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Introduction

The exceptions in focus

Copyright law seems to have lurched from one crisis to another over recent years.[1] Debates have raged over how new types of subject matter can be accommodated within copyright law,[2] whether the term of protection for copyright ought to be extended, how to respond to the unauthorised distribution of works over the Internet and whether developing countries ought to be forced to adopt Western copyright standards. More recently, controversy has also come to surround the copyright 'exceptions' or 'defences' or 'permitted acts' or 'users' rights' that all modern copyright systems provide so as to privilege certain acts that would otherwise amount to an infringement of copyright. This controversy looks set to continue, with copyright exceptions receiving an unprecedented level of attention from officials, academics and legal practitioners.

In the United Kingdom and elsewhere in Europe the most immediate reason why so much attention has been given to the exceptions is because the European Union (EU) has taken steps towards harmonising this aspect of copyright law as part of the Information Society Directive.[3] This has forced the United Kingdom and other European countries to amend their copyright legislation.[4] However, most countries have sought to minimise the impact of the Information Society Directive, with the

[1] Similarly, see Sherman and Bently, p. 1.
[2] Including, for example, multimedia products and electronic databases – questions considered by earlier books in this series. See, respectively, I. Stamatoudi, *Copyright and Multimedia Works: A Comparative Analysis* (Cambridge: Cambridge University Press, 2002); M. Davison, *The Legal Protection of Databases* (Cambridge: Cambridge University Press, 2003).
[3] 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. Hereafter, the Information Society Directive.
[4] In the United Kingdom the relevant changes were brought into effect by the Copyright and Related Rights Regulations 2003 (SI 2003 No 2498), which came into force on 31 October 2003. The Information Society Directive should have been implemented by 22 December 2003, but the United Kingdom, like most other member states, found it impossible to meet this deadline.

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result that significant differences remain between the laws of member states as regards the exceptions. Consequently, questions are likely to arise as to whether countries are complying with their obligations under European law, and the European Commission may seek to revisit this aspect of its harmonisation agenda.

Developments at the European level should also be seen alongside international developments that are turning the exceptions into a source of potential controversy. Although the various international instruments relating to copyright have long contained provisions dealing with this aspect of copyright law,[5] for the most part national governments and legislatures were left with a free hand in this area. Unsurprisingly, this led to 'bewildering differences in national copyright Acts in the area of exemptions and limitations'.[6] More recently, however, the TRIPS Agreement has limited the freedom of member states to provide copyright exceptions. While the relevant provision of TRIPS has its origins in the Berne Convention, the enforcement mechanism of TRIPS means that member states are being forced to treat the TRIPS provision as more than a mere general statement of principle, as was the case under Berne.[7]

A third reason why attention is being focused on the exceptions is that, in the United Kingdom at least, interest in such provisions has coincided with developments in other areas of the law. Most notably, increased interest in the exceptions has coincided with the coming into force of the Human Rights Act.[8] Not only has this created interest generally in the intersection between copyright and the fundamental rights and freedoms guaranteed under that Act (in particular, freedom of expression), it has also furthered interest in the question of the extent to which limitations and exceptions can be found outside copyright law, that is, the circumstances in which human rights law, competition law or the general principles of the common law might operate to limit the rights granted to copyright owners.

A fourth factor that explains why the exceptions are becoming increasingly controversial is that many people are concerned that an interrelated

[5] See Berne Convention (1886 text), Art. 8: 'As regards the liberty of extracting portions from literary or artistic works for use in publications destined for educational or scientific purposes, or for chrestomathies ['a collection of selected passages from an author or authors, especially one compiled to assist in learning a language' – *Shorter OED*], the matter is to be decided by the legislation of the different countries of the Union, or by special arrangements existing or to be concluded between them'.

[6] T. Hoeren, *Copyright in Electronic Delivery Services and Multimedia Products* (Luxembourg: European Commission, 1995), p. 12.

[7] The relevant provisions are Art. 9(2) of the Berne Convention and Art. 13 of the TRIPS Agreement. See Chapters 7 and 9 for detailed discussion.

[8] Human Rights Act 1998. The Act came into force on 2 October 2000.

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set of technological and legal developments will result in copyright owners being able to exclude the operation of the exceptions. There is a strong international trend towards providing legal protection for 'technological measures of protection', that is, for devices or technologies that are designed to prevent or restrict the reproduction of copyright works.[9] Copyright owners insist that legal protection for technological measures of protection is essential if they are to have the confidence to make their works available in digital form. Critics have argued, however, that protection for technological measures, together with the possibility that owners may seek to exclude the operation of the exceptions through contract, may alter dramatically the relationship between copyright owners and users.

More generally, interest in copyright exceptions has increased as awareness of copyright law and other forms of intellectual property has risen. In particular, those who work with copyright on a day-to-day basis are coming to appreciate the importance of the exceptions to their ordinary working practices. For example, artists are coming to appreciate that whether they need permission to use parts of the cultural environment will largely depend upon the range and scope of the exceptions that any given copyright system provides. Similarly, those working in the education sector have had to confront the fact that because the exceptions relating to education are limited, widespread copying practices in universities and schools constitute an infringement of copyright. Even librarians and archivists, who have long been concerned with copyright, have had to confront new issues as they consider the extent to which they are able to place materials online and provide other digital services for their readers.

If it is possible to point to a number of factors that are coming together to push debates about the exceptions centre stage, it is also important to appreciate that arguments about the exceptions often form part of a wider dispute between those who are in favour of the expansion of copyright and those who would like to see copyright protection curtailed. For example, now that the argument that the digital environment should be entirely unregulated by copyright law has been lost[10] (at least at the political level[11]), those opposed to the operation of copyright in cyberspace have turned their attention to ensuring that copyright is applied in as

[9] For evidence of the international trend, see WIPO Copyright Treaty 1996, Art. 11; WIPO Performances and Phonograms Treaty 1996, Art. 18; Information Society Directive, Art. 6.

[10] Compare, most famously, J. Barlow, 'Selling Wine without Bottles: The Economy of Mind on the Global Net', in P. Ludlow (ed.), *High Noon on the Electronic Frontier* (Cambridge, Mass.: MIT Press, 1996).

[11] But see Chapter 10 for a discussion of the possibility that at the social level copyright may increasingly come to be seen as illegitimate.

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narrow a form as possible. One way of achieving this is to insist that copyright protection should be subject to a range of broad exceptions. In some respects, therefore, disputes over the exceptions are merely a veneer that disguises more fundamental disagreements about the functions of, and justifications for, a copyright system, and it is unsurprising that the existing literature is deeply divided on the question of whether the exceptions ought to expand or contract. As will become apparent, we are in favour of a liberalisation of the exceptions and hence, broadly speaking, fall into the pro-user camp. Taking the United Kingdom's system of 'permitted acts' as our principal focus, we argue that the current legislative regime is much too restrictive and that user interests have never been accorded the weight they deserve. In order to defend this position it is first necessary to pause and consider the approach to the provision of copyright exceptions in the United Kingdom that has been adopted and the roles such provisions play.

The functions of the exceptions

Although all modern copyright systems provide for circumstances in which copyright will not be infringed by the unauthorised reproduction or presentation of a copyright work, there are two general approaches to the provision of copyright exceptions that can be taken. The first approach is to provide a small number of generally worded exceptions. The second approach is to provide a larger number of much more specific exceptions, encompassing carefully defined activities. Although no country can be said to adhere rigidly to either approach, some countries lean towards one approach rather than the other. The United States, for example, leans towards the first approach. This is because US copyright law contains a broad 'fair use' defence.[12] The effect of this defence is such that any use which a court deems to be 'fair' will be treated as non-infringing. Admittedly, the US Act does seek to provide guidance as to how the question of whether the use was 'fair' is to be determined, but ultimately fair use remains a highly flexible instrument.

In contrast to the United States, the United Kingdom leans heavily towards the second approach. Thus Chapter III, Part I of the Copyright, Designs and Patents Act 1988 consists of more than 60 sections that set out, often in great detail, a wide range of acts that will not infringe copyright. Given the number of exceptions that have been incorporated into the Act, the claim that the current system fails to provide adequate protection for users may well seem extraordinary at first. However, once

[12] Copyright Act 1976 (17 USC), s. 107.

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it is appreciated that under UK law the exceptions perform a range of different functions this claim may well seem much more plausible.

Copyright exceptions are most commonly thought of as representing situations in which the legislature has decided to prioritise some other interest over the interests of the copyright owner, and many of the United Kingdom's permitted acts do take this form. It is important, however, to distinguish the provisions that reflect some overriding goal of public policy from permitted acts that have a rather different function and effect. In particular, some permitted acts are provided to deal with the special nature of certain types of work. For example, the Copyright, Designs and Patents Act 1988 contains special provisions relating to computer programs.[13] These provisions are designed to ensure that the copyright owner does not abuse its monopoly in circumstances where the general principles of copyright might seem to offer such an opportunity.[14] Similarly, there are a number of exceptions that only apply to artistic works consisting of the design of a typeface.[15] These exceptions go even further and establish a distinctive and much more limited form of copyright than that which exists in other types of artistic work. (In effect, these exceptions reduce the copyright monopoly to a 25-year term and limit the owner's monopoly to the right to control the production and sale of articles designed to produce the typeface). Still other exceptions are provided to mark out the boundary between copyright and designs law, so that owners are forced to rely on the most appropriate form of protection.[16] The exceptions therefore play an important part in modifying copyright law so as to ensure that it fits different types of subject matter whilst preserving the illusion that copyright law consists of one set of standards and one set of principles that apply equally to all types of work.

Another group of permitted acts should be viewed in the context of industry or media regulation more generally. Here we have in mind the provisions relating to broadcasts which allow copies of broadcasts to be made for the purposes of oversight by a regulatory body,[17] which allow for retransmission of a broadcast by cable[18] and which allow for temporary copies to be made of a work for the purpose of broadcasting.[19] These provisions are best understood as part of a much wider regime of broadcasting regulation which includes regulation of content, 'must

[13] CDPA 1988, ss. 50A–50C, and see also s. 56 (transfers of copies of works in electronic form).
[14] For example, s. 50B of the Act provides a decompilation exception, without which a copyright owner's monopoly would extend beyond the boundaries of 'the work' to include the sole right to produce compatible products.
[15] CDPA 1988, ss. 54–55. [16] *Ibid.*, ss. 51–53.
[17] *Ibid.*, s. 69. [18] *Ibid.*, ss. 73–73A. [19] *Ibid.*, s. 68.

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carry' obligations for cable service providers, the 'needletime' compulsory licence[20] and oversight and control of licences and licensing schemes by the Copyright Tribunal.

It is important to emphasise that we are not claiming that the above threefold division of the permitted acts is comprehensive or that there are not a number of other, equally plausible, ways of dividing up and thinking about the permitted acts. However, for the reasons given above, it is important to recognise that the permitted acts perform a range of different functions and that they should not all be treated as if they represent circumstances in which Parliament has decided to privilege some other interest over the interests of the copyright owner. Nevertheless, it must equally be recognised that it is the exceptions that reflect some overriding goal of public policy that are the most controversial provisions and those on which litigation and demands for reform most often centre.

The plan of this work and our argument in outline

In order to make the case for reform of the exceptions we have divided this work into three parts. The first part consists of a detailed examination of some of the United Kingdom's existing exceptions. It is important to emphasise that no attempt is made to provide a comprehensive treatment of all of the permitted acts. Rather, we concentrate on those exceptions that relate to the protection of important rights and interests. Our aims in this first part of the book are twofold. First, we set out to demonstrate why exceptions of this type are required. More specifically, we demonstrate in Chapter 1 that copyright has the potential to impose serious restrictions on freedom of expression and that the exceptions have a key role to play in ensuring that copyright does not unduly burden political communication and artistic freedom. Similarly, in Chapters 4 and 5 we emphasise the importance of the exceptions for scholarly research and other forms of study and for the activities of 'institutional users' of copyright, such as educational establishments, libraries, archives, museums and galleries.

Our second aim in the first part of the book is to provide a detailed analysis of current law in those areas on which we have chosen to concentrate. To this end, in Chapter 2 we consider at length the fair dealing exceptions that allow reuse of part of a work for the purposes of criticism, review and news reporting. We also consider a number of related exceptions in this chapter, for example, the provision that allows for the use of records of spoken words. In Chapter 3 we turn to consider whether, in addition to the exceptions considered in Chapter 2, UK law contains

[20] *Ibid.*, ss. 135A–G. For background see *Copinger*, para. 29.28.

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a public interest defence and, if so, the circumstances in which such a defence might now be available. The final chapters in the first section of the book, Chapters 4 and 5, consider the provisions that apply to research and private study and to establishments such as schools, universities, libraries and archives. In each case, our argument is that the current provisions suffer from a number of serious defects and cause real practical difficulties for those who have to deal with copyright as part of their ordinary working lives. More specifically, we set out to demonstrate that the current provisions are much too inflexible. Not only can this create injustice for particular defendants, at a more general level it prevents courts from responding creatively to technological developments or new artistic practices. Many of the exceptions are also outdated, unnecessarily complicated and bureaucratic. In addition, however, our analysis reveals that considerable uncertainty surrounds the scope and operation of some of the exceptions. This is particularly important, because the strongest argument for the United Kingdom's existing approach to the exceptions (that is, for providing a long list of detailed exceptions) is that it provides certainty, for owners and users alike. If it can be shown that the current system does not in fact provide certainty, the case for reform becomes overwhelming.

By providing a detailed doctrinal analysis of the current provisions together with a consideration of why such provisions are justified and illustrations of some of the practical problems caused by the United Kingdom's current approach, we hope to be able to convince opponents of reform that at least some liberalisation of the permitted acts is desirable. In particular, we hope that advocates of strong copyright protection will recognise that there are some circumstances in which it would be highly undesirable to allow copyright owners to enforce their rights and others in which there is no realistic prospect of owners being able to exercise their rights effectively. We do not accept that it is necessarily naïve to suppose that copyright owners might be persuaded of the case for reform if the problems with the current system are laid out sufficiently clearly, and more generally we are uncomfortable with the tendency amongst some pro-user commentators to portray the copyright industries and their representatives as irredeemably wicked and self-centred.

We also believe that an approach that takes current law and practice as its starting point is preferable to starting with a normative theory of copyright law and attempting to build an ideal system from the ground up. That is, we believe that our approach is preferable to attempts to use a particular justification or set of justifications for copyright to construct an ideal system of rights and exceptions. All too often copyright theorists of various persuasions have applied their preferred visions of copyright

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much too mechanistically, ignoring the increasingly accepted insight that there needs to be an interaction between our ethical principles and our observations of the world and its complexities.[21] A closely related failing is that many copyright theorists write as if they were designing a copyright law in a state of nature, rather than against the backdrop of an existing body of law that has created a series of expectations around which a variety of actors have structured agreements, understandings and practices. This is not to suggest that our current arrangements are sacrosanct or that particular fundamental reforms are not desirable, but it does mean that all reforms, including reform of the exceptions, must be judged against the disruption they would create as well as against more concrete standards.

In the second part of the book we move away from doctrinal analysis and turn to consider why users have received a poor deal in the United Kingdom. In outline, we argue that a complex set of factors is responsible. Political factors (such as the disparity in lobbying power between owner representative and user groups and the way in which the United Kingdom chooses to implement European legislation), institutional factors (such as the division of departmental responsibilities within government), constitutional factors (such as the mandate of the European Commission), accidental factors (in particular, the effect of poor drafting) and the attitude of the judiciary towards users, all have to be accounted for. In addition, however, we believe that certain widely held beliefs about copyright law and the nature and role of the exceptions have played both a direct and an indirect role in influencing the shape of the current regime. Consequently Chapter 6 is concerned with a number of ideas and assumptions about copyright and the role of the exceptions that have informed and continue to reinforce the current approach. In particular, we criticise the argument that exceptions should only be available in cases of market failure (an argument that is becoming increasingly important in the light of recent technological developments), the idea that the exceptions must be interpreted narrowly because copyright is a property right, and the idea that copyright represents a balance between the interests of owners and users. Thus, for example, we argue that the idea that copyright represents a balance is, at best, an empty rhetorical flourish and, at worst, is a device used to close off debates about the proper boundaries of copyright law.

[21] Cf. J. Glover, *Humanity: A Moral History of the Twentieth Century* (London: Pimlico 2001), in particular p. 6, developing Rawls' idea of the 'Reflective Equilibrium', as to which see J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1973), in particular pp. 48–50. See also J. Waldron, *Law and Disagreement* (Oxford: Clarendon, 1999), in particular pp. 5–6, discussing the requirement of 'fit'.

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The remaining two chapters in the second section, Chapters 7 and 8, are concerned respectively with the supranational and domestic legislative and political processes that have produced the current regime. We argue that the interests of users have not been adequately accounted for at either the supranational or domestic level, but that users have struggled to make their voices heard at the supranational level in particular. This provides cause for concern about the effect of a shift in the law-making process in the copyright field from the domestic to the European level. It does not, however, lead us to conclude that the exceptions should be solely a matter for domestic law, since we are also concerned about the practical consequences of differences between national standards for the international marketing of derivative works.

The third section of the book is concerned with options for reform. In Chapter 9 we consider the argument that has frequently been put that the United Kingdom (and other Commonwealth jurisdictions) should move to adopt a general, US-style, fair use defence. We argue against this solution for a number of reasons. Most fundamentally, we believe that a search for a legislative solution is, by itself, potentially fruitless, because it is also important to appreciate the role that the judiciary has played in the emergence of the current system of exceptions. Starting with the history of the copyright exceptions in the United Kingdom, we demonstrate that if judges are unable to protect users at present, this is at least in part because they have divested themselves of a series of tools that could have been used to keep copyright protection within more appropriate bounds. We therefore conclude that any proposal that focuses solely on the need for legislative reform should be treated with caution, and that without a change in judicial attitudes the introduction of a fair use defence might achieve little. Of course, this still leaves open the possibility of arguing for the introduction of a fair use defence coupled with a change in judicial mindset. However, we also argue that the political obstacles to the introduction of a fair use defence are such that it makes more sense to look for alternative ways of reforming the exceptions.

In the final chapter, therefore, we turn to outline our preferred model of reform. Somewhat counterintuitively, we argue that the Information Society Directive provides an opportunity for fundamental reform. Thus far, pro-user commentators have invariably been implacably opposed to the Information Society Directive, probably in large part because the initial proposals for a directive would have dramatically curtailed the range and scope of copyright exceptions across Europe. In contrast, we argue that it is important to look at the final version of the Directive and that if the wording of the Directive were to be followed closely this would result

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in the introduction of a range of flexible, but not entirely open-ended, exceptions. Provided such provisions were supplemented by a public interest defence (which we argue can be justified within the terms of the Directive) and minimum standards around which institutional users could safely structure their copyright policies, this approach would represent the beginnings of a much better deal for users.

We therefore believe that we are confronted with a rare opportunity for fundamental reform of the exceptions. That this is a result of the Information Society Directive is paradoxical, given the problems users have had in influencing the European legislative process. But it is an opportunity that should nevertheless be seized.

A note on language

As a final introductory point it is perhaps worth saying something briefly about the language we have employed in this study. One of the problems that confronts anyone who wishes to write about copyright 'exceptions' is that there is no neutral language with which to describe the subject matter under consideration. This is because disagreements about how the 'exceptions' ought to be described have formed part of the broader dispute between pro-owner and pro-user commentators. On the one hand, proponents of increased copyright protection tend to prefer the language of copyright 'exceptions'. This indicates that these provisions run counter to the ordinary rule and hence that they ought to be interpreted narrowly – that these provisions are to be treated as 'exceptional'. On the other hand, pro-user commentators tend to prefer to style the 'exceptions' as 'users' rights' or as 'rights of the public'. This suggests that such provisions are to be treated on an equal footing with the rights given to copyright owners. In contrast, we believe that although copyright law *ought* to recognise 'users' rights', it is a mistake to describe the current provisions in these terms. First, as an historical matter, we believe that it is important to recognise that the current system of permitted acts has its origins in those spaces that were left unregulated after copyright was expanded (initially by the judiciary) beyond its role as a system for the regulation of the book trade. To represent the current provisions as if they were purposely designed at their inception to protect the interests of the public may be to underestimate the difficulties of reform. Second, we believe that to refer to the current provisions as users' rights may be to lose a useful means of describing the reforms that are required. Politically, it may be more effective to insist that the current system of 'exceptions' needs to be replaced by a system of 'users' rights'.

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