Guidance on answering the discussion questions in the book

Para 5.8

Why do TRIPS and the WCT 1996 want to 'confine' exceptions to copyright?

Copyright owners are concerned that in the digital environment where perfect copies can be made very quickly and transmitted to others as fast as they are made, unregulated copying (i.e. the copying permitted under copyright exceptions) has the capacity to undermine their rights completely. TRIPS and WCT 1996 are largely driven by the need to protect the interests of copyright owners.

Para 5.12

Find out whether there were any controversies during the prolonged gestation of the InfoSoc Directive, and why.

During the prolonged gestation of the Directive there was great controversy as to whether its extension of owner rights was sufficiently (or, indeed, at all) balanced by the exceptions to the restricted acts of reproduction and public communication set out in Article 5; and whether these in turn were set at naught by the rules in Article 6 supporting the use of technical measures of copyright protection in digital products, and enabling the right holder to deny access until paid by the would-be user, whether or not the proposed use fell within the scope

of copyright or the exceptions. The importance of the debate was that, at least with regard to reproduction and public communication rights in the digital context, these exceptions were to replace entirely existing national rules on the subject (COM(1997) 628 final, 28 (para 2)).

Para 5.28

Does the InfoSoc Directive 2001 require the exclusion of all commercial research from the benefit of the exception for research?

The Directive's reference to "sole purpose" seems to mean that research carried out for purposes going beyond that of contributing to knowledge and understanding is excluded from the benefit of the research exception.

Para 5.32

Discussion Point 1

Do you agree with the decision of the Court of Appeal in *Hubbard v Vosper*?

Hubbard v Vosper may be contrasted with the exam study guide case, *Sillitoe v McGraw-Hill Book Co Ltd* [1983] FSR 545, where it was held that the extensive quotation of passages from the plaintiff's novel (*The Loneliness of the Long-Distance Runner*) went beyond fair criticism and review. Arguably the purchaser of the guide would not need to purchase the novel, and so the market for the latter would be diminished. But there may be a difference in that there was public concern about the activities of the Church of Scientology, and the criticism

purported to show why that concern was justified.

Discussion Point 2

Why is a 'wide, liberal' approach needed for the exemption for criticism and review? How does this compare to the CJEU's approach to exceptions?

There is a clear link between the exception for criticism and review, and the human right of freedom of expression, as well as the social interest and benefit from the circulation of information and ideas contributing to public debate, and the advance of knowledge and understanding in a wide variety of contexts, political, cultural, economic and social (see further at para 5.61). The narrow approach proposed generally in Infopaq (para 5.19) therefore seems inapt for the criticism and review exception. However, note also the purposive approach adopted by CJEU in recent decisions (para 5.13).

Para 5.33

The 2003 regulations implemented the requirement of the InfoSoc Directive 2001 for the copyright work to have already been lawfully made available to the public for the purposes of criticism and review. Find out what was the position under the law before 31 October 2003.

Under the law before 31 October 2003, it was held to be unfair to subject an unpublished work to public criticism, particularly where the author never intended to publish it. (British Oxygen Co v Liquid Air Ltd [1925] Ch 383; Beloff v Pressdram [1973] RPC 765). Again, to

use copyright documents which were confidential yet given to someone not entitled to them might be unfair even though the use is for one or more of the statutory purposes (Beloff v Pressdram [1973] RPC 765 at 787–788). 'But after all is said and done it must be a matter of impression . . . The tribunal of fact must decide.' (Hubbard v Vosper [1972] 2 QB 84 per Lord Denning MR at 94). So it was not impossible for use of confidential documents to be fair dealing (Fraser v Evans [1969] 1 QB 349), and public criticism of unpublished material was not automatically to be regarded as unfair dealing if it had had some previous circulation (Hubbard v Vosper [1972] 2 QB 84). The law of copyright was not to be used to restrain free speech in relation to political or religious controversy (Kennard v Lewis [1983] FSR 346 per Warner J at 347).

Para 5.38

Is the death of Princess Diana in August 1997 still a current event? Or the events in New York on 11 September 2001? Or the fall of the Berlin Wall in 1989?

Given the continuing fallout from 9/11 (the Afghan and Iraq wars, further acts of Al-Quaeda terrorism in the UK and elsewhere), it is certainly arguable that this is still in some sense a current event. On the other hand, the fall of the Berlin Wall looks more like history now than a current event, but given its significance in the shaping of contemporary Europe and the countries of the former USSR, the distinction is still not easily maintained. Similarly, the inquest into Princess Diana's death ended in 2008 so it can be seen as history but if there were new developments (e.g. the claims from a soldier in 2013 about her death), it is possibly arguable that this is still a current event.

Para 5.51

Discussion Point 1

Is 'incidental inclusion' really an exception to copyright? Or does it just follow from the definitions of copyright and infringement thereof?

Incidental inclusion might be thought not to amount to the taking of the author's skill and labour/intellectual creation and as such not amount to a substantial taking (see para 4.14 ff) although note the impact of the Infopaq decision (para 4.9).

Discussion Point 2

If I take a photograph of my family against the background of a statue in a city square in order to create a striking overall image, is the sculptor's copyright infringed? Is it any different from taking a picture of a well-known actor against the background of a sculpture in his home because I think the statue symbolises something of the actor's personality?

The statue in both cases appears to be an integral rather than an incidental part of the image; but the first case seems not to be infringement because the statue is a sculpture located in a public place. The second case cannot benefit from that exception because the sculpture is not in a public place, however, note that other exceptions might apply depending on the facts and circumstances.

Para 5.54

To what extent may the exceptions for lawful use of computer programs be compared with fair dealing for purposes of private study and non-commercial research?

Decompilation might be compared to private study.

Observing/studying/testing to determine underlying ideas and principles looks like research.

There is no exclusion of the commercial, however; the creation of an interoperable programme as a commercial venture can benefit from this exception.

Para 5.57

Is 'place-shifting' as legitimate as 'time-shifting'? Ought there to be such an exception to copyright?

No, 'place-shifting' is not legitimate because there is no exception for 'place-shifting' under the CDPA. Both the Gowers Review 2006 and the Hargreaves Review 2011 recommended that 'format-shifting' should receive the benefit of a private copying exception. The UK government subsequently introduced an exception in October 2014 which was repealed subsequently in July 2015.

There are good reasons for there to be such an exception. If a person has purchased a CD and makes copies in other formats to enable him or her to listen to the contents elsewhere than by way of the home CD player, it may seem unlikely that this is depriving the copyright owner of further sales of the CD; just as the VCR and its successor machines do not really deprive

the TV company of its audience. However, an important question is whether such an exception should involve a levy system to ensure some financial compensation to the rightowners in return for permitting such place-shifting.

Para 5.62

Discussion point 1

Is there a real difference between acts which are not within the scope of copyright at all, and acts which are permitted as exceptions to copyright? Is this important in the context of the idea of 'user rights'?

Probably a full discussion of this issue would require careful analysis of what exactly we mean by 'rights' in general. On this reference may be made to the writings of Wesley Hohfeld, Herbert Hart, Ronald Dworkin, Joseph Raz and Neil MacCormick. In the pre-digital world there probably was a significant difference between doing something with a work which copyright law did not touch (e.g. reproducing an out-of-copyright work), which would be something you had a right to do and that in practice nobody could stop you doing; and claiming the benefit of a copyright exception (e.g. copying a work for purposes of private study), which was more in the nature of a privilege than a right, and could really only be relevant in the event of your being sued for infringement. But in the digital world this difference becomes blurry; and the question of whether the user has a right with which to challenge the property rights of the copyright owner becomes much more acute.

Discussion point 2

Can you distinguish between 'fair dealing' and 'public interest' exceptions to copyright?

'Public interest' is much more ad hoc and related to particular individual cases and circumstances than 'fair dealing' rules, which seek to cover much more generic circumstances for certain specified purposes.