

USING INSUBSTANTIAL PARTS OF A COPYRIGHT PROTECTED WORK

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1. Introduction

This guidance explains UK copyright law as it affects the use of insubstantial parts of copyright protected work. It outlines what constitutes infringement, and considers the extent to which you can make use of part of a work without the need for permission and without infringing the copyright in that work.

This note does not take into account copyright exceptions that may be relevant to a digitisation initiative. That is, while copying a part of a work may be considered substantial for the purposes of copyright compliance, you might still benefit from one of the many exceptions to copyright (e.g., making a preservation copy of a work in accordance with s.42 of the *Copyright Designs and Patents Act 1988*, the CDPA).

However, you will not need to rely on an exception at all if the part of the work you are copying is not substantial enough to trigger copyright liability in the first place. And so, in this note, we focus on understanding the line between substantial and insubstantial copying.

2. In Practice

There is no simple way to determine whether use of part of a work will qualify as substantial or insubstantial use. Whether a substantial part of a protected work has been copied must be decided on a case-by-case basis, and will often be a matter of impression. As such, it is particularly helpful to be aware of how substantiality has been defined in past legal cases – see section 3.3 for discussion.

The type of material in the Edwin Morgan Scrapbooks which might be considered insubstantial includes cuttings of printed text and crops of images from newspapers and other periodicals. The majority of texts and images are partial or cropped in some way, and rarely are they accompanied by an indication of source. The decontextualized nature of these items within the Scrapbooks makes a determination about substantiality difficult. Each item needs to be considered individually.

With longer extracts of texts, even when removed from their original context, it is probably safer to assume that the extract represents a substantial part of the original work. Shorter pieces of text are more problematic. The Scrapbooks contain newspaper headlines (in part and in full), image captions, single sentences from articles, and even cuttings or one or two words. Under certain circumstances, headlines can be considered works that attract copyright.¹ A single sentence – perhaps the opening or closing taken from a famous novel – may be argued to be substantial, but when taken from a more commonplace source such as a newspaper article, this will be less clear cut. And certainly, it seems unlikely that reproducing a one- or two-word cutting would ever give rise to copyright concerns.

It is worth considering the potential implications of using substantial extracts of works in collection catalogues in more detail. For example, an extract from a literary work

¹ See Guidance *Copyright in Titles and Newspaper Headlines*

(whether published or unpublished) could be included in the contextual information accompanying the online catalogue entry for a particular record or document. Might this trigger liability for copyright infringement? The first question to ask should be: does the transcribed extract amount to a substantial part of the work in question? If so, is it permissible under any of the existing exceptions for libraries and archives? If the work in question has been published then one might rely on the quotation exception so long as the use of the extract is fair and the extent of the quotation is no more than is required for the purpose of cataloguing.² If the work is unpublished, however, the matter is less clear cut. Indeed, it may be advisable to avoid the use of extracts from unpublished documents within a catalogue, if the extracts in question might be regarded as substantial in nature.

As for images, there are many cropped photographs in the Scrapbooks that share the same problem as the text cuttings. Removed from their original context, it can be impossible to confirm whether or not the cropped image represents a substantial part of the original work. Some cuttings are so small in size (as small as 1cm x 1cm) and/or show something that cannot be determined, e.g. a close up of a grassy hillside or a natural formation that has been cut from a much larger image. These have become almost abstract and might be considered insubstantial. But even for less abstract images where cropping has obviously occurred, the lack of the source image makes it impossible to definitely determine the crop as substantial or insubstantial.

It is also worth considering captions that accompany images. Within the context of a newspaper or magazine article, they may be part of the literary work (the text), or a separate work accompanying the image. The captions accompanying images are likely to be by the photographer or a photo editor, rather than by the author of the article itself. As such, we might consider them separate works in themselves so long as they are sufficiently original. Where captions are simple or factual in nature, they will not attract protection. For example, the caption to a photograph of the island Ailsa Craig included in the Scrapbooks reads as follows: 'Ailsa Craig from the west, early morning'. This is little more than a statement of fact, providing information about where and when the photograph was taken. A more florid description of the scene, however, may be considered a literary work protected by copyright.

3. Legislative Context

3.1. When infringement occurs

In certain circumstances, making use of a copyright work without the permission of the copyright owner will infringe the copyright in that work. Copyright infringement takes one of two forms: *primary infringement* or *secondary infringement*.

Primary infringement occurs when someone carries out any of the 'acts restricted by copyright' (CDPA ss.16-21) without the copyright owner's permission. Secondary infringement provides owners with protection against those who aid and abet the primary infringer in some way or who deal in or with infringing copies (CDPA ss.22-26).

² The same would hold true for including headlines and titles that may be copyright-protected in catalogues.

The 'acts restricted by copyright' represent the bundle of economic rights the copyright owner enjoys in their work for the duration of the copyright term. Section 16 of the CDPA defines the acts restricted by copyright as including the right to:

- copy the work: the reproduction right (further defined in s.17 of the CDPA)
- issue copies of the work to the public: the distribution right (see s.18)
- rent or lend the work to the public: the rental right (see s.18A)
- perform, show, or play the work in public: the public performance right (see s.19)
- communicate the work to the public [including broadcasting the work and making it available online]: the communication right (see s.20)
- make an adaptation of the work or do any of the above in relation to an adaptation: the adaptation right (see s.21)

Doing any of these acts without permission will infringe copyright in the work, and the owner typically will be entitled to some form of relief or compensation. However, not all of these rights are granted to all copyright owners. Instead, the economic rights enjoyed by a copyright owner will vary depending on the type of work they have created. For example:

- performing or showing an *artistic work* in public is *not* an offence under s.19 of the CDPA
- the public communication right does *not* apply to the *typographical arrangement of published editions* (see s.20 for further details)
- the right to make an adaptation of a work *only* applies to *literary, dramatic, or musical* works, and not to artistic works, sound recordings, films or broadcasts (see s.21 for further details)

In the table that follows we provide an overview of which economic rights apply to each type of work protected under the CDPA.

ECONOMIC RIGHTS THAT APPLY UNDER CDPA

	MAKE COPIES	DISTRIBUTE COPIES	RENT OR LEND	PERFORM IN PUBLIC	COMMUNICATE TO THE PUBLIC	MAKE AN ADAPTATION
LITERARY	Y	Y	Y	Y	Y	Y
DRAMATIC	Y	Y	Y	Y	Y	Y
MUSICAL	Y	Y	Y	Y	Y	Y
ARTISTIC	Y	Y	Y*	-	Y	-
FILM	Y	Y	Y	Y	Y	-
SOUND RECORDING	Y	Y	Y	Y	Y	-
BROADCAST	Y	Y	-	Y	Y	-
TYPOGRAPHIC ARRANGEMENT	Y	Y	-	-	-	-

* Note that the rental and lending right as it applies to artistic works is qualified. That is, it does not apply to 'a work of architecture in the form of a building or a model for a building, or a work of applied art' (see s.18A(1)(b)).

3.2. Copying part of the work

Copyright protection is not confined to preventing the copying or use of works in their entirety. Simply copying part of the work can also infringe. This principle is set out in s.16(3)(a) of the CDPA which states that infringement can occur in relation to 'the work as a whole *or any substantial part of it*' (emphasis added). It is also enshrined in European copyright law. Article 2 of the *Information Society Directive* 2001 defines the reproduction right to include reproduction 'in whole or in part'. Although the *Directive* makes reference to copying 'in part', whereas the CDPA makes reference to copying the work 'or any *substantial part of it*', it is generally accepted that the 'substantial part' test under UK law is in conformity with – and will be guided by – the requirements of the *Directive* as interpreted by the European Court of Justice.

However, the logical implication of the substantial part test is that while it is not permitted to copy a substantial part without permission, it is permissible to make use of protected work as long as you are not copying any more than a substantial part of that work. But where do you draw the line between a substantial and an insubstantial part?

3.3. Defining Substantiality - Relevant cases

It is often said that this question of substantiality will depend upon the *quality* of what has been taken rather than the *quantity*. In *Sillitoe v. McGraw-Hill* (1983) Mr Justice Mervyn Davies QC observed that '[s]ubstantiality is a question of fact and degree determined by reference not only to the amount of work reproduced but also to the *importance of the parts reproduced*' (emphasis added).

This distinction between *quantitative* and *qualitative* importance is well illustrated by the comments of Mr Justice Arnold in the decision of *England and Wales Cricket Board v. Tixdaq* (2016). The court was asked to consider whether making an eight-second clip of a film or broadcast of a cricket test match constituted copying of a substantial part of each session of play (over two hours of footage). Arnold J observed:

Quantitatively, 8 seconds is not a large proportion of a broadcast or film lasting two hours or more. Qualitatively, however, it is clear that most of the clips uploaded constituted highlights of the matches: wickets taken, appeals refused, centuries scored and the like. Thus most of clips showed something of interest, and hence value ... Accordingly, in my judgment, each such clip constituted a substantial part of the relevant copyright work(s).

In recent years courts have become less likely to excuse unauthorised copying on the ground that what was copied was an insubstantial part. Previously, liability might only be triggered if the defendant had copied an essential, vital or significant part of the protected work. Now, however, courts are more inclined to find infringement unless '*no more than an insignificant part of the copyright work is copied*' (quoting Lord Bingham in *Designer Guild Ltd v. Russell Williams* (2000)).

The decision of the European Court of Justice in *Infopaq International v. DDF* (2009) has consolidated this trend. The case concerned a media monitoring business (Infopaq) that scanned newspapers on a daily basis to identify and summarise articles of interest to its clients. Their media monitoring process involved the automated copying of eleven-word extracts of text from relevant newspaper articles. The European Court of Justice was asked for guidance as to whether this automated copying might constitute copyright infringement.

The Court decided that parts of a copyright work will enjoy copyright protection if 'they contain elements which are the expression of the intellectual creation of the author of the work'. The Court continued that individual sentences *or even parts of sentences* from a literary work, such as a newspaper article, would be protected by copyright 'if that extract contains an element of the work which, as such, expresses the author's own intellectual creation'. In short, the copying of an eleven-word extract from a newspaper article without permission might constitute infringement, depending on the nature of the extract.

So, when considering whether an extract is substantial or not, ask yourself whether the part that is being copied contains a feature or features that express the author's intellectual creation; that is, whether the part that is copied evidences the kind of skill and labour on the part of the author that makes her work original. As *Infopaq* demonstrates, even a part of a sentence might be sufficient to constitute a substantial part. On the other hand, the part that is copied may be trite or insignificant within the context of the work, it may be a commonplace phrase, or material that is not itself original to the work: that is, it may have been influenced by or copied from an earlier source.

4. Legal References

Copyright Designs and Patents Act 1988 c.48 (www.legislation.gov.uk/ukpga/1988/48/)

Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (the *Information Society Directive*)

Designer Guild Ltd v. Russell Williams [2000] UKHL 58

England and Wales Cricket Board Ltd [the ECB] & Anor v. Tixdaq Ltd & Anor [2016] EWHC 575 (Ch)

Infopaq International A/S v. Danske Dagblades Forening [2009] (C-5/08)

Sillitoe v. McGraw-Hill Book Co (UK) Ltd [1983] FSR 545

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