**Exceptions and Limitations in UK Copyright law**

An exception or limitation (hereafter limitation) to copyright law is when a third party can take parts of a work protected by copyright without permission or payment to the copyright owner. They are able to do this because the law contains a number of rules for when this may happen.

Often when people talk about these takings, they speak about the public domain, and about fair use. While the ‘public domain’ is a UK (and indeed global) concept, fair use is a US concept. Fair dealing is the UK term for these limitations – which will be discussed below.

At this point it is useful to think about what is meant by the ‘public domain’. All new works draw in some way on what comes from the past. So, in creating new works you must be able to take something from what comes before. You can draw on works that are in the public domain which are generally works that are no longer protected by copyright. You will remember from the last section that copyright for authorial works last for 70 years after the death of the author – which is a long time. If something is in the public domain, then you can take as much as you like without payment or permission.

It is also important to remember that some things are never protected by copyright. This would include single words, and unoriginal artistic works (remember the requirement of originality to subsist from the last section).

In terms of works currently protected by copyright you are limited to taking insubstantial parts of existing works. You will see in the next section on infringement that copyright is only infringed if you take a substantial part of an existing work. The test of substantiality is both quantitative and qualitative, so it is not just how much, but the quality of what is taken is important – so it is impossible to say exactly how much is insubstantial as that will vary depending on how important the part is. Another aspect of promoting authorship is seen in the ideas expression dichotomy discussed in the last section. Ideas are not protected – only the expression of ideas. Therefore, you can take as many ideas from existing works as you like when developing your work without payment or permission. The difficulty, as seen in the last section, can be to work out the line between ideas and expression.

Beyond these general limitations, there are a number of other instances in which parts of works can be taken without permission or payment which are set out in the Copyright Designs and Patents Act 1988. Before looking at the substance of the rules it is interesting to consider why they are included in the legislation, as when applying them that sometimes helps to understand their parameters.

First of all, **limitations promote ongoing authorship**. As noted above, all new works draw on the past. Examples fulfilling this goal can be seen in the UK in, for instance, the fair dealing provisions for quotation, parody, pastiche and satire. Other fair dealing provisions that would support this goal include the fair dealing measure for non-commercial research and private study.

 Second, limitations promote the **public interest in access to information**. If no parts of works could be taken and reproduced without permission or payment, then the public interest in access to information could be curtailed. This limitation is seen, for example, in the fair dealing exceptions for reporting current events, and for criticism and review

Third, limitations pursue **public policy, social and cultural goals**. These find expression in the UK in, for example, the fair dealing provisions for illustration for instruction, and for quotation, caricature, parody or pastiche.

Fourth, there are a number of specific limitations in the law that are there to enable **institutions to function**. So, for example, copyright will not be infringed by copying existing works for court proceedings. These are less relevant for the dance community than the first three examples.

**Key points on limitations to copyright**

• Works never in copyright, or the copyright in which has expired, are often said to be ‘in the public domain’

• The limitations are where making a reproduction of a substantial part of an existing work would be an infringement of copyright but is lawful under the Copyright Designs and Patents Act 1988

• UK law takes a specific fair dealing rather than a general US ‘fair use’ approach to this subject

**Fair dealing**

The most important limitations for these purposes fall under the head of fair dealing. When an act falls under the head of fair dealing, it can be said to be a ‘permitted act’.

These permitted acts under fair dealing can be for:

* research for a non-commercial purpose (CDPA 1988, s 29(1));
* private study (CDPA 1988, s 29(1C));
* criticism or review (CDPA 1988, s 30(1));
* quotation (CDPA 1988, s 30(1ZA)) caricature, parody or pastiche (CPDA 1988 s 30A);
* reporting current events (CDPA 1988, s 30(2));
* illustration for instruction (CDPA 1988, s32).

The permitted acts apply to all types of work. Note that if there are takings under one of these headings, then sufficient acknowledgement of is required except private study and caricature, parody, or pastiche (see below).

An important limitation on the operation of these permitted acts is that the dealing with the copyright work must be fair. Fair dealing is a question of degree and matter of impression.

**Fair dealing - meaning**

In deciding what is fair, the British courts have taken a number of factors into account, according to the nature of the permitted purpose. For example, the quantity of material quoted and reproduced is relevant: to take large extracts from a work and criticise only some of them may be unfair and make the dealing an infringement rather than a permitted limitation for the purposes of criticism.

Similarly, the impact of the taking on the market for the right holder’s work, if any, can be a relevant factor in assessing the fairness of that activity. It has been held that even if the infringer’s activity involves criticism of someone else’s work, comparative advertising is nonetheless not fair dealing because its primary purpose is to advance the critic’s own work. The Court of Appeal in one case on reporting current events, noted that in assessing fair dealing ‘it is appropriate to take into account the motives of the alleged infringer, the extent and purpose of the use, and whether that extent was necessary for the purpose of reporting the current events in question’ and also, ‘if the work had not been published or circulated to the public’. Fairness must be judged by the objective standard of whether a fair minded and honest person would have dealt with the copyright work, in the manner that the defendant did for the purpose of reporting the current events. In another case, it considered the three important factors for fair dealing to be commercial competition, prior publication and the amount and importance of the work taken.

**Sufficient acknowledgement**

A sufficient acknowledgement is an identification of the work in question by its title or other description and, unless the work is published anonymously or the identity of the author cannot be ascertained by reasonable inquiry, also identifying the author. In one case, a brief reference in a newspaper story to the fact that quoted words had been given in answer to another newspaper’s questions did not constitute sufficient acknowledgement of its authorship as distinct from its copyright.

**Fair dealing - categories**

***(a) research for non-commercial purposes***

Fair dealing with any kind of work, for the purposes of research for a non-commercial purpose, is a permitted act. Research is required to be accompanied by a sufficient acknowledgement, unless such acknowledgement is impossible for reasons of practicality or otherwise.

The meaning of the word ‘research’ appears never to have been considered by the courts in the UK. Research may be thought of as having some end product in view, a contribution to knowledge and understanding. While photocopying and scanning for the purpose of research would be covered by this limitation, it is not clear how much of the material can be copied on this basis; the dealing does have to be fair, and the publisher’s loss of a sale, for example, might be seen as unfair

The research must be carried out for a non-commercial purpose. Unfortunately, there is a large amount of ambiguity in the distinction between commercial and non-commercial research although it is clear that if at the time of the research, the ‘end use’ is contemplated to be for a purpose with some commercial value then this exception doesn’t provide a defence.

**Question:** Think of your own practice and when, during the process of creating a new work, you have borrowed from elsewhere. Could fair dealing for the purposes of non-commercial research be relevant to that borrowing? What are the limitations?

**Key points on the exception for non-commercial research**

• Research is a process of search and investigation

• Research for a commercial purpose is not within the exception. It is enough that there is ‘a’ commercial purpose; the presence of other non-commercial purposes will probably not bring the research within the exception

• The purpose is tested at the time the research is carried out, but the contemplated end use at the time should not be commercial

• This exception applies to all copyright works

• Sufficient acknowledgement is required

***(b) private study***

Fair dealing with any kind of work for the purpose of private study is a permitted act. Private study doesn’t have a ‘sufficient acknowledgement’ requirement. ‘Study’ can be thought of as the application of the mind to the acquisition of knowledge ‘Private study’ does not include any study which is directly or indirectly for a commercial purpose.

It would also seem that study carried out for another person—an employer, for example—cannot be private study. Private must mean that the study is for one’s own personal purposes.

**Key points on the exception for private study**

• Study, the application of the mind to the acquisition of knowledge, is distinct from research

• The exception applies to all copyright works

***(c) criticism or review***

Fair dealing with any kind of work, for purposes of criticism and review of that, or of another, work or of a performance of a work, is also a permitted act if accompanied by a sufficient acknowledgement, and provided that the work has been made available to the public. Review requires, as a minimum, some dealing with an original copyrighted work other than condensing that work into a summary. Criticism, on the other hand, is not solely focused on the style of a copyrighted work but can also extend to the ideas or theories that work contains. Sufficient acknowledgment is required unless this would be impossible for reasons of practicality or otherwise.

A typical example of an activity coming within the exception would be a review of a book with quotations in illustration of critical points, or a film review on a TV programme containing extracts from the film in question. Another instance would be comments upon a book in another book or article, with the use of quotations to point the criticism. The criticism need not be hostile. But how much of the original work can be used for such purposes? Lengthy extracts from the original work have been permitted where the purpose was purely to enable criticism to be made, but where the purpose is not so much to provide criticism but the same information as the original work and to compete with it, the activity is not permitted.

Further, the criticism or review must be directed to the original or another work, not at the author or against the person whose activities are the subject of the original work.

■ Hubbard v Vosper [1972] 2 QB 84 (CA)

This case involved the unauthorised publication (although in a traditional rather than an electronic medium) of the works of L Ron Hubbard, founder of the Church of Scientology, together with critical commentary thereupon. The Court of Appeal found that the criticism was sufficient to make the taking of substantial extracts of the copyright material fair dealing.

■ Fraser-Woodward Ltd v BBC and another [2005] FSR 36

Photographs of a well-known footballer (David Beckham) and his family were published under licence in tabloid newspapers. The defendants used images of the newspaper pages with the photographs in a BBC TV programme, to criticise their coverage of the doings of celebrities. The copyright owner sued for infringement of the copyright in the photographs. It was held that the defendants’ use was for the purposes of criticism and review of the newspapers rather than the photographs themselves. But since under section 30(1) a work could be used to criticise ‘another work’, the defendants’ activity fell within the scope of the permitted act. The other work had to be a work itself capable of copyright protection, but it did not have to be still in copyright.

**Public availability of work being criticised and reviewed**

Only criticism and review of a work which has been made available to the public is fair dealing. The work may have been made available by any means—by issue of copies to the public, through an electronic retrieval system, by way of public rental, lending, performance, exhibition, showing, or playing, or through public communication. However, no account is to be taken in this regard of any unauthorised act. Thus, it would seem that criticism or review of unpublished material involving quotation, or where the material has been obtained surreptitiously, cannot claim to be fair dealing as criticism or review.

**Question:** Think of the work ‘Fake it’ devised and directed by Janez Jansa – an excerpt of which is available on YouTube here <https://www.youtube.com/watch?v=8B5SBGYiwnE>

Ramsay Burt, in his book, Ungoverning Dance (2017), talks about this piece (p 76).

‘a group of Slovenian dancers under the direction of Janez Jansa restaged excerpts of canonical works from recent dance history for a particular event, the 2007 Exodus Festival in Ljubljana. Its starting point was the desire to make a performative response to the fact that the government, at that time formed by the Slovene Democratic Party, had cut financial support for the Exodus Festival so that it was no longer in a position to program the kinds of international artists that it had for so many years presented alongside Slovenian artists. …

The group of dancers working with Jansa drew up a list of artists whom, had money been no problem, they would have liked to program in the festival; they identified Pina Bausch, Trisha Brown, William Forsythe and Steve Paxton, and Sankai Juku because it was a key company with which Tatsumi Hijikata had been associated. These artists or their administrators were then contacted with invitations to perform in Exodus and asked what fee they would charge. Because the invitations were extended so late, none of the artists were able to accept, though some fondly recalled previous visits to Ljubljana. During Fake It! The email correspondence was projected on a screen, together with contextual information about the works as well as statistics about the dance scene in Slovenia. Meanwhile the dancers performed their own ‘fake’ versions to an audience seated in the round …

Fake It! Was performed in the name of the Slovenian prime minister in such a way as to trouble and undermine the processes of national identity formation on which the government’s nationalistic policies depended’.

If Fake It! Was performed in the UK, would the performance fall under fair dealing for the purposes of criticism and review? If so why? If not, why not?

**Key points on exception for criticism and review**

• This exception applies to all forms of copyright work

• The work criticised/reviewed must be one that is publicly available

• The exception should be given a wide and liberal interpretation

• Use of a copyright work in the criticism or review of another work, even one that is not in copyright, may be justified under the exception

• But the exception does not allow one freely to criticise the author of the work as distinct from the work itself, or the person whose activities are the subject of the work’s content

• Sufficient acknowledgement is required

 ***(d) quotation***

Quotation is not defined in the copyright act. Most requirements are similar to that of the criticism and review exception: the work is available to the pubic; the use of the quotation is fair dealing with the work; and the quotation is accompanied by sufficient acknowledgement, unless this would be impossible for reasons of practicality or otherwise. The only additional requirement is that the extent of the quotation is no more than is required by the specific purpose for which it is used.

The exception allows for quotations, from any form of copyright work, such as films or photographs and not just literary works, and for any purpose, so long as the extent of the quotation is no more than is required to achieve such purpose. However, the exception was envisaged to only permit ‘minor uses’ such as quotations in academic papers, internet blogs, and tweets and, seen as ‘highly unlikely’ to allow for unauthorised uses of commercially available clips from news agencies and film archives because the fairness requirement would not be met where such use conflicted with the normal exploitation of the work or harm the rights holders unreasonably. It remains to be seen if the courts will use the ‘fairness’ requirement to curtail the scope of the exception by assessing whether certain purposes are justified or not, and whether the form of work is important.

**Question*:*** consider the quote above from Ramsay Burt’s book. Would this be fair dealing for the purposes of quotation?

**Key points on exception for quotation**

• This exception applies to all forms of copyright work

• The work quoted from must be one that is publicly available

• The quotation can be used for criticism or review or any other purpose

• The extent of the quotation should be no more than is required by the specific purpose for which it is used

• Sufficient acknowledgement is required

 ***(e) reporting current events***

Fair dealing with any work other than a photograph for the purpose of reporting current events does not infringe copyright, provided that it is accompanied by a sufficient acknowledgement. However, no acknowledgement is required when current events are being reported by means of a sound recording, film, or broadcast, where this would be impossible for reasons of practicality or otherwise. The underlying idea here is to support the circulation of news.

**Key points on the exception for reporting current events**

• The exception applies to all copyright works except photographs

• There must be sufficient acknowledgement of the source

• The exception is to receive wide scope and a liberal interpretation

• Events may remain ‘current’ for some time after their occurrence, but not indefinitely

 ***(f) caricature, parody, or pastiche***

In October 2014, the UK government introduced a new exception allowing fair dealing with a work for the purposes of caricature, parody, or pastiche. There is no requirement for sufficient acknowledgement.

The copyright act lacks detail as to when a use is a caricature, parody, or pastiche and what may amount to fair dealing but it could be an important permitted act for dance. There has been only one decided case so far from the EU.

■ Deckmyn v Vandersteen (C-201/13) [2014] ECDR 21

D, member of a Belgian political party, reproduced a drawing resembling the cover of a Suske en Wiske comic book, authored by V. In the original drawing, the book’s main character, wearing a white tunic, is throwing coins to people who are trying to pick them up. D had replaced the character with the Mayor of the City of Ghent and the people picking up the coins with people wearing veils and people of colour. The court of first instance held D’s drawing to be infringing but on appeal, V argued it fell with the parody exception and the court referred it to CJEU seeking guidance on the meaning of parody. CJEU held that ‘parody’ must be regarded as an autonomous concept of EU law and interpreted uniformly through the EU (para 15). The meaning and scope of ‘parody’ must be determined by considering its usual meaning in everyday language and with regard to such meaning there are two essential characteristics of a parody: it evokes an existing work, while being noticeably different from it; and, it constitutes an expression of humour or mockery. The concept of parody is not required to fulfil other conditions such as the parody: should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; could reasonably be attributed to a person other than the author of the original work itself; should relate to the original work itself or mention the source of the parodied work (paras 19–21). It is for the national courts to determine, in light of all circumstances, whether a ‘fair balance’ is preserved in the application of the exception, between the rights and interests of right owners and the freedom of expression of user of the copyright work (paras 26–28).

The fairness test in the UK will be key to achieving this balancing exercise and factors used in relation to other fair dealing exceptions are likely to be relevant. CJEU also noted that the national court must have regard to the copyright holder’s legitimate interest in the protected work not being associated with a discriminatory message conflicting with the principle of equal treatment between persons irrespective of racial or ethnic origin (paras 29–31). This is seen to be a problematic aspect of the ruling because copyright may not be the most appropriate mechanism for regulating discriminatory messages.

**Question:** having read the synopsis of the Deckmyn case above, can you think of any dance works that could be classified as parody, pastiche or caricature?

**Key points on exception for caricature, parody, or pastiche**

• This exception applies to all forms of copyright work

• The work can be used for the purposes of caricature, parody, or pastiche

• Parody should evoke an existing work, while being noticeably different, and constitute an expression of humour or mockery

• Sufficient acknowledgement is not required

**Educational establishments, libraries, archives and museums**

There are a number of exceptions in favour of educational establishments (schools, further education colleges, and universities) and libraries, archives and museums. Broadly, these allow the listed establishments to use copyright works within fairly tightly circumscribed parameters for limited purposes. The provisions are fairly complex, but should always be consulted if work is being done in this area to see if they apply. Further details can be found on the gov.uk website.