of the Duchess's personal letter to her father were judged not to have been previously made available to the public. Had the exception been considered, the reproduced parts of the letter were likely, it is submitted, to have qualified as quotations both as a matter of ordinary language and in law – although, as in Case Study 1, the extent of the quotations may well have been more than required by the specific purpose of use, and so section 30(1ZA) may have been inapplicable in any event).

The coincidence between cases that fail to satisfy subsection (a) of section 30(1ZA) ('the work has been made available to the public'[1133]) and those in which the relevant author also has an action for misuse of private information[1134] is likely to be high.[1135] In each of *Prince of Wales* and *Duchess of Sussex*, a misuse of private information (or, as applicable, breach of confidence) argument was run in parallel with the copyright action;[1136] in each, both the misuse of private information or breach of confidence and the copyright actions ultimately succeeded.[1137] Therefore, the in-practice materiality of a failure to establish the application of the quotation exception (or, indeed, any copyright exception) is perhaps

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1132 [2021] EWCA Civ 1810 ('*Duchess of Sussex*').

1133 CDPA, s 30(1ZA)(a).

1134 Or traditionally, breach of confidence.

1135 By way of example, in *Duchess of Sussex* there was a dealing with an unpublished original literary work, a 'large and important proportion' of which was copied, 'most of which infringed the claimant's privacy rights': *Duchess of Sussex* (n 1132) [102]. This case thereby demonstrates the overlap that can occur between actions in copyright and actions in breach of confidence.

1136 In *Ashdown*, proceedings were commenced for breach of confidence and copyright infringement; only the copyright action was pursued before the Vice-Chancellor: see *Ashdown v Telegraph Group* [2001] EWHC 28 (Ch) [4].

1137 See *Prince of Wales* (n 1131) [84] (dismissing the appeal and upholding the first instance judge's decision that there was an 'unanswerable claim for breach of privacy' (at [74]) and 'there were two infringements of copyright' (at [75]); *Duchess of Sussex* (n 1132) [105] (dismissing the appeal against the first instance judge's decision that 'the claimant's reasonable expectation of privacy and copyright in [her letter] had been infringed').

minimised in such cases, as the use of quotations from the relevant copyright work(s) – albeit only those containing private information – is often rendered unlawful in any event by the law of privacy.

Nonetheless, and unsurprisingly,[1138] actions in copyright and in privacy will not always cover the same ground nor achieve the same result, even when applied to the same facts: relevantly, the rights to be balanced by courts, and the extent to which these are engaged, will be different where the primary right asserted is a privacy right, as distinct from a property right.[1139] Consistent with this, a defendant seeking to rely on section 30(1ZA) CDPA must establish that the relevant copyright work has been 'made available to the public',[1140] whereas a claimant pursuing an action for misuse of private information must, necessarily,[1141] seek to establish a reasonable expectation of privacy in respect of the relevant information – information that is perhaps contained within a copyright work. Whilst there will tend to be a loss of a reasonable expectation of privacy where information is placed in the public domain (although this is a matter of 'fact and degree'),[1142] this does not equate entirely to a copyright work having been 'made available to the public' – despite there being some overlap between the two.[1143]

Further, whilst in misuse of private information cases, UK courts must 'have regard to the extent to which it is or would be in the public interest for the material to be published',

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1138 Considering, for example, the differing rationales supporting the actions.

1139 Even though both actions typically engage, for example, freedom of expression on the countervailing side.

1140 CDPA, s 30(1ZA)(a).

1141 *Campbell v MGN Ltd* [2004] UKHL 22 [21].

1142 'If the information, or similar information about the claimant, is in the public domain, or is about to become available to the public, the Court must have regard to that. In such a case it is a matter of fact and degree as to whether the legitimate expectation of privacy has been lost. Privacy rights can survive a degree of publicity for the information or related information': *Duchess of Sussex v Associated Newspapers* [2021] EWHC 273 (Ch) [30].

1143 Consider, for example, that the copyright work must have been 'made available to the public' with the permission of the copyright owner: see CDPA s 30(1A).

where a 'decisive factor' is 'an assessment of the contribution which the publication of the relevant information would make to a debate of general interest',[1144] express public interest considerations (over and above those already reflected, and the manner in which they are reflected, in existing copyright exceptions[1145]) do not have a place in the assessment either of whether prima facie copyright infringement is established, or of whether a copyright exception, including the UK quotation exception, should be applied. Put differently, if the relevant copyright work has not been made available to the public, then consequently section 30(1ZA) CDPA will not apply, regardless of the extent to which use of a quotation or quotations from that work might (or might not) serve a public interest, including by contributing to a debate of general interest. Arguably, this fails to take sufficient account of the contribution that the use of quotations makes to public discourse, including political discourse and other matters of public interest.

Nonetheless, it should be recalled that a person wishing to use a quotation or quotations from a copyright work may do so lawfully by seeking the permission of the copyright owner – (although as Case Study 1 illustrates, there may be reasons, including purely commercial reasons, why such permission would be refused). More pertinently, and despite the proposition, as stated in *Ashdown*, that 'there will be occasions when it is in the public interest not merely that information should be published, but that the public should be told the very words used by a person',[1146] UK copyright law does not itself prevent the publication of information contained within a copyright work.[1147]

1144 *Duchess of Sussex* (n 1132) [35].

1145 Including the dedicated provision in CDPA, CDPA, s 171(3), designed to enable courts to develop a public interest exception (although note the discussion of this provision in Robert Burrell and Alison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press 2005) Chapter 3.

1146 *Ashdown 2* (n 1123) [43].

1147 Pursuant to the idea-expression distinction, on which, see n 834.

It is against this background that the scope of section 30(1ZA) must be viewed. Therefore, notwithstanding the conclusion that the provision does not extend (with respect to the situation pre-2014) a person's ability to use quotations from a copyright work where that work has not been made available to the public, copyright law as a whole substantially preserves the rights of the public at large to receive information.

Allowing further latitude within copyright law for quotations from copyright works to be used, even where these had *not* previously been made available to the public, would not, it is submitted, be justifiable – particularly when author rights against compelled speech, which are stronger in respect of unpublished material, are taken into account.

Conclusions drawn from Case Study 2

Let us turn, then, to Case Study 2, in which the section 30(1ZA)(d) CDPA requirement of 'sufficient acknowledgement' was not satisfied – despite, it is suggested, there being use of a 'quotation' under section 30(1ZA). Section 178 CDPA defines 'sufficient acknowledgement' as 'an acknowledgement identifying the work in question by its title or other description, and identifying the author [other than in certain prescribed circumstances]'.[1148] In the 2005 decision in *Fraser-Woodward v BBC*, it was held that the concept of identification (of the work and the author) does not require 'a precisely or virtually contemporaneous act of identification'.[1149] Nonetheless, and as has been noted, the identification must be 'one that can readily be seen'[1150] and must not require 'some form of hunting around or detective work'.[1151]

1148 CDPA, s 178.

1149 *Fraser-Woodward v BBC* [2005] EWHC 472 (Ch) [75].

1150 ibid [72].

1151 ibid.

In summary, therefore, the UK quotation exception will not apply unless the relevant quotation (if any) is accompanied by an identification of the work from which it is derived, and its author, which can readily be seen. Whilst in *Fraser-Woodward* it was perception by sight that was relevant,[1152] it may surely be assumed that ready perception by other means, including hearing, will also be sufficient. Yet, despite this, the facts of Case Study 2 demonstrate that the 'sufficient acknowledgement' criterion in section 30(1ZA)(d) may be more difficult to satisfy in the context of uses of quotations from some copyright works and materials – for example, uses of quotations in sound recordings – in particular.

It was suggested earlier in this chapter that public education about obligations under copyright statute may go some way to ensuring that the effects of this do not create inequities for non-textual and other non-traditional uses of quotations, impacting upon the exercise of users' freedom of expression (including their artistic freedom) and relatedly, the dissemination of any resulting works. For example, if the composers of the pop song in Case Study 2 had been aware of using a 'quotation', and the accompanying requirements for the application of section 30(1ZA), then they could have taken steps to ensure satisfaction of these requirements (including acknowledging the source of the quotation – a convention that is often adopted, irrespective of the requirements of section 30(1ZA), in textual uses of quotations[1153]). Note that this suggestion is consistent with the contention of this thesis that use of a 'quotation' under section 30(1ZA) must be an *intentional* act.

However, even if the composers had been aware of using a 'quotation' in law, and had taken steps to meet the requirements for the application of section 30(1ZA), it can be queried whether the steps taken could have satisfied these requirements – and the requirement

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1152 As that case involved a broadcast.

1153 For example, because of institutional requirements such as those contained in university guidelines, the conventions of journalistic practice, and so on.

contained in section 30(1ZA)(d), in particular. Put differently, could the quotation the use of which is detailed in Case Study 2 ever have been 'accompanied by' an acknowledgement 'sufficient' to satisfy subsection (d) of section 30(1ZA), so as to render the provision applicable? The answer to this question requires some specificity about the time at which the identification of title and author must be readily discernible: in this respect, it is concluded that the 'use' to which section 30(1ZA) refers is the act that would otherwise be infringing ('Copyright in a work is not infringed by the use of a quotation from the work … provided that …'), and therefore that the relevant quotation must be accompanied by sufficient acknowledgement *at the time of that use* (although, as held in *Fraser-Woodward*, there is some temporal latitude, in that it need not be 'precisely or virtually contemporaneous'[1154]).[1155]

Accordingly, it follows that it is the copying of a substantial part of the children's song in the later *recording* of the pop song that must be accompanied by acknowledgement. As yet, there is no convention for including in such a recording an acknowledgement – for example, a recorded verbal acknowledgement immediately following the conclusion of the musical piece – of any copyright work used within the recording (whether with permission or otherwise).

Record or CD 'liner notes', which might once have served the purpose of providing authorship credits and other similar information, are surely now so infrequently accessible as to render any acknowledgement provided within them insufficient, on the count that they

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1154 *Fraser-Woodward* (n 1149) [75].

1155 This question gives rise to considerations very similar to those that were relevant to the determination of whether a quotation, to be such, must be 'identifiable' by its audience or 'identified' by its user: see text to n 717 – n 725. Section 30(1ZA)(d) requires that the quotation is 'accompanied by' sufficient acknowledgement, but the existing case law refers to the identification being 'readily … seen'. The former is focussed on the acts of the user (of the quotation) and the latter is focussed on the acts of the audience.

require too much 'detective work' to uncover.[1156] Further, whilst there exist conventions for acknowledging the 'sampling' of an earlier musical work (or specifically, earlier sound recording of a musical work) in a recording, these tend first, to identify the performer (and not necessarily the author or title) of the earlier work, and secondly, to involve identification in the title of the later recording.[1157] In any case, it can be queried whether these methods allow for identification sufficiently close in time to the relevant act of infringement (being, in Case Study 2, the copying of a 'substantial part' of the children's song in the recording of the later pop song).

The requirement for sufficient acknowledgement in section 30(1ZA)(d) therefore creates challenges for some uses of quotations, in particular – indeed, it does so to the extent that it risks substantially undermining the ability to so use quotations from copyright works. This matter went unaddressed by the decision in *Pelham*, in which the CJEU noted that 'the use of that sample may, depending on the facts of the case, amount to a "quotation", on the basis of article 5(3)(d) of [the Infosoc Directive]',[1158] subject to satisfaction of the various conditions of the provision (including that 'unless this turns out to be impossible, the source, including the author's name, is indicated'[1159]).

This is concerning, and tends to lead to the conclusion that the UK quotation exception does *not* strike an appropriate balance between the full breadth of rights and interests at issue, in that – as is demonstrated by the facts of Case Study 2 – it fails to sufficiently accommodate artistic freedom and the 'socially valuable' consequences

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1156 With reference to the criteria outlined in *Fraser-Woodward* (n 1149) [75].

1157 For example, *Stan – Featuring Dido* by Eminem, from *The Marshall Mathers LP* (Aftermath Entertainment and Interscope Records, 2000).

1158 Case C-476-17 *Pelham and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] OJ C 347, para 72 ('*Pelham*').

1159 See Infosoc Directive, art 5(3)(d).

generated through the exercise of this freedom. Perhaps surprisingly, this does not come as a result of the manner in which 'quotation' must be interpreted under section 30(1ZA) CDPA, which some may see as restrictive or insufficiently flexible , but rather because of the express statutory requirement for sufficient acknowledgement in section 30(1ZA)(d) (derived in turn from the same requirement in both article 5(3)(d) Infosoc Directive and article 10(3) Berne Convention).

What remains to be seen is how broadly the caveat appearing in both section 30(1ZA)(d) CDPA and in article 5(3)(d) Infosoc Directive – namely, that sufficient acknowledgement must be provided unless this would be 'impossible' whether 'for reasons of practicality or otherwise'[1160] – will be interpreted.[1161] In his Opinion in *Pelham*, Advocate General Szpunar commented that 'in the case of a musical work, it is difficult (even if not impossible) to indicate the source of the quotation in the work itself',[1162] and appeared to accept that sufficient acknowledgement could be provided 'in the description of the quoting work, or even in its title'.[1163] However, as noted above, the CJEU itself did not address the matter in its judgment in the same case.

If the threshold of impossibility is set high in the UK, then this bears the risk of impacting substantially on the availability of the section 30(1ZA) exception in respect of certain, non-textual, uses of quotations, including in musical recordings. It is suggested here that only a flexible approach to the 'sufficient acknowledgement' requirement, and/or low

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1160 CDPA, section 30(1ZA)(d). Or in the case of article 5(3)(d), 'unless this turns out to be impossible': Infosoc Directive, art 5(3)(d).

1161 Note that whilst the requirement for 'sufficient acknowledgement' in, for example, section 30(1) CDPA pre-existed the insertion into the CDPA of section 30(1ZA), the caveat to this ('impossible for reasons of practicality or otherwise') was only added in 2014: see the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (SI 2014/2356), reg 3. Accordingly, the case law on 'sufficient acknowledgement' in, for example, *Fraser-Woodward* (n 1149), does not address the impossibility or otherwise of providing sufficient acknowledgement.

1162 *Pelham* (n 1158), Opinion of AG Szpunar, para 68.

1163 ibid.

threshold of impossibility which recognises the unique challenges of source acknowledgement in non-textual media, will allow the scope of the UK quotation exception to be set appropriately.

Conclusions drawn from Case Study 3

Let us return now to Case Study 3, the facts of which would not, it was concluded, allow the application of the UK quotation exception. Case Study 3, like Case Study 2, involves the use of a copyright work in a creative context (an artwork and a musical recording, respectively). Accordingly, the user's artistic freedom is one of the relevant rights and interests in each case.

It was stated above that the UK quotation exception should be available in circumstances such as those described in Case Study 2. That it is not (it is concluded) demonstrates that the balance struck between the relevant rights and interests is not appropriate, in that it does not allow sufficient space for the exercise of artistic freedom.

A different conclusion is reached in respect of Case Study 3. In this respect, the decision of the German Constitutional Court in *Germania 3*, in which the court was required under German law to weigh the artistic freedom of the user of a claimed quotation as against the copyright interest of the author of the work from which that quotation was derived,[1164] is instructive. The court noted that:

> In these matters, it is of basic importance to remember that, upon being made available to the public, a work is no longer solely at the disposal of its [copyright] owner. Rather it enters, as it is destined to do, into the social sphere and can thereupon become an independent contributing factor to the cultural and intellectual picture of the times. Over time it ceases to be the subject of private rights and becomes common property of an intellectual and cultural kind. This is, on the one hand, the internal

[1164] See Adeney and Antons (n 1076) 649 – 655, on which pages the judgment of the German Constitutional Court is reproduced in translation.

> justification for limiting the period of copyright protection; on the other, this circumstance also leads to the fact that, the more the work fulfils its desired social role, the more strongly it can serve as a point of attachment for artistic engagement. This social link of art is thus simultaneously the precondition for its effectiveness and the reason why artists must accept, to some extent, impingements on their rights by other artists [acting] as part of the society which engages with their art.[1165]

Put differently, the author of a copyright work must accept that, *once it is made available to the public*, members of the public may exercise their own freedom of expression (including artistic freedom) to comment upon that copyright work or, perhaps, use it as a vehicle for comment. (Concerns about compelled speech remain, but as commented above are stronger where works have not yet been made available to the public[1166]).

Taking both this, and what was assessed as 'an insubstantial impingement on the copyright — without danger of any noticeable commercial disadvantage (for example, loss of sales)' into account, the court determined in *Germania 3* that the relevant quotation should be permitted under copyright law.[1167]

In Case Study 3 the later artwork did not appear to engage in criticism or review of the earlier copyright work, an idea or philosophy underlying it, or of other copyright works, or the ideas or philosophy underlying those. Neither, by contrast with the circumstances in *Germania 3*, did the copyright work, or any part of it, appear to serve commentary, or an artistic idea, pursued by later artwork.[1168] The extent to which the artistic freedom of the alleged infringer is engaged is, therefore, minimised. Accordingly, it may be accepted that the balance of rights struck by the UK quotation exception, in failing to permit the use of copyright works where these are presented without any objectively observable commentary,

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1165 ibid 654 ([23] of the judgment).

1166 See text to n 1107

1167 Adeney and Antons (n 1076) 654 ([24] of the judgment).

1168 Contrast the later (quoting) work in *Germania 3*, which was found to 'criticis[e] the state of injustice represented by the German Democratic Republic' through the use of quotations from the work of Brecht: ibid 652 ([10] of the judgment).

is appropriate.[1169] This is consistent with the reproduced parts of the copyright work in Case Study 3 failing to constitute 'quotations' even according to the ordinary meaning of the term.

Conclusions drawn from Case Study 4

The reproduced part of the copyright work used in Case Study 4, instead, is likely a 'quotation' both as a matter of ordinary meaning and within the meaning of section 30(1ZA). Further, the use of the quotation described in Case Study 4 is likely one of those uses intended by the legislature to fall within the scope of section 30(1ZA) CDPA[1170] – to the extent that the scope in practice of the exception was considered. This expectation does not of itself allow a conclusion about the appropriateness of the scope of section 30(1ZA). It is, however, relevant that the quotation used in Case Study 4, representing one line of a novel, is one that would not, it is argued, meet the 'substantial part' threshold for copyright infringement, were this a quantitative assessment alone. Yet, the *Infopaq* test for copyright infringement appears to place beyond any doubt that use of this quotation could constitute *prima facie* infringement, including under UK law.[1171] Accordingly, it might be thought appropriate to ensure that uses of such (quantitatively insignificant but potentially qualitatively significant) quotations can – subject to meeting its various conditions – take advantage of the UK quotation exception, to lessen the effects of any unintended consequences of the *Infopaq* decision.

1169 Whilst, for example, 'readymade', or *objet trouvé*, artworks are also typically presented without observable commentary, it is notable that these do not tend to implicate the rights comprised in copyright. There is therefore no balance to be struck - the artist may, generally, freely express him or herself without limitation.

1170 That is, on the basis that it is a *de minimis* use of a type similar to the examples canvassed in the pre-legislative materials: see text to n 182- n 188.

1171 Recall that, following the decision in Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-06569, it must be contemplated that even a phrase of 11 words might of itself qualify for copyright protection.

Further, the Case Study 4 facts mirror those of *Germania 3*, in that the artistic freedom of the user of the quotation is demonstrably engaged. This suggests that it is appropriate that the scope of section 30(1ZA) allows for uses such as those described in Case Study 4.

Nonetheless, the application of section 30(1ZA) to Case Study 4 is, as described, conditional upon satisfaction of section 30(1ZA)(d), considering that the facts show that the author, but not the source, of the quoted line was acknowledged. If sections 30(1ZA)(d) and 178 CDPA were enforced strictly, rendering section 30(1ZA) inapplicable to Case Study 4, this would indicate that the provision is of insufficient scope – particularly considering the inapplicability of other CDPA exceptions (barring, possibly, section 30(1)). Accordingly, and as noted with respect to Case Study 2, some degree of flexibility in the application of section 30(1ZA)(d) is necessary to ensure that section 30(1ZA) assists to maintain a reasonable balance of rights and interests, allowing the socially valuable purposes of quotations to be achieved.

Conclusions and a possible explanatory theory

This chapter focussed on an assessment of competing rights (and to a lesser extent, related 'socially valuable' consequences). It was concluded that the scope of the UK quotation exception, assessed on this basis, is broadly appropriate – subject only to the statutory requirement of 'sufficient acknowledgement',[1172] and/or the circumstances in which this will be considered 'impossible',[1173] being given a flexible interpretation.

1172 See CDPA, s 30(1ZA)(d).

1173 ibid.

Here it is argued that, just as a 'transactional approach', importing considerations of market failure, can provide a 'distinct basis on which to ground the parody defence',[1174] so too can considerations of 'alternatives' provide a useful supplementary explanation for conclusions about the quotation exception based on fundamental rights and public interest.

In summary, a theory of alternatives asks: if the copyright owner was asked for permission to reproduce (part of) a copyright work and refused a licence (for any reason[1175]), could another copyright work – or, indeed, a work in the public domain – readily provide an alternative? If the answer is yes, then this provides one explanation why the quotation exception ought not to apply in such a scenario (and why, conversely, it ought to apply – assuming the absence of any other exception – if the answer is no, minimising the potential weaponization of copyright as a means of censorship).

In some circumstances – for example, where use of (part of) a book is desired to complete a review of that book – quite clearly, other works do not provide adequate alternatives. In others, by contrast, an alternative could readily be found – for example, where a photograph is desired to illustrate the cover of a biology textbook, it may be concluded that any one of a number of differing photographs (assuming a sufficient link to the broad subject matter) would suffice. Somewhere between these two possibilities, in other circumstances still, an alternative could be found but only in a relatively limited range – for example, works of a particular origin or that engage with a specific subject matter or theme. By way of example, in a documentary on the films of Francis Ford Coppola, it is possible that (part of) one film by the director could be substituted for another, but not that a (part of) a film by another director entirely could provide a substitute.

1174 Robert Merges 'Are You Making Fun of Me: Notes on Market Failure and the Parody Defense in Copyright' (1993) 21 AIPLA QJ 305, 312.

1175 Unlike to accounts of parody exception, the reason for refusal is immaterial to this theory.

Whilst this theory bears some resemblance to the merger doctrine – pursuant to which it is asked whether there is only one way, or by contrast, several alternative ways, to express an idea[1176] – the focus, application, and consequences of each are different,[1177] and accordingly, the theories are to be distinguished. Indeed, one way of understanding this theory is as an extension of the proportionality test already included in section 30(1ZA)(c),[1178] as the use of a quotation from a particular copyright work is not 'required' to achieve a specific purpose if there are alternatives available which may allow the same purpose to be achieved (meaning that the use of that original copyright work is not justified to any extent under the provision).

When Case Studies 1 to 4 are viewed through the lens of the 'alternatives' theory, it can be seen that in Case Study 1, there was no possible alternative for the copyright work (the minute of the meeting). In Case Study 2, there might have been an alternative, but only from a limited range of works – namely, those that were 'icons' of Australian culture (the Australian national anthem, or a traditional folk song,[1179] might provide an example). In Case Study 3, almost any headshots, it is assumed, could have substituted for those taken from the

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1176 Michael Murray explains the merger doctrine thus: 'if an idea and the expression of the idea are so tied together that the idea and its expression are one – there is only one conceivable way to express and embody the idea in a work – then the expression of the idea is not copyrightable because ideas may not be copyrighted' (see Michael Murray, *Copyright, Originality, and the End of the Scenes a Faire and Merger Doctrines for Visual Works* (2006) 58 Baylor L. Rev. 779, 781). Whilst the language used in this extract betrays the fact of its context, namely, the law of the US, the notion of the merger doctrine has been considered in the UK also: see *Ibcos Computers v. Barclays Mercantile Finance* [1994] FSR 275.

1177 For, as noted in the preceding footnote, the merger doctrine is directed at indicating circumstances in which the threshold for copyright subsistence is not met, whereas the theory of alternatives suggested here is directed at providing a supplementary explanation why it is appropriate that the copyright quotation exception does not apply in particular circumstances (and sufficient that it does apply in others).

1178 That is, that the 'extent of the quotation is no more than is required by the specific purpose for which it is used': CDPA, s 30(1ZA)(c). Similar wording is found in Infosoc Directive, art 5(3)(d) and Berne Convention, art 10(1).

1179 The tune of 'Waltzing Matilda', set to the words of AB ('Banjo') Paterson, might have provided an alternative (although on copyright in 'Waltzing Matilda', see Roger Clarke, 'Copyright in "Waltzing Matilda" (20 May 2001) <www.anu.edu.au/people/Roger.Clarke/WM/Copyright.html> accessed 9 March 2024.

Yes Rasta photographs. And in Case Study 4, only a small number of works, if any, could have provided alternatives allowing the film's character to make an observation about time (citing an author from the particular era with which the film was concerned).

On this basis, the conclusion reached in respect of Case Study 3 – that is, that it is appropriate that section 30(1ZA) does *not* allow an exception to copyright infringement in such circumstances – is confirmed. Similarly, the conclusions reached in respect of Case Studies 2 and 4, that it is appropriate that section 30(1ZA) *should* allow an exception in such circumstances (with this requiring a flexible interpretation of the statutory 'sufficient acknowledgement' criterion in both cases – something countenanced as achievable in the latter), are confirmed.

Whilst the theory of 'alternatives' suggests that it is appropriate that the quotation exception is available in the circumstances of Case Study 1, on the basis that there is no alternative for the copyright work, section 30(1ZA) would not be applicable in practice and, further, it was concluded above that this is appropriate. This discrepancy may be explained by the single caveat to the theory of 'alternatives' – namely, that even if there are no alternatives to the copyright work, the quotation exception should nonetheless not apply where the copyright work has not been made available to the public. This ensures that due regard is paid to the strength of the author's compelled speech argument in such circumstances.

9. CONCLUSION

Ten years on from the introduction of a dedicated quotation exception into the CDPA,[1180] this thesis has considered the potential significance of that provision. Although initially dismissed by the UK legislature as 'minor',[1181] based on the understanding that its scope would extend only minimally upon the scope of the existing exception for 'fair dealings' with copyright works for the purpose of criticism or review,[1182] this thesis has sought to demonstrate that this understanding was founded on several mistaken assumptions. It is likely these assumptions, together with the expectation of the UK legislature that the scope of the provision would simply match that of article 5(3)(d) Infosoc Directive (from which it was derived[1183]), which led to an omission to fully explore the meaning and breadth of section 30(1ZA) prior to its introduction in 2014.

In light of the UK legislature's expectation that the scope of section 30(1ZA) CDPA would mirror that of article 5(3)(d), similarly operating 'within the strong European legal framework that protects the interests of creators and rights holders',[1184] it is proper that the UK quotation exception continues to be interpreted in accordance with relevant EU law, even after the UK's exit from the EU. It is indeed required, under the provisions of the European Union (Withdrawal) Act 2018, that lower UK courts continue to interpret EU-derived

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1180 The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, which introduced section 30(1ZA) into the CDPA, came into force on 1 October 2014: see the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, reg 1.

1181 See IPO, *Modernising Copyright: A modern, robust and flexible framework* (20 December 2012) ('Modernising Copyright') 28.

1182 See CDPA, s 30(1). This understanding is evidenced in 'Modernising Copyright': ibid.

1183 Transposition note for Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ No L 167, 22.6.2001, p.10) 2.

1184 'Modernising Copyright' (n 1181) 8.

legislation in accordance with relevant pre-Brexit CJEU decisions.[1185] Higher courts must depart from such precedent in limited circumstances only.[1186] And post-Brexit CJEU decisions 'may' be taken into account by any UK court, to the degree they are considered relevant.[1187] Other than in circumstances in which future decisions of the CJEU, unexpectedly, interpret article 5(3)(d) Infosoc Directive in a manner inconsistent with the wording of section 30(1ZA) CDPA or its statutory context, this thesis has suggested that those decisions should in general be considered relevant and thereby taken into account.

Pre-Brexit, the CJEU considered article 5(3)(d) Infosoc Directive in one decision of 2011, and three decisions issued on the same day in 2019. From these decisions, certain lessons about the interpretation of article 5(3(d), and thereby section 30(1ZA) CDPA, can be derived. Amongst these is that the usual meaning of 'quotation' in everyday language is the 'use, by a user other than the copyright holder, of a work or, more generally, of an extract from [*of*] a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user[*, since the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into "dialogue" with that work*]'.[1188] Yet, the Court conducted little analysis of the meaning of 'quotation' to support this conclusion. Further, the Court left unaddressed certain matters concerning the concept of quotation.[1189]

1185 European Union (Withdrawal) Act 2018, s 6(3).

1186 ibid s 6(5).

1187 ibid s 6(2).

1188 Case C-476-17 *Pelham and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] OJ C 347 ('*Pelham*') para 71; Case C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] OJ C 392 ('*Spiegel*') para 78. Text is taken from *Spiegel* and replicated in *Pelham*, with slight variations in *Pelham* shown in square brackets.

1189 Such as, for example, the degree to which a quotation must display formal fidelity to its source. (Noting that Advocate General Szpunar did address this matter in his Opinion preceding the decision in *Pelham*: see *Pelham* (n 1161), Opinion of AG Szpunar, para 64.

In its 2019 decisions in *Pelham* and *Spiegel*, the CJEU purported to follow in its considerations of the concept of quotation the interpretative approach that had been applied in Case C-201/13 *Deckmyn and Vrijheidsfonds VZW v Vandersteen and Others*[1190] in respect of the concept of parody in article 5(3)(k) Infosoc Directive.[1191] Yet, the *Deckmyn* approach arguably requires a more fulsome analysis. Further, this thesis has argued that the *Deckmyn* interpretative approach relies in part upon the definitional approach to 'usual meaning everyday language' adopted by Advocate General Cruz Villalón in his Opinion in *Deckmyn* – namely, consideration of the dictionary meaning of the relevant term in several languages of the EU.[1192] Both this definitional approach, and the *Deckmyn* interpretative approach more broadly, are methodologically sound.

Applying the interpretative principles of *Deckmyn* to article 5(3)(d) Infosoc Directive results in an interpretation of the concept of quotation within the provision as requiring a reproduction; that is identified 'as such'; and is for a purpose of criticism, or review, or an analogous purpose. As this thesis has contended, this interpretation is entirely consistent with those 'essential characteristics' of quotation identified by the CJEU in 2019,[1193] but also provides a rationale for the conclusions reached and allows greater detail about the nature of a quotation for the purposes of EU law.

As shown by the decision in *Shazam Productions v Only Fools the Dining Experience*,[1194] a post-Brexit decision of the Intellectual Property Enterprise Court, there may still be reference by UK courts to the approach in *Deckmyn* when considering concepts

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1190 [2014] OJ C 189 ('*Deckmyn*').

1191 See *Spiegel* (n 1161) para 77; *Pelham* (n 1161) para 70.

1192 See *Deckmyn* (n 1190) Opinion of AG Cruz Villalón, paras 47 – 70.

1193 See *Pelham* (n 1161) para 71; *Spiegel* (n 1161) para 78.

1194 [2022] EWHC 1379 (IPEC) ('*Shazam*').

integral to UK copyright exceptions derived from article 5 Infosoc Directive.[1195] Consistent with this, a UK court asked to consider section 30(1ZA) CDPA should adopt the interpretation required of article 5(3)(d) Infosoc Directive when *Deckmyn*'s principles are applied. As this thesis discussed, this interpretation is entirely consistent with the wording of section 30(1ZA) and its statutory context.

Application of this interpretation to four Case Studies served to demonstrate the resulting scope of section 30(1ZA). This allowed the conclusion that permission to use quotations from copyright works has been enlarged under UK copyright law since 2014, as section 30(1ZA) CDPA extends upon section 30(1) CDPA by allowing uses of quotations for purposes analogous, and not confined, to criticism or review. Yet, the requirements for the copyright work to have been made available to the public under section 30(1ZA)(a),[1196] and for 'sufficient acknowledgement' under section 30(1ZA)(d),[1197] potentially cut across this otherwise enlarged scope – the latter especially in its application to uses of, or in, non-textual materials.

In the view of this thesis, it is appropriate that the UK copyright quotation exception requires the copyright work from which a quotation is taken to have been 'made available to the public'.[1198] Yet, considering the legislature's stated goal of maintaining a 'reasonable balance … between the interests of creators, owners, performers, consumers and users of copyright works',[1199] and further considering a broader range of rights and interests than is typically considered in this respect, this thesis suggested that the scope of section 30(1ZA) is

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1195 ibid [187]. (There, the exception for 'fair dealing' for the purpose of caricature, parody or pastiche in CDPA, s 30A, derived from article 5(3)(k) Infosoc Directive).

1196 CDPA, s 30(1ZA)(a).

1197 ibid s 30(1ZA)(d).

1198 (As is currently the case under section 30(1ZA)(a) CDPA).

1199 Explanatory Memorandum to the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, para 2.1.

appropriate if, and only if, a flexible approach to the 'sufficient acknowledgement' requirement is taken, and/or a low threshold of impossibility under section 30(1ZA)(d) is set,[1200] in the interpretation of the provision.

Next steps

The IPO's 2019 Post Implementation Review of copyright exceptions introduced into the CDPA in 2014, including section 30(1ZA), concluded that the exceptions had delivered on their policy objectives, namely i) 'remov[ing] inconsistencies cause by the uneven treatment of different media types', ii) 'reduc[ing] transaction costs and unnecessary rights clearance barriers', iii) 'enabl[ing] a larger quantity of high-quality research' and iv) 'encourag[ing] the creation of new content'.[1201] Specifically, the Review noted that the quotation exception had been relied upon to '[enable] curators to include extracts and quotes from works to illustrate points relevant to the exhibitions in question'.[1202] Further, it noted stakeholder feedback that '[t]he quotation exception is being used more widely than expected', especially since 'the quotation exception provides a practical alternative to the time-limited current events exception [in section 30(2) CDPA]'.[1203] This is consistent with the findings of Hudson's empirical work, which demonstrates enthusiastic reliance on the quotation exception by those working in cultural institutions[1204] - work that is reportedly being continued, together with

1200 Recall that subsection (d) of section 30(1ZA) requires that 'the quotation is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise)': CDPA, section 30(1ZA)(d).

1201 IPO, Post Implementation Review – Copyright exceptions (for various purposes), 1.

1202 ibid 6.

1203 ibid 2.

1204 'In empirical work with UK cultural institutions, there were repeated reports that the quotation exception was of value and was being used for reproductions from a range of works – e.g., literary, artistic and audio items – in such things as publications, onsite exhibitions, educational materials, and informational and research-oriented aspects of public websites': Emily Hudson, Tanya Aplin and

Tanya Aplin, through investigation of the in-practice impact of the exception on practices in the publishing industry.[1205]

Respondents to the IPO's Post Implementation Review indicated that 'it would be beneficial to extend the quotation exception to unpublished works as well, as a substantial amount of the content held in archives is unpublished'.[1206] The Review concluded, however, that this was not possible, given that 'international consensus is that unpublished works should not be included in this type of exception, as rights holders in unpublished works chose not to make them available widely when creating them'.[1207] (This should perhaps be taken as a reference to the requirement of article 10(1) Berne Convention that quotations are from 'a work that has already been lawfully made available to the public'[1208]). The ultimate conclusion of the Review, therefore, was that the provisions introduced into the CDPA in 2014, including section 30(1ZA), should be retained (and in their current form).[1209]

What does this mean for the future of the UK copyright quotation exception in section 30(1ZA) CDPA? The breadth of options that may be posed in answer to that question is greater than that available at the time of the Hargreaves Review, the report of which notably concluded that the introduction of 'fair use' was unlikely to be possible within the EU framework (and thus considered other options for reform).[1210] With the UK having now formally exited the EU,[1211] and increasingly seeking to distance itself from the influence of

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Robert Burrell, Submission to the IPO Consultation: post-implementation review of 2014 copyright changes (2019), 5.

1205 See Emily Hudson, 'An Empirical Study of Quotation Norms in the Publishing Industry', IALS, School of Advanced Study, University of London, 21 February 2022.

1206 IPO (n 1201) 6.

1207 ibid.

1208 Berne Convention, art 10(1).

1209 IPO (n 1201) 6.

1210 Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (18 May 2011) 5.

1211 On 31 January 2020.

EU law,[1212] it would be open to the legislature to again consider amending the CDPA, introducing an open-ended 'fair use' exception in place of the existing closed list of 'fair dealing' exceptions.[1213] The merits of a general 'fair use' exception to copyright infringement, as compared those of a system of 'fair dealing' exceptions, have been well rehearsed.[1214]

A less bold step, namely, amending section 30(1ZA) to alter its contours, would also now be possible. An obligation to comply with the Berne Convention, and specifically article 10(1) thereof, clearly remains. However, to the extent that article 5(3)(d) Infosoc Directive reflects differing requirements,[1215] these no longer constrain lawmaking in the UK. Amendment of the provision that abandoned the term 'quotation' altogether, or provided expressly for additional types of uses, would allow the scope of the provision to be broadened (albeit within the quite rigid constraints of the provision's current statutory context,[1216] if this was retained): whilst, as this thesis has sought to argue, the category of acts that might now be described as uses of quotations is expanding, there is truth to the contention of Rimmer, in an article written following the decision in *Larrikin Music Publishing Pty Ltd v EMI Songs*

1212 See, for example, the Retained EU Law (Reform and Revocation) Act 2023, which amended the European Union (Withdrawal) Act 2018 to provide, *inter alia*, that '[t]he principle of the supremacy of EU law is not part of domestic law': see Retained EU Law (Reform and Revocation) Act 2023, s 5(1).

1213 As, for example, was done in Australia in 2014 (with ultimately, no change to the system of statutory 'fair dealing' exceptions): see ALRC, *Copyright and the Digital Economy* (ALRC Report 122, 2014).

1214 With recent work by Handler and Hudson seeking to 'depolarise' the debate: see Michael Handler and Emily Hudson, 'Fair Use As an Advance on Fair Dealing? Depolarizing the Debate' in Shyamkrishna Balganesh, Ng-Loy Wee Loon and Haochen Sun (eds), *The Cambridge Handbook of Copyright Limitations and Exceptions* (Cambridge University Press 2021).

1215 It is the contention of this thesis that article 5(3)(d) Infosoc Directive is not narrower in scope than article 10(1) Berne Convention. Whilst article 10(1) does not make explicit mention of purpose (and article 5(3)(d), by contrast, provides that quotations must be 'for purposes such as criticism or review'), it is the contention of this thesis that in any case, the legal concept of quotation itself imports a requirement of use for criticism, or review, or an analogous purpose.

1216 Namely, that provided by the group of limited 'fair dealing' exceptions in the context of which section 30(1ZA) is currently found (those for 'Criticism, review, quotation and news reporting').

Australia Pty Limited (and in the same case on appeal),[1217] that the term 'quotation' is ill-adapted to capture all manner of remixes and mash-ups.[1218]

The recommendation of this thesis is, however, that neither of these courses should be taken, as the current scope of section 30(1ZA) is (subject to the caveat regarding 'sufficient acknowledgement') appropriate, within the context of UK copyright law as a whole. Whilst this is consistent with evidence received by the IPO Post Implementation Review, such evidence should not, it is suggested, be determinative of future steps given that, amongst other things, prevailing understandings of the scope of section 30(1ZA) 'in the field' are not entirely clear.[1219]

The effect of this recommendation is, as detailed, that section 30(1ZA) CDPA, remaining in its current form, should continue to be interpreted in line with relevant pre-Brexit (and, as a general proposition, post-Brexit) decisions of the CJEU. Amongst other things, the resulting interpretation of section 30(1ZA) requires an objectively-assessed intention, on the part of the user, to create an interaction between the quoting and quoted works. A discussion of the consequences of this requirement for the 'use' of 'quotations' by generative artificial intelligence and other automated processes is warranted, but beyond the scope of this thesis.

The conclusions in this thesis have been drawn on the basis that the decision of the CJEU in *Infopaq* informs the standard for copyright originality and infringement in UK law,

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1217 [2010] FCA 20. See also the judgment of the Full Federal Court on appeal: *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* [2011] FCAFC 47.

1218 Mathew Rimmer, 'An Elegy for Greg Ham: Copyright Law, the Kookaburra Case, and Remix Culture' (2012) 17(2) Deakin Law Review 383, 405 (The term 'quotation' is 'somewhat anachronistic, and does not necessarily capture a full range of transformative uses – such as forms of digital sampling, remixes, and mash-ups').

1219 The guidance provided by the IPO was cited in the Review as useful, but this is limited to one page's length, leaves several matters unaddressed, and at times uses unhelpful language (such as 'use of material where it is genuinely *for the purpose of quotation*' (emphasis added)): IPO, *Exceptions to copyright: Guidance for consumers* (October 2014) 3.

with the effect that even relatively short or small extract, such as a sentence from a literary text, may itself be accorded protection against copyright infringement.[1220] Some uses of quotations are more likely to infringe if the tests for copyright originality and infringement (including the 'substantial part' assessment) are informed by *Infopaq*, and this was a significant assumption in the analysis of Chapter 7, with clear implications for the assessment of Chapter 8.

As the principles drawn from *Infopaq* have been absorbed into UK law via decisions such as *Newspaper Licensing Agency v Meltwater Holding BV*,[1221] it is to be expected that they will continue to inform assessments of copyright originality and infringement for the foreseeable future. However if, as appears possible,[1222] there is a departure from these principles (in favour, perhaps of a return to the lower threshold of originality that traditionally prevailed in the UK[1223]), this would have implications for the conclusions of this thesis – and might necessarily prompt a reconsideration of section 30(1ZA) and its amendment, within the constraints of international law.

1220 See Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-06569, para 47.

1221 [2010] EWHC 3099 (Ch) [71]. See also *Banner Universal Motion Pictures Limited v Endemol Shine Group Ltd* [2017] EWHC 2600 (Ch): '[t]he requirement of originality under the [CDPA] is that the work must be an expression of that author's own intellectual creation' (at para 26, reflecting the *Infopaq* standard).

1222 See European Union (Withdrawal) Act 2018, s 6(4).

1223 On this and the impact of *Infopaq* on the standard, see Eleonora Rosati, 'Originality in copyright law: An objective test without any artistic merit requirement, recalls Arnold LJ' (*The IPKat*, 30 November 2023) <https://ipkitten.blogspot.com/2023/11/originality-in-copyright-law-objective.html> accessed 7 March 2024.

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