

4.4 What may and may not be done with a copyright work?

4.4.1 Restricted acts

The copyright owner has the right to permit, or to prevent, a range of things to be done to a copyright work, unless an exception or limitation applies. If you are, or your organization is, the owner then no permission is of course needed. The rights are:

- copying, which includes transcription as well as facsimile reproduction;
- issue of copies to the public (i.e. including conventional publication);
- communication to the public by wire or wireless means (e.g. broadcasting or publication on the internet);
- rental (on a commercial basis) or lending (on a non-commercial basis through an establishment that is open to the public);
- performance (including the reading aloud of a whole literary work, the performance of musical and dramatic works and the public exhibition or showing of anything but an artistic work); and
- adaptation of a literary, dramatic or musical work (including translation, or conversion of a computer program into a different language).

4.4.2 Exploiting the rights

A copyright owner may do any of the restricted acts with his or her own copyright works. He or she may also license others to do any of the restricted acts, and may limit the scope of the licence in various ways, for instance, by specifying the medium (such as in print only), the term (such as for ten years only) or the territory (such as the UK only). However, most licensees will probably wish to publish on the internet, in which case the licence must cover communication to the public and be for worldwide use. A copyright owner may also sell the rights or even give them away.

It is relatively unusual for a publication, particularly an internet publication, to contain only a single copyright work. If there are illustrations or charts, or contributions by a number of authors, it is important to ensure that permission is obtained for any in which copyright is not owned.

Practical Tip — Copyright statements

As a minimum, any copyright work issued to the public should carry the standard assertion of copyright:

© [name of copyright owner] [year]

If there is more than one such owner in the whole, all copyrights should be asserted. If there are individual works (such as illustrations) with various rights owners, the right of each owner should be asserted and his or her permission acknowledged in the appropriate place.

If the work is by an identified author, it is proper to allow the author the moral right of attribution. This requires a public assertion of the right, such as:

[Name of the author] has asserted his [her] right under the Copyright, Designs and Patents Act 1988 to be identified as the author of this work.

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Websites, which carry many works and which are commonly used as source materials, should always have a prominent copyright statement. This should:

- assert any copyrights;
- acknowledge any permissions from other copyright owners;
- specify all permitted uses of the material (see “Copyright and public sector information”, 3.3) and any activities explicitly excluded (such as use for a commercial purpose);
- give contact details for obtaining permission for use; and
- specify that no permissions apply to third-party copyright material.

4.4.3 Limitations and exceptions

There is a wide range of limitations and exceptions to the rights of the copyright owner, but they are all quite narrowly defined. Great care should be taken before extensive use is made of a copyright work in reliance on any limitation or exception.

The first thing to note is that there is no copyright infringement in the use of an insubstantial part of a copyright work. A substantial part is undefined, but it is clear that the quality of what is taken matters more than the quantity. Even a very small extract is likely to be substantial if it includes the essence of the work: consider, for instance, the smile of the Mona Lisa.

There is no copyright protection for facts or ideas unless they are expressed in a particular form and that expression is taken. Thus, individual facts about where a person was and whom he or she met may be taken from a diary, and facts about businesses, such as their names, addresses and phone numbers, may be taken from a business directory. However, if you were to take the diary writer’s opinions or you were to compile a rival directory using the information, there would be infringement. Similarly, anyone may use an idea for a format for a television quiz show or for a series of books about child wizards, but they may not copy the questions set or the decoration of the studio, nor may they copy the plots of existing novels.

Any limitation or exception to the rights of a copyright owner must now fall within the terms of one of the limitations and exceptions set out in the European Union’s information society Directive [99]. The intention of this was to harmonize the limits on the rights of copyright owners across Europe, but since the list was exhaustive but optional the result is continued disharmony. The UK has a set of closely defined exceptions occupying more than 60 sections of the 1988 Act. Most other member states rely on more general defences based on the human rights of individuals, much like the defence of fair use in the USA, though they must still be constrained by the Directive.

Limitations and exceptions include, in general terms:

- private copying, in the UK solely of literary, dramatic, musical and artistic works;
- copying for the purposes of non-commercial research, again in the UK solely of literary, dramatic, musical and artistic works;
- use for purposes of criticism, review and (with the exception of photographs) current news reporting, and, in Europe, normally also for pastiche, as long as the work has previously been made available to the public;

- use for educational purposes or examination;
- use for judicial purposes;
- copying by libraries and archives; and
- copying in order to make copies which are usable by disabled (notably visually disabled) people.

Wherever possible, any use under a limitation or exception should be accompanied by acknowledgement of the work and of the work's author. A lack of an acknowledgement could mean that the use will infringe. In some cases, notably the general educational exceptions, the exception ceases to apply if a licensing scheme is available (see "Copyright and public sector information", 4.4.5). This scheme will generally be more generous than the exception, but of course must be paid for.

Example — What is a substantial part?

The courts have found the following to be substantial parts of the works in question:

- a single frame from a film¹⁰;
- 20 seconds of the four-minute musical march "Colonel Bogey" where the principal theme was used¹¹;
- verbatim extracts from a historical book used in a novel, where the extracts contained the author's detailed arguments and illustrations¹²;
- the essence of a fantasy rugby game in a newspaper, with variations¹³;
- a textile design which had many and obvious similarities to an earlier one, even though there were also significant differences¹⁴;
- each separate entry in a diary, which is a distinct copyright work so that the taking of a whole day's entry takes the whole work¹⁵;
- a spoof version of a newspaper masthead, with the words "Absolutely not" before the title¹⁶;
- a series of dramatic events contained in a short story, retold as a ballet¹⁷.

¹⁰ *Spelling Goldberg Productions v BPC Publishing* [1981] RPC 283

¹¹ *Hawkes and Son v Paramount Film Service* [1934] LR 1 Ch 593

¹² *Ravenscroft v Herbert* [1980] RPC 193

¹³ *Bleiman v News Media (Auckland)* [1994] 2 NZLR 673

¹⁴ *Designers Guild v Russell Williams (Textiles)* [2000] 1 WLR 2416

¹⁵ *A v B* [2000] EMLR 1007

¹⁶ *Scottish and Universal Newspapers v Paul Mack* [2003] ECDR 364

¹⁷ *Holland v Vivian van Damme Productions* [1936-45] MacCC 69

Practical Tip — What is fair dealing?

Fair dealing is a general term that applies to a small group of exceptions covering private study, non-commercial research, criticism, review and current news reporting. Important points are:

- the use must fit one of the categories or it cannot be fair dealing;
- private study is for the benefit of the individual alone, though the knowledge gained may be used to inform subsequent activities;
- non-commercial research may not be for direct or indirect economic or commercial advantage. Research for a book will normally be commercial, since even an academic can expect some royalties. Sponsored research may be non-commercial if the sponsor is not going to exploit the results commercially. On the other hand, research for a charity could be commercial if its purpose is to support fund-raising activities;
- criticism and review do not have to be fair to the author of the work copied and they can be of another work than the one copied, as, for instance, use of a series of photographs to criticize the journalistic practices of newspapers. There must be substantially more criticism or review than there is material copied;
- current news reporting must illustrate a news event. The reproduction of the work must not itself be the event. There can be no fair dealing use of a photograph for this purpose;
- the use must be fair, which is a matter of impression, but the use must not compete with the rights owner's own activities.

4.4.4 Business use, records management and backups

Some very limited copying of copyright materials for the business purposes of an organization might be permissible under fair dealing for the purposes of non-commercial research (see “Copyright and public sector information”, 4.4.3). However, the scope of this exception is not broad, and it would not cover any commercial activity. Most organizations, including companies, partnerships, schools, universities, charities and government departments, would be well advised to take out licences at least from the Copyright Licensing Agency (CLA) (for the copying of most published literary works and their illustrations) and the Newspaper Licensing Agency (NLA) (for the copying of newspapers and the distribution of cuttings) (see “Copyright and public sector information”, 4.4.5).

Modern records management and the management of data and computer programs require a great deal of copying: by digitization to create electronic files, by migration to new media and formats, and by copying for backups. Very little of this activity is explicitly permitted without licence, though in practice few rights owners are likely to object.

Backup copies of computer programs may be made if they are “necessary” for the user’s lawful use. However, the courts are not inclined nowadays to regard indiscriminate backing up as always necessary. If the software company offers a service to supply free replacements of damaged software, for instance, a backup might well not be necessary.¹⁸ No backups of any other kind of work are permitted.

¹⁸ See *Sony Computer Entertainment v Ball* [2005] FSR 159 [100].