## Harmonised copyright issues table

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<th>Relevant European legislation</th>
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<td>To what extent should we seek to classify copyright works i.e. to protect only works which fall within the various categories of copyright works set out in national legislation?</td>
<td>Article 2(a) InfoSoc Directive</td>
<td>The InfoSoc Directive, as interpreted by the CJEU, does not require Member States to protect works which fall within categories of works; rather, it requires them simply to protect works which are their author’s own intellectual creation. “Intellectual creation” is an open-ended concept covering all conceivable types of authored matter. For example, in the <em>BSA</em> case, a graphical user interface of a computer program was found to be protectable as a copyright work in itself, without the need to categorise it as an artistic work. In practice, this means that the UK practice of classifying works may not be compatible with the InfoSoc Directive. More radically, all of this could also mean that the UK concept that ideas are not protected by copyright is no longer valid in certain circumstances. An idea may well be protected where it has been worked out in sufficient detail and is the subject of the author’s own intellectual creation.</td>
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<td>What is the future of the UK requirement that a literary, dramatic, musical or artistic work must be “original”?</td>
<td>Article 2(a) InfoSoc Directive</td>
<td>The CJEU has interpreted EU law as containing a harmonised and autonomous standard of originality for copyright works. In the <em>Infopaq</em> case, the CJEU held that a work is protected if it is “original in the sense that it is its author’s own intellectual creation”. An intellectual creation is an author’s own if it reflects the author’s personality. That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices.</td>
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| What amounts to “communication to the public”? | Article 3 InfoSoc Directive | The CJEU has, over a series of judgments, ruled that to be actionable/licensable, a communication must meet the following conditions:  
  - The communication must be made by electronic transmission;  
  - each transmission or re-transmission using a specific technical means must be individually authorised by the rightsholder. For example, where a business streams a broadcast via the internet to members of the public who are nonetheless entitled to receive that broadcast via television, that will amount to a new “specific technical means” and it must be licensed even though the copyright works are being communicated to an audience which is entitled to receive them;  
  - The communication must be made to a new public i.e. different from the public at which the original act of communication of the works was directed. It must be communicated to a public which was not taken into account by the authors of the copyright work. For example, a hotel operator who distributes a broadcast signal to guest bedrooms, communicates copyright works to a “new public”.  
  - The public means a “large and indeterminate class of people”. For example, playing music (via the radio) in dental surgeries does not constitute a communication to the public. The number of people in the surgery at any one time was likely to be small.  
  - What is relevant is whether a large, indeterminate number of people may access the work at the same time, not whether they actually did.  
  - There are conflicting suggestions in a couple of the CJEU’s rulings about the relevance of whether the further communication was made with the aim of obtaining some sort of economic benefit. Most recently, in the *TVCatchUp* case, the CJEU dismissed the suggestion that whether a service is profit making or competes with authorised services would influence whether there is communication to the public. |
| To what extent can content providers license their works on a territory by territory basis and include restrictions in their licence agreements on the making available/distribution of works outside the licensee’s territory? | Article 101 Treaty on the Functioning of the European Union | The issue arose in the case of Karen Murphy v Media Protection Services Ltd / Football Association Premier League Ltd v QC Leisure and others. This case looked at the FAPL practice of selling matches on a territory-by-territory basis. At the time the cases were brought, FAPL would only appoint one broadcaster per territory and would include restrictions on the circulation of authorised decoder cards outside the licensee’s territory. The CJEU found that these clauses amounted to a restriction on competition, impeding the free movement of goods and services in the EU single market. As a consequence, the FAPL is unable to rely on contractual restrictions in its contracts with broadcasters to prevent EU citizens importing decoder cards from other EU countries. It remains to be seen what the effect of this decision is on geo-filtering, as well as the effect on territory-by-territory online distribution. In certain circumstances, clauses requiring licensees to geddsblock customers from certain Member States are vulnerable to challenge under competition law. |

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1. Section 1 Copyright, Designs and Patents Act 1988  
2. Karen Murphy v Media Protection Services Ltd / Football Association Premier League Ltd v QC Leisure and others. Joined Cases C-435/08 and 429/08  
3. Bazaarňová softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury C-355/09  
5. Section 1(1) Copyright, Designs and Patents Act 1988  
6. Infopaq International A/S v Danske Dagblades Forening C-5/08  
8. Paragraph 98, Karen Murphy v Media Protection Services Ltd / Football Association Premier League Ltd v QC Leisure and others. Joined Cases C-435/08 and 429/08  
9. ITV Broadcasting Limited v TVCatchUp Limited C-607/11  
10. SGAE v Rafael Hoteleros C-306/05  
11. SCF Consorzio Fotografico v Micro Del Corso C-185/10 – this case looked at the concept of “communication to the public” in the context of Directive 92/100 on rental right and lending right and on certain rights related to copyright in the field of intellectual property  
12. On the one hand see *ITV v TV CatchUp* (paragraphs 41-44) and Rafael Hoteleros (paragraph 44) and on the other hand see Karen Murphy v Media Protection Services Ltd / Football Association Premier League Ltd v QC Leisure and others. Joined Cases C-435/08 and 429/08 (paragraphs 204-206) and also SCF Consorzio Fotografico (paragraph 88)
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<td>What is the test for copyright infringement?</td>
<td>Article 2 InfoSoc Directive</td>
<td>In the case of <em>Infopaq International A/S v Danske Dagblades Forening</em> (&quot;Infopaq I&quot;), the CJEU held that the test for infringement was whether what had been taken (i.e. the extract) &quot;contains an element of the work which, as such, expresses the author's own intellectual creation&quot;. The correct test for infringement is whether the defendant has taken the author's own intellectual creation, rather than whether the defendant has copied the whole or any substantial part of the work. Infringement is deemed to be taking the test in Infopaq I, rather than the test under the UK Copyright, Designs and Patents Act 1988. The European test is arguably more flexible in favour of the rightholder than the classic UK substantiality test. For example, in some circumstances, a rightholder may be able to prevent a defendant from taking sufficiently detailed &quot;concepts&quot; and &quot;ideas&quot;. In the Infopaq I case itself, the CJEU found that taking an 11 word extract from a literary work could amount to copying if the extract contained an element of the work which expressed the author's own intellectual creation.</td>
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<td>Where infringing content is sold via the internet across borders, where can the rightholder sue for copyright infringement?</td>
<td>Article 5(3) Jurisdiction Regulation 44/2001</td>
<td><em>Pinckney v Mediachec</em> – A court will be able to hear a case concerning copyright infringement committed on or through a website if the website is accessible within the jurisdiction of that court. It can, however, only rule on the damage suffered in that court's Member State. The national court will then apply national law to decide whether or not there was actually an infringement in that particular Member State (see discussion of <em>Football Dataco v Sportradar</em> below). The CJEU is soon to rule on whether a claimant can sue in a Member State B (Austria) where photographs published online by the defendant based in Member State A (Germany) but which are accessible in Member State B. Based on its decision in Pinckney, the CJEU is likely to rule that the claimant can sue in Austria for damage suffered there. The Austrian court would then have to establish whether there was any infringement within the jurisdiction, in accordance with Austrian copyright law.</td>
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Copyright issues which will be harmonised

| Member States must provide authors of copyright works with the exclusive right to authorise or prohibit any communication to the public of their works. What the Directive does not do is to say where the communication is deemed to take place when the work is communicated across borders. Is it enough for a content provider to take a licence in the country where its server is based or must it also be licensed in the territories where it provides those copyright works? | Article 3(1) InfoSoc Directive                                                                                                                                  | The CJEU has still to decide this point in relation to copyright. However, it has decided the point in relation to database right in the case of *Football Dataco* and the case is instructive for copyright purposes. Where data was sent from servers in Member State A to a person in Member State B at the person's request, the database right equivalent of "communication to the public" took place in at least in Member State B where there was an intention by the sender to target members of the public in that Member State. In our view, it is extremely likely that the CJEU will say the same thing about the place of communication in copyright law. Assuming the court has jurisdiction (see above on the CJEU's recent ruling in *Pinckney v Mediachec*), copyright owners may potentially sue in each EU Member State where an unlicensed individual or business targets consumers. This means that it is difficult for potential infringers, who may have hoped that they could avoid legal liability simply by locating their servers or operations in a favourable jurisdiction to them and/or an unfavourable jurisdiction for the rights owner. |

Does hyperlinking to a website containing copyright material constitute communication to the public of the material at that link? | Article 3(1) InfoSoc Directive                                                                                                                                  | The CJEU will rule on this question in the case of *Svensson v Retriever Sverige AB*. |

Does framing a website containing copyright material on another website constitute a communication to the public of the material which is framed (e.g. an individual frames a YouTube clip on Facebook. When the user clicks on the clip, the user is accessing the third party website and the content is not on the framing website’s server)? A third party's website is framed inside another giving the appearance that the framed content is on the framing website's page. In fact, the user is accessing the third party's website and the content is not on the framing website's server. We see this regularly e.g. YouTube clips posted within Facebook. | Article 3(1) InfoSoc Directive                                                                                                                                  | The CJEU will rule on this question in the cases of *Svensson, Bestwater v Meyes et al.* and *C-More Entertainment*. It is possible that the CJEU might take inspiration from the US. In the US, Perfect 10 case, Google framed images from third party websites. Those images were not actually reproduced on Google’s servers. It was the underlying website publisher that distributed copies of the images to the user’s computer through the frame on Google’s website. Perfect 10 argued Google’s framing gave the impression that Google was showing the image within a single Google webpage. While inline linking and framing may cause some computer users to believe they are viewing a single Google page, the Ninth Circuit Court of Appeal held that the US Copyright Act does not protect a copyright holder against acts that cause customer confusion. |

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13 Section 10(3) Copyright, Designs and Patents Act 1988
14 C-5/08
15 Paragraph 48
17 Paragraph 48
18 C-173/11
19 C-173/11
20 Pinz Hajlač C-445/15
21 Football Dataco v Sportradar C-573/11
22 Casa C-170/12
23 C-366/12
24 C-366/12
25 C-548/13
26 C-379/13
27 Perfect 10 v Google Inc 416 F. Supp2d 828
28 "Such assistance raises only contributory liability issues... and does not constitute direct infringement of the copyright owner’s display rights,"
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| Can users rely on the temporary copying defence when they view or listen to infringing copyright works, so that they do not infringe copyright? | Article 5(1) InfoSoc Directive | Public Relations Consultants Association Limited v The Newspaper Licensing Agency Limited and others<sup>31</sup> - The UK Supreme Court has stated in a judgment, which amounts to an interim opinion (pending a reference by it to the CJEU), that the EU's temporary copying defence to copyright infringement should apply to the acts of browsing the internet, caching browsed material and viewing material on screen, even where those acts are unauthorised by the copyright owner. The Court stressed, however, there is a distinction between use of a computer to view material and use to record material. Whenever a user’s activities fall on the “record” side of the line e.g. when music is downloaded rather than streamed, copyright should restrict those user activities, where unlicensed. In its reference to the CJEU, the Supreme Court has asked whether caching material for a period of time after the browsing session is completed interferes with a finding of temporary copying. |

| Is it permissible to apply technical protective measures (TPM) to content which prevents that content from being used for non-infringing purposes? | Article 6(2) InfoSoc Directive | The CJEU has yet to rule in the recent case of [Nintendo Co Ltd and others v PC Box Srl]<sup>32</sup>. However, Advocate General Sharpston has given her opinion to the court, in a case where Nintendo is seeking an injunction against the sale of devices for unlocking its games consoles so that they can be used to play third party games. Sharpston has advised that where TPM restrict legitimate acts (for example, playing third party games on Nintendo consoles or playing Nintendo games on third party consoles), as well as preventing illegal activity, the court should assess the proportionality of the TPM measures. In doing this, it should examine any other purposes (other than prevention of infringement) pursued by the measures, the importance of the legitimate acts being restricted and the cost and availability of alternative, less restrictive measures to achieve the same end. |

| Does a court in Member State A (where the key acts of infringement take place) have jurisdiction to adjudicate on whether there has been a contributory act of copyright infringement in Member State B? | Article 5(3) Jurisdiction Regulation 44/2001 | The CJEU will rule on this question in the case of [Hi Hotel]<sup>33</sup>. The referring German court has asked whether a court has jurisdiction to adjudicate both on copyright infringement in its territory and also on any contributing act which took place in France carried out by a party which assisted in the German infringement. |

#### Copyright issues which remain unharmonised

| The CJEU recently ruled<sup>34</sup> that the right to control distribution of downloaded software is exhausted after a first sale within the EU. Resale is possible even where that entails downloading another copy from the internet, provided that the original copy is deleted. To what extent does the UsedSoft judgment have wider application than resale of computer programs? For example, can rightholders prevent a second hand market in MP3s or are their rights exhausted after first sale in the EU such that they cannot prevent resale (provided that the reseller deletes its own copy after sale)? | Article 3(3) InfoSoc Directive | There are arguments that can be made each way as to whether this ruling applies to works other than software. Mark Owen explores those arguments here. What about works, such as computer games which incorporate software and other works, such as music and graphics? As was noted by the Milan referring court in the [Nintendo case]<sup>35</sup>, Nintendo games are not just computer programs, they are “complex multimedia works expressing conceptually autonomous narrative and graphic creations”. Given that it is not just software at issue in the case of computer games, will resale be possible without rightholder authorisation? Advocate General Sharpston advised the CJEU that “[w]here complex intellectual works comprising both computer programs and other material are concerned – and where the two cannot be separated … the greater, and not the lesser, protection should be accorded. If that were not so, rightholders would not receive in respect of that other material the degree of protection to which they are entitled under the InfoSoc Directive 2001/29.” In other words, she advises that where a product is protected by both Directives, the greater protections under the InfoSoc Directive should prevail. |

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<sup>31</sup> [2013] UKSC 38, 17 April 2013
<sup>32</sup> Case C-128/11
<sup>33</sup> UsedSoft GmbH v Oracle International Corp, C-128/11
<sup>34</sup> Advocate General Sharpston’s opinion. |