INFRINGEMENT OF COPYRIGHT

Free trade doesn’t require that one should be allowed to appropriate the fruits of another’s labour, whether they are tangible or intangible. The law has not found it possible to give full protection to the intangible. But it can protect the intangible in certain states, and one of them is when it is expressed in words or print. The infringement of copyright of another, therefore, assumes great importance. Infringement of copyright may be divided into direct infringements which consists of the unauthorised exercise by persons not being the copyright owners of rights restricted by relevant copyright statute, and indirect infringements, which consists of unauthorised dealings with works which are themselves direct infringements or unauthorised importations.

After discussing the nature and scope of copyright in its various manifestations in the preceding chapters, this chapter examines the issues relating to infringement of copyright such as what constitutes infringement? What are the types of infringements? How far defence of “fair use” can be taken in a case of infringement? How does “fair use” balance the interest of the copyright owners and that of public?

(A) BASIC CONCEPTS OF INFRINGEMENT:

The copyright statutes of the three countries which form subject matter of this study define in some detail the types of activity which constitute infringement of the various forms of copyright.

The rights of the copyright owners may roughly be classified into “reproduction” rights and “performing” rights. The more detailed
statutory categories which can be placed under these heads are to be taken up later in the Chapter. But first, there are four basic matters to discuss: Copyright must be distinguished from rights in the physical embodiment of the original work; then come two aspects of the subject-matter improperly taken—the need to show that the defendant has misappropriated the actual work and that this has been to a substantial extent; the last concerns the infringer—the degree to which he may infringe by authorising the acts of others.

(i) **Ownership of the Original Work**:

Copyright in a work gives rights that are distinct from ownership of the physical embodiment of the original work—the manuscript, letter, painting or whatever. When one person sends another a letter, he will normally be taken to intend a gift of the paper on which it is written and the recipient becomes its owner. Only if the conditions of confidence exist, can the author prevent it being shown, given or sold to other.¹ But sending a private letter implies no assignment or licence of the copyright in it and the recipient has no right to make copies or give performances of its content.² The same is true of artistic works. The artist's lack of rights in the original painting or sculpture, once he disposes it off, is often a considerable economic disadvantage and has led a few legal systems to introduce a special right to share in the proceeds of certain re-sales.³ But such a sale assigns no copyright unless this is separately expressed or can be implied from the purpose of the transaction.⁴
ii) **Misappropriation**

Misappropriation can be studied under following sub-heads.

a) **Casual Connection**

The plaintiff must prove that, directly or indirectly, the defendant's alleged infringement is taken from the work or subject-matter in which he claims copyright. This is fundamental to the whole concept of copyright, and distinguishes it from the full monopoly of the patent system. Despite the very term, copyright, the U.K. legislation has, until 1988, mostly avoided reference to "copying". Now that word is used in relation to the making and marketing of reproductions. But equally there must also be copying in a general sense for infringement of the performing rights. The owner must show that this casual connection is the explanation of the similarity between the work and the infringement - the other possibilities being that he copied from the defendant, that they both copied from a common source, or that they arrived at their results independently. On the other hand, he does not have to show that the defendant knew that his copying constituted an infringement. As with other rights of property recognised at common law, the primary exclusive rights may be asserted even against the defendant who honestly believes that he purchased the right to reproduce the work.

If the evidence shows that there are striking similarities between the two works, that the plaintiff's was the earlier in time and that the defendant had the opportunity to get to know the plaintiff's work, then a court may well find copying proved in the absence of any convincing explanation to the contrary by the defendant. But the judges have
hesitated to fetter the assessment of each case on its facts by the introduction of rules formally shifting the burden of proof from plaintiff to defendant at any stage of the trial. Some subject-matter, such as factual and historical information, may well drive from independent effort or a common source.

(b) Sub-Conscious Copying:

Particular difficulty arises when the defendant denies any intention to copy and the court believes him. Some judges have accepted that copying could occur subconsciously where a person reads, sees or hears a work, forgets about it but then reproduces it, genuinely believing it to be his own. In such a case, proof of copying is said to depend on a number of composite elements: The degree of familiarity (if proved at all, or properly inferred) with the plaintiff's work, the character of the work, particularly its qualities of impressing the mind and memory, the objective similarity of the defendant's work, the inherent probability that such similarity as is found could be due to coincidence, the existence of other influences on the defendant the... own evidence on the presence or otherwise in his mind of the plaintiff's work.

(c) Indirect Copying:

It has long been accepted that a work may be copied by imitating a copy of it: "to hold otherwise would be to open the door to indirect piracies, which I am not at all disposed to do." Like wise if a novel is turned into a play, which is in turn converted into a ballet, the same will apply. In Purefoy v. Sykes Baxall, P made a trade catalogue with
illustrations of his products and D also published a catalogue with pictures of his own products, which were copied from P's products. In this alone there was no infringement of P's catalogue, for it was not that catalogue but the products which were the starting point in the chain. On the other hand, if the plaintiff's parts were reproductions of copyright drawings, the defendant's illustrations would derive from those drawings. But to establish the linkage is not enough. It is also necessary to show that the defendant's ultimate use is substantial reproduction of the plaintiff's work - this is simply the general requirement discussed below. In providing that infringement may be direct or indirect, the latest U.K. Statute also renders it immaterial that any intervening act does not itself constitute infringement.

(B) SUBSTANTIAL TAKING:

Where there has been copying and all or virtually all of a work is taken without emendation, the proof of infringement is straightforward; difficulties arise to the extent that this is not the case. The copyright statutes of the three countries require that a substantial part must have been copied. This test is a major tool for giving expression to the court's sense of fair play so "the question whether the defendant has copied a substantial part depends much more on the quality than the quantity of what he has taken". Likewise it has often been insisted that the copying must be of the expression of ideas, rather than just of the ideas. But that is a distinction with an ill-defined boundary. Judges who incline to the view that "what is worth copying is prima facie worth protecting" may well stretch the notion of "expression" a consider-
able way. Once convinced that the defendant unfairly cut a competitive corner by setting out to revamp the plaintiff’s completed work, they will not easily be dissuaded that the alternations have been sufficient. In this approach, the taking of ideas alone is confined to cases where the defendant does not start from the completed work at all, save in the sense that he goes through a similar process of creation: as where he paints for himself the scene that the plaintiff painted, or draws his own cartoon for the same basic joke.

The assessment of each case turns a good deal on its own circumstances. But there are some general considerations which may well have a bearing on the result. These are worth illustrating.

(i) Unaltered Copying:

If the defendant has copied without additions or alterations to the part taken, the proportion of that part to the whole of the plaintiff’s work need not be large: a short extract from a poem, a recognisable segment of a painting, the refrain of a pop-song. The issue is not much contexted, but, given the new copying technology, its practical importance is considerable.

(ii) Extent of Defendant’s Alteration:

Where the defendant has reworked the plaintiff’s material there comes a point beyond which the plaintiff has no claim. Whatever may have been the position in the part, the fact that the defendant has himself added enough by way of skill, labour and judgement to secure copyright for his effort does not, under the present law, settle the question whether he has infringed: rather the issue is whether a substantial part of the
plaintiff's work survives in the defendant's so as to appear to be a copy of it.\textsuperscript{21}

Particular difficulty arises when the plaintiff's work is taken with intent to satirise - whether the butt in mind is the work itself or some quite different object. In \textit{Glyn V. Weston Feature}\textsuperscript{22} a filmed burlesque (or, in today's language, "send-up") of Elinon Glyn's once notorious novel, \textit{Three Weeks}, was held not to infringe because very little by way of incident was taken over from novel to film. Likewise in \textit{Joy Music V. Sunday Pictorial}\textsuperscript{23}, a song lyric had been parodied in pursuit of Prince Philip; but only one repeated phrase was taken, and that with pointed variation. Again there was no infringement. In both decisions it was asked whether the defendant had bestowed such mental labour on what he had taken and subjected it to revision and alteration as to produce an original work.\textsuperscript{24} This must be understood as a way of emphasising that nothing substantial must remain from the plaintiff's work.\textsuperscript{25} While in the past, English judges have seemed loathe to find sufficient copying in borderline parody cases, they have now also to consider the moral right of integrity.

A rather similar difficulty relates to resumes - summarised plots of plays, abridgments of novels, head notes of law reports, and so on. There has been a tendency to treat a really substantial precis of contents as permissible because it is useful or because it is no serious interference with the plaintiff's interests. To this end it has been asked whether the defendant has really produced a "new work".\textsuperscript{26} In this context the phrase seems to indicate a very substantial condensation and revision of the material. With this should be contrasted the Court of Appeal's grant of an interlocutory injunction in \textit{Elanco V. Mandops}.\textsuperscript{27} The defendants
first copied the plaintiff’s instruction leaflet for a weed killer and had to withdraw it; they then produced a revision giving the same detailed information in other words. This was held to create an arguable case of infringement because the defendants were not entitled to make use of the plaintiff’s skill and judgement in securing the information.

(iii) **Character of Plaintiff’s or Defendant’s Work:**

Certain types of work are treated as having a particular value; to appropriate this feature is accordingly of qualitative significance. This is particularly true of dramatic works and films. In periods when stock dramas made the staple of so much English theatre, there were frequent allegations of improper borrowings. After 1911, a series of cases settled that “if the plot of a story, whether some of it be found in a play or in a novel, is taken bodily with or without some minor additions or substractions for the purposes of a stage or cinema film, there is no doubt about the case.” It was not necessary to copy the actual words used to work out the plot. This approach shows, the concept of mere ideas being confined to “starting point” conceptions - it would be no more than an idea, for instance, to conceive of a play about the return of a husband who has been presumed dead. But where the works in question are both nondramatic, probably more by way of detailed incident and language must be taken before there is substantial copying. Whether the works are artistic, and the court is testing sufficient similarity by appeal to the eye, stress is sometimes laid upon the “feeling and artistic character” of the plaintiff’s work.
(iv) **Nature of Plaintiff's Effort**

In some cases, the plaintiff's "skill, labour and judgement" form a distinct part of the whole result. This may well be so where the effort consists of such secondary work as editing, compiling or selecting material. A court will treat the whole work as the subject of copyright. But whether there is substantial taking falls to be judged by reference to the plaintiff's contribution. In *Warnick Film v. Eisinger*[^33], an author published an edited version of Oscar Wilde's trials, a transcript of which had earlier appeared. He acquired copyright in the whole from his work in selection and providing linking passages. But a defendant who took from it passages of the transcript but very little of author's edition was held not to infringe.

This nearly adjusts the scope of protection to the author's literary effort. The same approach can be seen to apply to some cases where the real skill lies in some commercial assessment distinct from the expressive content of the work: thus in the football pool coupon cases, where it is the particular selection that is so significant, protection goes to taking the selection more or less as a whole. This correlation of protection with achievement is not easily made in all such cases. Where, for instance, the skill consists in recording some one else's performance, it is arguable that there should be infringement only where some considerable part of the whole is taken. The same might be said of the entrepreneurial copyright - particularly that for typographical format, since it is not associated with the artistic execution of performers, directions or the like. But this sort of consideration is at present speculative.
(v) **Extent of Plaintiff's Effort**: 

If the plaintiff's labour, skill and judgement have only been just enough to earn him copyright, infringement may arise only where there is exact imitation of such features as are of some individuality. In *Kenrick v. Lawrence*, the plaintiff claimed copyright in a simple drawing of a hand, made with the intention of showing voters where to register their vote on a ballot form. But it was held that only an exact copy of the drawing would infringe, if the plaintiff were not to be conceded a monopoly in drawings of hands for this and other purposes. Through this consideration also the court is able to take account of the overall merit of the plaintiff's work.

(vi) **Manner in Which the Defendant Had Taken Advantage of Plaintiff's Work**: 

Where the plaintiff's work records information, the use that a defendant may make of it for his own purposes has been carefully circumscribed. The defendant is entitled to use the plaintiff's work as a source of ideas or information if he takes it as a starting point for his own collation of information or as a means of checking his own independent research. But he is not entitled to copy what the plaintiff has done as a substitute for exercising his own labour, skill and judgement. And he will not escape having his conduct so regarded merely by taking the plaintiff's work and checking that its contents are accurate. Thus, it was improper to compile a street directory by sending out slips for checking, which contained entries from the plaintiff's directory. Equally, it is wrong to adopt the same quotations which
have been selected for a critical edition of a Shakespeare play\textsuperscript{37}, or an account of historical incidents which digest the available sources\textsuperscript{38}. In such cases, a defendant who is shown to have adopted the plaintiff's imaginative embellishments or plain errors will be in particular jeopardy.

(vii) \textbf{Where the defendant's use will seriously interfere with plaintiff's exploitation of his work}:

While infringement may occur even if there is no likelihood of competition between plaintiff and defendant, the possibility of such competition or its absence may nevertheless be treated as a relevant factor. This factor undoubtedly played a more significant role while copyright was still in the process of acquiring its character as a full right of property, and before substantial taking was distinguished from notions of "fair use"\textsuperscript{39}. But it remains a practical consideration that courts are unlikely even entirely to discount.\textsuperscript{40} Thus, it is referred to by Farwell J. in deciding that four brief lines from a popular song did not infringe when taken as a heading for a serial story in the \textit{Red Star Weekly}\textsuperscript{41}

(viii) \textbf{Reproduction by the Original Author}:

Suppose that an author creates a work, and subsequently, at a time when he doesn't own the copyright,\textsuperscript{42} he reproduces it in a second work. Some concession in his favour seems called for, in order to allow him to continue doing the kind of the work at which he is proficient. But across the spectrum of copyright it is difficult to know how far judges would accord him greater freedom than is permitted to others. In respect of artistic works, a special compromise is embodied in legislation: the artist may make substantial reproductions, even using the same mould
sketch or similar plan, provided that the subsequent work doesn't repeat
or imitate the main design of the earlier works. Where other types of
work are concerned, a similar approach might well be adopted: the
relation between the two end products would be considered rather than
the relation between the first work and what has been copied from it.
The fact that the author made his reproduction unconsciously (if he can
be believed) would probably enhance any claim not to have infringed.

(C) INFRINGEMENT CARRIED OUT BY OTHERS:

Infringement of copyright being a tort, in the ordinary run of
things an employer will be vicariously liable for any infringement
committed by an employee in the course of his employment and for the
acts of independent contractors which he specifically requested. Under
earlier law, these principles seem to have delimited the scope of one
person's liability for infringements by another. But, in contrast with
the case of patents, judges have more recently been ready enough to
extend the scope of responsibility for the infringement by others.

In this they have been assisted by the legislature, which has
introduced three forms of infringement: (i) "authorising" infringement
by others:47 (ii) "permitting" a place of public entertainment to be
used for performance of a work; and (iii) providing apparatus for
performing, playing or showing a work, etc.49 (of these, (ii) and (iii) are
now forms of secondary infringement which require proof of the
defendant's complicity in some way).

"Authorise" has been read as bearing its dictionary meaning of
"sanction, countenance or approve".50 In line with these broad syn-
onomys, it has been said that "indifference, exhibited by acts of commis-
sion or omission, may reach a degree from which authorisation or
permission may be inferred". Accordingly in a case concerning
performing rights both authorising and permitting may be alleged, and
they amount to much the same thing. "Permitting" performance is
expressly stated to be subject to the defences of reasonable innocence
and absence of profit making; "authorising" is not the subject of
specific exceptions, but the meaning given to the world excludes
liability when the defendant could not reasonably except that another
would infringe. It is also necessary to show an act of infringement that
had occurred as a result of the authorisation.

To take some examples: People who organise public entertain-
ments by hiring musicians and independent contractors are likely to be
authorising or permitting infringement if they simply leave the choice
of music to the musicians. Accordingly they ought to procure an
appropriate licence from the Performing Right Society themselves or
require the musicians to do so. Where the defendant is not the organiser
of the entertainment, but only, for instance, the owner of the hall, he is
unlikely to be held culpable if he is simply "indifferent" to the choice
of music.

In other fields, authorising may also occur by implication. A
person who transfers the serial rights in a book authorises their publi-
cation in that form, since the specific intent is apparent. An Australian
University was held to have authorised infringement by allowing
library readers to use its copying machine without giving precise
information about the limits of copying within the copyright legislation
and without attempting any supervision to prevent infringement: the degree of indifference was too blatant to escape liability.\textsuperscript{56} On the other hand, those who provide the copying machinery or the material for home taping will rarely be found to have necessary control over what is then done, to be "authorised".\textsuperscript{57} The manufacturer of a twin-deck cassette recorder did not authorise infringement of particular copyrights, even though he advertised the capabilities of his product, since he also drew attention to copyright obligations.\textsuperscript{58}

\textbf{(D) CLASSES OF PROHIBITED ACTS :}

The United Kingdom legislation of 1988 defines the "acts restricted by the copyright" in general terms, each type applying to the various categories of work unless a specific exception is given. The 1956 Act, by contrast, took each category of subject-matter and listed the relevant acts of infringement. The new technique seems rather more straightforward. The U.S. Act of 1976 talks of exclusive rights of copyright owners, and violations of such rights, basically expressed in general terms, classes them infringements. Similarly, the Indian Copyright Act 1957 as amended in 1994 also says that doing of anything, the exclusive right to do which is by the Act conferred upon the owner of the copyright is the infringement of copyright.

In the patent law, as we know, the monopoly right was extended to use, as well as manufacture and sale, thus enabling the patentee and his associates to exercise whatever control over their own products seemed advantageous. In copyright law, the same basic assumption has not been made.\textsuperscript{59} The typical act of infringement has been the making of
copies. Control over them and their contents once legitimately made has been conceded only on a case-by-case basis: the rights over public performance and broadcasting are one form of control over use; the newly created rental right in sound recordings, films and computer programs is another.

Often enough the various rights that make up copyright are separately assigned or made the subject of an exclusive licence. The assignee or exclusive licensee is then entitled to sue only in respect of his own part and it may be necessary to decide just what his part is if the division up has been made by reference to the different acts listed in the statute, then the question will turn on the meaning of the statutory words.60 If some other, more specific right has been conceded (such as the right to translate into French, or the right to engrave a picture for a particular book) then the particular assignment or licence will require interpretation.

(E) RIGHTS CONCERNED WITH REPRODUCTION & ADAPTATION:

The U.K. Act of 1988 distinguishes two broad categories of infringement: restricted acts (or primary infringement) which occur without regard to the defendant's state of mind: and secondary infringement which are committed only if the defendant know or had reason to believe a defined state of affairs relating to infringement. Similar provision is made in the Indian law by the 1994 Amendment.61

(i) Primary Infringement:

Copyright in a work in all the three countries i.e. U.K., U.S.A.,
& India, may be infringed by copying it; issuing copies of it to the public or by making an adaptation of it. Copying a work, so far as concerns literary, dramatic, musical and artistic copyright, means "reproducing the work in a material form" - a formula introduced by the British Act of 1911. Some of the material forms are specifically listed: storing the work in any medium by electronic means - which clearly covers computer storage and presumably extends to the incorporation of the work in a record or film, converting a two-dimensional artistic work into three dimensions, and vice-versa. But other changes of form may also count: for instance, turning a story into a ballet, copy a photograph by painting, making a knitting pattern into a fabric and turning a drawing, such as a cartoon, into a revue sketch. Novel analogies can be made, subject always to the need to satisfy the test of substantial taking.

Quite apart from this, certain acts of adaptation constitute infringement: turning a literary work into a dramatic work or vice versa; translating either kind of work or turning it into a picture form (such as a comic strip); arranging or transcribing a musical work (by, for instance, harmonizing or orchestrating it).

The new U.K. legislation is not so specific as its predecessor about what acts of "copying" infringe sound recording, film, broadcasting and cable-casting copyright. Presumably, as before, this includes making recordings or films that are substantial copies; but could it now also cover the transcription into written form of the material on (say) a recording?

Copying also includes specific cases. Making a photograph of the
whole or a substantial part of any image forming part of a film, broadcast or cable programme - for instance for a post-card or poster - is such an infringement.\textsuperscript{70} And the publisher's copyright in typographical format is infringed (solely) by making a facsimile copy, even if it is enlarged or reduced.\textsuperscript{71}

Issuing copies of a work to the public is the form of primary infringement which relates only to first putting the copies in question into circulation, and not, in general, to subsequent distribution, sale, hiring, loan or importation into the United Kingdom\textsuperscript{72} (since these acts fall under the heading of secondary infringement). However, to this there is now one important exception. In respect of sound recordings, films and computer programs, it is an act of primary infringement to rent copies to the public, and this includes not only supplying a copy on terms that it will or may be returned for payment or as part of services or amenities of a business, but also lending by public libraries whether or not for a charge.\textsuperscript{73}

(ii) \textbf{Secondary Infringement}:

Infringement of all forms of copyright may be committed by a defendant concerned in the commercial exploitation of copies, if he knows or has reason to believe that the copies were infringements when they were made. In the case of imported copies this includes \textit{notional infringements}, i.e. Copies that would have infringed if they had been made in Britain or would have constituted a breach of an exclusive licence agreement relating to that work. The stages of exploitation in question are: importing, possessing in the course of a business, selling,
letting for hire, offering or exposing for sale or hire, and exhibiting in public in the course of a business, and distributing either in the course of a business, or otherwise to an extent that prejudicially affects the copyright owner.

As to the defendant's state of mind in secondary infringement, the previous law required it to be shown that the defendant had knowledge that the copies in issue were infringements. But that had been read as requiring only that he had "notice of facts such as would suggest to a reasonable man that "breach of copyright was being committed". The new phrase, "knew or had reason to believe", for all its apparent subjectivity, is likely to be understood in the same sense.

(F) Rights Concerned With Performance And Broadcasting:

(i) The Various Performing Rights:

The extension of copyright from the making of copies to the giving of public performances began in 1833. With modern technology, this has grown into a bundle of related aspects of copyright that can be loosely grouped as "performing rights". These include, performing, playing or showing a work in public; broadcasting it or including it in a cable programme (cable-casting).

The possibilities of infringement in this field have become complete. If, for instance, a copyright musical work is performed to a public audience at the same time as being televised, both the performance and the broadcast require licence. If broadcast is received and shown publicly this calls for licence of the copyright in the music, and save (where the showing is free) of that in the broadcast. If the original performance was recorded this will be either in the form of a sound
recording or a film with associated sound track (each of which will be a form of reproduction). If either the recording or the film is broadcast, this needs a licence. But the owner of copyright in the sound recording or film (as distinct from that in the musical work) has no right in respect of free public playings or showing of the broadcast.

Performance is too ephemeral a phenomenon for it to be easy for copyright owners to enforce their performing rights individually. Those who have copyright in musical works and associated lyrics have been leaders in establishing societies for the collective enforcement of their rights. The great proliferation in the exploitation of music through recording and broadcasts has made this economically feasible in many countries and an international network of performing right societies now exists. In Britain, where record companies have performing rights in their recordings, they have a separate collecting society to assert their rights. In various countries, indeed, the economic power of collecting societies has become suspect.

(iii) Performance In Public:

It has been left to the courts to draw the line between performances in public and in private. In 1984, the Court of Appeal characterised as "quasi-domestic" - and therefore private - an amateur performance of a play in Guy's Hospital to an audience of doctors and their families, nurses, attendants and students. But this was regarded (even in the decision itself) as marking the extreme outpost of free territory. To be in public performance does not have to be a playing audience or by paid performances; it is enough that entertainment is
being offered as an incident of some commercial activity (such as running a hotel, or even a shop that is seeking to sell the records being played), of industrial production ("music while you work")

Even such worthy institutions as Women's Institute and a Football Club's Supporter's Association engage in public performance, whether they restrict audiences to their own members or allow in guests; and the Act makes clear that a school play or other performance will not be exempt if parents or friends are present. Green M.R. laid particular stress on the need to consider the relationships of the audience to the owner of the copyright rather than to the performers. This is one way of emphasising the primacy of the owner's entitlement to an economic return from his proprietary rights; the fact that an organisation is socially desirable does not normally give it a claim to free use of copyright material. The one general exception concerns the sound recording right (as distinct from copyright in music and words) where records are played at a charitable or similar club or organisation.

(F) **FAIR DEALING AND LIKE EXCEPTIONS**

The requirement of "substantial taking" prevents the owner from objecting to minor borrowings from his copyright work. And, as we have just seen above, the requirement that a performance be in public means that his licence is unnecessary for a private performance even of the complete work. In the copyright legislations of three countries under study presently, a detailed list of exceptions is found. Some of them, such as those relating to education, concern important conflicts of interest. Here they are listed in order that they can be compared in the round.
(i) **Fair Dealing**:

The three most important of these exceptions turn upon a qualitative assessment. They exempt copying for certain purposes if it amounts to no more than "fair dealing". In these cases the courts are left to judge fairness in the light of all the circumstances. But other exceptions are more factual; for instance, unduplicated copying in the course of instruction is exempt irrespective of the amount copied.

Prior to earlier legislations (1911 of U.K., 1914 of India & 1909 of U.S.A), the three main "fair dealing" exceptions were fore-shadowed in the case-law as forms "fair use", a concept that was not clearly distinguished from "insubstantial taking". If there is substantial copying, it is a nice question today whether the use could nevertheless be justified for a reason beyond the confines of statutory exceptions. Certainly this would be difficult if the case was closely analogous to one of the statutory exceptions but just outside it; the more so if the statutory exceptions are to be strictly construed as limitations upon property rights. Nonetheless a 'defence' of publication in the public interest has been recognised to exist and now has a place in the statutes. In Australia it has been held that it is less extensive than in a claim based on breach of confidence; but in England the tendency been to treat the two cases alike.

The first fair dealing exception is that covering purposes of research or private study, which now applies to the copyright in literary, dramatic, musical and artistic works, and published editions.

The representatives of educational, author, and publisher organisations agreed upon certain guidelines which are described in the
United States House Report as a reasonable interpretation of the minimum standards of fair use. These guidelines provide, with respect to books and periodicals, that a teacher may, subject to certain prohibition make a single copy of a Chapter from a book, an article from a periodical or newspaper, a short story, short essay or short poem, a chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper, for the purpose of scholarly research, use in teaching, or for preparation to teach a class. Multiple copies for classroom use, but not to exceed in any event more than one copy per pupil in a course, are permissible, provided each copy bears a copyright notice and the copying meets the text of (1) brevity, (2) spontaneity, and (3) cumulative effect.

The congressional guidelines were designed to give teachers direction as to the extent of permissible copying and to eliminate some of the doubt which had previously existed in this area of the copyright laws. The guidelines were intended to represent minimum standards of fair use. These guidelines, while not intended to limit the types of copying permitted under the standards of fair use, and while recognizing that certain types of copying permitted under the guidelines may not be permissible in the future, or that in the future other types of copying not permitted under the guidelines may be permissible under revised guidelines may nevertheless be persuasive in determining proper educational fair use.

The copying permitted by the guidelines may not be used to create, replace, substitute for authorities, compilations, or collective works, and copying is not allowed from such "consumable" works as workbooks, exercises, standardized tests, answer sheets and similar
materials, nor may the student be charged for the copy beyond the actual cost of photocopying. Where a teacher created a "learning activity package" concerning cake decorating, by copying 11 out of the 28 pages of a copyrighted booklet, used such package over several academic years and didn’t acknowledge the owner’s authorship or copyright, such copying did not qualify as fair use under these guidelines. The copying of a computer programme for use by students is probably not a "fair use" because of the need to copy substantially the entire programme. Similar guidelines have been adopted in regard to educational uses of music. But no guidelines for classrooms use have been developed with respect to off-the-air taping of copyrighted audio-visual works incorporated in radio or television broadcasts although it has been recognised that the fair use doctrine has some limited application in this area. The use of excerpt from copyrighted works for the purpose of educational broadcasting activities, where such use is not otherwise exempt and is not subject to compulsory licensing provisions may nevertheless be a fair use, depending on whether the performers, producers, directors, and others responsible for the broadcast were paid, the size and number of excerpts taken, and in the case of recording made for broadcasts, the number of copies reproduced and the extent of their re-use or exchange.

(ii) Parody, Satire Or Burlesque:

A "parody" protected by the fair use provisions has been defined as a work in which the language or style of another work is closely imitated or mimicked for comic effect or ridicule and in which some critical comment or statement about the original work is made reflecting
the original perspective of the parodist, thereby giving the parody social value beyond its entertainment function.\textsuperscript{99} It is in the interest of creativity, not piracy, to permit others to take well-known phrasing and fragments from copyrighted works and add their own contributions of commentary or humor.\textsuperscript{100} The parody branch of the fair use doctrine is a means of fostering the creativity protected by the copyright law: it balances the public interest in the free flow of ideas with the copyright holder's interest in the exclusive use of his work.

"Satire" for purposes of the fair use provision is defined as work which holds up the vices or shortcomings of an individual or institution to ridicule or derision, usually with an intent to stimulate change or the use of wit, irony, or sarcasm for the purpose of exposing and discrediting vice or folly.\textsuperscript{101} Similarly, it has been said that the law permits more extensive use of the protected portion of a copyrighted work in the creation of a burlesque than in the creation of other fictional or dramatic works not intended as burlesque.\textsuperscript{102}

Parody and satire have been said to be deserving of substantial freedom, both as entertainment and as a form of social and literary criticism. Where the parodist does not appropriate a greater amount of the original work than is necessary to recall or conjure up the object of his satire. While, a parody song to a copyrighted tune may be a fair use,\textsuperscript{103} a burlesqued or parodized presentation has been held to be no defence to copyright infringement when substantially more material was "borrowed" from the copyrighted original than necessary for successful burlesque.\textsuperscript{104}

Although it has been that the Copyright Acts do not expressly
exclude pornographic materials from the parameters of the fair use defence since an obscenity exception to the fair use defence could fragment national Copyright Act standards, the U.S. Courts have generally been reluctant to permit the use of the "fair use" defence when the alleged parody or satire has resulted in a sexually explicit work.

(iii) **Photographs, Reporting of Current Events**

This fair dealing exception permits all works other than photographs to be used for reporting current events. Photographs have been differently treated in order to preserve the full value of holding a unique visual record of some person or event. To come within the exception, the event itself be current and not the pretext for receiving historical information: the death of the Duchess of Windor did not justify an exchange of letters between her and the Duke being published without copyright licence. The exception must be read in conjunction with a number of cognate provisions. Together they are of particular importance to the public affairs media and will be related to that field later.

(iv) **Criticism, Review etc**

It is this fair dealing exception that is most general of all, allowing works to be used for purposes of criticism or review (of themselves or another work), one precondition of fairness being that the source should be sufficiently acknowledged. Despite its potential range, the defence has not been much elucidated in the case-law. The Court of Appeal has held that the criticism or review may concern the ideas expressed as well as the made of expression. It has also been said that it can not be "fair" to publish an unpublished work for this purpose at
least if it is known to have been improperly obtained and the courts will not permit wholesale borrowing to be dressed up as critical quotation. Lord Denning M.R.’s remarks stressing that fair dealing is inevitably a matter of degree can usefully be applied not only to this head but in spirit equally to the other two:

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 comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, they may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression.

Beyond above cases of ‘fair dealing’ and the like, there are numerous exceptions which, as a whole, are not easily classified. Thus in the final analysis, in determining whether the use made of a work in any particular case is fair use the factors to be considered shall include:

(a) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit or educational purposes;

(b) the nature of the copyrighted work;
(c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(d) the effect of the use upon the potential market for or value of the copyrighted work.

Under the first factor, one must determine if the use is commercial; under the fourth factor, one must determine the impact of the use on the potential market for or economic value of the work. The second factor focuses on the nature of the work, and the third focuses on the amount used in relation to the total work. These factors make sense only in economic terms, particularly in view of the philosophy underlying U.K., U.S.A and Indian copyright laws: the protection of the copyright owner's economic rights in the market place.

It can, thus, be said that there is a remarkable similarity in the three copyright systems under study on the question of infringement & law in these jurisdictions on this issue is almost settled. The 1994 Indian Amendment on the issue of infringement of copyright in computer software has put the Indian copyright law at par with the Internationally recognised standards.
1. See e.g. Pole V Curl (1741) 2 Atl. 341; Gee V. Pritchard (1818) 2 Swans. 402; Phillip V. Pennell (1907) 2 Ch. 577; Hauhart (1984) 13 U. Ball. L.R. 244.

2. E.g. a letter to the editor. Under a will a bequest of an unpublished manuscript or artistic work is now to be construed as including the copyright: See U.K. copyright, Designs & Patents Act, 1988, Section 89.

3. For instance Droit de suite, supra, Chapter II, "Subject matter of Copyright Right and Rights of Authors".

4. In any case an implied licence (exclusive or non-exclusive according to circumstances) may be a more reasonable implication.

5. See, U.K. Copyright, Designs & Patents Act 1988, Section 16; Indian Copyright Act 1956, Section 51 (i); U.S. Copyright Act 1976, Section 106.


7. Mansell V. Valley Printing (1908) 2 Ch. 441; Byrne V. Statist Co. (1914) 1 K.B. 622. Innocent defendants may be protected from liability for damages: see infra Chapter X, "Remedies for Copyright Violations".

8. If the question is whether the defendant's work has come from the plaintiff's or from independent sources, the defendant may find it difficult to explain the presence of plaintiff's errors or idiosyncrasies in his text: see, e.g. Harman V. Osborne (1967) 2 All E.R. 324.


15. U.K. Copyright, Designs & Patents Act 1988, Section 16(3). It might have been better to say that the act need not involve the making of anything that could be a copyright work.


22. (1916) 1 Ch. 261. The plaintiff’s claim also failed for its “grossly immoral” tendency.

23. (1960) 2 Q.B. 60.

24. This derives from Linley L.J., Hanfstaegl V. Empire Palace, Supra note 13.


30. In Fernald V. Jay Liwis (1953) (1975) F.S.R. 499, even the taking
of one episode out of an episodic novel for a film was held to infringe when the literary characteristics of the episode were all copied and there were some startling similarities of dialogue.


33. (1969) 1 Ch.. 508; see also John Fairfax V. Australian Consolidated Press (1960) 60 S.R. (N.S.W.) 413.

34. (1890) 25 Q.B.D. 99.

35. See Jarrold V. Houston (1857) 3 K & J. 708.

36. Kelly V. Morris (1866) L.R. 1 Eq. 677; see also Morris V. Ashbee (1868) L.R. 7 Eq. 34 (poocher turned gamekeeper). The Whitford Committee (Cmnd. 6732) considered that new versions of the ordnance survey would be infringed if details were systematically copied onto other maps.


39. Thus initially such activities as translation and abridgement did not count as infringement.

40. Chappell V. Thompson (1928-1935) Mac. C.C. 467; Note also Parker J., Weatherby V. International Horse Agency (1910) 1 Ch. 297 at p. 305: "...the nature of the two publications and likelihood or unlikelihood of their entering into competition with each other is not only a relevant but may even be a determining factor in the case. But... an unfair use may be made of one book in the preparation of another, even if there is no likelihood of competition between the former and the latter. After all copyright is property...".

41. Chappell V. Thompson, ibid, also see Ravenscroft V. Herbert Supra note 38.

42. If he has given up rights by assignment, his freedom to copy the work may be governed by its express term.

43. U.K. Copyright, Designs & Patents Act 1988, Section 64.
44. On the difficulties of deciding this, see Industrial Furnaces V. Reaves (1970) R.P.C. 605.

45. To tell a servant not to infringe will not affect this liability if he defies instructions in the course of employment: PRS V. Bradford Crop. (1917-1923) Mac. C.C. 309.

46. See especially Karno V. Pathe (1909) 100 L.T. 260 - film distributor did not "cause" representation of a play in public by supplying theatre operator with film of it; only the operator infringed cf. Falcon V. Famous Players (1926) 2K.B. 474.

47. U.K. Copyright, Designs & Patents Act 1988, Section 16(2).

48. U.K. Copyright, Designs & Patents Act 1988, Section 25. This relates only to literary, dramatic and musical works; a defence concerning non-profit activities has been dropped; The Indian copyright (Amendment) Act 1994, Section 51(a) (ii).


51. PRS V. Ciryl (1914) 1 K.B. 1 ; Moorhouse V. University of N.S.W. (1975) 6 A.L.R. 193.


53. PRS V. Bradford Corp, Supra note 45; Australian PRA V. Contabury - Bankstown Club (1964-1965) N.S. W.R. 138.

54. Vigneux V. Canadian PRS (1945) A.C. 104; Adelaide Corp. V. Australasian PRS (1928) 40 C.L.R. 481 (despite knowledge that infringement is likely).


56. Morhouse case, supra note 51.


59. The supposed droit de destination in French and Belgian Copyright law fulfils much the same function as the British Patent Law doctrine; it allows, for instance, a rental right to be read into the law
without specific provision: see E.C. commission, Green Paper, Copyright and the Challenge of Technology [Com. (88) 172] 146.

60. Chappell V. Columbia (1914) 2 Ch. 124.

61. Indian Copyright (Amendment) Act 1994, Section 51 (i) (a) (ii).


63. U.K. Copyright Act, 1911, Section 17(2). It makes no difference that the copies are transient or incidental: Section 17(6).

64. U.K. Copyright, Designs & Patents Act 1988, Section 17(3). Converting a literary work (e.g. a jumper) is not, however, a reproduction: Brigid Foley V. Elliot (1982) R.P.C. 433; Duriron V. Hugh Jennings (1984) F.S.R. 1. (e.g. a knitting pattern) into a three dimensional.


66. Hanfstaegl V. W.H. Smith (1905) 1 Ch. 519.


69. The final clause of Section 21 suggests that these forms of infringements are closely related to infringement by reproduction in a material form "No inference shall be drawn from this section as to what does or does not amount to copying the work".


72. Section 18, ibid.

73. Section 22-24,27, ibid. As already noted, the person who first puts copies into circulation commits the primary infringement of issuing copies to the public.

74. U.K. Copyright Act 1956, Sections 5,16.

75. Harvey J., Albert V. Hoffnung (1922) 22 S.R. (N.S. W. 75 at 81;
followed by Whitford J., Infabrics v. Jaytex (1978) F.S.R. 451 at 464-465; and see at 467: was the defendant's selection "put on inquiry" Did he turn "a blind eye to an enquiry which he should have known he ought to have made" Once apprised of the truth he was allowed a number of days to make his own inquiries. Van Dusem v. Kritz (1936) 2 K.B. 176.

76. U.K. Copyright, Designs & Patents Act 1988, Section 19,20; U.S. Copyright Act, 1976,Section 605(b); Indian Copyright Act 1957, Section 51; see infra chapter VII, "Performers Rights".

77. Duck v. Bates (1884) 13 Q.B.D. 843; under the British Act of 1833, the requirement was in any case that the performance be in a "place of public entertainment".

78. PRS v. Hawthornes Hotel (1933) Ch. 855.
82. In the Jennings and Turven cases, Supre notes 80,81.
83. U.K. Copyright, Designs & Patents Act 1988, Section 28,50; U.S. Copyright Act 1976, Section 107(1) (4); Indian Copyright Act 1957, Section 52.
84. This approach was taken in Howkes v. Paramount (1934) Ch. 593 (C.A.) to a fair dealing exception in the British Act of 1911.
85. For instance, copyright, Designs & Patents Act 1988, Section 171(3), preserving rules of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise.
88. U.K. Copyright, Designs & Patents Act 1988, Section 29; U.S. Copyright Act 1976, Section 107 (1); Indian Copyright Act 1957,
Section 52 (a) (i).


90. The guidelines limit the amount of the work that may be copied to a poem of less than 250 words, printed on not more than two pages; an excerpt of not more than 250 words from a longer poem; prose articles, stories, or essays of less than 2500 words in their entirety or excerpts from longer prose works limited to 1000 words or 10 percent of the work, whichever is less, but in any event a minimum of 500 words; illustrations such as one chart, drawing, or picture of a work may also be included. House rep. No 94 - 1476, p. 68.

91. To meet the test of spontaneity, the copying must be at the instance and inspiration of the individual teacher, not directed by higher authority, where the teacher's decision to use the work in class does not allow for a timely reply to a request for permission. House Rep. No. 94 -1476, p. 69.

92. To satisfy the “cumulative effect” requirement, the copying must be for only one course in the school, and except for current news periodicals, newspapers, and current news sections of periodicals, only one short poem, article, story, essay, or two excerpts therefrom, may be copied from the same author or three excerpts from the same collective work or periodical volume, during one class term; and no more than 9 instances of such multiplying for one course during one class term shall be permitted. House Rep. No 94 - 1476, p. 69.

93. Marcus V. Powle, (CA 9 Cal) 695 F2d 1171.

94. Ibid.


96. House Rep. No 94 - 1476, p 72, noting that nothing in Section 107 of U.S. Copyright Act 1976 is intended to change or prejudge the law on this point.

97. U.S. Copyright Act 1976, Section 108.

98. House Rep. No. 94 -1476, p. 72, noting further that the availability of the fair use doctrine to educational broadcasters would be
narrowly circumscribed in the case of motion pictures and other audiovisual works.


100. Warner Bros, Inc. V. American Broadcasting Cos. (CA 2 NY) 720 F 2d 231.

101. Metro - Golwin Case, Supra note 99.


103. Elsmere Music, Inc. V. National Broadcasting Co. (CA2NY) 623 F2d 252, holding that a skit on the “Saturday Night Live” television program, which poked fun at a New York city’s public relations campaign and its theme song by singing “I love Sodom” to the tune of the copyrighted “I love New York” was a fair use.

104. Benny V. Leoew, Inc. (CA9 Cal) 239 F 2d 532.


106. This may be in a newspaper or magazine, in which case sufficient acknowledgement is required; or in a sound recording, film broadcast or cable - cast where acknowledgement is not called for.


108. Especially in the U.K. Copyright, Designs & Patents Act, 1988, Section 31 (incidental inclusion); Section 58 (record of spoken words); section 62 (artistic works on public display).

109. Hubbard V. Vosper, Supra note 87.

110. British oxygen V. Liquid Air (1925) Ch. 383; Beloff V. Pressdram (1973) 1 All E.R. 241.

111. Mawman V. Tegg (1826) 2 Russ 385.

112. Hubbard V. Vosper, Supra note 87.