Suggested Answers to the Questions in Chapter 4

1. Which new restricted acts have been introduced to address the internet challenge?

The good answer will:

- Elaborate on the challenges of digitization and the internet on copyright law and mostly focus around the introduction of the right of communicating works to the public.
- Demonstrate an understanding of the broader legislative context, starting by the WIPO Internet Treaties of 1996 (WCT and WPPT), which introduced the right of communicating works to the public within international copyright, moving on to Article 3 of the Information Society Directive (2001/29/EC) and eventually to s.20 CDPA 1988.
- Indicate how the right of communication to the public has been interpreted by the Court of Justice and national courts.
- Look into how other rights, e.g. the reproduction right or right to public performances, have been interpreted in order to address the internet challenge.

Suggested Answers to the Questions in Chapter 4

2. What is the test for copyright infringement? In which way does the idea/expression dichotomy play an important role in understanding whether infringement took place?

The good answer will:

- Elaborate on the elements of copyright infringement, including:

  a) Objective similarity: The requirement of objective similarity requires the court to compare the source work with the alleged infringement. The purpose of such a comparison is to enable the court to decide whether the similarities are more likely to be the result of 'copying rather than coincidence', taking into account whether the similarities are 'close, numerous and extensive' and disregarding similarities which consist of commonplace or unoriginal information, or general ideas (*Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416). Such a comparison is carried out objectively and is of the work as a whole. Relevant cases that can be examined in this context include: *Baigent & Lee v Random House Group Ltd* [2007] FSR 579, relying on *Ladbroke v William Hill* [1964] 1 WLR 273; *Forensic Telecommunications Services Ltd v Chief Constable of West Yorkshire* [2011] EWHC 2892 (Ch), etc.

  b) Derivation / 'causal link': Derivation means that there must be a causal link between the claimant's and defendant's works. The claimant's work must be the *source* of the infringement. The length of the causal chain does not matter, because s. 16 CDPA expressly protects against indirect taking, so that a copy of a copy of a copy of a copy of the source work will infringe. Relevant cases to discuss include: *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416; *Solar Thomson v Barton* [1977] RPC 537; *LB (Plastics) v Swish Products* [1979] RPC 551; *Michael Mitchell v British Broadcasting Corp* [2011] EWPCC 42, etc.

  c) Substantial taking: There are many cases which declare that what is 'substantial' is a matter of quality not quantity, so that the percentage of the claimant's work taken does not matter, the principal authority being *Ladbroke (Football) Ltd v William Hill (Football) Ltd*. The test is ultimately a qualitative one, assessing the originality—and hence the protectability—of the portion taken in light of the so-called idea/expression dichotomy. Cases that can be discussed include: *Ravenscroft v Herbert* [1980] RPC 193; *Baigent & Lee v Random House Group Ltd* [2007] FSR 579, etc.

- Note that the general rule is that in order to distinguish between the protected parts from the non-protected part of a work the idea/expression dichotomy plays a central role. Non-original and/or public domain parts are not protected, and the same applies to the underpinning ideas as such. Non-literal elements however do receive protection (e.g. *Designers Guild Ltd v Russell Williams (Textiles) Ltd*). For certain categories of works such as computer programs and databases, however, it is important to draw the line between ideas and expressions, particularly because alternative forms of protection for the non-authorial aspects of such works are available (including, for example, patent protection for

technical aspects of computer programs and the sui generis database right for non-original databases) (e.g. *SAS Institute Inc v World Programming Ltd* [2013] RPC 421).

- Explain that independent creation will always be a defence to copyright infringement (*Kleeneze Ltd v DRG Ltd* [1984] FSR 399).

Suggested Answers to the Questions in Chapter 4

3. What is the meaning of the concept of the new public in the context of the right of communicating works to the public? Which are the key cases of the Court of Justice of the European Union that have developed this concept, which defines the scope of the right? What is the likely impact of this new test on the scope of copyright protection?

The good answer will:

- Elaborate on the concept of the 'new public' as developed by the Court of Justice and refer to the key cases that have established its meaning and scope of application (e.g. Case C-306/05 *Sociedad General de Autores y Editores España v Rafael Hoteles SA*; Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and others*; Case C-607/11 *ITV Broadcasting Ltd v TV Catchup Ltd* etc).

- Explain that the 'new public' is considered to be one that the rightholders did not have in mind when the initial communication took place and that the Court of Justice has developed this concept as a test in order to ascertain whether infringement of the right of communication to the public has taken place.

- Indicate that the Court's emphasis on there being a new public means that s. 20 CDPA covers not just those who indulge in unlicensed file sharing activities (*Polydor Ltd v Brown*, *Dramatico Entertainment Ltd v BSB Ltd*) but also those whose service enables viewers to catch up on free-to-air programmes they may have missed (*ITV Broadcasting*).

- Discuss the way in which the concept of the new public has been considered by cases concerning hyperlinking and framing of content, e.g. Case C-466/12 *Nils Svensson and Others v Retriever Sverige AB*. Explain that in order for infringement to take place, there are two cumulative conditions that need be met: first, there should be an act of communication; secondly, this communication should be addressed to a (new) public.

- Explain that criticism on the new public requirement emerged through arguments that this requirement has 'the unfounded and illegitimate effect of exhaustion of the communication to the public right or, rather, the scope of that right is *reduced* by the court from the outset' ((ALAI) Opinion on the criterion 'New Public', developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the public, adopted on 17 September 2014, 15–16).

- Critically reflect on how the concept of the new public affects the scope of copyright protection in light of the criticisms above.

Suggested Answers to the Questions in Chapter 4

4. The exhaustion principle is the legal basis upon which protected works can lawfully be resold. To what extent, if at all, can this principle cover the electronic dissemination of digital copies?

The good answer will:

- Explain the meaning and function of the exhaustion principle that applies by reference to the right of issuing copies of the works to the public (s.18 CDPA): whilst the copyright owner cannot object to the issuing of copies which have previously been put in circulation within the EEA, they can object to the issuing of copies which have previously been put in circulation outside the EEA. According to Case C-429/04 *Laserdisken ApS v Kulturministeriet,* Member States do not have the discretion to maintain any doctrine of international exhaustion of rights in relation to copyright.
- Elaborate on the inapplicability of exhaustion in the online context, as the right of communication to the public is not subject to the exhaustion rule.
- Discuss and critically reflect on the normative impediments towards the application of exhaustion to the electronic dissemination of digital copies (e.g. tangibility as a condition towards the application of the exhaustion rule).