

In light of the ends. Copyright hysteresis and private copy exception after the British Academy of Songwriters, Composers and Authors (BASCA) and others v Secretary of State for Business, Innovation and Skills case

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Summary

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1. The concept of legal hysteresis.

A recent judgement of the High Court of Justice in matter of private copy exception [1] provides the twofold prime opportunity to shed light on the state of the art of copyright in the UK and to flesh out the idea of 'legal hysteresis', which I have sketched elsewhere [2].

Proceeding in reverse order, hysteresis (from the ancient Greek 'ἠστῆρις', coming late, but also lack, privation) is a polysemous concept originally proper to physics and then transplanted to other fields such as cytology, ethnography and economics [3]. Broadly understood, hysteresis is the characteristic of a system whereby there is a delay in the response to stresses as an effect of the previous status of the relevant system [4]. By legal hysteresis I mean the fact that the development of law is slowed down by existing laws and regulations, therefore, especially when it comes to new technologies, statutes and regulations are obsolete even in the moment itself when they come into force. The situation is worsened in the legal systems characterised by never-ending granular negotiations with stakeholders and by lobbying [5].

There is increasing conscience of this problem, as emerges for instance [6] from the annual report of the Italy Data Protection Authority (*Garante per la protezione dei dati personali*, henceforth 'Garante'), [7] insofar as the Garante observes that the revision of the security measures provided by the technical specifications attached to the code of privacy cannot be any more delayed, for the relevant provisions are obsolete ('only' ten years have passed), being changed the technological context [8].

The present occasion regards the Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, and the private copy exception under the Copyright, Design and Patents Act 1988 (hereafter 'CDPA'). However, the examples are utterly umpteen.

One need only think to the directive 2011/83/UE (so-called consumer rights directive, henceforth CRD) [9], insofar as it refers to digital content in CDs and DVDs [10] without mentioning all the new tangible media for such contents (such as smartphones [11], wearables, etc.), let alone the intangible media based on cloud computing technologies [12].

In fact, a good example is provided by laws applicable to cloud computing, which assume 'one-to-one relationships

not one-to-many, dedicated not shared infrastructure, and controllers' absolute control over processors who process data actively for controllers, instead of renting out self-service resources' [13]. As more recently noted, "regulators seem to 'discriminate' against cloud, for whatever reason: if a controller rents a computer from a rental company to process personal data, the rental company is not considered a "processor"; but, if a controller uses a cloud service to perform the same processing, the cloud provider *is* considered a "processor", with attendant data protection law requirements" [14]. Similar considerations apply, just to name a few, to the Internet of Things, machine learning, artificial intelligence, artificial enhancement, drones, and robots.

Nor legacy problems are confined to the law traditionally understood. Technology lawyers know very well that it is not rare to read contracts that are clearly tailored for past realities (for instance, outsourcing contracts used for the provision of cloud computing services) [15].

One of the consequences of legal hysteresis is private ordering. By 'private ordering' neither I mean here the spontaneous enforcement of agreements (usually due to the so-called reputational mechanism), nor (better, not only) are we referring to the abuse of contracts in order to elude the law [16]. I mean that, as a response to a legislator that intervenes always too late, there are a lot of regulating gaps when it comes to technology and these gaps are filled by the contracts [17].

In order to avert this infinite chase, in the last decades the majority of the stakeholders of the technology-related sectors has increasingly been suggesting to avoid hard law and ad hoc measures in favour of soft law, self and co-regulation initiatives, codes of practice, and the like. More generally, it has become a quite common view that one ought not to approve "the law of the horse", [18] whereas the existing principles are flexible enough to accommodate the new reality. I am not sure that this is always (and still) the case, but it is indeed a matter of striking a balance between legal certainty and democracy, on the one hand, and efficiency and legal creativity, on the other hand. At any rate, until the legislators will not take a stand, courts, corporations, and other public and private stakeholders will retain the upper hand over the technological order.

2. The Infosoc Directive: negotiation and implementation.

The Infosoc Directive allows the Member States to introduce exceptions and limitations to copyright [19]. Namely, under Article 5(2)b Member States can provide for exceptions or limitations to the reproduction right "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned." [20] It has been recognised that this exception can only be limited subject to the conditions specified thereof, therefore these conditions not being satisfied, the consumer who has acquired a DVD and cannot make a copy for private use on videocassette because of technical protection measures (TPM) has suffered a loss [21].

On a national level, all the Member States have introduced a private copy exception, with approaches to implementation that have varied, with reportedly [22] 21 out of 28 Member States having levies in place to ensure fair compensation for rights holders [23].

During negotiations on the Infosoc Directive, the UK Government's approach was conservative inasmuch it sought to maintain existing UK exceptions as far as possible [24]. The Copyright and Related Rights Regulations 2003, thus, amended the existing exceptions where required to comply with the Directive, but in general they did not introduce new exceptions [25]. As to the private copy and photocopy exceptions, particularly, it was indeed clear since the very beginning that "There will be no UK implementation. There is a private sector licensing scheme covering much published material, which may be thought to meet the need reflected in these exceptions." [26] This was also the result of the pressures exerted by the lobbies of the sectors involved (music, books, etc.). For instance, the British Phonographic Industry suggested that only the compulsory exceptions in the Directive should be implemented and that "all of the 5.2(b) restrictions on exceptions must be implemented, and that existing private use exemptions must not be extended." [27]

3. The Copyright and Rights in Performance (Personal Copies for Private Use) Regulations 2014.

As far as I know, the only private copy exception existing in the UK is broadcast time-shifting (sec. 70(1) of the CDPA). A recording of a broadcast can be made in domestic premises for private and domestic use to enable it to be viewed or listened to at a more convenient time [28]. This is unique peculiarity, as “All member states – with the exception of the UK and Ireland – thereby provide for an exception which is identical to the core regulatory concept under Article 5(2)b” [29], let alone the more public interest-oriented states where the exception applies to all acts of private copying remains in place, only subject to the condition that the purpose must be for personal use [30]. This situation was particularly intolerable, given that the private copy appears the most important exception, if only one think of the European relevant case law [31] and of the mediation process carried out by António Vitorino [32].

With a notable delay, if compared with other Member States,[33] on 1.6.2014 the UK implemented art. 5(2)b of the Infosoc Directive by introducing a limited private copy exception. The Copyright and Rights in Performance (Personal Copies for Private Use) Regulations 2014 provided an exception limited to the personal use, to the owners of a personal copy and with the exclusion of the even indirectly commercial uses. No compensation was provided. Computer programs had been left out as existing provisions made under the Software Directive [34] already allow back-up copies of software [35]. Thus, the UK rendered legal what the society perceived as absolutely commonplace activities (facilitated by a large number of technologies whose essence is some form of copying).

Let us analyse closer the then introduced section 28A (Personal copies for private use) of the CDPA [36], which constitutes the output of a process of consultation and debate with all the stakeholders involved that lasted nearly 3 years and saw the Government doing approximately 150 ad hoc meetings.

To understand the provision, one can divide it into object, subject, and purpose.

The non-infringing copy is a copy of the individual's own copy of the work, or a personal copy of the work made by the individual. To qualify as “the individual's own copy” the copy must have been lawfully [37] acquired by the individual on a permanent basis. The said basis includes a copy which has been purchased, obtained by way of a gift, or acquired by means of a download resulting from a purchase or a gift, and does not include a copy which has been borrowed, rented, broadcast or streamed, or a copy which has been obtained by means of a download enabling no more than temporary access to the copy.

As regards the subject, copyright is infringed if an individual transfers a personal copy of the work to another person such as a family member (otherwise than on a private and temporary basis), except where the transfer is authorised by the copyright owner. Obviously, one can sell for instance the CD he has lawfully acquired (property prevails on copyright), but after the transfer they are not allowed any more to retain any personal copy and must therefore destroy them.

The purpose is equally critical. The dealing is fair only for for the individual's private use, and for ends which are neither directly nor indirectly commercial. This includes essentially the making of back-up copies, format-shifting, storage, including cloud storage [38].

Lastly, two provisions are relevant insofar as they show that the private copy exception is expression of a public interest.

On the one hand, under subsection subsec. 10 of sec. 28A “To the extent that a term of a contract purports to prevent or restrict the making of a copy which, by virtue of this section, would not infringe copyright, that term is unenforceable.” Freedom of contract, which is a cornerstone of liberal private law, [39] yields to the freedom of expression, because copying is recognising as a fundamental step of the creation process.

On the other hand, section 296ZEA provides a remedy [40] for the case where an individual is prevented from making a personal copy of a copyright work, or is restricted in the number of personal copies of it which may be made, because of a restrictive measure applied by or on behalf of the copyright owner. The reference is to the TPMs [41]. In

my opinion, TPMs and more generally the solutions of “enforcement by design” run counter the contextual and contingent nature of the law, which in copyright law expresses itself in the necessity to assess fairness case by case and striking a balance between the private and public interested involved.

4. The new framework of exceptions and limitations in the UK.

The Copyright and Rights in Performance (Personal Copies for Private Use) Regulations 2014 is one of the five instruments that have introduced the new framework of exceptions and limitations to copyright in the UK. Alongside the above analysed regulations, the Government has introduces regulations as to research, education, libraries and archives; [42] quotation, parody, and pastiche; [43] disability; [44] and public administration.[45] This constitutes the culmination of the process started thanks to the publication of Professor Ian Hargreaves’s independent report (so-called *Hargreaves Review*) [46], where it has been recognised that “Copyright exceptions are designed to allow uses of content that offer benefits deemed either *more important than those delivered by the core aims of copyright* and/or benefits that do not significantly detract from those aims.” [47] Professor Hargreaves recommendations have been accepted by the Government [48] which committed itself to extend it as far as possible within the confines of the EU copyright framework, moving from the assumption that “Where society (...) acknowledges in practice that the enforcement of rights is uneconomic or unreasonable, for example over private copying, these should ideally be taken out of scope of the IP system.” Following the “*Consultation on proposals to change the UK’s copyright system*” (closec in March 2012), further informal consultation, and the blessing of the Business, Innovation and Skills Committee and o the Regulatory Policy Committee, in December 2012 the Government published its final policy “*Modernising Copyright: a modern, robust and flexible framework*”. In a written ministerial statement, on 20.12.2012, the Secretary of State for Business, Innovation and Skills announced the Government’s intention to make changes to the copyright exceptions framework in order to achieve “*strong, sustainable and balanced growth.*” [49]

The new framework is as follows. [50]

Caricature, Parody or Pastiche. As bizarre as in may be, given the importance of the sense of humour in English society, until the 1.10.2014 in the UK it was illegal to deal with a copyright work for purposes of caricature, parody, or pastiche. Now it is legal, but only if the dealing is fair, therefore for instance use of a few lines of song for a parody sketch is likely to be considered fair, whereas use of a whole song is not. [51]

Quotation. Before the newly enacted regulations, one could quote only for the purpose of criticism, review or news reporting. Not it is allowed to do it for any purpose as long as it is fair dealing.

Research and private study. Institutions such as libraries and universities can offer access to sound recordings, films and broadcasts on the premises at electronic terminals, if purpose is not commercial and the copying is fair and reasonable (e.g. not a whole DVD).

Text and data mining. Whether for non-commercial research, it is allowed to copy materials for the technical process of data mining, that is computer-based analysis of copyright material.

Education and teaching. One can now make a more extensive use of materials in conjunction with educational licensing schemes; minor acts of copying for teaching purposes are legal.

Archiving and preservation. Institutions such as libraries, archives, museums and galleries are able to make copies of all types of creative works in their collections, in order to preserve them.

Public administration. Public bodies can share some third party copyright material online, such as material submitted by an individual or business for the purpose of maintaining a public register.

Accessible formats for disabled people. Individuals can make a single copy of copyright works in accessible formats for the personal use of a disabled person. Charities can make multiple copies of copyright protected works for disablec people [52].

As one can read in the *Explanatory Memorandum*, the Government has thus expanded the freedoms in copyright law for a variety of economically and socially valuable purposes. The changes, however, contain safeguards “to ensure that a reasonable balance is maintained between the interests of creators, owners, performers, consumers and users of copyright works.”[53]

5. The unnecessary compensation and pricing-in theory: empirical evidence.

I have mentioned that no ad hoc compensation scheme was provided by the private copy regulations. The Hargreaves Review – on which there has been a triennial consultation – pointed out that the UK has a thriving market for personal media devices which rely on private copying and that there is no economic argument for adding an extra charge to these devices in order to authorise reasonable private acts which are part of the normal use of devices. In fact, whereas there is no evidence of harm to rights holders done by this kind of private copying in the normal course of using digital equipment to play works, “There is considerable evidence of overall public benefits from consumer use.”[54] As rights holders are well aware of consumers’ behaviour the benefit of being able to copy “is already factored into the price that rights holders are charging.” [55]

During the consultation, the copyright owners were the only ones to feel “that a private copying exception of any type or scope would cause them unreasonable harm (...) the Government should therefore apply a levy, licence or tax to copying devices in order to compensate for this harm.”[56] In fact, the Government was convinced that the private copy exception “causes minimal or no harm to copyright owners” [57] inasmuch as the exception was limited to people who already owned a lawful copy of a work (which meant that the ability to make personal copies can be factored in at the point of sale).

There is empirical evidence of this phenomenon [58]. Indeed when music downloads that could be copied freely for personal non-commercial use were first introduced they were sold at higher prices than the DRM-protected equivalents.[59] And also after the dropping of the DRM-free download prices to the same price as DRM-protected copies, still more units were sold. An IPO commissioned independent research [60] based on a comparison of prices of copies of different media sold under different usage restrictions. This research appears to confirm that pricing-in is possible, and is taking place. Another approach is to look at impacts on consumer demand and sales of copies. Without format shifting, it is becoming increasingly difficult to play CDs on portable devices, as MP3 players and mobile phones are widespread, and demand for portable CD players declines. This suggests that many people buying CDs do so with the expectation that they will format shift in order to play their CDs on a portable device, and that sales of CDs (and prices) would be lower if they could not do this. Another way to examine the consistency of the pricing-in theory is to compare the price of an average digital download album and the price of an average CD album: average CD prices are higher than MP3 download prices, not only because the manufacturing costs are higher, but also because CD copying is widely considered to be reasonable and takes place regardless of copyright. Therefore, the value of being able to make private copies from CDs is likely to already be factored into the market.

Consequently, the Government took the stand that

levies or other compensation are neither required nor desirable in the context of a narrow provision that causes minimal harm. Levies are an unnecessary and inefficient tax on consumers. They are unfair to consumers in that they are payable regardless of the use to which a levied device (for example a hard disk) is put and regardless of whether a user has already paid for the copies they store on a device. Furthermore, particularly in the current economic climate, it is not right to extract more money from the pockets of hard pressed consumers.” [61]

Similar considerations apply to cloud storage, given the technology neutrality principle. The Government notes that the removal of the ability of copyright owners to license certain types of cloud storage would not cause them a significant loss of income, because

All or most cloud services that currently exist in the market and are licensed by rights holders will still require licences following introduction of the exception. Any loss of licensing income is therefore unlikely to be significant” [62]

Moreover, this removal would reduce barriers to entry and enhance competition in this market, supporting technological innovation and economic growth.

6. British Academy of Songwriters, Composers and Authors and others, R (On the Application Of) v Secretary of State for Business, Innovation and Skills.

Notwithstanding the long process of consultation and all the empirical evidence gathered, the British Academy of Songwriters, Composers and Authors (BASCA), the [Musicians' Union](#), and [UK Music](#) still found that this narrow [63] exception harmed their interests; therefore, they brought an application for judicial review and surprisingly succeeded. More precisely, on 19.6.2015 the High Court of Justice ruled only one issue (the fourth) in favour of the claimants, [64] that was

The submission that the decision was flawed because the evidence relied upon to justify the conclusion about harm was inadequate/manifestly inadequate: This submission focuses upon the Secretary of State's conclusion that the exception would lead to minimal or zero harm when the evidence relied upon does not support that conclusion"

At to this issue, Mr Justice Green decides in favour of the claimants

"because the conclusions and inferences which have been drawn from the evidence the Secretary of State has relied upon are simply not warranted or justified by that evidence. This is a conclusion I would arrive at on the basis of any test for judicial review; it is not as such dependent upon the review being intensive or merits based"

Being the parties' submissions the following step, Mr Justice Green clarifies that the judgement does not necessarily result in section 28A CDPA being struck down.

It is, in theory, possible for the Secretary of State to re-investigate the issue in order to address the evidential gap which now prevails. If he does this then one possible outcome would be that the gap that I have identified is plugged and the present decision becomes justified. Another outcome might be that following further investigation the gap in the evidence remains un-plugged in which case the Secretary of State could either repeal section 28B or introduce a compensation scheme. A third possibility is that the Secretary of State simply decides to introduce a compensation scheme without more."

Before analysing the conclusions after the parties' submissions, let us touch on the reasoning as to the fourth issue.

Now, it is true that the defendant's discretion in drawing conclusions from the evidence gathered is somewhat fettered by the fact that he is only permitted to avoid the introduction of a compensation scheme if the harm caused by the introduction of the copyright exception is *de minimis* or zero. But if one reads Mr Justice Green's judgement, they may have the impression that the judge would not accept the no harm claim if the pricing-in practice was not proved and effective beyond a shadow of a doubt, thus mixing different issues. Indeed, he states that

It is therefore no answer to this question to say that economic common sense suggests that "*to some extent*" pricing-in will obviate harm. That perfectly sensible conclusion might go some way to answering the requisite legal question but it does not go all the way. For example, if "*to some extent*" means that 60% of harm is obviated by pricing-in then unless the residual 40% can be treated in law as *de minimis* then economic intuition is not enough."

It looks like Mr Justice Green has already come to a decision when he dismisses the empirical evidence as to the higher price of non-DRM downloads as a mere 'incident', but, as to other empirical data, it is nevertheless true that the Government might have moved from a sounder evidence. For instance, the Secretary of State had pointed out "one approach to research could be to examine the impact on consumer demand and sales of copies," however, no such survey had ever been commissioned. At the same time, I do not find that the High Court's assumption that from 1.10.2014 on "upon countless occasions, no doubt running into many millions, natural and legal persons performed acts of copying which were lawful under the law as it then stood" is based on sufficient evidence.

On 17.7.2015, the High Court of Justice has addressed the issues arising out of the judgment handed down on

19.6.2015.[65] As said above, the Secretary of State could have shielded the private copy regulations by reinforcing the underlying evidence or by introducing a compensation scheme. On the contrary, they have decided not to decide and, despite the three-year-long consultation process, “take time to reflect before making any further decisions”.

Therefore, in principle [66] Mr Justice Green could not do anything but quashing the private copy regulations prospectively [67], because there had been “defect in the process by which evidence was collected and evaluated during the consultation process leading up to the adoption of the Regulations.” Consequently, the Secretary of State “will now take the opportunity to reflect further and in due course take a view as to whether [...] a new private copying exception should be introduced”. It is not clear why they welcome the guidance that the Court has provided as to the scope and nature of the factual enquiries which are necessary, but then they want to reflect as to “whether, and in what form, any further factual enquiries should be carried out.” Moreover, if the Government had defended the private copy exception, this would have been an ideal occasion to refer to the Court of Justice to clarify the concept of harm. Unfortunately, “Given that the Secretary of State submits that a quashing order is appropriate at this stage, there is no necessity for a reference to the CJEU.” [68]

7. The future: Bernard of Chartres, a value-driven view on the private copy exception and a purpose-oriented interpretation of copyright.

The reasoning of the judge is so that one can expect a different decision in the future, as he does not deny the validity of the inferences, he questions the solidity of the evidence itself, which we wish the Government will better gather in order to put an end to the unfortunate predicament where the UK is the only Member State not having the most important of the exceptions to copyright.

I expect that a new narrow private copy exception will be reintroduced. This time it will be accompanied by a compensation scheme, not because it is really necessary, but due to the lobbying of the stakeholders involved and as the Court of Justice has shown to be prone to favour the property reasons in the balance with freedom of expression and information. In fact, as one can read in *Martin Luksan v Petrus van der Let*, [69] with reference to the private copy exception, European Union law must be interpreted as meaning that the right holder (in this case the principal director of cinematographic work) “must be entitled, by operation of law, directly and originally, to the right to the fair compensation”.

A reference to the Court of Justice might still be useful and it is not in the least prevented by the BASCA judgement. In fact, “Nothing that [the High Court has] said in this ruling should be taken as an indication as to the decision that a future Court might make upon an application by the Claimants (or others) for a reference in the future.”

It ought to be noted that a system of right holder remuneration is not necessary under EU law (the High Court applied English Common Law). In the so-called *Amazon* case [70], the Court of Justice has clarified Member States enjoy a good degree of discretion over compensation systems, as long as *a fair balance is struck* between rights holders and users of the exception. If a compensation is introduced, its purpose is to recompense the harm suffered by authors (*Padawan* case) [71].

If one analyses *in vitro* article 5(2)k of the Infosoc Directive, they might get the wrong impression that a compensation is necessary. A contextual and systematic interpretation of the directive, however, suggests a different scenario. In fact, under recital 35 no compensation must be provided if the prejudice to the right holder would be minimal and, as recently stated in the *Copydan Båndkopi* case, [72] the Member States have ample discretion to decide where the threshold lies below which prejudice or harm might be classified as “minimal”. In addition, one should wish that the UK would inspire itself to the virtuous models of Malta, Cyprus and Luxemburg that treat private copying as *de minimis* harm. Ideally, the new private copy exception should not be limited to the individual’s use, thus conforming to the vast majority of Member States’ policies that introduced an exception, which was generally stretched beyond personal private copying and covered, for instance, copying to family and friends and by way of gifts.

Systematic interpretation today means also to place the normative text in the international context, which confirms [73]

how much public interest and balance are important in copyright law. It is not a case that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) itself, which is not the most public-spirited existing treaty, makes clear that

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and *in a manner conducive to social and economic welfare, and to a balance of rights and obligations*" (art. 7)

The conscience of the ends of copyright is present also in the Infosoc directive, whose goal is to comply "with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest" (rec. 3) and to "promote learning and culture by protecting works, while permitting exceptions or limitations in the public interest" (rec. 14)

The US case law can teach us something in this respect. I have already cited the *Campbell v. Acuff-Rose Music, Inc.* case. The Supreme Court considered a commercial parody involving substantive copying as 'fair,' because exceptions to copyright "have to work [their] way through the relevant factors, and be judged case by case, in light of the ends of the copyright law." The ends of the copyright law, useless to say, are creativity, innovation, and freedom of expression. Now, it is true that the WTO has always sponsored a step-by-step right holders-favourable application of the three-step test, but nothing in European law prohibits an overall purpose-oriented interpretation of copyright and of its exceptions.

To conclude, I do not believe that historically copyright was the only way to promote culture and innovation. General public domain system might have served better this goals. Nonetheless, the advocates of intellectual property have always used these noble ends to justify proprietary protection of immaterial products. They must be consistent now. If the ends of copyright are the promotion of culture, free speech, and innovation, then "the law of copyright must allow prospective authors to 'stand on the shoulders of giants' and freely engage in transformative uses. Private copying is an essential first step in this process of follow-on creation" [74].

The vivid image attributed to Isaac Newton, but coined by the French Neo-Platonist philosopher Bernard of Chartres, conveys the idea that the Moderns are dwarves perched on the shoulders of the Ancients, and thus they are able to see more and further. [75] We have to remember that the better vision we have today does not depend (only) on the acuteness of our sight, but it is because we are elevated by the ideas that have been developed before us, which also were the result of some sort of copying. In this sense it is correct albeit provocative to say that intellectual property is a theft.[76] This concepts exports the phrase "*la propriété c'est le vol*" (attributed to Proudhon, rooted in Brissot's thought [77]) to a realm where one does not have to be an anarchist or a Girondist to do such a claim.

In conclusion, I support the reintroduction of the private copy exception, possibly in a less narrow fashion, and I am confident the expectations will be fulfilled because: i. the judge did *not* rule on the actual compatibility of UK exception for personal copies for private use with EU law; ii. The High Court decided the majority of the issues of the BASCA case in favour of the Secretary State; iii. The 'no harm' inference from the evidence gathered has not been questioned; iv. The UK is the only Member State that does not have such an exception; v. Most Member States have a private copy exception not limited to the personal use; vi. European case law allows the Member States considerable room for discretion in assessing the *de minimis* regime while introducing copyright exceptions; vii. The fact that the majority of European cases on exceptions and limitations to copyright regard the private copy, jointly interpreted with the point *iv*, can be interpreted as a sign of the importance of this exception; viii. Copyright exceptions are the expression of the very nature of copyright and of its goals; ix. Copying is essential for the creative process; x. Copying is commonplace and regarded as legal not only by jailbirds, but by reasonable and honest people.

One obstacle to the future process can be the legal hysteresis, which in the UK is not only given to the natural greater rapidity in the development of technologies if compared to the making of the laws. In the UK, a three-year-long consultation and evidence-collection process is not sufficient to introduce an exception which exists in all the Member

States (by the by with a broader scope) and which reflects a commonplace activity regarded as legal (or at least as normal) by most respectable people. A misconception of democracy may worsen hysteresis and jeopardise democracy itself, which should be first of all about empowering people and being sensitive to the needs arising from society.

Note

[*] Il presente contributo è stato preventivamente sottoposto a referaggio anonimo affidato ad un componente del Comitato di Referee secondo il Regolamento adottato da questa Rivista.

[1] On 17.7.2015 *British Academy of Songwriters, Composers and Authors and others, R (On the Application Of) v Secretary of State for Business, Innovation and Skills*, [2015] EWHC 2041 (Admin), hereafter also ‘the second hearing’, has addressed the issues arising out of the judgment handed down on 19th June 2015 ([2015] EWHC 1723 (Admin)) (‘the Judgment’), where Mr Justice Green found that in principle the application for judicial review succeeded. Other claimants were Musicians’ Union and UK Music 2009 Limited, whilst The Incorporated Society of Musicians was an intervener.

[2] Namely in G. Noto La Diega, *Cloud computing e protezione dei dati nel web 3.0*, in “Giustiziavivile.com”, 5-4-2014 13 and in G. Noto La Diega, *Gigli e solitudine*, forthcoming.

[3] On some of these aspects, see M. Faliva-E. Venini, *Lezioni di metodi quantitativi per le decisioni economiche*, Milano, 2000, 68 s. It is noteworthy specifying that the application of the said concept to these new fields has sometimes led to a radical change in the meaning of ‘hysteresis’. For instance, in cytology protoplasmic hysteresis is the dehydration of the propoplasmic colloid, with subsequent reduction of colloidal dispersion.

[4] Cf. G. Gallini-G. Satta, *Incontri etnografici: processi cognitivi e relazionali nella ricerca sul campo*, Roma, 2007, 170, nt. 16

[5] One ought to remember that R. Pardolesi, «Software», «property rights» e diritto d’autore: il ritorno dal paese delle meraviglie, in *Foro it.*, 1987, 3, II, 300, was the first to apply hysteresis to the law, but the Author understood it as the sluggishness in the production of international rules. The situation may vary from country to country. For instance, in the Netherlands the *Auteurswet* (Copyright Act) is written in generally technology-independent language, therefore according to part of the Dutch legal literature the innovations have never led to a crisis of *auteursrecht* (cf. S. Nas, *The Netherlands, in Implementing the EU Infosoc Directive*, Foundation for Information Policy Research, 2003, 97, <http://www.fipr.org/copyright/guide/eucd-guide.pdf>).

[6] See also N. Kim, Two Alternate Visions of Contract Law in 2025 (2014). Faculty Scholarship. Paper 83, <http://scholarlycommons.law.cwsl.edu/fs/83> , 313, “can marketers use information obtained through these smart devices (that you take long showers, use scented creams, or cheat on your spouse) to sell you things? The technology to collect this information will be available before legislation exists to govern its use”.

[7] Garante per la protezione dei dati personali, *La protezione dei dati nel cambiamento. Big data Trasparenza Sorveglianza*, Relazione annuale, 2013, available at <http://194.242.234.211/documents/10160/0/Relazione+annuale+2013.pdf>.

[8] It is ‘ormai indifferibile [...] la revisione delle misure minime di sicurezza contenute nel disciplinare tecnico allegato B al Codice, in ragione dell’obsolescenza di molte disposizioni (pensate ormai più di dieci anni fa) e del mutato contesto tecnologico di riferimento, con l’esigenza crescente di proteggere il dato non solo staticamente, allorché è memorizzato all’interno di una banca dati, ma, ancor di più, in tutte le occasioni (sempre più frequenti) in cui lo stesso è oggetto di trasferimenti per mezzo delle reti di comunicazione o di accesso da parte di postazioni remote” (Garante, *La protezione dei dati in cambiamento*, 164).

[9] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights,

amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

[10] Recitals 19 and 23 CRD.

[11] It may be a surprise to read that the telephone is taken into account essentially as a means for the conclusion of distance contracts (see, e.g., article 8 CRD).

[12] In G. Noto La Diega-J. Singh, *A Use-Case Multidisciplinary Study on the Internet of Things*, forthcoming, we show how the CRD can be also read as apt for the Internet of Things, whereby, for instances, defines 'sales contracts' as 'any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services' (article 2(5)).

[13] W.K. Hon-C. Millard-I. Walden, *Negotiated Contracts for Cloud Services*, in *Cloud computing law*, ed. by C. Millard, Oxford, 2013, 105.

[14] W.K. Hon-C. Millard-G. Noto La Diega, *Twenty EU Legal Considerations for Clouds of Things*, forthcoming.

[15] Cf. in general O. Whitcroft, *Technology contracts: Creative Relationships Require Creative Agreements*, in *Computers & Law*, 25, VI, February/March 2015, 13.

[16] For a range of possible meanings of 'private ordering' s., for example D. Castle (ed.), *The Role of Intellectual Property Rights in Biotechnology Innovation*, Edward Elgar, Cheltenham, 2009, 312, especially notes 42-44.

[17] See more broadly G. Noto La Diega-I. Walden, *Contracting and regulating for the 'Internet of Things'. Looking into the Nest*, forthcoming.

[18] The reference is clearly to Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, in 1996 *U Chi Legal F* 207. This is not the place to take a stand as to this debate, but my impression is that horses are not like technology, at least inasmuch as the animals are prerogative of the rich, whereas technology is ubiquitous. For instance, Ericsson predicts that in Sub-Saharan Africa the number of mobile subscriptions will rise to 930 million by 2019, almost one per African (*Sub-Saharan Africa. Ericsson Mobility Report Appendix*, June 2014, <http://www.ericsson.com/res/docs/2014/emr-june2014-regional-appendices-ssa.pdf>).

[19] There is also a mandatory exception. In fact, "The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made." (Recital 33). Cf. CJEU, 4th ch., 5.6.2014, C-360/13, *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others*, not yet published.

[20] As to private copy for commercial use it is noteworthy the French case law regarding blank tapes. See e.g. Cour de Cassation, 4.1.1994, *Techni Import Professionnel v Société pour la Rémunération de la Copie Privée Sonore (Sorecop)*, [1995] E.C.C. 393. For another example of the typically proprietary French approach see Tribunal de Grande Instance de Paris, 22.4.2004, *UFC-Que Choisir v Les Films Alain Sarde*, unreported, in matter of technical protection measures (TPM) of DVDs.

[21] Cour d'Appel de Paris (4e chambre B), 22.4.2005, *Perquin et UFC Que Choisir c. SA Films Alain Sarde, Sté Universal Pictures video France et al. (so-called DVD II)*. On the final judgement of the Cour de Cassation, see e.g. *France: right to private copy must yield to DRMs, Supreme Court rules*, in *W.C.R.R.* 2006, 1(4), 19.

[22] CRA, *Assessing the economic impact of adopting certain limitations and exceptions to copyright and related rights in the EU. Analysis of specific policy options*, Prepared for DG Markt by J. Boulanger et al., May 2014, 87,

fn136, http://ec.europa.eu/internal_market/copyright/docs/studies/140623-limitations-economic-impacts-study_en.pdf. In particular, the United Kingdom, Ireland, Malta, Cyprus, Luxembourg, Estonia and Spain do not implement levies. G. Pryor-C. Barnett, *UK private copying exception quashed following challenge*, in *E-Commerce & Law*, August 2015, 8, http://e-comlaw.com/e-commerce-law-and-policy/article_template.asp?ID=2372 and E. Rosati, *Lack of fair compensation requirement in UK private copying exception not supported by sufficient evidence, High Court rules*, in *The IP Kat*, 19.6.2014, <http://ipkitten.blogspot.co.uk/2015/06/lack-of-fair-compensation-requirement.html> report the same datum.

[23] For instance, article 71-septies of the *legge n. 633/1941* (the Italian copyright law) provides that a part of the price of the recording devices (so-called *equo compenso*) goes to the SIAE, the Italian *collective rights management* society. As reported in the judgement BASCA, when the Member States impose levy schemes, they have in the main been introduced by way of the imposition of a levy charged on consumers of blank media (CDs, DVDs, Blu-Ray discs, etc.) and equipment (MP3 players, printers, PCs, etc.). The levies were structured differently but in the main, followed two principal routes. First, the imposition of a charge based upon a percentage of the manufacturing or import price implying that the harm sustained by right holders was a function of the price of the media or device. Secondly, a charge which increased with the memory capacity of the products upon the assumption that the greater the memory or storage capacity the greater the potential for private copying. Revenues collected were then distributed to right holders via collecting societies albeit that the manner of re-distribution varied greatly.

[24] I. Brown-N. Bohm, *UK*, in *Implementing the EU Infosoc Directive* (5), 121.

[25] However, see the Copyright (Visually Impaired Persons) Act 2002.

[26] Brown-Bohm (16), 121.

[27] Brown-Bohm (16), 122.

[28] Cf. *Sony Music Entertainment (UK) Ltd v. EasyInternetcafé Ltd*, [2003] EWHC 62 regarding commercial services allowing customers to download sound recordings on publicly accessible terminals and to have the café employees burn those files to CDRs. I imagine that this is the reason because the explanatory memorandum to the private copy regulations read “These Regulations amend the way in which this exception is

implemented in the UK.”

[29] G. Westkamp, *The Implementation of Directive 2001/29/EC in the Member States*, Study commissioned by the European Commission’s Internal Market Directorate-General, February 2007, 17, http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf.

[30] E.g. under art. 23 of the *Prawo autorskie* (ustawa z 4 lutego 1994 r. tekst jednolity z 2006 r.), the Polish copyright law, “Bez zezwolenia twórca wolno nieodpłatnie korzystać z już rozpowszechnionego utworu w zakresie własnego użytku osobistego” (It shall be permitted to use free of charge the work, which has been already disseminated for purposes of private use without the permission of the author).

[31] CJEU, 4th ch., 5.3.2015, C-463/12, *Copydan Båndkopi v Nokia Danmark A/S*, not yet reported; CJEU, 4th ch., 10-4-2014, C-435/12, *ACI Adam BV and others v. Stichting de ThuisKopie e Stichting Onderhandeligen ThuisKopie vergoeding*, not yet reported; CJEU, 2nd ch., 11.7.2013, C-521/11, *Amazon.com International Sales Inc. and o. v Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH*, in *European Court Reports* 2013 -00000; CJEU, 4th ch., 27.6.2013, C-457/11-C-460/11, *Verwertungsgesellschaft Wort (VG Wort) v Kyocera and o., Canon Deutschland GmbH and o. v Verwertungsgesellschaft Wort*, in *European Court Reports* 2013 -00000; CJEU, 3rd ch., 9.2.2012, C-277/10, *Martin Luksan v Petrus van der Let*, in *European Court Reports* 2012-00000; CJEU, 3rd ch., 16.6.2011, C-462/09, *Stichting de ThuisKopie v Opus Supplies Deutschland GmbH and o.*, in *European Court Reports* 2011 I-05331; CJEU, 3rd ch., **21.10.2010**, C-467/08, *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)*, in *European Court Reports* 2010 I-10055.

[32] A. Vitorino, *Recommendations resulting from the Mediation on private copying and reprography levies*, Brussels, 31.1.2013, http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf. As remembered recently by **Mr Advocate General Cruz Villalón in its opinion on the *Copydan Båndkopi v Nokia Danmark A/S* delivered on 18.6.2014**, at the invitation of the Commission, which had announced in its communication of 24 May 2011, entitled *A Single Market for Intellectual Property Rights — Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe* [COM(2011) 287 final, paragraph 3.3.4), its intention to appoint a high level independent mediator tasked with bringing the main players to an agreement on certain aspects of the private copying levy, Mr António Vitorino put forward recommendations, including one specifically on this point. The first of his recommendations proposes clear acceptance that reproduction for private purposes of works acquired in the context of on-line services, and therefore under right holders' licences, do not cause any harm to the right holders and therefore do not require any compensation in the form of a private copying levy. On 17.7.2013, Mr Barnier on behalf of the Commission reported that Mr Vitorino's findings had been discussed with the Member States at the Competitiveness Council on 29 May 2013, but he professed that "Notwithstanding that Mr Vitorino's Recommendations are not meant to be endorsed as such by the College, the Commission will now assess to what extent some of them could be addressed at a national level, including in a coordinated way, and whether some could require specific action at EU level."

[33] For instance, Germany has introduced the *Vervielfältigungen zum privaten und sonstigen eigenen Gebrauch* in 1965 (as a result of *GEMA v. Grundig* 1 ZR 8/54, 17 BGHZ 266 [1955] GRUR 492, s. § 53 Abs. 1-3 of the *Urheberrechtsgesetz*) and the *Auteurswet* provides the private copy exception since 1993. Recently, CJEU, 4th ch., 10-4-2014, C-435/12 (note...) ruled that Article 5(2)(b) of the Infosoc Directive does not apply to private copying from an illegal source (cf. J. Kirwin, *Netherlands: copyrights – CJEU strikes down Dutch law allowing illegal downloading via private copy tax*, in *W.I.P.R.* 2014, 28(5), 15-16). In the Netherlands, a private copy levies covered both copying from a legal, as well as from an illegal source. Consequently on 28.10.2014, the *Minister van Veiligheid en Justitie*, while extending the private copy levy system until 1.1.2018, has lowered the levy by 30% (*Besluit van 28 oktober 2014, houdende wijziging van het Besluit van 23 oktober 2012 totaantwijzing van de voorwerpen, bedoeld in artikel 16c van de Auteurswet, en tot vaststelling van nadere regels over de hoogte en de verschuldigdheid van de vergoeding, bedoeld in artikel 16c van de Auteurswet*). In the case law see *FTD BV v Eyeworks Film & TV Drama BV*, [2011] E.C.D.R. 7, where the *Gerechtshof* (Den Haag), moving from the consideration that Dutch parliamentary records showed that the government intended the private home copying defence to be applicable where there was downloading from both legal and illegal sources (since the user could not be asked to judge whether the original source was authorised or not), concluded that "The interests of the rights holders were not therefore unreasonably harmed, and that complied with the three-step test and thus the requirements of art.5 (...) Accordingly, the provision (...) of intermediary services which were used for the purposes of downloading from illegal sources, as well as the (structural) facilitating or encouraging of that downloading, was not forbidden or unlawful under Dutch copyright law."

[34] Directive 2009/24/EC of the European Parliament and of the Council of 23.4.2009 on the legal protection of computer programs (see especially article 5).

[35] The 8th of The Copyright (Computer Programs) Regulations 1992 inserted section 50A in the CDPA, whereby "(1) It is not an infringement of copyright for a lawful user of a copy of a computer program to make any back up copy of it which it is necessary for him to have for the purposes of his lawful use. (2) For the purposes of this section and sections 50B and 50C a person is a lawful user of a computer program if (whether under a licence to do any acts restricted by the copyright in the program or otherwise), he has a right to use the program. (3) Where an act is permitted under this section, it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict the act (such terms being, by virtue of section 296A, void)." The provision is complemented by section 50C whereby "It is not an infringement of copyright for a lawful user of a copy of a computer program to copy or adapt it, provided that the copying or adapting— (a) is necessary for his lawful use; and (b) is not prohibited under any term or condition of an agreement regulating the circumstances in which his use is lawful."

[36] The Regulations have inserted as well paragraph 1B in Schedule 2, and it concerns “*Personal copies of recordings for private use*”. It has not any notable difference from section 28A, therefore it will not be covered in this work.

[37] The section indicates “not an infringing copy” as a condition separate by the lawful acquisition, but I believe that if it is an infringing copy it cannot be properly considered lawful. Moreover, the copy must not have been made under any other provision, which permits the making of a copy without infringing copyright.

[38] In my understanding, the phrase “in an electronic storage area accessed by means of the internet or similar means which is accessible only by the individual” can be interpreted as referring to cloud computing (even though the restriction to accessibility does not fit the multi-tenancy characteristic of the cloud. As to “the person responsible for the storage area”, it could refer to the cloud provider. My impression is corroborated by “*Modernising Copyright: a modern, robust and flexible framework*”

(<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/response-2011-copyright-final.pdf>): “The Government proposed a technology-neutral private copying exception which would include remote private storage of copies (including private “cloud” storage). Technology neutrality is likely to be increasingly important to consumers and technology providers as the use of cloud services and remote storage becomes more common.” This will cover cloud storage services such as, say, Dropbox, Google Drive, and OneDrive, but not other kinds of cloud services like Spotify or Apple Music; providers of these services will continue to require appropriate licences from copyright owners.

[39] It is true, however, that freedom of contract is not what it used to be at the time of *Printing and Numerical Registering Co v Sampson* (1875) 19 Eq 462. At least since the late 20th century, the judges “still had before them the idol, ‘freedom of contract.’ They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called ‘the true construction of the contract’.” (*George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803)

[40] The remedy itself has to be balanced with the right of the copyright owner to adopt adequate measures limiting the number of copies which may be made.

[41] The provision itself describes this restrictive measures as “any technology, device or component designed, in the normal course of its operation, to protect the rights of copyright owners, which has the effect of preventing a copyright work from being copied (in whole or in part) or restricting the number of copies which may be made.”

[42] The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 came into force on 1.6.2014. It amends sec. 28, inserts sec. 29A, 40B and par. 1C-1D, 6C-6H in sched. 2, substitutes sec. 32, 35, 36, 41-43, 61(3) to (6), 75 and par. 4, 6, 21 of sched. 2.

[43] The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, into force since 1.10.2014, following 5(3)k Infosoc inserted sec. 30A CDPA and sched. 2, par. 2A.

[44] The Copyright and Rights in Performances (Disability) Regulations 2014 was made on 19.5.2014 and came into force on 1.6.2014. It substitutes sec. 31A, 31B, 31F CDPA and inserts par. 3A-3E in sched. 2.

[45] The Copyright (Public Administration) Regulations 2014 came into force on 1.6.2014 and substituted sec. 47(2) and (3), 48(2) and (3) CDPA, while revoking sec. 118A of the Patents Act 1977.

[46] I. Hargreaves, *Digital Opportunity: an Independent Review of Intellectual Property and Growth*, May 2011; it makes recommendations about how the national and international intellectual property system can best work to promote innovation and growth.. The full report is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf .

[47] Hargreaves (note 46), 42, italics added.

[48] *The Government Response to the Hargreaves Review of Intellectual Property and Growth*, 3.8.2011. The full response is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32448/11-1199-government-response-to-hargreaves-review.pdf .

[49] <http://mcn.edu/pipermail/mcn-l/2012-December/006228.html>

[50] There are other exceptions and limitations which are left untouched by the 2014 reform. See e.g. temporary copies and incidental inclusion.

[51] The fair use doctrine of the US is wider and more favourable to the public interest. In *Campbell v. Acuff-Rose Music, Inc.* (1994), for instance, the Supreme Court recognised that the parody qualified as “fair use” even though the purpose was commercial and the copying regarded the heart of the previous work (the hip-hop group 2 Live Crew had parodied Roy Orbison’s “Oh, Pretty Woman”).

[52] This overview owes much to https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448269/Exceptions_to_copyright_-_An_Overview.pdf , where the reader can find further details and precisions, which here were unnecessary. I will not cover the exceptions and limitations that have not been touched, such as the incidental inclusion.

[53] One could infer from the wording that the balance occurs merely between private interests. At a closer look, however, one recognises many public interests epitomised by the named stakeholders. Yet the linguistic choice is a sign of commonplace approach to copyright in the UK.

[54] Hargreaves (note...), 48.

[55] Hargreaves (note...), 49.

[56] *Modernising Copyright* (note...), 22 (annex A).

[57] *Modernising Copyright* (note...), 23.

[58] See pages 16-18 of the Impact Assessment.

[59] *EMI takes locks off music tracks*, 2.4.2007, <http://news.bbc.co.uk/1/hi/technology/6516189.stm> .

[60] Intellectual Property Office, *Private copying*, edited by R. Camerani et al., March 2013, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309681/ipresearch-private-150313.pdf .

[61] *Modernising Copyright* (note...), 24.

[62] *Modernising Copyright* (note...), 24.

[63] As recognised in the judgement BASCA, the power under the Directive allowed Member States to introduce exceptions of variable scope; for instance in principle it would allow Member States to create an exception to copyright covering a purchaser of a digital download who copied it to a friend or a family member.

[64] It was not a success across the board. In fact, in relation to the substantive issues (i.e. II-VI) the judge has decided Issues II, III, V, and VI in favour of the Secretary of State. These issues between were as follows. Issue II: The meaning of “harm”: This is relevant to the identification of that for which compensation is due under Article 5(2)(b). The Claimants submit that the Secretary of State misunderstood the concept and accordingly misapplied Article 5(2)(b). Issue III: The alleged irrationality and/or inapplicability of the pricing-in principle: The Claimants submit that the pricing-in economic principle is irrational, illogical and inapplicable. Pricing-in cannot properly exist in the absence of an ability to price discriminate which ability does not exist in the affected music, publishing and film sectors. Issue V: Whether the Secretary of State predetermined the outcome of the consultation: The Claimants contend that the Secretary of State was so firmly committed to introducing an exception without a compensation scheme that his “pre-

disposition” in truth was a “predetermination” which, in law, was unlawful. Issue VI: Does the introduction of Section 28B constitute unlawful State aid within the meaning of Article 107 TFEU, which was not notified to the Commission under Article 108(3) TFEU and so is unlawful: The impact assessments record that the new exception will confer a benefit worth about £258 million over ten years on technology providers. It is submitted that this amounts to unnotified illegal aid granted “through State resources” contrary to Articles 107 and 108 TFEU.

[65] In the second hearing the issues are whether the Copyright and Rights in Performance (Personal Copies for Private Use) Regulations 2014 ought to be quashed (and if so, whether *ex nunc* or *ex tunc*); whether a reference ought to be made to the Court of Justice in relation to the concept of ‘harm’; the costs.

[66] Cf. *R(ICI Plc) v Attorney General* [1987] 1 CMLR 72 (CA). At paragraph [112] Lord Oliver stated: “It must be wrong in principle, when a litigant has succeeded in making good his case and has done nothing to disentitle himself to relief, to deny him any remedy, unless, at any rate, there are extremely strong reasons in public policy for doing so.” According to me, in the BASCA case there were strong public policy reasons not to quash the regulations, given the importance of the private exceptions in pursuing the ends themselves of copyright, but it is clear that this view is not shared by Mr Justice Green.

[67] The High Court declines to make any ruling as to whether or not the Regulations are void *ex tunc*. It will be for a defendant in future proceedings to explore and raise this issue, including whether the effect of the fact that they relied at the time upon Section 28B creates some species of estoppel, legitimate expectation or fair use defence in private law and whether, if such exists, this goes to the cause of action or the remedy or both.

[68] The High Court, thus, does not want “to create what is in effect a forensic sword of Damocles to be dangled over the head of the Secretary of State.”

[69] CJEU, 3rd ch., 9.2.2012, C-277/10 (note 31).

[70] CJEU, 2nd ch., 11.7.2013, C-521/11 (note 31).

[71] CJEU, 3rd ch., **21.10.2010**, C-467/08 (note 31).

[72] CJEU, 4th ch., 5.3.2015, C-463/12 (note 31).

[73] Cf., e.g., *Ashdown v Telegraph Group Ltd* : “Considerations of public interest are paramount.”

[74] N. Helberger-P.B. Hugenholtz, No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law, 22 Berkeley Tech. L.J. 1061 2007 (1070), who cite L. Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World*, Random House, New York, 2001, 249, http://www.the-future-of-ideas.com/download/lessig_FOI.pdf (he refers to y Suzanne Scotchmer, “Standing on the Shoulders of Giants: Cumulative Research and the Patent Law,” *Journal of Economic Perspectives* 5 (Winter 1991).

[75] *Dicebat Bernardus Carnotensis nos esse quasi nanos gigantium humeris insidentes, ut possimus plura eis et remotiora videre, non utique proprii visus acumine, aut eminentia corporis, sed quia in altum subvehimur et extollimur magnitudine gigantean*” (John of Salisbury (Joannes Saresberiensis), *Metalogicon*, III, 4 (1159)). An introduction and a translation are available at http://gossettphd.org/library/salisbury_metalogicon.pdf , whereas I have consulted the Latin version *Joannis Saresberiensis Postea Episcopi Carnotensis Opera Omnia* , ed. by J.A. Giles, V, Oxford, 1848, 11 ff. (where the title is *Metalogicus*), thanks to Google Books. As shown by Y. Iwakuma, *Influence*, in *The Cambridge Companion to Peter Abelard*, ed. J. Brower and K. Guilfooy, Cambridge: Cambridge University Press, 2004, there is no surviving text explicating entirely and defending Bernard of Chartres’s ideas, which anyway arrived to John of Salisbury via Gilbert of Poitiers, William of Conches, and Richard the Bishop (cf. P.E. Dutton, *Bernard of Chartres, Glosae super Platonem*, Pontifical Institute of Medieval Studies, Toronto, 1991, esp. 21-45).

[76] Cf. J. Smiers, *La propriété intellectuelle, c’est le vol!*, in *Le Monde Diplomatique*, September 2001,

<http://www.mondediplomatique.fr/2001/09/SMIERS/15604> ; D. Cohen, *La propriété intellectuelle, c'est le vol*, in *Le Monde*, 8.4.2001; D. Sagout-Duvauroux, *La propriété intellectuelle, c'est le vol! Le débat sur le droit*

d'auteur au milieu du XIXe siècle, in *L'Economie politique*, 2004, II, 34; J. Naughton, *Intellectual property is theft. Ideas are for sharing*, in *The Observer*, 9.2.2003.

[77] P.-J. Proudhon, *Qu'est-ce que la propriété? ou Recherche sur le principe du Droit et du Gouvernement*, Paris, 1840, 1-2, writes "*Si j'avais à répondre à la question suivante : Qu'est-ce que l'esclavage ? et que d'un seul mot je répondisse : c'est l'assassinat, ma pensée serait d'abord comprise. Je n'aurais pas besoin d'un long discours pour montrer que le pouvoir d'ôter à l'homme la pensée, la volonté, la personnalité, est un pouvoir de vie et de mort, et que faire un homme esclave, c'est l'assassinat. Pourquoi donc à cette autre demande : Qu'est-ce que la propriété ? ne puis-je répondre de même : c'est le vol, sans avoir la certitude de n'être pas entendu, bien que cette seconde proposition ne soit que la première transformée?*". I believe that one can hear Brissot's echo in J.P. Brissot de Warville, *Recherches philosophiques sur le droit de propriété considéré dans la nature*, Paris, 1780, 26: "*La nature ne t'a point accordé ce droit pour te faire trainer dans des équipages fastueux, pour t'enivrer dans de somptueux repas, pour e'blouir tes semblables par l'étalage insolent de tes richesses. A ta porte cent malheureux meurent de faim, & toi rassasié de plaisirs, tu te crois propriétaire; tu te trompes: les vins qui sont dans tes caves, les provisions qui sont dans tes maisons, tes meubles,, ton or, tout est à eux: ils sont maîtres de tout.*". See also where the Girondist says "la propriété exclusive est un crime véritable dans la nature... L'Être suprême a donné la terre à tous les hommes" (42); "*Ce n'est pas le malheureux affamé qui mérite d'être puni; c'est le riche assez barbare pour refuser au besoin de son semblable, que est digne du supplice. Ce riche est le seul voleur; il devrait seul être suspendu à ces infames gibbets, qui ne semblent élevés que pour punir l'homme né dans la misère, d'avoir des besoins; que pour le forcer d'étouffer la voix de la nature, le cri de la liberté; que pour le contraindre à se jeter dans un dur esclavage, pour éviter une mort ignominieuse*" (109); "*Cette propriété civile...n'est pas qu'une usurpation sociale*" (110). Emphasis added.

28 ottobre 2015

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