Regulating Content on Social Media
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Chapter Two
Regulation by copyright laws

In this chapter I consider the application of copyright laws of the US, the UK and Australia to the content-generative activities of social media users. I begin by discussing the following copyright subsistence and infringement issues: the types of subject matter that are protected by copyright laws; originality and authorship requirements; fixation, recording or reduction to material form; the scope of rights protected, including moral rights; available remedies; exceptions to copyright infringement, in particular, the fair use doctrine in the US and the fair dealing exceptions in the UK and in Australia; and finally, conflict of laws issues. I also outline the challenges posed in addressing these issues.

I then apply the copyright laws of each of the three jurisdictions to the content-generative activities undertaken by Jane and other users in the case study, under the first of four hypothetical scenarios in this book. I do not seek here to determine with finality how the copyright issues will be resolved in relation to each activity. Specific analysis is possible only in the context of particular disputes. My purpose is rather to provide a general overview of the interaction between copyright laws and the generation of content in the social media context.

The application of copyright laws in this chapter to the case study constitutes scenario one of this book. It allows for the evaluation of the consistency of the copyright regimes, with each of the terms of service and the technological features, under subsequent scenarios in the later chapters.

I. Relevant copyright standards

The clause on intellectual property rights in the US Constitution provides for the promotion of ‘the progress of science and useful arts, by securing
for limited times to authors and inventors the exclusive right to their respective writings and discoveries'. The US Supreme Court has reiterated in its decisions that copyright exists to promote creative expression and its dissemination, so as to encourage others to build freely upon the ideas contained within copyright works. In the UK the goal for copyright is similarly articulated in the first statute providing for the regulation of copyright, the *Statute of Anne 1709*; its preamble described the act as one for ‘the encouragement of learning’. Australian copyright law has this same goal as its British counterpart.

The respective copyright statutes in the US, the UK and Australia have been shaped, to some extent, by the obligations assumed by each country under international instruments such as the *Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)* and the *Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement)*. In the following sub-sections I will refer to the copyright principles contained in the *Copyright Act of 1976* in the US (*US Copyright Act*), the *Copyright, Patents and Designs Act 1988* in the UK (*UK Copyright Act*) and Australia’s *Copyright Act 1968 (Cth)* (*Australian Copyright Act*). In particular, given that copyright laws protect digital content, including content on social media, I will discuss the potential application of the copyright laws of these three jurisdictions to the content-generative activities on social media. I will also set out the challenges faced in addressing copyright issues pertaining to these activities. This will enable me to examine how social media platforms can alter the effectiveness of copyright laws in regulating users’ content-generative behaviours.

A. Subsistence: works and other subject matter protected by copyright

Given the dual role of users as producers and consumers of content on social media, it is important for users to know whether the content they create and share on social media is copyright protected, and if this entitles them to rights against other users. In addition, users may like to know whether the primary content they use from social media to create secondary content is entitled to copyright protection in its own right. For example, are ‘status updates’ on Facebook and ‘tweets’ on Twitter protected under the copyright laws of the US, the UK and Australia? Addressing questions on copyright subsistence requires a preliminary assessment as to whether the particular content falls under the categories of works and other subject matter protected.
The categories of copyright-protected works are set out in a non-exhaustive list protected under the US Copyright Act. The content available across the five social media platforms surveyed is in textual, image, audio and video formats, and the categories of works that are principally relevant to this book include: literary works; musical works; dramatic works; ‘pictorial, graphic and sculptural works’; audiovisual works; sound recordings; and architectural works. Additionally, compilations of pre-existing materials or data, as well as derivative works – albeit not of materials used unlawfully or not contributed by the author in question – are copyright protected.

In contrast, copyright protection under the UK Copyright Act and the Australian Copyright Act extends to a finite group of works and other subject matter. This group includes literary, dramatic, musical and artistic works, as well as sound recordings and films. As a ‘broadcast’ is broadly defined in the UK to include any internet transmission that takes place simultaneously on the internet, broadcasts are relevant for consideration in the book. On the other hand, a ‘broadcast’ in Australia is more narrowly defined and will not be relevant. Additionally, because of the limited definitions of ‘published editions’ in the UK and the references made to ‘published editions’ in Australia, published editions are not relevant to this book.

At the same time, as minor contributions of content are incorporated through incremental activities on social media and are regular occurrences on social media, users are likely to be confused on whether content created or used by them with minimal effort is protected under copyright laws. Mature copyright systems protect expressions, but not ideas, facts and other building blocks of literary and artistic expression. In the US such material, whether or not embodied in copyright-protected works and subject matter, is expressly excluded from copyright protection. For instance, the US Copyright Office Regulations provide, as examples of materials not protected by copyright and of which applications for registrations will not be entertained, ‘words and short phrases such as names, titles and slogans’ and, among other things, ideas, plans and so on. The axiom that copyright protection only covers the expression of ideas has been described as an amorphous characterisation rather than a principled guidepost. As such, courts in the US have developed two doctrines to fill the gaps.

With reference to Goldstein and Hugenholtz’s description of the doctrines, the first is the doctrine of merger and the second, ‘scènes à faire’. Under these two doctrines expressions will not be copyright protected if the underlying ideas can be expressed in only one or a limited number of ways. While the first doctrine usually applies to functional works, such
as rules, forms and computer programs, the second applies mainly to fictional works, including novels and dramas. Because the second doctrine withholds copyright protection from elements such as narrated incidents that are preordained by unprotected ideas, including basic plot, this could mean that a fair amount of content on social media platforms — being expressions which flow from the commonplace ideas shared on the platforms — is not copyright protected. An example of such content is a status update on Facebook, say a photograph of the blue skies on a sunny day, accompanied by a comment that reads: ‘Perfect weather for a stroll today!’ This comment on its own will not be copyright protected. Also, as users can undertake content-generative activities simultaneously in relation to the same content on social media, they may frequently arrive at similar expressions that necessarily follow the same idea.

The two doctrines in the US described above are employed to effectuate the distinction between ideas and expressions. This idea–expression dichotomy similarly applies in the UK and in Australia, and results in the non-protection of ideas under copyright laws.

B. Subsistence: originality

Whether content generated on social media is protected under copyright laws will be determined by the originality of such content. This concept of originality under copyright laws is closely linked to the concept of authorship, which will be discussed next.

The measure for originality entitling a work to copyright protection is the independent creation by its author (as opposed to copying from other works) and the exercise of some minimal degree of creativity. In the US, originality is the touchstone of copyright protection. Differentiating between a mechanical arrangement of content that is not copyright protected and a compilation that is — provided that there is some creative effort found in the arrangement or selection of material — can be challenging. For example, is a collage incorporating a few images shared previously on Pinterest deserving of copyright protection on this measure? If the material variation test is used to counter the ambiguity of the definition of ‘creativity’, the question that arises will be whether the secondary work contained more than a trivial variation vis-à-vis the original work and is hence copyright protected. Nevertheless, the analysis to be undertaken in respect of such variations in terms of number, size, abstract significance and so on necessarily entails multiple subjective judgements which can result in different outcomes.
In the UK and in Australia, the statutory requirement of originality for copyright protection only applies in relation to literary, dramatic, musical and dramatic works; it does not apply in relation to other subject matter such as sound recordings, films and broadcasts. In both jurisdictions, copyright protection has to be the result of a person’s ‘skill, labour or experience’, in addition to being more than a copy of earlier content. It is worth noting that the threshold to be met for the originality requirement in all three jurisdictions is fairly low.

Further, in the UK, the requirement of sufficient skill and/or labour is suggested to operate as a *proviso de minimis* (ie, a court will refuse to consider trifling matters) and henceforth excludes works in which the degree of literary composition is slight from copyright protection. Similarly, in Australia, Ricketson has suggested that the application of the *de minimis* principle results in the denial of copyright protection in works on the basis that they are not original, or alternatively are ‘insubstantial’ in purely quantitative terms. There is also the consideration that conferring copyright protection on single words or phrases may intrude too much on the rights of the public, in the case of which the real reason for denying copyright protection is suggested to be one of public policy.

In this respect English and Australian courts have not recognised as copyright-protected works the following: an advertisement consisting of four common sentences; the title of a song; the word ‘Exxon’, which is a well-known trademark; a short series of words communicating the need for assistance; and headlines.

The question then is whether simple activities such as the posting of a brief ‘status update’ on Facebook, commenting on content shared on Pinterest or YouTube and ‘tweeting’ on Twitter, as well as making minor edits on Wikipedia, result in content that is copyright protected. Given that much of the content on social media platforms will be short or insubstantial works, add-ons and revisions, ascertaining whether content is copyright protected in an instance will require consideration of the following:

(i) The application of the idea–expression dichotomy discussed in sub-section (A);
(ii) The satisfaction of the originality requirement; and/or
(iii) The application of the *de minimis* principle (ie, copyright-protected works need to comprise a certain minimal amount of content).

For example, a ‘tweet’ – limited to a maximum of 140 characters on Twitter – may not be copyright protected because of either or all of
the following reasons: the ‘tweet’ consists of facts or ideas; the ‘tweet’ is insufficiently original; or the ‘tweet’ fails to meet the basic quantitative requirement. The joke of the freelance writer Olga Lexell, which reads: ‘Saw someone spill their high end juice cleanse all over the sidewalk and now I know God is on my side’ is therefore more likely to be copyright protected than a ‘tweet’ that reads: ‘Loving the sunny Melbourne’, given that all three of the reasons apply in the case of the latter ‘tweet’.

The rate at which content is simultaneously created, modified and disseminated by social media users gives rise to additional considerations. The degree of originality between successive versions of content (for instance, where derivative material is based upon pre-existing material) required for copyright protection, as well as the point at which content contributed as an add-on or revision becomes a copyright-protected work in terms of quantum, raise issues that are difficult to resolve. Richard Prince’s recent sale of the enlarged images shared by other users on Instagram as artworks comes to mind here. In between an original image first shared by the relevant Instagram user and the subsequent artwork incorporating this image sold by Prince, a few successive versions of the modified image were possibly generated on Instagram – this happens when users, including Prince, comment on the image. The ‘modified composites’ of the images circulating on Instagram which incorporate other users’ (including Prince’s) comments are arguably not derivative works; there is little originality and authorial activity to qualify them as warranting separate consideration. It is far from certain, however, whether Prince’s artworks will qualify as copyright-protected derivative works by virtue of his enlargement and re-contextualisation of the relevant images.

Indeed, there is no clear approach under existing authorities that can definitively address the issues raised above, to give certainty as to whether specific content on social media (whether new or a successive version of content) is copyright protected. Moreover, given the three criteria highlighted above, it is foreseeable that a large volume of content on social media may not be copyright protected under the copyright laws of all three jurisdictions.

C. Subsistence: authorship

Next the authors of content on social media, in whom copyright resides, have to be identified. While the US Copyright Act expressly provides that copyright vests in the author or authors of the work, and that the authors
of a joint work are co-owners of the copyright of such work, the term ‘author’ remains undefined. A ‘joint work’ has been defined as a work prepared by two or more authors with the intention that their contributions be merged into inseparable parts of a unitary whole. This requirement for contemporaneous intention has been suggested to be satisfied even where participants do not know one another and have not worked within the same time frame, so long as each participant contributed with the intention of integrating his or her contribution into a unitary product. Examples of such joint works, each created by multiple authors holding the intention to merge their contributions into a single product, are the content pages on Wikipedia.

At the same time, under the UK Copyright Act, an ‘author’ is defined as the person who creates a work, and ‘a work of joint authorship’ is defined as a work produced by the collaboration of two or more authors and in which the contribution of each author is not distinct from the other(s). In Australia the term ‘author’ is defined only in relation to a photograph under the Australian Copyright Act; similarly, ‘a work of joint authorship’ refers to a work that is produced by the collaboration of two or more authors and in which the contributions of each author are inseparable from one another. In view of these definitions in the UK and in Australia, it is less clear if content pages on Wikipedia are ‘works of joint authorship’. Although the history of a content page sets out the individual contribution made to that page by each user, each user’s contribution to, or editing of, a single sentence in the page can be so minor that it may be practically unfeasible to distinguish the individual contribution of one user from another. If this is the case, such content pages on Wikipedia are ‘works of joint authorship’.

Further, in spite of the provision for joint authorship under the copyright laws of all three jurisdictions, it may be arduous to identify the users who have authored content on social media together. This is because such content frequently comprises parts from several users that are inseparable from one another, as per the definitions given for works jointly authored. Previous criticisms of copyright laws for failing to accommodate the realities of contemporary writing practices still hold true today, as collaborative writing practices are shoehorned into the conventional human-centric concept of authorship. While it remains crucial to identify the human authors of works jointly authored, it may be tedious to do so in relation to all such content on social media. For example, a user can write a segment for an article that incorporates existing contributions from other contributors on Wikipedia. Although all of the authors of this article are joint authors, their identification through their
 usernames is subject to their retention of their Wikipedia user accounts. Also, more often than not, the Wikipedia platform will be attributed as the source of the relevant content – in this sense, the identification of the joint authors of content on Wikipedia takes a back seat.

In this respect Ginsburg, in critiquing the techno-postmodernist view of the ‘death of the author’ and the rising importance of the reader, highlights that under this view, the reader no longer draws from the authored works of others. Instead, the reader casts the contents of his or her bucket into the ‘constantly changing stream of reader-modified creations’. In this sense, the reader is characterised as a creator, as reading is an act of creative interpretation in which readers give meaning to the texts they peruse. Social media users are active participants: they interact with, and continuously contribute to, existing works, often to the same extent as the original producers of these works. At the same time, Bently’s observation that the author is a notion to be sustained only for an instant is also relevant to the generation of content on social media. This is particularly the case as social media platforms are designed to allow for a great extent of collaborative participation from their users, in creating, modifying and disseminating content. Because active interaction with content is so often encouraged on social media, with no single user able to impose his or her unilateral significance as creator over a piece of content, the palpable challenge faced is in deciding on whom copyright protection is vested. For the reasons given above, these dilemmas around the designation of authorship (whether single, joint or multiple) and the identification of authors are amplified when it comes to content generated on collaborative projects such as Wikipedia.

D. Subsistence: fixation, recording or reduction to material form

Where originality and authorship requirements standards are met, the issue of fixation, recording or reduction to material form comes into play. It has been argued that the content created on some categories of social media – for instance, social networking platforms such as Facebook and blogs (especially micro-blogs such as Twitter) – and which is not stored separately elsewhere does not meet the fixation standard, or its equivalent, for copyright protection. This is because content on such platforms is incredibly fluid, and hence can be deleted just as quickly as it is posted. For example, Twitter only displays the 3,200 most recent ‘tweets’. Although old ‘tweets’ are not displayed on Twitter, these ‘tweets’ are stored and hence copyright protected; moreover, they can still be located. Further, some social media platforms may invite the
continual participation of users with regard to the collaborative content on such platforms. Wikipedia, a long-term collaborative project that is open-ended, and that allows users to create, modify and share content over an indefinite period of time, is one example of such a platform. On the Wikipedia platform, given that content is constantly evolving, it is difficult to identify at which point content, and further what content, is fixed, recorded or reduced to material form, and thus copyright protected.⁸⁰

In the US copyright protection is conferred on an original work when it is ‘fixed in any tangible medium of expression’ by or under the authority of the author.⁸¹ So long as the embodiment of the work in a copy ‘is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration’,⁸² the nature of the medium is immaterial. In this respect the term ‘copies’ is broadly defined and refers to material objects, other than phonorecords, in which a work is fixed by any known method (whether existing now or later developed) and from which a work can be communicated, either directly or with the aid of a machine or device. Therefore copyright protection is granted to a work that is fixed, wherever that fixation takes place, whether on a web page of a social media platform or otherwise.

In the UK copyright only subsists in literary, dramatic and musical works that are ‘recorded, in writing or otherwise’.⁸³ Furthermore, an ‘artistic work’ is defined to mean, among others, a painting, drawing or photograph (i.e., defined also as a recording of light or other radiation on any medium).⁸⁴ In addition, ‘sound recordings’ and ‘films’ are broadly defined to include recordings on any medium.⁸⁵ Similarly, in Australia, in respect of literary, dramatic, musical and artistic works, reference is made instead to works that are reduced to writing or some other material form,⁸⁶ the latter of which is defined to include any form of storage of the work.⁸⁷ ‘Sound recordings’ and ‘cinematograph films’ in Australia are also broadly defined.⁸⁸ Thus, in both the UK and in Australia, I argue that the wide definitions in relation to recording or reduction to material form, as the case may be, include the recording or storing of content on social media – such content can thus be copyright protected.

Finally, following the satisfaction of the fixation requirement, or its equivalent, copyright subsists in works and other subject matter only when conditions tied to the publication or authored status of such works or other subject matter are met. For instance, in the US published works (being literary, musical, dramatic, pictorial, graphic, sculptural, audiovisual or architectural works, as well as sound recordings, compilations and derivative works)⁸⁹ are copyright protected if, among other
things,他们 are first published in the US or in a foreign nation that is a treaty party. Sound recordings are copyright protected only if they are first fixed in a treaty party. Unpublished works, on the other hand, are granted copyright protection regardless of the nationality or domicile of the author.

It is noted that the term ‘publication’ is defined as the distribution of copies of a work to the public by sale or other transfer of ownership. On the face of this definition, content on social media may be considered unpublished in the US, as such content is not distributed to the public by sale or other transfer of ownership. Thus copyright’s protection of content on social media could exist irrespective of the nationality or domicile of the relevant author. There is hence no need to determine the precise venue of first publication or fixation of content on social media platforms: the treatment of content on social media as unpublished obviates this difficulty. This would mean that content created by social media users without any connection to the US, but which meets the other copyright subsistence requirements discussed above, is copyright protected in the US.

In the UK a literary, dramatic, musical or artistic work, sound recording or film qualifies for copyright protection if such work, sound recording or film is first published in the UK, or the author is a qualifying person (such as a British citizen or a person resident in the UK). The term ‘publication’ is, however, defined more broadly than in the US to include not only the issue of copies, but also the making available of literary, dramatic, musical or artistic works to the public by means of an electronic retrieval system. While there is no definition of the term ‘copies’, the definition of ‘copying’ is instructive. In this respect ‘copying’ can include, among other things, the storing of a literary, dramatic, musical or artistic work in any medium by electronic means, as well as the making of copies that are transient or incidental to the use of such work. By the application of these definitions, content shared on social media constitute published works in the UK.

In Australia the requirements for copyright protection are similar and refer, among other things, to the place of first publication, or the nationality or domicile of the author if the relevant work is published. The term ‘publication’ is widely defined as occurring when reproductions of literary, dramatic, musical or artistic works are supplied, whether by sale or otherwise, to the public. Therefore content on social media can constitute published works in Australia, just as in the UK. For such works to be copyright protected in either jurisdiction, the first publication, nationality or residency requirements mentioned earlier will need to be
102 While nationality and domicile are relatively easy to ascertain if the users who authored the content can be identified, the same cannot be said of identifying the country of first publication, given the global reach of content shared on social media.

This problem is somewhat mitigated by the principle of national treatment stipulated under article 5(1) of the Berne Convention which requires the country in which protection is claimed to treat foreign and domestic authors alike.103 Although it may be challenging to identify the venue of first publication, it is more likely than not that the nationality and domicile of a user is that of a contracting party to the Berne Convention, given that very few countries are not contracting parties.104 In general, so long as a user is a national or resident in a Berne Convention country, and other copyright subsistence requirements are met, the content he or she creates on social media will be copyright protected, even if the venue of first publication (if published) cannot be ascertained.

This means that, because all three countries are members of the Berne Convention,105 just as content created by a social media user resident in the UK can receive copyright protection as unpublished content in the US, content created on social media by a person resident in the US will similarly receive copyright protection as published content in the UK, pursuant to The Copyright (Application to Other Countries) Order 1993 in the UK.106 The same content, if available online in Australia, being published in a Berne Convention country, is hence copyright protected by virtue of the Copyright (International Protection) Regulations 1969 in Australia.107

E. Infringement: scope of protection

Once the copyright subsistence requirements are satisfied and the relevant content (whether on social media or otherwise) is found to be copyright protected, the next step is to inquire into the specific rights infringed by the activities undertaken with regard to such content. A copyright holder is entitled to a bundle of exclusive rights under the US Copyright Act.108 Unless otherwise stated, these rights are held by authors of the full range of works that content on social media platforms can constitute, namely: literary works; musical works; dramatic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.109 The most basic right in the bundle to which a copyright holder is entitled is the right of reproduction.110 As mentioned earlier, the term ‘copies’ is liberally defined. It refers to the material objects in which a work is fixed and
from which a work can be *communicated*, either directly or with the aid of a machine or *device*.\textsuperscript{111} This broad definition of ‘copies’ includes the reproductions of pre-existing content when users interact with such content on social media. Such reproductions can occur, for example, when users share another user’s ‘status update’ on Facebook, ‘re-pin’ a ‘pin’ on Pinterest or ‘re-tweet’ another user’s ‘tweet’ on Twitter.

Under the *UK Copyright Act*, the right of reproduction is one among others in a similar bundle of rights.\textsuperscript{112} ‘Copying’\textsuperscript{113} can mean, among others: the storing of a literary, dramatic, musical or artistic work in *any* medium by *electronic means* (ie, in a material form);\textsuperscript{114} the making of a copy in two dimensions of a three-dimensional work;\textsuperscript{115} in relation to a film or broadcast, the making of a photograph of the whole or substantial part of any image forming part of the film or broadcast;\textsuperscript{116} and the making of copies that are *transient* or *incidental* to some other use of a work.\textsuperscript{117} This right of reproduction of a literary, dramatic, musical or artistic work in a material form is similarly set out under the *Australian Copyright Act*.\textsuperscript{118} In respect of sound recordings and cinematograph films, copyright holders have the equivalent right to make copies of the relevant subject matter.\textsuperscript{119}

The term ‘material form’ is widely defined to include *any* form of *storage* of a work or adaptation, or a substantial part of the work or adaptation; at the same time the term ‘copy’ refers to *any* article or thing in which the visual images or sounds comprising a cinematograph film are embodied.\textsuperscript{120} Further, a work, sound recording or film is reproduced if it is converted into or from a digital or machine-readable format.\textsuperscript{121} In addition, the right of reproduction under Australian copyright legislation can be infringed when a two-dimensional work is produced from a three-dimensional artistic work.\textsuperscript{122} There are some exceptions from infringement, including one that applies to the taking of a photograph of a sculpture situated permanently in a public place.\textsuperscript{123} There will, however, be an infringement if a photograph of a privately owned sculpture is shared on a platform such as Pinterest. Therefore some content-generative activities on social media, such as those described above, can involve the infringement of the right to reproduce existing content, whether reference is made to this right in the US, the UK or Australia.

The challenge faced is in differentiating these activities from other activities which involve *de minimis* uses (ie, the forms of copying that are too trivial for copyright laws to apply) and hence do not amount to infringement. In the US, whether the right of reproduction has been infringed is determined by the standard of substantial similarity. The allegedly infringing work is compared with the original work – both to
ascertain the amount of the original work that has been copied, as well as the observability of the original work in the allegedly infringing work (particularly in the case of visual works). In the UK and in Australia, the standard is couched in different terms. The reproduction of the whole or a substantial part of the original work in the allegedly infringing work can amount to infringement. In any case, the application of the standard of substantial similarity in the US may not give rise to a different outcome from that reached in the UK and in Australia (ie, when the test of whether a substantial part of the original work has been reproduced is applied). This is given that the latter also involves looking at the similarities between the original and the allegedly infringing works.

Secondly, the right of a copyright holder to prepare derivative works under the US Copyright Act may be infringed, for example, when other users’ ‘pins’ are modified to form collages on Pinterest or when ‘vidding’ results in new video clips on YouTube. The definition of a ‘derivative work’ under the US Copyright Act refers to ‘a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation or any other form in which a work may be recast, transformed or adapted’ and further states that ‘a work consisting of editorial revisions … or other modifications which, as a whole, represent an original work of authorship’ is a ‘derivative work’. The allegedly infringing derivative work also has to be ‘substantially similar’ to the original before it is seen as infringing.

Further, the scope of application of this right to prepare derivative works is unclear. There are uncertainties as to whether material derived from an original work which does not qualify for copyright protection separately as a secondary work can infringe the derivative works right (although, in any case, the right of reproduction could still be infringed if there is substantial similarity). If the view that a derivative work must be original and qualify for copyright protection for the derivative work’s right to be infringed is adopted, the derivative work’s right will only be relevant in a fairly narrow range of situations with respect to content on social media.

Notwithstanding this, Prince’s sale of art works comprising images shared on Instagram could be an example falling within this range of situations. These resulting art works can be argued to be sufficiently modified (ie, in presentation and scale) by virtue of Prince changing the purpose of the Instagram images to create original works of authorship, and are hence derivative works. They may also appear to be substantially similar to the original images as
these images are readily observable in the art works (although the wholesale embodiment of the images within the art works alone is not determinative), such that they are infringing of the rights to prepare derivative works.

In the UK there is instead the right to make adaptations of works, or to do anything in relation to such adaptations. This right of adaptation is only restricted by copyright in a literary, dramatic or musical work (but not an artistic work). ‘Adaptation’ is further defined under the UK Copyright Act. The forms of adaptations include, among others: in relation to a literary work, a translation of the work or a version of the work in which the story is conveyed mainly by pictures in a form suitable for reproduction; or, in relation to a musical work, an arrangement or transcription of the work. Under the Australian Copyright Act, this right is also referred to as the right of adaptation, and only attaches to a literary, dramatic or musical work (but not an artistic work). What an ‘adaptation’ means is also similarly defined. Additionally, in both jurisdictions, a copyright holder enjoys further rights to do anything in relation to the adaptation of a literary, dramatic or musical work.

In the UK and in Australia, given that the definitions of ‘adaptation’ are different from the definition of a ‘derivative work’ in the US, the right to make adaptations or to do anything in relation to these adaptations is potentially relevant for consideration in relation to different types of content-generative activities. The modification of content, undertaken by users on social media discussed earlier (ie, those that result in derivative works in the US), can, however, be considered in relation as to whether the right of reproduction has been infringed.

Thirdly, the right to distribute is another right in the bundle. It is described, under the US Copyright Act, as the right ‘to distribute copies or phonorecords of the copyright work to the public by sale or any other transfer of ownership, or by rental, lease or lending’. As mentioned earlier, the term ‘copies’ refers to material objects in which a work is fixed and from which a work is communicated. In spite of the lack of express stipulation, the digital transmission of content has been held to fall within the exercise of the exclusive right to distribute. Further, although the transmission of content on social media platforms to the users of such platforms – for example, the sharing of a ‘status update’ on Facebook, a ‘tweet’ on Twitter or information on Wikipedia – is not occurring by sale or any other transfer of ownership, a US court is expected to take a broader view of a copyright holder’s right to distribute his or her content, so as to uphold the exclusive rights held by copyright holders in the digital age. In this respect, the right to distribute can be infringed.
through the usual dissemination or making available⁴⁴ of content on social media.

In the UK the equivalent to the right to distribute is the right to issue copies of a work to the public.⁴⁸ In light of the express exclusion of the subsequent distribution of copies previously put into circulation (from the exercise of this right) under the UK Copyright Act,⁴⁹ this right will not be infringed by the regular dissemination of content on social media, insofar as such dissemination involves content already circulated. Under the Australian Copyright Act, the right to publish is provided for in relation to literary, dramatic, musical and artistic works.⁵⁰ This right to (first) publish under section 31(1)⁵¹ is distinguished from the notion of publication for the subsistence of copyright under section 32.⁵² As in the UK, the right to publish is arguably not infringed by the typical dissemination of content on social media, so long as the content has already been made available to the public. Nonetheless, there are limited situations – such as the sharing of content known privately on social media for the first time (for example, when a private copy of a copyright-protected collage is converted into a digital copy and shared on social media, or when an image of a private sculpture is disseminated for the first time) – which can infringe this right of first publication.

Fourthly, a copyright holder has the right to perform publicly,⁵³ among others, works such as literary, dramatic or musical works, motion pictures or audiovisual works, as well as sound recordings (by means of digital audio transmissions). The term ‘performance’ is defined broadly. Also, the US Copyright Act makes clear that there is actionable infringement when there is a transmission of a performance of a copyright work, and explains what performing a work publicly means (includes performing at a place open to the public or transmitting or otherwise communicating a performance to the public, by means of any device or process, notwithstanding that the performance is received in separate places at different times).⁵⁴ Furthermore, the right to display publicly⁵⁵ applies (in addition to literary, musical or dramatic works) to pictorial, graphic and sculptural works, as well as individual images of motion pictures and other audiovisual works, and is defined broadly enough to include the showing of a copy of a work, either directly or by means of a ‘film, slide, television image, or any other device or process’.⁵⁶

Displaying a work publicly is as widely defined as performing a work publicly, and includes displaying the work at a place open to the public or transmitting or otherwise communicating the display of the work, by means of any device or process, notwithstanding that the display is received in separate places at different times.⁵⁷ A place open to the
public can include a limited space which can accommodate only a few people at any one time, and the performance and display of a work are considered as ‘public’ irrespective of the composition of the audience. Additionally, a copyright holder has the right to perform a sound recording publicly by means of a digital audio transmission.

These broad definitions of public performance and display are intended to accommodate technological changes. This means that some content-generative activities on social media – in particular, the dissemination of content – can infringe the exclusive right of a copyright holder to perform and display publicly his or her content. An example of the former (ie, right to perform publicly) is the uploading of a television episode on YouTube, while an example of the latter (ie, right to display publicly) is the ‘pinning’ of a photograph of a private sculpture on Pinterest – both without the relevant copyright holders’ consent.

In the UK the equivalent rights are the rights to perform, show or play a work in public and to communicate a work to the public. The performance of a literary, dramatic or musical work includes any mode of visual or acoustic presentation, including a presentation by means of a sound recording, film or broadcast of the work. The UK Copyright Act further provides that where copyright is infringed by virtue of the performance, playing or showing of a work, ‘by means of apparatus for receiving visual images or sounds conveyed by electronic means’, the person by whom the images or sounds are sent is not responsible for the infringement. Moreover, the communication to the public of a literary, dramatic, musical or artistic work, sound recording, film or broadcast has been broadly defined to include the broadcasting of the work or the making available of the work to the public by electronic transmission, in a way that members of the public access such copyright work from a place and at a time individually chosen by them.

Given these technologically neutral definitions, the dissemination of content on social media can infringe the rights to perform, play, show or communicate to the public in the UK. This ‘public’, whether in relation to the rights to issue copies (as discussed earlier), to perform, show or play, or to communicate, has been construed as referring to an indeterminate number of recipients, or a fairly large number of persons. More specifically, in respect of a performance made to a limited group of persons, the ‘public’ has been interpreted to refer to a ‘copyright owner’s public’. Such public is considered in relation to the copyright owner – where a copyright owner would be exercising his or her statutory right in performing before an audience described as the owner’s ‘public’ or part of his or her ‘public’, any performance without the owner’s consent to this audience or ‘public’ will infringe his or her copyright.
In relation to the right to communicate, the concept of ‘public’ has been recently qualified in a decision made by the European Court of Justice to refer to a ‘new public’ that was not taken into account by the copyright holder when he or she authorised the initial exercise of his or her copyright.\textsuperscript{168} The consent of the copyright holder is needed for a communication made to the ‘new public’.\textsuperscript{169} Given that the applicability of the concept of ‘new public’ in the UK is uncertain,\textsuperscript{170} some content-generative activities, such as those discussed above (ie, the activities on YouTube and Pinterest) will likely involve the (unauthorised) exercise of the right to communicate.

In the same vein, a copyright holder of a literary, dramatic or musical work has the exclusive right to perform the work in public under the Australian Copyright Act,\textsuperscript{171} as well as the right to communicate a literary, dramatic, musical or artistic work to the public.\textsuperscript{172} ‘Performance’ has been defined broadly to refer to ‘any mode of visual or aural presentation … by the use of a record or by any other means’.\textsuperscript{173} The term ‘communicate’ is also defined widely to refer to the making available online or electronic transmission of a work or subject matter.\textsuperscript{174} There are equivalent rights in respect of sound recordings and cinematograph films, namely, the right to cause the sound recording or film to be seen or heard in public and the right to communicate the sound recording or film to the public.\textsuperscript{175} While the term ‘public’ includes a small portion of the public, the phrase ‘to the public’ emphasises the nature of the recipient as a member of the public, even if in a private situation.\textsuperscript{176} Audiences in a private situation can constitute the ‘copyright owner’s public’ if a work is performed in a commercial setting.\textsuperscript{177} It is further noted that ‘to the public’ is defined as the public within or outside Australia.\textsuperscript{178} Thus these rights to perform, communicate or cause to be seen or heard in public can be infringed on social media. Like in the UK, the right to communicate to the public, in particular, is frequently infringed through similar activities to those given in the earlier examples.

Among the exclusive rights discussed above, I note that the rights to reproduce,\textsuperscript{179} to make available (in the US)\textsuperscript{180} and to communicate to the public (in the UK\textsuperscript{181} and in Australia\textsuperscript{182}) will be the most relevant rights for consideration in relation to content-generative activities on social media.

F. Infringement: other rights

Further to the copyrights above, other rights – such as moral rights – held by the authors of content can be infringed on social media. Moral rights
essentially allow the creators of works to control the treatment and presentation of such works by others. The infringement of these rights is relevant for consideration in the UK or in Australia, but not in the US, for the reasons given below.

The Visual Artists Rights Act (VARA)184 that provides for the ‘rights of attribution and integrity’185 in the US applies to a very narrow subset of works of visual art. This includes paintings, drawings, prints, sculptures and still photographic images produced for exhibition purposes, existing in single copies or as limited editions.186 As such, moral rights of attribution and integrity vest only in a very narrow group of persons, being the authors of works of visual art.187

Pursuant to the VARA, an author is entitled to: the right of attribution (ie, the right to claim authorship);188 the right against false attribution (ie, to prevent use of his or her name as the author of any work he or she did not create);189 the right to prevent use of his or her name where there is a distortion, mutilation or modification of the work that would be prejudicial to his or her honour or reputation;190 the right to prevent modification of his or her work that would be prejudicial to his or her honour or reputation;191 and the right to prevent any intentional or grossly negligent destruction of a work of recognised stature.192 The right of attribution is suggested to be broad enough to object to misattribution – this happens, for example, when one’s work is plagiarised by another and the plagiarist is credited for the work instead of the author.193 The right of integrity is, however, limited by the condition that a cause of action for its violation only arises where there is a distortion, mutilation or modification that is prejudicial to the author’s honour or reputation.194

On the other hand, in the UK, moral rights are held in a broader range of works and films. For instance, an author of a literary, dramatic, musical or artistic work195 or the director of a film has the right of attribution (ie, right to be identified) under the UK Copyright Act.196 Although the right against misattribution of a work or film to another is not expressly provided for, such right to object to incorrect attribution is one that is assumed to fall under the general right to attribution.197 In general, this right of attribution arises when literary, dramatic, musical and artistic works, as well as films, are published commercially or made available to the public, whether by way of issue of sound recordings, films or other communication to the public, as applicable.198 There can, however, only be infringement of the right of attribution if the author or director has previously asserted his or her moral rights – this assertion may be general or specific.199
Separately, there is a right against the false attribution of authorship in the UK. In the same way, the right of integrity is held in a similarly broad range of works and films, and is violated when a modified or adapted work is distorted, mutilated or otherwise prejudicial to the honour or reputation of the author or director. Because of the wider application of moral rights in the UK, these rights can be infringed on social media. For example, the author’s moral right of attribution may be infringed when a commentary shared as a ‘status update’ by a Facebook user is plagiarised by another user and shared on Facebook or another platform, without identification of the first user as the author. A separate example in which the author’s moral right of integrity is potentially infringed occurs when a user takes a photograph of an art work and vandalises it digitally.

Likewise moral rights under the Australian Copyright Act are held broadly in, among others, literary, dramatic, musical and artistic works, as well as cinematograph films, but without the requirement of assertion. In Australia these basic authorial entitlements are divided into three main rights: the right of attribution of authorship; the right of integrity; and the right not to have the authorship falsely attributed. The right against false attribution of authorship differs from its namesake in the UK and refers instead to an author’s right not to have another identified as the author of his or her work, as well as his or her right not to have such work altered by another and dealt with so as to indicate that the alterations were made by the latter. Separately, the author’s right of integrity to a work is defined as the right not to have the work subject to derogatory treatment, or that which results in a material distortion, mutilation or alteration to the work, or otherwise, that is prejudicial to the author’s honour and reputation. Moral rights in Australia can be similarly infringed through the undertaking of the content-generative activities discussed in the paragraph above.

Even where content resulting from generative activities on social media meets the subsistence requirements under copyright laws for authorship, originality and fixation – and is henceforth copyright protected – users who are authors of content on social media will not be entitled to the moral rights specified under the VARA. This is because digitised content on social media falls outside the narrow definition of works of visual art under the VARA. Although moral rights have a broader scope of application in the UK than in the US, there is a requirement of assertion to be fulfilled in relation to the right of attribution. Typically, this requirement will not be met on social media.
The right of attribution has, however, a broader scope of application in Australia, given the lack of a requirement of assertion there. Therefore, with reference to copyright laws in the UK or in Australia, a user will hold moral rights (other than the right of attribution in the UK) to content resulting from his or her generative activities on social media, provided that other subsistence requirements under the respective copyright laws are met. Such moral rights can be infringed when other social media users interact with this content, through modifying and disseminating such content.

There are alternative avenues to protect the rights of attribution of authors in each of the US, the UK and Australia. They are, however, imperfect and subject to the satisfaction of substantive requirements under the relevant rights management provisions. Under the Digital Millennium Copyright Act (DMCA), the intentional removal or alteration of ‘copyright management information’ by a person knowing, or having reasonable grounds to know, that the removal or alteration will, among others, facilitate or conceal an infringement of any right – is prohibited. The term ‘copyright management information’ is defined to include the information conveyed in connection with digital copies or displays of a work, such as the name of and other identifying information about the author or the copyright holder of the work, as well as about the writer, performer or director of an audiovisual work (with the exception of public performances of works by radio and television broadcast stations).

‘Copyright management information’ is interpreted to extend to any information embedded in a copyright work, independent of the use of an automated copyright protection or management system to do so – this includes, for instance, information crediting the author of a photograph. The copyright management provisions allow for the enforcement of moral rights – in particular, the right of attribution – except that such rights to prevent the removal or alteration of ‘copyright management information’ extend more broadly to other categories of works beyond works of visual art under the VARA.

It has been suggested that the provisions are ineffective in ensuring, among other things, the maintenance of authorship attribution, as many claims against the alteration or removal of ‘copyright management information’ are likely to flounder on the statutory double intent standard. There is, first, a requirement of knowledge (or reasonable grounds for such knowledge) for the removal or alteration to, inter alia, facilitate or conceal copyright infringement, and secondly, another requirement of knowledge that the information is removed or altered without the copyright holder’s authorisation. Thus, so long as the double intent
standard is met, these provisions are breached in similar circumstances to those in which the moral right of attribution is infringed (for instance, when the commentary of a Facebook user is plagiarised by another or when the information identifying the author of an image digitally created and shared on Pinterest is removed).

The equivalent provision to this under the UK Copyright Act refers to the rights of a copyright holder against a person’s knowing removal or alteration of ‘electronic rights management information’ that is associated with a copy of a copyright work, or appears in connection with the communication of the copyright work to the public, by a person who knows, or has reason to believe, that by doing so, he or she is, inter alia, facilitating or concealing a copyright infringement.\textsuperscript{223} Further, it is required that the person knows that he or she has no authority from the copyright holder to do so.\textsuperscript{224}

Also, the rights management provisions extend to prohibit the removal or alteration of such information when a person, among other things, distributes or communicates to the public copies of a copyright work.\textsuperscript{225} The term ‘rights management information’ is similarly defined to include information which identifies the author or the copyright holder of the work.\textsuperscript{226} These provisions are breached where the moral right of attribution\textsuperscript{227} is infringed, in the same situations as those highlighted above. Just as in the US, the double intent standard needs to be satisfied for the prohibition to apply.\textsuperscript{228}

At the same time, under the Australian Copyright Act, a copyright holder can bring an action against a person who removes or alters electronic rights management information relating to a work or subject matter – if the person knew, or ought reasonably to know, that such removal or alteration would, inter alia, facilitate or conceal a copyright infringement of the work or subject matter.\textsuperscript{229} In addition, the person has removed or altered the information without the permission of the copyright holder.\textsuperscript{230} This right to bring an action extends to when such person, among other things, distributes or communicates a copy of the work or subject matter to the public in which the electronic rights management information has been removed or altered.\textsuperscript{231} The term ‘electronic management rights information’ is defined to refer to electronic information that is attached to, or embodied in, a copy of the work or subject matter, or appears in connection with a communication of such work or subject matter, and which, among other things, identifies the author or copyright holder of the work or subject matter.\textsuperscript{232} Again, the right to bring an action potentially arises where the moral right of attribution is infringed.\textsuperscript{233} This can happen in relation to the examples given earlier, so long as the double intent standard is satisfied (as in the US and the UK).\textsuperscript{234}
Where there is infringement of copyright-protected content on social media, the next step will be to ascertain the remedies available to the relevant copyright holder. This consequentially highlights the risks that users face in undertaking content-generative activities that potentially infringe the copyrights held by others. Generally, if a copyright work originated in the US, or in a country with which the US does not have copyright treaty relations, registration is a pre-requisite to the commencement of copyright infringement actions. In addition, the requirement of timely registration (ie, before commencing an action for infringement of copyright in an unpublished work, or within three months after the first publication of the published work) has to be satisfied if the copyright holder intends to elect to recover statutory damages, in addition to the usual remedies of inter alia, injunctions, damages and account of profits.

The implications of registration (and non-registration) are significant, particularly if one considers that the statutory damages recoverable with respect to infringement for any one work is in a wide range – between US$ 750 and US$ 30,000, ‘as the court considers just’. Additionally, if the copyright holder proves wilful infringement, the court may in its discretion award up to US$ 150,000 of statutory damages. A case where the maximum statutory damages were awarded is Agence France Presse v Morel (Morel). In this case the jury found that there was wilful infringement by the news agencies of the photojournalist Daniel Morel’s copyrights in his eight photographs of the Haitian earthquake shared on Twitter. Morel was awarded in excess of US$ 300,000 in actual damages and profits, as well as the maximum US$ 1.2 million in statutory damages (based on the award of US$ 150,000 for each of the eight photographs). Notwithstanding that infringing users are potentially subject to hefty copyright damages – in view of the availability of a large volume of content, including the images shared on social media, and the ease with which images can be extracted for publication offline (as illustrated by the Morel case) – registering copyrights in the content on social media may not be an easy burden for copyright holders to discharge, particularly within the short time frame of three months provided.

On the other hand, it is not necessary to register for copyright protection in the UK and in Australia, nor are there any registration systems in these countries. In the UK the remedies available to copyright holders include injunctions, damages and accounts of profits. Where the defendant in an action for infringement did not know, and had no reason to believe, that copyright subsisted in the work, the copyright holder is
not entitled to damages, but can still be awarded an injunction and/or account of profits. Additional damages may be awarded in special circumstances, as ‘the justice of the case’ requires. Such circumstances considered by the court include the flagrancy of the infringement and the defendant’s benefit from the infringement.

Similarly, in Australia either damages or an account of profits can be awarded, together with an injunction, to compensate copyright holders whose copyrights are infringed. Damages are not available to a copyright holder, if the defendant in question was not aware, and had no reasonable grounds to suspect, that his or her act constituted an infringement. In such a situation, an account of profits may be awarded instead. Additional damages, if appropriate in the specific circumstances, can also be awarded. The circumstances considered in Australia in the court’s assessment of damages are wider than those in the UK. They include, in addition to the flagrancy of the infringement and the defendant’s benefit from the infringement, the conduct of the defendant after the infringing act and whether the infringement involved the conversion of a work or other subject matter from hard copy into digital form.

Therefore, under the US Copyright Act, copyright holders of content on social media can choose to register their content, prior to commencing copyright infringement actions against their respective defendants. The millions of users interacting with such content on social media on an everyday basis are therefore vulnerably positioned, as they are exposed to potentially massive awards of statutory damages. In contrast, under the UK Copyright Act and Australian Copyright Act, the quantum of damages awarded (whether ordinary or additional) does not fall within as wide a range as the statutory damages in the US. Moreover, defendant-users may be able to establish, within the social media context, that they had no reasonable grounds to suspect that copyright subsisted in the (allegedly) infringed works or that their acts constituted infringement. If that is the case, social media users who infringe the copyrights of others through their content-generative activities will likely be subject to the imposition of injunctions and/or accounts of profits, instead of damages.

H. Infringement: fair use and fair dealing exceptions

Users who infringe the copyrights held by others when they engage in content-generative activities on social media can consider whether their uses are exempt from copyright infringement under copyright exceptions, such as the fair use and fair dealing exceptions. Through permitting some exercise of the copyright holders’ exclusive rights by others, even
without their consent, these copyright exceptions balance the rights of copyright holders to remuneration against the public’s interest in accessing copyright-protected works. These exceptions have been argued to create space for cultural engagement on social media by allowing for the re-interpretation and remixing of copyright-protected content.  

Content-generative activities undertaken by users on social media platforms can give rise to concerns of the infringement of more than one right. For example, when a user creates a collage with photographs taken by others of sculptures, including private sculptures, he or she potentially infringes multiple rights under the US Copyright Act. The scope of copyright exceptions becomes a more pressing concern than before, because the creation, modification and dissemination of content on social media often – as illustrated earlier – involve the rights to reproduce, to make available (in the US) and to communicate to the public (in the UK and in Australia). The possibilities for infringement increase in proportion to the frequency of these activities. As noted above, the prospect of statutory damages is a particularly grave concern for potential infringers.

In this respect, the fair use doctrine in the US serves as a safety valve against the rigid application of copyright laws and remedies. It exempts uses for purposes such as criticism, comment, news reporting, teaching, scholarship and research from copyright infringement, as well as acts of parody, satire and even artistic appropriation. Further, in ascertaining whether the use made of a work is a fair use, the four factors to be considered include: the purpose and character of the use; the nature of the copyright work; the substantiality of the portion used in relation to the copyright work; and the effect of the use on the potential market for or value of the copyright work.

At the same time the ‘transformative-ness’ (of a use) – or the alteration of the original work with new expression, meaning or message – has been recognised as a key element of the fair use analysis in the US. Broad categories of transformative uses demonstrating a change in purpose or character under the fair use doctrine have been identified. These include, among other things: commenting on or criticising the original work, or targeting the original work for parody; using the original work to comment on something else; re-contextualising the original work through changing the meaning of the work; and changing the purpose of the original work within an expressive context. Although a large number of content-generative activities on social media are arguably for purposes such as criticism and comment, it will be impossible to predict which specific activity is exempt as fair use and which is not, as each of the four factors can be decided differently on the facts of each
case. Unsurprisingly then, the application of the doctrine confounds not only judges, but also users of content.

The fair dealing exceptions in the UK and in Australia exempt specified categories of purposes from copyright infringement. Although a balance is also sought between the private interests of copyright holders and the wider public interests in the dissemination of ideas, British and Australian legislators have taken a more prescriptive approach. In the UK there are fair dealing exceptions for the purpose of research and private study, as well as for the purpose of criticism, review and news reporting. These exceptions are conditional on a sufficient acknowledgement being made, except in respect of fair dealing for the purpose of private study. Further, fair dealing exceptions for the purposes of quotation, as well as for caricature, parody or pastiche, were introduced recently, pursuant to The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014. Unlike the newly extended fair dealing exception for the purpose of criticism, review, quotation and news reporting, there is no requirement of acknowledgement under the new fair dealing exception for the purpose of caricature, parody or pastiche.

In Australia the fair dealing exceptions are similar and are for the purposes of criticism or review, reporting news and research or study. An additional category of fair dealing for the purpose of parody or satire was introduced under the Copyright Amendment Act 2006. As in the UK, the application of the fair dealing exceptions for the purposes of criticism or review, or for reporting news, are conditional upon giving the requisite acknowledgement of the relevant copyright work – there is no similar condition in relation to the fair dealing exception for the purpose of parody or satire. It is worth noting that the Australian Law Reform Commission has recommended in its report on copyright reform that the fair use exception be introduced as an extension of Australia’s existing fair dealing exceptions. This recommendation has recently been provisionally endorsed by the Productivity Commission in its Draft Report on Intellectual Property Arrangements.

Among these available categories of fair dealing in the UK and in Australia, I argue that the fair dealing exception for the purpose of research or study will be of lesser use to users keen to defend their content-generative activities undertaken on social media platforms against copyright infringement than the exceptions for other purposes. In particular, the fair dealing exceptions for the purposes of caricature, parody or pastiche in the UK, as well as for parody or satire in Australia respectively, are arguably the most relevant to social media users. This is in view of the nature of the content-generative activities in which they engage on
social media. Taking the example of Australia, before the new exception was introduced into the *Australian Copyright Act* in 2006, the other fair dealing exceptions, including the exception for the purpose of criticism or review, were hard to rely on to excuse parodic or satirical uses due to their restrictive interpretations.

Notwithstanding this, both fair dealing exceptions – whether for the purpose of caricature, parody or pastiche in the UK or for the purpose of parody or satire in Australia – are still untested by litigation. In addition, the terms ‘caricature, parody or pastiche’, as well as ‘parody or satire’, remain undefined in their respective statutes, giving courts a considerable scope to interpret these terms. In this respect, as a pastiche refers to a work made from a selection of materials and styles from one or more sources, its broader meaning may make the ‘caricature, parody or pastiche’ defence in the UK more suited for exempting uses – particularly when users modify content on social media – than the ‘parody or satire’ defence in Australia.

On the other hand, however, the newly extended fair dealing exception for the purpose of quotation (whether for criticism, review or otherwise) in the UK may be of limited use in exempting social media uses. This is given that it is conditional upon: the availability of the original work to the public; the use of the quotation being a fair dealing of the work; the extent of quotation being no more than is required for its specific purpose; and its accompaniment by a sufficient acknowledgement (unless this is impossible for reasons of practicality or otherwise). On the face of it, while the first condition may be easily satisfied on social media, the same cannot be said for the other three conditions.

On the whole, because the fair dealing exceptions in the UK and in Australia are more prescriptive than the fair use doctrine in the US, ascertaining whether a use is exempt as a fair dealing exception is more straightforward. Nonetheless, this too involves addressing questions of degree and impression, and can reasonably lead to different determinations.

**I. Conflict of laws issues**

Before social media users can ascertain whether they have infringed the copyrights held by others, they have to decide which laws govern the subsistence of copyright in the relevant content, as well as their potentially infringing activities. In general, the expansion of digital communications compromises the reach and practicality (of enforcement) of territoriality-based domestic copyright laws. The rapid generation of huge volumes of content on social media exacerbates the problems introduced by the fact that cyberspace is inherently borderless. Due to the global reach of social media platforms, the creation, modification and dissemination of content consequentially occur
among users situated in different jurisdictions. However, the principle of territoriality to which copyright laws are subject makes it difficult to localise any dispute around content on a social media platform to a single jurisdiction.

These transnational disputes occur, for example, when the copyright in a work held by a copyright holder in the US is infringed by users resident in other jurisdictions, such as the UK and Australia. If the infringement action is commenced in either the UK or Australia, reference may be made to the rights of the copyright holder of such work in the US. On the other hand, if the action is instead commenced in the US, it will be related to infringing activities occurring outside the US, including but not limited to the UK and Australia (given the nature of the internet). A user is exposed to the challenge of identifying which copyright laws apply and hence faces greater uncertainty over the legitimacy of the content-generative activities he or she undertakes.

Currently, there is no clear direction provided under existing international conventions, or otherwise, on the private international law of intellectual property. It has been suggested that this lack of direction may explain why provisions in international intellectual property instruments resembling conflicts principles are sometimes adopted without any attempt to relate them to any coherent principle of private international law. For instance, while the principle of national treatment stipulated in article 5(1) of the Berne Convention requires the country in which protection is claimed to treat foreign and domestic authors alike, it is not read as a conflicts rule. Also, notwithstanding the reaffirmation of the principle of national treatment in article 3(1) of the TRIPS Agreement, the article is seen to operate as a constraint on the choice of law rules that a country adopts rather than as a mandate of a particular rule.

In addition, the view that article 5(2) of the Berne Convention endorses the lex loci protectionis (ie, the law of the jurisdiction for which protection is sought) is the majority view, but one not without its detractors. The international flow of copyright-protected content and the ubiquity of content disseminated online – both effects amplified on social media – have evoked doubts around the applicability of the lex loci protectionis choice of law rule, given that lex loci protectionis may not capture the complete set of ‘affinities’, or connecting factors, that govern the conduct of users online. As such, the breadth of private international intellectual property law today gives little guidance to potential litigants involved in copyright disputes relating to content on social media.

There are, however, initiatives that have proposed possible solutions regarding the jurisdiction, choice of law and the enforcement of judgments in transnational intellectual property disputes, such as the principles
adopted by the American Law Institute (ALI Principles) in 2007 and the Principles on Conflict of Laws in Intellectual Property prepared by the European Max Planck Group (CLIP Principles) in 2011. Under both the ALI Principles and the CLIP Principles, a person may be sued in any state in which he or she is resident. The same person can also be sued in any state in which he or she has acted to initiate or further the alleged infringement, or if such person has directed his or her activities to that state. Thus there is more than one jurisdiction in which the action can be commenced. Finally, there are rules dealing with ubiquitous infringement under both sets of principles that recognise the problem of having a multitude of applicable laws and attempt to solve that by referring to the law or laws of the state or states with the closest connection to the dispute. The difference between the two is that the ALI Principles refer to both parties, but the CLIP Principles refer mainly to the infringer’s location. Even with the guidance of these principles, the factors taken into account to ascertain the state (and hence the applicable law) having the closest connection with the infringement – including the residency of the parties (or the infringer), as well as the principal markets toward which the parties directed their activities (or the place where the harm caused by the infringement is substantial in relation to the infringement in its entirety) – will prove challenging to identify in the case of social media.

While there are no clear answers, the following preliminary questions could guide a copyright holder in ascertaining where he or she can enforce his or her rights in relation to content-generative activities on social media:

(i) Which court has the jurisdiction to govern the dispute?
(ii) Which governing law will this court apply? Will the same governing law apply across the various copyright subsistence and infringement issues?
(iii) Will judgements given by the court be recognised and enforced in other jurisdictions?

In the next chapter, I will discuss how the terms of service of social media platforms attempt to address some of the above questions and the resulting implications for social media users.

J. Summary

Table 2.1 below serves as a summary of the above discussion relating to the application of copyright laws in the US, the UK and Australia to the content-generative activities of social media users, and the unique challenges arising from such application.
Table 2.1  Summary of the application of copyright laws in the US, the UK and Australia to the content-generative activities of social media users

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<td></td>
<td>Graphic works</td>
<td>Broadcasts</td>
<td>Sound recordings</td>
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<td></td>
<td>Sculptural works</td>
<td>Sound recordings</td>
<td>Cinematograph films</td>
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<tr>
<td></td>
<td>Audiovisual works</td>
<td>Films</td>
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<td></td>
<td>Sound recordings</td>
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<td></td>
<td>Architectural works</td>
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<td></td>
<td>Compilations and derivative works (excluding material used unlawfully or pre-existing material not contributed by the author in question)</td>
<td></td>
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<tr>
<td>2</td>
<td>Originality</td>
<td>Requirement of creativity</td>
<td>Result of 'skill, labour or experience'</td>
</tr>
<tr>
<td></td>
<td>‘Sweat of the brow’ insufficient</td>
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(continued)
Table 2.1 (Cont.)

<table>
<thead>
<tr>
<th>No.</th>
<th>Copyright issues</th>
<th>Jurisdictions</th>
<th>Other comments</th>
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<tbody>
<tr>
<td></td>
<td></td>
<td>US</td>
<td>UK</td>
</tr>
<tr>
<td>3</td>
<td>Authorship</td>
<td>Term ‘author’ is not defined, although the term ‘joint work’ is</td>
<td>Term ‘author’ is defined simply (i.e., person who creates a work)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Requirement of contemporaneous intentions of joint authors for the creation of a joint work</td>
<td>‘Work of joint authorship’ is also defined</td>
</tr>
<tr>
<td>4</td>
<td>Fixation, recording or reduction to material form</td>
<td>Requirement of fixation in a tangible medium of expression – work has to be sufficiently stable to permit its communication, or otherwise communicated for more than a transitory period</td>
<td>Requirement of being recorded, in writing or otherwise (for literary, dramatic and musical works)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>See also the definitions for an artistic work (means, inter alia, any painting, photograph [also defined as a recording of light or other radiation on any medium], and so on) and broadcast</td>
<td>See also the broad definitions for sound recordings and cinematograph films</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Sound recordings and films – requirement of being recordings on any medium</td>
<td>Content on social networking sites and blogs (especially micro-blogs) may not meet the fixation requirement – or its equivalent – for copyright protection, since it may be deleted after a short while and is not stored separately</td>
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Table 2.1 (Cont.)
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<tr>
<th>Jurisdictions</th>
<th>Other comments</th>
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<tbody>
<tr>
<td>US</td>
<td>UK</td>
</tr>
<tr>
<td>Limited definitions of ‘publication’ (ie, distribution of copies … by sale or other transfer of ownership) and ‘copies’ (ie, material objects) apply, such that content on social media is taken to be unpublished – copyright subsists irrespective of the nationality or domicile of the author. Therefore, there is no need to determine the precise venue of first publication or fixation.</td>
<td></td>
</tr>
<tr>
<td>Definitions of ‘publication’ and ‘copying’ much broader, such that content on social media will constitute published works – copyright will only subsist if the author is a British citizen or resident, or if the country of first publication is the UK. Need to determine the precise venue of first publication, if the requirement of nationality or domicile is not met.</td>
<td></td>
</tr>
<tr>
<td>Definition of ‘publication’ is broadly defined, such that content on social media will constitute published works – copyright will only subsist if the author is an Australian citizen or resident, or if the country of first publication is Australia. Need to determine the precise venue of first publication, if the requirement of nationality or domicile is not met.</td>
<td></td>
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<tr>
<td>Furthermore, the venue of first publication may be hard to ascertain on social media.</td>
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</table>

In the US, this issue is obviated from consideration. In the UK and in Australia identifying the venue of first publication may be needed – although this problem is mitigated in view of the principle of national treatment in the Berne Convention and the convention’s wide membership. So long as the user is a national or resident of a Berne Convention country, the content is likely to be copyright protected if other subsistence requirements are met, regardless of where the content is first published (if published).
<table>
<thead>
<tr>
<th>No.</th>
<th>Copyright issues</th>
<th>Jurisdictions</th>
<th>Other comments</th>
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<tbody>
<tr>
<td>5</td>
<td>Scope of protection</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Right of reproduction (applies to, inter alia: literary, musical and dramatic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works)</td>
<td>Right of reproduction (applies to, inter alia, literary, dramatic, musical and artistic works, as well as films)</td>
<td>The right of reproduction in the US, the UK and Australia can be infringed when users engage in some content-generative activities on social media</td>
</tr>
<tr>
<td></td>
<td>Note that the term ‘copies’ is liberally defined to refer to material objects in which a work is fixed, and from which a work can be communicated, either directly or with the aid of a machine or device</td>
<td>Note that the references to ‘copying’ are broad and can include the storing of a work in any medium by electronic means, as well as the making of copies that are transient or incidental to some other use of the work</td>
<td>Note that in relation to this right, references are made to conversion into or from a digital format</td>
</tr>
<tr>
<td>Right to prepare derivative works (applies to, inter alia, all the categories of works listed above) – note the preparation of a derivative work, even prior to fixation, can be an infringement</td>
<td>Right to make adaptations of works, or to do anything in relation to these adaptations (applies to, inter alia, literary, dramatic and musical works, but not artistic works)</td>
<td>Right to make adaptations of works, or to do anything in relation to these adaptations (applies to, inter alia, literary, dramatic and musical works, but not artistic works)</td>
<td>Given the differences in the definitions of a ‘derivative work’ in the US and ‘adaptation’ in the UK and in Australia, the right to make adaptations or to do anything in relation to such adaptations is potentially relevant for consideration in relation to different types of content-generative activities on social media</td>
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<tr>
<td>Uncertainties as to whether material derived from original work which does not qualify for copyright protection separately as a secondary work can infringe the derivative work’s right</td>
<td>May be exercised when undertaking content-generative activities (for instance, the translation of a literary work, conveying a story in a different version with pictures, arranging or transcribing a musical work, and so on)</td>
<td>May be exercised when undertaking content-generative activities (for instance, the translation of a literary work, conveying a story in a different version with pictures, arranging or transcribing a musical work, and so on)</td>
<td>(continued)</td>
</tr>
<tr>
<td>No.</td>
<td>Copyright issues</td>
<td>Jurisdictions</td>
<td>Australia</td>
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<tr>
<td></td>
<td></td>
<td>US</td>
<td>UK</td>
</tr>
<tr>
<td></td>
<td>Right to distribute (applies to, inter alia, all the categories of works listed above). Note that this right is broadly interpreted such that digital transmission (including the transmission of content on social media) is included within the exercise of this right</td>
<td>Right to issue copies to the public (applies to, inter alia, literary, dramatic, musical and artistic works, as well as sound recordings and films). Note that the description of this right excludes subsequent distribution of copies already put into circulation; as such, this right will not be infringed by the regular dissemination of content on social media (insofar as such dissemination involves content already circulated)</td>
<td>Right to (first) publish (applies to, inter alia, literary, dramatic, musical and artistic works) – distinguished from the notion of publication for the subsistence of copyright</td>
</tr>
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</table>

Table 2.1 (Cont.)
Right to perform (applies to, inter alia, literary, musical and dramatic works, motion pictures, other audiovisual works and sound recordings [ie, by digital audio transmission]) and the right to display (applies to, inter alia, literary, musical and dramatic works, pictorial, graphic and sculptural works, as well as individual images of motion pictures and other audiovisual works). Note that 'audiovisual works', as well as what it means to perform or display a work publicly, are very broadly defined – these rights are frequently exercised on social media.

Right to perform, show or play a work in public (applies to, inter alia, literary, dramatic and musical works, sound recordings, films and broadcasts) and the right to communicate a work to the public (applies to, inter alia, literary, dramatic, musical and artistic works, sound recordings, films and broadcasts) – note that the right to perform, show or play, as well as the right to communicate, is defined very broadly to include electronic means and transmissions. In particular, the right to communicate is frequently exercised on social media.

Right to perform a work in public (applies to, inter alia, literary, dramatic and musical works) and the right to communicate a work to the public (applies to, inter alia, literary, dramatic, musical and artistic works) – note that the terms 'performance' and 'communicate' are defined broadly to include electronic transmissions.

Equivalent rights are available in respect of sound recordings and cinematograph films (ie, right to cause to be seen or heard in public [as applicable], as well as the right to communicate to the public).

In particular, the right to communicate is frequently exercised on social media.

Among the bundle of rights, the rights to reproduce, to make available in the US (ie, to distribute, perform and display) and to communicate in the UK and in Australia are the most relevant rights for consideration in relation to content-generative activities on social media.
<table>
<thead>
<tr>
<th>No.</th>
<th>Copyright issues</th>
<th>Jurisdictions</th>
<th>Other comments</th>
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<tbody>
<tr>
<td>6</td>
<td>Other rights</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Moral rights of attribution and integrity apply only to works of visual art</td>
<td>Moral rights of attribution and integrity apply to, inter alia, literary, dramatic, musical and artistic works, as well as films</td>
<td>Users who are authors of content on social media will not hold moral rights to such digitised content, which falls outside the definition of works of visual art under the VARA</td>
</tr>
<tr>
<td></td>
<td>Right of attribution – possibly broad enough to object to misattribution</td>
<td>Right of attribution – note that right against misattribution assumed to exist, even if not clearly provided for</td>
<td>On the other hand, users who are authors of content on social media can hold moral rights in their content resulting from content-generative activities under both the UK Copyright Act (other than the right of attribution, as the requirement of assertion will not likely be fulfilled) and the Australian Copyright Act, provided that other copyright subsistence requirements are met – these moral rights of attribution and integrity can conceivably be infringed when users interact with such content, through modifying and disseminating the content</td>
</tr>
<tr>
<td></td>
<td>Right against false attribution</td>
<td>Right against false attribution (note that this refers instead to what is called misattribution in the US and in the UK [ie, the right of an author or director not to have another identified as the author or director of his or her work or film])</td>
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<td></td>
<td>No requirement for assertion</td>
<td>No requirement for assertion</td>
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</table>

Table 2.1 (Cont.)
Under the right of integrity, the right to prevent any intentional or grossly negligent destruction of a work of recognised stature, or of a work that would be prejudicial to his or her honour or reputation.

Under the right of integrity, the right to prevent modification of a work of recognised stature, or of a work that would be prejudicial to his or her honour or reputation.

Under the right of integrity, the right to prevent derogatory treatment of a work of recognised stature, or of a work that would be prejudicial to his or her honour or reputation.

In general, moral rights are of a broader application as they are held by copyright holders in a broader range of works (including literary, dramatic, musical and artistic works, as well as films).

Clearly stipulated that the right of integrity is violated by a person who engages in various acts that result in, inter alia, a distortion to the work or is prejudicial to the author's honour or reputation.

In general, moral rights are of a broader application as they are held by copyright holders in a broader range of works (including literary, dramatic, musical and artistic works, as well as films).
<table>
<thead>
<tr>
<th>No.</th>
<th>Copyright issues</th>
<th>Jurisdictions</th>
<th>Australia</th>
<th>Other comments</th>
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<tr>
<td></td>
<td></td>
<td>US</td>
<td>UK</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Remedies for infringement</td>
<td>Registration is a pre-requisite to the institution of copyright infringement actions</td>
<td>No registration requirement</td>
<td>No registration requirement</td>
</tr>
<tr>
<td></td>
<td>Additional requirement of timely registration for statutory damages (ie, three months after the first publication of a work, or before the commencement of a copyright action for an unpublished work)</td>
<td>Grant of injunctions, damages and/or accounts of profits are possible remedies</td>
<td>Grant of injunctions, damages and/or accounts of profits are possible remedies</td>
<td>Registration requirement in the US is not an easy burden to discharge, but when discharged, a very large sum of damages can be awarded if infringement is found to be wilful</td>
</tr>
</tbody>
</table>
Statutory damages recoverable in a wide range of between US$ 750 and US$ 30,000, with respect to an infringement for any one work. In the case of wilful infringement, court can award up to US$ 150,000 of statutory damages. Note that damages are not likely to be awarded when the defendant did not know, and had no reason to believe, that copyright subsisted in the relevant work. Note that damages are not likely to be awarded when the defendant was not aware, and had no reasonable grounds to suspect, that his or her act constituted an infringement.

Also, in the UK and in Australia, defendant-users may be able to defend themselves against awards of damages for infringement, through establishing that they had no reason to believe copyright subsisted in the relevant content on social media, or that they had no reasonable grounds to suspect that their acts were infringing.

<table>
<thead>
<tr>
<th>8</th>
<th>Defences such as fair use and fair dealing</th>
<th>Fair use doctrine</th>
<th>Fair dealing exceptions (ie, for the purposes of criticism, review, quotation and news reporting, as well as caricature, parody or pastiche)</th>
<th>Fair dealing exceptions (ie, for the purposes of criticism or review, reporting news and parody or satire)</th>
<th>Unpredictability around the application of the fair use doctrine in the US to the content-generative activities of social media users</th>
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<tbody>
<tr>
<td>8</td>
<td>Defences such as fair use and fair dealing</td>
<td>Fair use doctrine</td>
<td>Fair dealing exceptions (ie, for the purposes of criticism, review, quotation and news reporting, as well as caricature, parody or pastiche)</td>
<td>Fair dealing exceptions (ie, for the purposes of criticism or review, reporting news and parody or satire)</td>
<td>Unpredictability around the application of the fair use doctrine in the US to the content-generative activities of social media users</td>
</tr>
</tbody>
</table>

The fair dealing exceptions for the purpose of caricature, parody or pastiche in the UK, and for the purpose of parody or satire in Australia, are the more relevant defences to social media users – although both are untested, the UK defence is possibly wider than its Australian counterpart.
<table>
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<tr>
<th>No.</th>
<th>Copyright issues</th>
<th>Jurisdictions</th>
<th>Other comments</th>
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<tr>
<td></td>
<td></td>
<td>US</td>
<td>UK</td>
</tr>
<tr>
<td>9</td>
<td>Conflict of laws</td>
<td>Little guidance on the private international law of intellectual property</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Principle of national treatment articulated in the <em>Berne Convention</em> and the <em>TRIPS Agreement</em> is not a conflicts rule</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td><em>Lex loci protectionis</em> (ie, law of the jurisdiction for which protection is sought) is the default view – but has its detractors, since it does not capture the complete set of affinities that govern the conduct of users online</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>More than one jurisdiction, as well as applicable law, can be identified under both the <em>ALI Principles</em> and the <em>CLIP Principles</em>, in transnational disputes</td>
<td></td>
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</tbody>
</table>

Challenge of identifying the jurisdiction, as well as applicable law, for disputes relating to copyright-protected content on social media. It is thus uncertain for social media users to ascertain the legitimacy of their content-generative activities under copyright laws.
II. Scenario one: the application of copyright laws

The case study of Jane in Chapter One serves as the basis on which the copyright laws discussed in this chapter can be applied to the content-generative activities undertaken by Jane and other users. Jane’s day will be dissected to allow for a consideration of the copyright issues arising from each activity she and other users undertake, in chronological order. I then consider the possible grounds of liability and whether exceptions apply under the respective copyright laws for each activity. For this purpose, I assume that the relevant connecting factors for protection under each law (nationality, residence, place of first publication and so on) are met.316

A. Jane’s use of the music video clip on YouTube as her morning alarm

Under the US Copyright Act the video clip in its entirety is a copyright-protected ‘audiovisual work’; the lyrics in it constitute a literary work, while the music in it constitutes a musical work. This same video clip is a copyright-protected film comprising a literary work (ie, in the lyrics) and a musical work (ie, in the musical score) under the UK Copyright Act and the Australian Copyright Act. I argue that Jane’s use of the video clip infringes the right of reproduction in the US, the UK and Australia.317

Although the right of reproduction is arguably infringed, Jane’s use is likely to qualify as a fair use in the US. Given that her use is private and non-commercial, at least two of the four fair use factors – the purpose and character of use, as well as the effect of the use on the potential market for the copyright work – are likely to tip the balance in her favour.318 This is in spite of the possibility that another factor, being the substantiality of the portion used,319 does otherwise. In the UK Jane’s use does not fall within the fair dealing exceptions, including the exceptions for the purposes of criticism, review, quotation and news reporting,320 or caricature, parody or pastiche.321 Furthermore, the private copying exception under The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014322 is fairly narrow and may not excuse Jane’s use. Although Jane makes a personal copy for private use each time she uses the video clip as her morning alarm, I argue that she does not satisfy the condition of having lawfully acquired the video clip on a permanent basis, by her use of the relevant application on her mobile phone. Finally, Jane’s use is not exempt in Australia, as
her use does not fall within the fair dealing exceptions for the purposes of criticism or review,\textsuperscript{323} parody or satire,\textsuperscript{324} or reporting news.\textsuperscript{325} In addition, the exceptions for private and domestic uses will not apply to Jane’s use for two reasons. Firstly, the video clip is not included within the categories of copyright-protected material under these private and domestic use exceptions;\textsuperscript{326} secondly, there is a condition of ownership under most of these provisions.\textsuperscript{327}

The above suggests that Jane has infringed the copyright laws in the UK and Australia, but not in the US.\textsuperscript{328}

B. Jane’s ‘pinning’ of the YouTube music video clip on her pin-board titled ‘My Favourite Things’ on Pinterest

Jane’s ‘pinning’ of the video clip on Pinterest may infringe the right to distribute\textsuperscript{329} held by the copyright holder of the video clip under the US Copyright Act. The position is different under the UK Copyright Act, as the description of the right to issue copies to the public\textsuperscript{330} specifically excludes subsequent distribution of copies already put into circulation – in this case, the video clip is already shared on YouTube. Under the Australian Copyright Act the right to (first) publish\textsuperscript{331} is also not infringed by Jane’s ‘pinning’, given that the video clip has already been made available to the public on YouTube.

In addition, a case can likely be made out for Jane’s infringement of the copyright holder’s rights to perform and to display a work publicly in the US;\textsuperscript{332} to perform, show or play a work in public, as well as to communicate the work to the public in the UK;\textsuperscript{333} and to perform, cause to be seen or heard in public, as well as to communicate the work and copyright protected subject matter to the public in Australia.\textsuperscript{334} As the audience of the video clip shared on Jane’s pin-board comprises an expanding group of users who choose to ‘follow’ Jane or this pin-board in particular, and who can access the video clip in separate places at different times on the Pinterest platform, the requirement for performing or displaying a work ‘publicly’ is met in the US.\textsuperscript{335} At the same time this falls within the broad definition of a communication to the public in the UK.\textsuperscript{336} Further, the indeterminate number of Pinterest users to whom the video clip is performed, showed, played and communicated constitutes this ‘public’ in the UK,\textsuperscript{337} and also in Australia (in relation to the performance and causing to be seen or heard).\textsuperscript{338} Finally, Jane’s use falls under the broad concept of a communication to the public in Australia.\textsuperscript{339}

Jane’s use is less likely to qualify as a fair use in the US than is the case under sub-section (A) above, as her ‘pinning’ of the video clip is
more likely to have an adverse impact on the potential market for the video clip, even if the purpose of sharing the video clip remains non-commercial in nature. Jane’s ‘pinning’ is similarly not exempt as a fair dealing or private use in the UK and in Australia.

The above indicates that Jane has infringed the copyright laws in all three jurisdictions.

C. Jane’s use of Evangeline’s earlier commentary on Facebook to create her own commentary

Evangeline’s commentary constitutes a literary work, whether in the US, the UK or Australia, if other subsistence requirements such as originality, authorship and fixation (or their equivalents) are met. In general, it will be more likely for the commentary to qualify for copyright protection in the UK and Australia than in the US, given the higher originality requirement in the last. As the author can be identified (ie, Evangeline), the requirement of authorship is not likely to pose a barrier to the recognition of the commentary as a copyright-protected literary work. In addition, fixation (and its equivalent) requirements are broadly defined, and are therefore likely to be satisfied. When the other copyright subsistence requirements are met, Evangeline’s commentary will be copyright protected, whether she is a national or resident of the US, the UK or Australia.340

On the basis that the original commentary is copyright protected, I argue that Jane will not infringe Evangeline’s right to prepare derivative works.341 This is because Jane’s commentary has to be ‘substantially similar’ to Evangeline’s before it can be considered to be an infringing work. Given that Jane has woven her views into Evangeline’s commentary to create a new one and that Evangeline’s contribution is no longer identifiable in Jane’s commentary, there is arguably no infringement of the derivative works right as there is no substantial similarity342 between the original commentary and Jane’s new commentary.343

In the UK and in Australia, an equivalent to this right is the right to make adaptations of works and such an adaptation includes, among other things, the translation of a literary work.344 While the term ‘translation’ is not defined, Jane’s creation of her own commentary using Evangeline’s commentary is not a translation, by the term’s ordinary meaning. In spite of the non-infringement of this right, Jane may infringe Evangeline’s right to reproduce in both the UK and Australia,345 particularly if Jane is seen to have taken a substantial part of Evangeline’s commentary.346 In this case, it will not matter if Jane’s commentary is otherwise different from Evangeline’s.
Additionally, I argue that Jane infringes Evangeline’s right of attribution as an author of the commentary under the *Australian Copyright Act*[^347]. This is not the case under the *US Copyright Act*, which applies very narrowly to works of visual art[^348], or the *UK Copyright Act*. In the case of the latter, the assertion requirement in the UK[^349] has not been met as Evangeline has not asserted her right to be identified. This is in spite of the fact that the identity of Evangeline as the author of the commentary is known to Jane, who extracted Evangeline’s commentary from her Facebook ‘Timeline’.

As no rights are infringed in the US, discussing whether the fair use doctrine will apply to excuse Jane’s use of Evangeline’s commentary is not necessary. The UK fair dealing exception for the purpose of criticism, review, quotation and news reporting[^350], as well as the Australian fair dealing exception for the purpose of criticism or review[^351], could have applied to exempt Jane’s use, but for the lack of acknowledgement of Evangeline’s earlier commentary. Further, Jane’s infringement of Evangeline’s right of attribution (ie, non-identification of Evangeline) under the *Australian Copyright Act* is not likely to be reasonable in the circumstances[^352].

This suggests that Jane has infringed the copyright laws in the UK and Australia, but not in the US.

D. Jane’s use of multiple photographs of newborn babies available on the pin-boards of other Pinterest users to create a collage to share on Pinterest

Under the *US Copyright Act* each of the photographs, as well as the overall collage that Jane creates, will fall under the definition of ‘pictorial, graphic and sculptural’ works. Under the *UK Copyright Act* and the *Australian Copyright Act*, each of the photographs and the overall collage is an artistic work.

The originality, authorship and fixation (or their equivalents) requirements are easily met for copyright to subsist in the individual photographs and in the collage. The collage is not however a ‘joint work’ in the US, as the mutual intention of the individual authors (ie, of each photograph) to merge their works into a joint piece is absent. Similarly, in the UK and in Australia, the collage will not qualify as a ‘work of joint authorship’ as there is no collaboration among the authors of each of the photographs forming the collage. As such, Jane is the sole author of the collage.

Furthermore, it is noted that Jane crops only some of the original photographs, but not all, to create the collage. At first appearance, she could have exercised more than one exclusive right in the bundle of

[^347]: Regulating Content on Social Media
[^348]: Regulating Content on Social Media
[^349]: Regulating Content on Social Media
[^350]: Regulating Content on Social Media
[^351]: Regulating Content on Social Media
[^352]: Regulating Content on Social Media
rights held by the copyright holder to each photograph, namely, the right to reproduce, the right to prepare derivative works, the right to distribute and the right to display in the US, as well as the equivalent rights in the UK and in Australia. Firstly, the discussion under sub-section (A) can be referred to in respect of the right of reproduction – Jane’s use infringes this right under the US Copyright Act, the UK Copyright Act and the Australian Copyright Act.

Secondly, in respect of the right to prepare derivative works, because the individual components in Jane’s collage can be recognised in the overall collage, there is arguably substantial similarity between each of these components (ie, photographs) and Jane’s collage. Hence the right to prepare derivative works held by the relevant copyright holder(s) in the US is probably infringed. The equivalent right to make adaptations of works in the UK and in Australia does not apply in respect of artistic works such as photographs, therefore addressing the issue of such infringement is not necessary.

Thirdly, the discussion under sub-section (B) can be referred to in respect of the rights to distribute and to display. While Jane’s sharing of the collage infringes the right to distribute in the US, the right to issue copies to the public in the UK and the right to (first) publish in Australia will not be infringed. On the other hand, Jane’s use infringes each copyright holder’s rights to display (in the US) and to communicate the work to the public (in the UK and in Australia).

In summary, Jane’s use has infringed: the rights to reproduce, to prepare derivative works, to distribute and to display under the US Copyright Act; the rights to reproduce and to communicate the work to the public under the UK Copyright Act; as well as the rights to reproduce and to communicate the work to the public under the Australian Copyright Act. More than one right under the copyright laws of each jurisdiction is infringed by Jane’s use. Her use may be transformative enough to qualify as a fair use under the fair use doctrine in the US, particularly as the use is non-commercial and if there is no market for the photographs (ie, the photographs are not taken by professional photographers who licence their use in return for fees). Regardless of the commerciality of the use or existence of a market for the photographs, Jane’s use is still likely to qualify as a fair use, given that she has used the original photographs to comment on something else (ie, the ageing population), and that she has changed the composition, presentation and scale of the original photographs so as to have sufficiently transformed them in creating her collage. At the same time, the fair dealing exception for the purpose of caricature, parody or pastiche in the UK could exempt Jane’s use, as she
has created her collage – a pastiche – using selected photographs shared by other Pinterest users. However, no exceptions, including the fair dealing exception for criticism or review,\textsuperscript{356} will likely apply to exempt Jane’s use in Australia. In any event, the condition of acknowledgement of the source of each photograph is not satisfied.

Based on the above, Jane has infringed the copyright laws in Australia, but not in the US and the UK.\textsuperscript{357}

E. Jane’s simultaneous sharing of the collage on Facebook and Twitter

The discussion under sub-section (D) can be referred to in respect of the rights to \textit{reproduce}, to \textit{prepare derivative works}, to \textit{distribute} and to \textit{display} under the \textit{US Copyright Act}, as well as the equivalent rights under the \textit{UK Copyright Act} and the \textit{Australian Copyright Act}. The application of copyright exceptions such as fair use and fair dealing, as the case may be, is also similar.

For the same reasons as under sub-section (D), the above indicates that Jane has infringed the copyright laws in Australia, but not in the US and the UK.

F. Jane’s sharing of the same collage in her blog post on WordPress

The discussion under sub-section (D) can be referred to in respect of the rights to \textit{reproduce}, to \textit{prepare derivative works}, to \textit{distribute} and to \textit{display}, as well as the equivalent rights under the \textit{UK Copyright Act} and the \textit{Australian Copyright Act}. The application of copyright exceptions such as fair use and fair dealing, as the case may be, is also similar.

For the same reasons as under sub-section (D), the above suggests that Jane has infringed the copyright laws in Australia, but not in the US and the UK.

G. Zee’s contribution to Wikipedia on ‘income inequality’ using what Jane has written

With reference to the discussion on copyright subsistence in Evangeline’s commentary under sub-section (C), the discussion in this sub-section is conducted on the assumption that Jane’s commentary enjoys copyright protection as a literary work in all three jurisdictions. I argue that Zee, in contributing Jane’s commentary to Wikipedia, infringes Jane’s rights to \textit{reproduce} and to \textit{display} the commentary under the \textit{US Copyright Act}; to \textit{reproduce} and to \textit{communicate her work to the public} under the \textit{UK Copyright Act}.
Copyright Act; and to reproduce and to communicate her work to the public under the Australian Copyright Act.

Zee also infringes a moral right – the right of attribution – under the Australian Copyright Act. This is not the case under the US Copyright Act, as it applies very narrowly to works of visual art. Further, although Zee extracted Jane’s commentary from her Facebook ‘Timeline’ and is aware of her authorship, the assertion requirement under the UK Copyright Act is not satisfied, as Jane has not asserted her right to be identified. Therefore there is no infringement of this moral right in the UK.

In any case, more than one right under the copyright laws of each jurisdiction is infringed by Zee’s use. The fair use doctrine in the US will arguably exempt Zee’s use from infringement, as the purpose of Zee’s use is non-commercial and there is no existing market for Jane’s commentary. Neither of the fair dealing exceptions for the purpose of review or criticism, whether in the UK or in Australia, will apply to exempt Zee’s use, given the lack of acknowledgement of Jane as the original author of the commentary. Finally, on the facts given, Zee’s infringement of Jane’s right of attribution under the Australian Copyright Act will not likely be seen as reasonable in the circumstances.

Based on the above, Zee has infringed the copyright laws in the UK and Australia, but not in the US.

H. Jane’s creation and sharing of a new video clip by way of ‘vidding’ on YouTube, and subsequently on Facebook

Under the US Copyright Act, each of the random video clips from which scenes are extracted, as well as the new video clip Jane created, is an ‘audiovisual work’. These video clips are ‘films’ under the UK Copyright Act and ‘cinematograph films’ under the Australian Copyright Act.

Copyright subsists in each video clip and in the new video clip created by Jane, so long as the originality, authorship and fixation (or their equivalent) requirements are met. However, the new video clip is not a ‘joint work’ in the US, as the mutual intention of the individual authors (ie, of each video clip) to merge their works into a joint piece is absent. Similarly the new video clip will not qualify as a ‘work of joint authorship’ in the UK and Australia, as there is no collaboration involved among the authors of the original video clips. As such, Jane is the sole author of the new video clip.

The discussion under sub-section (D) can be referred to in respect of the rights to reproduce, prepare derivative works, distribute, perform and display in the US, as well as the equivalent rights, as applicable, in
the UK and in Australia. I argue that Jane’s use infringes the rights of the copyright holder (ie, the producer of the television series) to reproduce, prepare derivative works, distribute, perform and display in the US; reproduce, show or play and communicate to the public in the UK; as well as reproduce, cause to be seen or heard and communicate to the public in Australia.

More than one right under the copyright laws of each jurisdiction is infringed by Jane’s use. Jane’s use will arguably not qualify as a fair use in the US. While her use is non-commercial, it may be argued to interfere with the existing market for the television series. On the other hand, the fair dealing exception for the purpose of caricature, parody or pastiche in the UK could exempt Jane’s use as she has created the new video clip – a pastiche – through drawing on other video clips shared on YouTube. No exceptions, however, including the fair dealing exception for criticism or review, will apply to exempt Jane’s use in Australia. In any event, the requirement for sufficient acknowledgement is not met.

The above indicates that Jane has infringed the copyright laws in the US and Australia, but not in the UK.

I. Cheryl’s use of ‘stills’ from Jane’s video clip as thumbnail images on her website

I discuss the extent to which each of the extracted ‘stills’, or individual images, is protected under the US Copyright Act, the UK Copyright Act and the Australian Copyright Act below.

As mentioned in sub-section (H), the individual images are extracted from ‘audiovisual works’ (being the random video clips, as well as Jane’s new video clip) as defined under the US Copyright Act. These images are extracted from ‘films’ under the UK Copyright Act and ‘cinematograph films’ under the Australian Copyright Act.

At first appearance Cheryl may have exercised more than one exclusive right in the bundle of rights held by the producer of the television series in the audiovisual works from which these images are extracted – namely the rights to reproduce, prepare derivative works and display in the US. On further analysis, I argue that Cheryl does not infringe the right of reproduction. As she has only extracted a few images for her website, the amount she has copied from the original works is minimal and the standard of substantial similarity is not met. In addition, Cheryl does not infringe the right to prepare derivative works as there is no substantial similarity between her web page incorporating the images as thumbnails and the original audiovisual works. However, Cheryl’s use does infringe
the right to display the individual images from the original works. The term ‘display’ means, in the case of an audiovisual work, ‘to show individual images nonsequentially’.366

I argue that in the UK Cheryl’s use of the individual images infringes the right to reproduce. This is because the definition of ‘copying’ in relation to a film ‘includes making a photograph of the whole or any substantial part of any image forming part of the film’.367 On the other hand, in Australia the position is less clear. Given the definition of ‘cinematograph films’ to be the ‘aggregate of the visual images’,368 as well as the nature of copyright in these films,369 no copyright appears to be infringed in relation to Cheryl’s use. Notwithstanding this, the individual images are arguably protected as ‘artistic works’,370 and Cheryl’s use infringes the rights to reproduce and to communicate the works to the public.

Based on the above, at least one right under the copyright laws of each jurisdiction is prima facie infringed by Cheryl’s use. Her use is likely to qualify as a fair use in the US. Not only is her use non-commercial, such use is not one that can foreseeably interfere with the market for the television series.371 Additionally, her use of only a few images as thumbnails on her website is likely to tip the balance in her favour.372 Cheryl’s use may also be transformative enough to qualify as a fair use under the fair use doctrine in the US. By using the ‘stills’ as thumbnail images on her website, she has arguably re-contextualised the original video clips through changing their meaning (ie, using the ‘stills’ from them to decorate the website). Furthermore, in using the thumbnail images for aesthetic reasons she has changed the purpose of these clips from the television series. In the UK and in Australia this is not the case, as Cheryl’s use is not for a specified purpose exempt under any fair dealing exception.

Therefore this suggests that Cheryl has infringed the copyright laws in the UK and Australia, but not in the US.373

J. Other users’ partial use of Jane’s collage to create their own, and sharing the same on Pinterest, Facebook and Twitter

The discussion under sub-section (D) can be referred to in respect of the rights to reproduce, to prepare derivative works, to distribute and to display under the US Copyright Act, as well as the equivalent rights under the UK Copyright Act and the Australian Copyright Act. In particular, the rights (held by Jane in the collage and the author of each photograph used in such collage) to reproduce, to prepare derivative works, to distribute and to display in the US; as well as to reproduce and to communicate the work to the public in the UK and in Australia,
are arguably infringed by other users’ partial use of Jane’s collage. The application of copyright exceptions such as fair use and fair dealing, as the case may be, is largely similar. In relation to the application of the fair use doctrine in the US, the users’ transformation of Jane’s collage may additionally be their way of commenting on, criticising or parodying Jane’s collage, depending on the collages resulting from their uses. At the same time, the fair dealing exception for the purpose of caricature, parody or pastiche in the UK could exempt these uses, as the collages (or pastiches) are created using Jane’s collage, as well as other selected materials.

Based on the above, these users have infringed the copyright laws in Australia, but not in the US and the UK.

K. Editor Jasper’s use of Jane’s collage on the cover page of his magazine

As mentioned earlier, Jane’s collage is a ‘pictorial, graphic and sculptural work’ under the US Copyright Act, and an artistic work under the UK Copyright Act and the Australian Copyright Act. By his use, I argue that Jasper infringes Jane’s rights to reproduce and to distribute the collage in the US; to reproduce and to issue copies of the collage to the public in the UK; as well as to reproduce and to (first) publish the collage in Australia. Similar rights held by the author of each photograph used in such collage are also infringed by Jasper’s use.

Given that Jasper’s use of Jane’s collage is commercial in nature (ie, the magazine copies will be purchased by interested readers), his use is less likely to be exempt as a fair use in the US. Moreover, such use will have an adverse effect upon the potential market for Jane’s collage (and the photographs in the collage) if Jane (or the relevant author) decides to license the use of the collage (or each photograph in the collage) in return for a fee. In addition, Jasper’s use is not exempt as a specified purpose under any fair dealing exception in the UK and in Australia.

This suggests that Jasper has infringed the copyright laws in all three jurisdictions.

III. Conclusion

In this chapter I have considered the application of copyright laws in the US, the UK and Australia to the content-generative activities of social
media users. This allows me to compare copyright laws with other regulative factors on social media—namely the terms of service and the technological features—in regulating the content-generative behaviours of users. In particular, I am concerned with the consistency of the copyright regimes with each of the private regimes explored in the subsequent chapters of this book.

I have demonstrated, through my discussion of the application of copyright subsistence and infringement issues and the challenges posed to the content-generative activities on social media, as well as through scenario one, the following:

(i) Whether content used on social media is copyright protected requires one to address the multiple copyright subsistence issues set out;

(ii) Any single content-generative activity can raise concerns of copyright infringement of more than one right;

(iii) There is uncertainty as to whether any exceptions to copyright laws apply, although the fair use doctrine in the US is found to be more permissive than the fair dealing exceptions in the UK and Australia; and

(iv) Conflict of laws issues will make it hard for users to ascertain the applicable law and the relevant jurisdiction in which a court can adjudicate a copyright-related dispute with respect to content on social media.

In this sense, it is not possible for any regular social media user to have the level of understanding of copyright laws required to assess the legitimacy of the content-generative activities he or she undertakes, through the application of copyright laws to these activities.

With scenario one, I have shown how the application of the copyright laws of the three jurisdictions to the same content-generative activities under the case study can result in varied positions being reached on the copyright liabilities of users based in each jurisdiction. In particular, the application of the copyright laws of the US, the UK and Australia in scenario one yields different outcomes under the US Copyright Act, as against the UK Copyright Act and the Australian Copyright Act. Out of a total of eleven content-generative activities extracted from the case study for scenario one, the application of copyright laws to as many as nine of these activities results in contrasting positions on the copyright liabilities of the respective users.
In the next chapter I will survey the terms of service of the five selected social media platforms that purport to regulate the content-generative behaviours of users. I will also assess the interaction of these terms of service with the copyright regimes in each of the US, the UK and Australia for alignment and incompatibility. I then present the second of four scenarios in the book to demonstrate how the terms of service can apply to the content-generative activities of Jane and other users in the case study.

Notes

1. United States Constitution art I § 8, cl 8 (1787). The terms ‘science’ and ‘useful arts’ are used in their eighteenth-century sense: the term ‘science’ relates to knowledge, while the term ‘useful arts’ relates to inventions. See, for example, Tyler T. Ochoa, ‘Copyright Duration: Theories and Practice’ in Peter K. Yu (ed.), Intellectual Property and Information Wealth: Copyright and Related Rights (Green Publishing Group, 2007) 133; Malla Pollack, ‘What is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution or Introducing the Progress Clause’ (2001) 80 Nebraska Law Review 754.


3. Statute of Anne 1709 (UK) c 19, as repealed by the Copyright Act 1842.

4. Statute of Anne 1709 (UK) c 19.

5. The copyright laws of Australia and the UK did not evolve in lockstep. For instance, Australian copyright law was still based upon the Copyright Act 1911 (UK), even after the United Kingdom (UK) modernised its copyright laws under the Copyright Act 1956 (UK). Despite a strong resemblance between copyright laws in Australia and the UK between the years 1968 and 1988, subsequent reforms under the Copyright, Designs and Patents Act 1988 (UK) c 48 were not followed by Australia. The British Copyright Act of 1911 applied in Australia until the Copyright Act 1968 (Cth) came into force in 1969. See, for example, Copyright Owners Reproduction Society v EMI (Australia) Pty Ltd [1958] HCA 54; James Lahore, Intellectual Property in Australia: Copyright (Butterworths, 1977) [102].


9. Copyright, Patents and Designs Act 1988 (UK) c 48 (UK Copyright Act).

10. Copyright Act 1968 (Cth) (Australian Copyright Act).

11. Sculptural works are grouped together with pictorial and graphic works under the US Copyright Act and hence mentioned as part of this broad category. However, sculptural works per se are not the types of content currently available on social media, as we now know it to be.

12. See US Copyright Act, §§ 101 and 102 (a).

13. US Copyright Act, § 103.

14. UK Copyright Act, s 1(1).

15. Australian Copyright Act, ss 32, 89–92. Copyright protection is conferred on ‘works’ (comprising literary, dramatic, musical and artistic works) and other forms of subject matter not being ‘works’ (such as sound recordings, cinematograph films, television broadcasts, sound broadcasts and published editions of works).

16. This closed list of works may have less significance in the UK, particularly if creativity becomes the only relevant determinant of entitlement to copyright protection. See Jonathan Griffiths, ‘Dematerialization, Pragmatism and the European Copyright Revolution’ (2013) 33(4) Oxford Journal of Legal Studies 767, 782. See also Infopaq International A/S v Danske Dagblades
17. UK Copyright Act, s 6.
18. Australian Copyright Act, s 10. A ‘broadcast’ is defined to refer to a communication to the public delivered by a broadcasting service within the meaning of the Broadcasting Services Act 1992 (Cth).
19. UK Copyright Act, s 8.
20. Australian Copyright Act, s 88.
22. US Copyright Act, § 102 (b).
28. Goldstein, P. and Hugenholtz, B. 2013, 221. See also Walker v Time-Life Films Inc, 784 F 2d 44, 50 (2nd Cir) (‘Elements such as drunks, prostitutes, vermin and derelict cars would appear in any realistic work of policemen in the South Bronx. These similarities are therefore unprotectable as ‘scènes à faire’, that is, scenes that necessarily result from the choice of a setting or situation’), cert denied, 476 US 1159 (1986).
29. Goldstein, P. and Hugenholtz, B. 2013, 220. The US Supreme Court has stated that the idea–expression dichotomy strikes a balance between the First Amendment and the US Copyright Act by permitting the free communication of facts while still protecting an author’s expression. See Harper, 471 US 539 at 556 (1985).
31. See US Copyright Act, § 102(a); UK Copyright Act, s 1(1); Australian Copyright Act, ss 32(1) and 32(2).
32. See, for example, Feist Publications Inc v Rural Telephone Service Company, 499 US 340 (1991) (Feist); L Batlin & Son Inc v Synder, 536 F 2d 486, 490 (2nd Cir, 1976) (Batlin); Baltimore Orioles v Major League Baseball Players, 805 F 2d 663 (7th Cir, 1986).
33. The ‘sweat of the brow’ doctrine was rejected in Feist, 499 US 340 (1991), where the court held that the selection, coordination and arrangement of the pages in telephone directories did not satisfy the minimum standard of originality for copyright protection in the US.

35. See, for example, Alfred Bell & Co v Catalda Fine Arts Inc, 191 F 2d 99, 103 (2nd Cir, 1951), which articulated that an author had to contribute something more than a ‘merely trivial’ variation which is recognisable his or her own for the author’s work to be copyright protected. See also cases after Feist, 499 US 340 (1991), which relied in part or employed similar language to this test: Atari Games Corp v Oman, 979 F 2d 242, 246 (DC Cir, 1992) (Atari); Silverstein v Penguin Putnam, 368 F 3d 77 (2nd Cir, 2004); Assessment Technologies v Wiredata, 350 F 3d 640 (7th Cir, 2003).


37. UK Copyright Act, ss 1(a) and 1(b). See also Kevin Garnett, Gillian Davies and Gwilym Harbottle, Copinger and Skone James on Copyright (Thomson Reuters, 16th ed., 2011) [3–150]–[3–151].

38. Australian Copyright Act, s 32(1). See also Ricketson, S. and Cresswell, C. 2015 [4.35].

39. Ricketson and Cresswell suggest that there are two aspects of the requirement of ‘originality’. The first is that the particular work must have originated from the author and must not have been copied. The second is that the author has used some skill and/or labour in the making of the work. Although there is no statutory requirement of originality in Australia, there is still a minimum requirement for protection in relation to other subject matter, in the sense that such subject matter should not be taken or copied from another source. See Ricketson, S. and Cresswell, C. 2015 [4.35]. See also UK Copyright Act, ss 5A(2) and 5B(4), which provides for this minimum requirement.

40. See, for example, University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch 601 at 608–9; Ladbrooke (Football) Ltd v William Hill (Football) Ltd [1964] 1 All ER 465 (Ladbrooke); CBD Records Australia Ltd v Gross (1989) 15 IPR 385 (Federal Court of Australia); VPR (1937) 58 CLR 479 at 511; IceTV Pty Ltd v Nine Network Australia Pty Ltd [2009] HCA 14 (IceTV). In IceTV the High Court held that although the plaintiff invested the required ‘skill and labour’ in the programming decisions and selection of programme information, the action for infringement failed as this ‘skill and labour’ was not directed to the expression of time and title information in the programme guide that the defendant appropriated.


43. Ricketson, S. and Cresswell, C. 2015 [7.215]. Ricketson also suggests that an alternative explanation is that such works have no intelligible meaning on their own.


47. Francis, Day & Hunter v Twentieth Century Fox Film Corporation [1940] AC 112 at 123 (Francis, Day & Hunter) (see Lord Wright).


50. See, for example, Fairfax [2010] 88 IPR 11 (Federal Court of Australia). But see also Meltwater [2011] EWCA Civ 890, which suggests that news headlines can be copyright protected if they are worthy of being original literary works on their own.

52. See, for example, The Guardian 2015; D’Orazio, D. 2015.


54. In the US some courts have set a higher standard of originality for derivative works than that for non-derivative works. See, for example, Batlin, F 2d 486 (2nd Cir, 1976); Gracen v Bradford Exchange, 698 F 2d 300 (7th Cir, 1983). But see Schrock v Learning Curve International Inc, 586 F 3d 513, 519–20 (7th Cir, 2009) (where the court observed the historically lower standard in finding originality in the photographs, which were derivative works).


57. See Ricketson, S. 2012.

58. US Copyright Act, § 201(a). In addition, under the US Copyright Act, in the case of a work made for hire the employer is deemed to be the author of the work; see US Copyright Act, § 201(b).

59. US Copyright Act, § 101.


61. UK Copyright Act, s 9(1).

62. UK Copyright Act, s 10(1).

63. Australian Copyright Act, s 10.

64. Australian Copyright Act, s 10.


66. Jaszi, P. 1994, 50. See also Megan Richardson and Jake Goldenfein, ‘Competing Myths of Informal Economies’ in Dan Hunter et al (eds), Amateur Media: Social, Cultural and Legal Perspectives (Routledge, 2013) 18, 23. But see Ricketson, S. 2012. Where there is no human author identifiable for content, the question to ask could be whether the time, effort and investment of resources to create such content, if unprotected by copyright’s author-centric framework, should be protected under a neighbouring rights regime instead. It appears that there is no current protection for such content under present laws, except, perhaps, under the UK Copyright Act, s 9(3).

67. As indicated on the history of the relevant page. See also Fairfax [2010] 88 IPR 11 (Federal Court of Australia), which highlights the growing problem of identifying authorship in a work. In Fairfax, the plaintiff chose to rely on s 129(2) of the Australian Copyright Act that presumes the originality of published works where it is not established that ‘the identity of the author is generally known or can be ascertained by reasonable inquiry’, instead of adducing evidence regarding the authorship of the works in question. Bennett J noted that the plaintiff did not attempt to ascertain the identity of the authors from its own employment and attendance; as such, she found that the presumption under s 129(2) was not available to the plaintiff in proving the originality of the headlines. This presumption of originality under s 129(2) (including that the publication is alleged to be pseudonymous) may, however, be useful in relation to articles shared on Wikipedia.


69. Jane C. Ginsburg, ‘The Author’s Place in the Future of Copyright’ (2009) 153(2) Proceedings of the American Philosophical Society 147, 152–3. Ginsburg argues that the concept of professional authorship will persist, notwithstanding that professional authors will be joined by a host of newcomers.


74. See Telstra Corporation Ltd v Phone Directories Company Pty Ltd (2010) 194 FCR 142, where individual human contributions to telephone directories produced by Telstra could not be
discerned clearly, in part because the ultimate work was produced by technology. As such, it was held that copyright did not subsist in Telstra's phone directories. It was also decided that the collaboration between staff members did not warrant the deployment of the concept of joint authorship, and that the intellectual effort to organise the listings did not represent sufficient literary effort warranting protection.

75. But see Melissa Dolin, ‘Note: Joint Authorship and Collaborative Artwork Created through Social Media’ (2011) 39(4) American Intellectual Property Law Association Quarterly Journal 535, 561, where she suggests that in order to encourage artists to continue creating works and to further the goals of copyright, collaborative content created on social media platforms should generally be found to satisfy the requirements for copyright protection. Users who have jointly collaborated to create such works should be considered joint authors, unless there are contractual stipulations to the contrary or a person is contributing anonymously.


78. Twitter, Help Center: I'm missing Tweets <https://support.twitter.com/articles/277671#>.

79. See, for example, Elisa Gabbert, Find Your Old Tweets: How to See Your First (Worst?) Tweet (10 October 2013) <http://www.wordstream.com/blog/ws/2013/10/10/how-to-find-your-old-tweets>. This guide provides users with steps to take to locate their old 'tweets'.

80. This challenge persists although US courts are observed to be generous in their interpretation of the fixation requirement, so long as the expressions of ideas in content on social media are tangible. See Dolin, M. 2011, 553.

The US acceded the instrument on 16 November 1988, which came into force on 1 March 1989; and the UK ratified the instrument on 5 September 1887, which came into force on 5 December 1887. The instrument came into force in Australia on 14 April 1928. See WIPO.

See UK Copyright Act, s 159 and The Copyright (Application to Other Countries) Order 1993 (UK) SI 1993/942, Schedule One.


108. US Copyright Act, § 106.

109. US Copyright Act, § 102.

110. US Copyright Act, § 106(1).

111. US Copyright Act, § 101.

112. UK Copyright Act, s 16(1).

113. UK Copyright Act, s 17.

114. UK Copyright Act, s 17(2).

115. UK Copyright Act, s 17(3).

116. UK Copyright Act, s 17(4).

117. UK Copyright Act, s 17(6).

118. Australian Copyright Act, ss 31(1)(a)(i) and 31(1)(b)(i).

119. Australian Copyright Act, ss 85(1)(a) and 86(a).

120. Australian Copyright Act, s 10.

121. Australian Copyright Act, ss 21(1A) and 21(6).

122. Australian Copyright Act, s 21(3)(b).

123. Australian Copyright Act, s 65(2). See also Australian Copyright Act, ss 66 and 67.


125. In relation to the application of this principle in the UK see UK Copyright Act, s 16(3). See, for example, Designers Guild Ltd v Russell Williams (Textiles) Ltd [2000] UKHL 58 (Designers Guild); Ladbroke [1964] 1 All ER 465; Francis, Day & Hunter [1940] AC 112. See also William Cornish, David Llewelyn and Tanya Aplin, Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights (Sweet & Maxwell, 7th ed., 2010) [12–06]. In the case of Australia, see Australian Copyright Act, s 14(1). See, for example, EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd [2011] FCAFC 47 (EMI Songs); IceTV [2009] HCA 14; Elwood Clothing Pty Ltd v Cotton On Clothing Pty Ltd [2008] FCAFC 197 (Elwood Clothing). See also Ricketon, S. and Cresswell, C. 2015 [9.80]; Sam Ricketon, Megan Richardson and Mark Davison, Intellectual Property: Cases, Materials and Commentary (Lexis Nexis Butterworths, 5th ed., 2013) 247–71. Whether an author has copied a substantial part may depend more on quality (ie, whether an important part of the subject matter is taken) than on the quantity of what he has taken. This could make the assessment a difficult one to make.


127. US Copyright Act, § 106(2).

128. US Copyright Act, § 101. The definition of ‘derivative work’ also means that, to be copyright protected, such work must pass the threshold for originality and be fixed as tangible expression. The implications of the concept of originality on content on social media have been highlighted earlier.

129. Even where there is incorporation of the original work in the secondary work, the secondary work is not infringing if the final product is not substantially similar to the original work. See Castle Rock Entertainment Inc v Carol Publishing Group Inc, 150 F 3d 132 (2nd Cir, 1998) (Castle Rock), for the proposition that if the secondary work sufficiently transforms the expression of the original work such that the two works are not substantially similar, then the secondary work is not a derivative work and, as such, does not infringe the copyright of the original work. It is noted that no distinction was made between the two forms of infringement (ie, of the rights of reproduction and to produce derivative works) in Castle Rock. See also Well-Made Toy Manufacturing Corp v Goffa International Corp, 354 F 3d 112 (2nd Cir, 2003).
130. See, for example, Batlin, F 2d 486 (2nd Cir, 1976) for the view that a derivative work must qualify for copyright protection on its own in order to infringe the derivative works right. But see Lone Ranger Television Inc v Program Radio Corp, 740 F 2d 718, 722 (9th Cir, 1984) for the alternative view that a derivative work (of which derivative rights can be infringed) may not qualify for copyright protection. See also Lee v A.R.T. Co, 125 F 3d 580 (7th Cir, 1997). In this case the district court initially concluded that as the tile art created by the defendants with the plaintiff's copyrighted note cards was not original enough to be copyright protected, it was not an infringing derivative work. Subsequently the Seventh Circuit affirmed the judgement on slightly different grounds. Although the tile art was seen by itself to be a derivative work, it was not considered an infringement as 'an alteration that includes (or consumes) the original lacks economic significance'. In addition, a split in case law and in scholarly commentary was noted by Judge Easterbook, who then concluded that in the case it was not necessary to choose either view (at 582). The first view results in the paradoxical result that a defendant could gain more protection against liability for not being creative than if he or she had been; see Amy B. Cohen, ‘When does a Work Infringe the Derivative Works Right of a Copyright Owner?’ (1999) 17 Cardozo Arts and Entertainment Law Journal 623, 639.

131. See, for example, Eden Toys v Florelee Undergarment Co, 697 F 2d 27 (2nd Cir, 1982). In this case Judge Mansfield noted that a work may make non-trivial contributions to an existing one, and hence be copyright protected as a derivative work. The author of the work may be liable for copyright infringement if permission from the owner holding the copyright to the original work is not sought, and if the secondary work retains the same aesthetic appeal as the original work. He gave the example of a second edition of a textbook that is copyright protected as a derivative work. This second edition can infringe the original copyright work if it is created without permission.

132. If this case goes to trial its outcome would, however, likely depend on whether Prince's use qualified for the fair use defence in the US; see US Copyright Act, § 107.

133. See Cariou v Prince, 714 F 3d 694 (2nd Cir, 2013) (Cariou). In this case Prince was noted to have created the collages on canvases which incorporate colour, feature distorted forms and settings, and measure between 10 and nearly 100 times the size of the original photographs. Prince's composition, presentation, scale, colour palette and media, as is the expressive nature of his works, were observed to be fundamentally different from the original photographs.


135. Although this relates to content on social media, it should be noted that Prince's use occurred, in part, off site. See Valentine, C. 2015; Plaugic, L. 2015. See also sub-section (B).

136. UK Copyright Act, s 16(1).

137. UK Copyright Act, s 21.

138. UK Copyright Act, s 21(3).

139. Australian Copyright Act, s 31(1)(a)(vi).

140. Australian Copyright Act, s 10.

141. See UK Copyright Act, s 21(2); Australian Copyright Act, s 31(1)(a)(vii).

142. US Copyright Act, § 106 (3).

143. US Copyright Act, § 106 (3). This description overlaps with the given definition of the term ‘publication’ in § 101.

144. US Copyright Act, § 101.

145. See A&M Records v Napster, 239 F 3d 1004 (9th Cir, 2001), where the court held that the internet transmission of a sound recording is an infringing ‘distribution’ of the sound recording and of the copyright-protected music contained therein.

146. This is consistent with the obligations of the US under the WIPO Internet Treaties. See also United States Copyright Office, The Making Available Right in the United States (February 2016) <http://copyright.gov/docs/making_available/making-available-right.pdf>; Jane C. Ginsburg, Comments in response to the US Copyright Office’s Notice soliciting further comments on the ‘Right of Making Available’ dated 15 July 2014 (3 September 2014) <http://copyright.gov/docs/making_available/comments/docket2014_2//reply/Ginsburg_Jane.pdf>. See, for example, BMG Rights Management (US) LLC v Cox Communications Inc et al, 2015 WL 7756130 (ED Va, 1 December 2015) [transferring electronic files (also ‘material objects’) using the BitTorrent protocol satisfies the transactional element of distribution].
The making available right, although not expressly provided for, is said to be implemented through the US Copyright Act's rights of distribution, public performance and display. The making available right is noted to be narrower than the rights to communicate a work to the public under the UK Copyright Act (ss 16(1) and 20(2)) and the Australian Copyright Act (ss 31(1)(a)(iv), 31(1)(b)(ii) and 10). See United States Copyright Office 2016.

The right to publish under Section 31(1) is confined to 'first publication' (ie, as a right which can be violated under an infringement action), unlike publication for the subsistence of copyright under Section 32. See Avel Pty Ltd v Multicoin Amusements Pty Ltd (1990) 171 CLR 88. In this case it was established that the right to publish a work extends only to the right of first publication (ie, supplying copies of a work not previously made public in the relevant territory to the public). See also Ricketson, S. and Cresswell, C. 2015 [16.280]; Ricketson, S., Richardson, M. and Davison, M. 2013, 353–4.

When a work ‘deemed to have been published’ is further defined, and references are made, among others: to reproductions of a work being supplied to the public, by sale or otherwise; copies of films being sold or let on hire to the public; and records of sound recordings being supplied by sale or otherwise to the public.

Reference can be made to the decisions made at the European Union (EU) level. See Information Society Directive, art 3(1). See also ITV Broadcasting Ltd And Others (Court of Justice of the European Union, C-607/11, 7 March 2013) (ITV Broadcasting Ltd) [32].

See, for example, Jennings v Stephens [1936] Ch 469 (Jennings); Ernest Turner Electrical Instruments Ltd v Performing Right Society Ltd [1943] Ch 167; Performing Right Society Ltd v Harlequin Record Shops Ltd [1979] 2 All ER 828 at 833 (where Browne-Wilkinson J, as he then was, adopted the view of Greene LJ in the earlier cases, and said that it is important to see whether the composer would expect to receive a fee for the performance given to the audience).

See, for example, Nils Svensson et al v Retriever Sverige AB (Court of Justice of the European Union, C-466/12, 13 February 2014) (Svensson) [24]–[30], which introduced the concept of the ‘new public’. It was held that as making available the relevant works through hyperlinks did not lead the works in question to be communicated to a new public, the authorisation of the copyright holders is not required.

Svensson (Court of Justice of the European Union, C-466/12, 13 February 2014).

It should be noted that this is a contentious decision which may not be relevant to the UK in future, in any case, owing to the country's forthcoming exit from the EU (or 'Brexit').

178. *Australia Copyright Act*, s 10.

179. See *US Copyright Act*, § 106(1); *UK Copyright Act*, ss 16(1) and 17; *Australian Copyright Act*, ss 31(1)(a)(i), 31(1)(b)(i), 85(1)(a) and 86(a).


181. *UK Copyright Act*, ss 16(1) and 20.

182. *Australian Copyright Act*, ss 31(1)(a)(iv), 31(1)(b)(iii), 85(1)(c) and 86(c).

183. Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press, 2006) 1. See also art 6bis of the Berne Convention, which provides that an author is entitled to moral rights (ie, the rights of attribution and integrity) that exist independently of economic rights.


185. Prior to the enactment of VARA, some state legislatures have enacted moral rights laws. These states include California, New York and Maine. Not all state moral rights protection has been pre-empted by VARA, although the Artists Authorship Rights Act in New York has been held to be so (pre-empted); see *Board of Managers of Soho International Arts Condominium v City of New York*, US Dist LEXIS 10221 (SDNY, 2003).

186. In the case of limited editions of 200 copies or fewer, these are signed and consecutively numbered by the author; see *US Copyright Act*, § 101.

187. In general there is the question as to whether digital works of visual art can be protected under the VARA. It has been suggested that artists who seek VARA’s protection will need to fix their art works in a physical medium and arrange for subsequent dealings in a manner that is consistent with the VARA paradigm. An example is given of a photographer who never prints his digital photograph; instead, he sells the photograph in a digital format (for instance, by placing it in a thumb drive or by permitting the collector to download the digital work). See Joseph Gibbons Llewellyn, ‘Visual Artists Rights Act and the Protection of Digital Works of Photographic Art’ (2010) 11(3) North Carolina Journal of Law and Technology 531, 552.

188. VARA, § 106A(a)(1)(A).

189. VARA, § 106A(a)(1)(B).

190. VARA, § 106A(a)(2).

191. VARA, § 106A(a)(3)(A). The formulation for determining whether harm to honour or reputation exists is flexible – the reputation need not be derived independently of the art work that is the subject of the dispute (ie, author need not prove a pre-existing standing in the artistic community). See *Carter v Helmsley-Spear* 71 F 3d 77 (2nd Cir, 1995).

192. VARA, § 106A(a)(3)(B). The rights under § 106A(a)(2) and § 106A(a)(3) are noted to be rights of integrity.

193. See, for example, Adeney, E. 2006, 487.

194. VARA, §§ 106A(a)(2) and 106A(a)(3)(A). It is noted that the requirements for prejudice are conjunctive as the provision reads ‘which would be prejudicial to his or her honour or reputation’, therefore suggesting the non-ineluctability of the harm. This can be contrasted with the equivalent provisions in the UK and in Australia. See also Adeney, E. 2006, 494.

195. Dramatic works are again omitted from the discussion, as they are not relevant to this book.

196. *UK Copyright Act*, s 77.

197. See, for example, Adeney, E. 2006, 395.

198. *UK Copyright Act*, ss 77(2)–(6).

199. Specific assertion can be made by a statement included in an assignment of copyright in the work, where the author or director asserts his or her right to be identified, or by an instrument in writing signed by the author or director; see *UK Copyright Act*, ss 77(1) and 78(2).

200. The right of a person not to have a work or film falsely attributed to him or her if the person is not the author or director; see *UK Copyright Act*, s 84(1).

201. See, for example, *Pasterfield v Denham* [1999] FSR 168 (*Pasterfield*), 182, where it was held that the colour variations and minor variations of detail between the two works are not considered to be ‘derogatory treatment’ and that ‘gross differences’ would be required.

202. See *Pasterfield* [1999] FSR 168, 181–2, where it was considered that the honour or reputation test applied to mutilations and distortions. See also *Confetti Records* [a firm] v *Warner Music UK Ltd (trading as East West Records)* [2003] EWJC 1274, [149]–[150]; Adeney, E. 2006, 407–9. Like in the US, the honour or reputation test applies conjunctively.

203. *UK Copyright Act*, ss 80(1) and 80(2).
204. See UK Copyright Act, s 77(2)(a), in respect of the right to attribution where a literary work is communicated to the public.
205. See UK Copyright Act, s 80(4), in respect of the right of the right to integrity where a visual image of a derogatorily treated artistic work is communicated to the public.
206. Australian Copyright Act, Part IX.
207. Australian Copyright Act, Part IX, Divisions 2–4.
208. Australian Copyright Act, ss 195AC–AF.
209. Australian Copyright Act, ss 195AG and 195AH.
210. Australian Copyright Act, s 195AI.
211. Australian Copyright Act, ss 195AJ–AL. It has been suggested that proving the propensity to produce harm to honour or reputation through present action is sufficient to establish prejudice. See Adeney, E. 2006, 583.
212. Such content will not fall under the definition of a work of visual art, being a painting, drawing, print, sculpture or a still photographic image produced for exhibition purposes only; see US Copyright Act, § 101.
213. Doubt has been expressed as to whether this requirement is compliant with the Berne Convention. See, for example, Garnett, K., Davies, G. and Harbottle, G. 2011 [111.18].
214. This is because the right is not likely to have been asserted generally or specifically (ie, in an assignment through a statement of the author or director, or by an instrument in writing); see UK Copyright Act, ss 78(1) and 78(2).
215. For instance, the right of attribution of an author is only protected under rights management provisions if his or her name is included as part of the information accompanying the copyright work. There is no obligation imposed on the owner of the work to do so.
217. Digital Millennium Copyright Act, § 1202(c).
220. This will include literary, musical, dramatic, pictorial, graphic, sculptural and audiovisual works, as well as sound recordings, architectural works, compilations and derivative works. See US Copyright Act, §§ 102 and 103.
222. DMCA, § 1202(b)(1).
223. UK Copyright Act, s 296ZG(1).
224. UK Copyright Act, s 296ZG(1).
225. UK Copyright Act, s 296ZG(2).
226. UK Copyright Act, s 296ZG(7)(b).
227. UK Copyright Act, s 77.
228. UK Copyright Act, ss 296ZG(1)–(2).
229. Australian Copyright Act, s 116B.
230. Australian Copyright Act, s 116B.
231. Australian Copyright Act, s 116C.
232. Australian Copyright Act, s 10.
233. Australian Copyright Act, ss 195AC–AF.
234. Australian Copyright Act, s 116B(1)(c).
236. US Copyright Act, § 412.
237. US Copyright Act, §§ 502–504.
238. US Copyright Act, § 504(c)(1).
239. US Copyright Act, § 504(c)(2).
240. Agence France Presse v Morel, 10 Civ 02730 (USDC SDNY, 14 January 2013) (Morel); Morel, 10 Civ 02730 (USDC SDNY, 21 May 2013); Morel, 10 Civ 02730 (USDC SDNY, 22 November 2013); Morel, 10 Civ 02730 (USDC SDNY, 13 August 2014).
241. Morel (USDC SDNY, 14 January 2013); Morel (USDC SDNY, 21 May 2013); Morel (USDC SDNY, 22 November 2013); Morel (USDC SDNY, 13 August 2014).
242. See, for example, Eugene Reznik, How the photo community would reimagine copyright (16 July 2015) <http://www.americanphotomag.com/how-photo-community-reimagines-copyright>. A photojournalist named Yunghi Kim commented that there is a burden both
in terms of time and money for photographers to protect their works through registration. In addition, he recommended giving photographers up to a year to register their works. See also United States Copyright Office, eCO Registration System <http://copyright.gov/eco/>, where the current processing time for the electronic filing of a copyright (registration) application is stated to take up to 8 months and that for the filing of such an application through paper forms is 13 months.

243. *UK Copyright Act*, s 96.
244. *UK Copyright Act*, s 97(1).
245. *UK Copyright Act*, s 97(2).
246. *UK Copyright Act*, s 97(2).
247. *Australian Copyright Act*, s 115(2).
248. *Australian Copyright Act*, s 115(3).
249. *Australian Copyright Act*, s 115(4).
250. *Australian Copyright Act*, s 115(4).

251. This content is likely to be considered as *unpublished*. Reference is made to the limited definitions of the terms 'publication' and 'copies' discussed earlier; see sub-section (D).

252. The awards of additional damages can, however, be high in Australia. See, for example, *Aristocrat Technologies Australia Pty Ltd v DAP Services (Kempsey) Pty Ltd (in liq)* (2007) 71 IPR 437.

253. *UK Copyright Act*, s 97(1).
254. *Australian Copyright Act*, s 115(3).

255. The fair use doctrine exempts a fair use from copyright infringement in the US, while the fair dealing exceptions exempt specified categories of purposes from copyright infringement in the UK and in Australia.

256. See Matthew Sag, ‘Predicting Fair Use’ (2012) 73(1) *Ohio State Law Journal* 47, 85, where Sag makes this comment of fair use.

257. The right of reproduction (of the photographs), the right to prepare derivative works (also of the photographs), as well as the right to display publicly (in respect of the sculptures that are private); see *US Copyright Act*, §§ 106(1), 106(2) and 106(5).

258. *US Copyright Act*, § 106(1); *UK Copyright Act*, ss 16(1) and 17; *Australian Copyright Act*, ss 31(1)(a)(i), 31(1)(b)(i), 85(1)(a) and 86(a).
259. *US Copyright Act*, §§ 106(3)–(6).
260. *UK Copyright Act*, ss 16(1) and 20.
261. *Australian Copyright Act*, ss 31(1)(a)(iv), 31(1)(b)(iii), 85(1)(c) and 86(c). See also sub-section (E).


269. See, for example, *Campbell*, 510 US 569 (1994); *Suntrust Bank*, 268 F 3d 1257 (11th Cir, 2001).
270. See, for example, *Koons II*, 467 F 3d 244 (2nd Cir, 2006); *Mattel Inc*, 353 F 3d 792 (9th Cir, 2003).
271. See, for example, *Bill Graham*, 448 F 3d 605 (2nd Cir, 2006).
272. See, for example, Kelly, 336 F 3d 811 (9th Cir, 2003); Perfect 10, 508 F 3d 1146 (9th Cir, 2007).
274. UK Copyright Act, s 29.
275. UK Copyright Act, s 30.
276. UK Copyright Act, s 29(1C).
277. The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (UK) SI 2014/2356 (UK Copyright Regulations 2014), reg 5. The regulation introduced, among other things, the new sections 30(1ZA), 30A and a new paragraph 2A (to Schedule 2) to the UK Copyright Act.
278. This is practical given that the subtle humour of a parody can be diminished by such a requirement.
279. Australian Copyright Act, ss 41 and 103A.
280. Australian Copyright Act, ss 42 and 103B.
281. Australian Copyright Act, ss 40 and 103C.
282. Australian Copyright Act, ss 41A and 103AA.
283. The Copyright Amendment Act 2006 (Cth). Part 3 introduced the new sections 41A and 103AA.
284. Australian Copyright Act, ss 41, 41A, 42, 103A, 103AA and 103B.
285. ALRC, Copyright and the Digital Economy (November 2013) <http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf>. The ALRC recommended that a fair use exception should be applied when determining whether quotation infringes copyright, and that ‘quotation’ should be one of the illustrative purposes in the fair use analysis. Alternatively, if fair use is not enacted, the ALRC recommended consolidating the existing fair dealing exceptions and to provide for certain new purposes in a closed list (including for the purpose of quotation) which do not infringe copyright. In this instance, fairness factors will have to be considered in determining if a dealing is fair.
287. UK Copyright Act, s 30A.
288. Australian Copyright Act, 41A and 103AA.
289. Australian Copyright Act, ss 41 and 103A.
290. See, for example, Network Ten Pty Ltd v TCN Channel Nine Pty Ltd [2004] HCA 14. In this case, Network Ten’s show ‘The Panel’ played short clips from the recorded broadcasts made by Channel Nine (and other networks) – its hosts discussed these short clips. Channel Nine brought suit for Network Ten's copyright infringement of its broadcasts. The finding that some of The Panel's uses infringed copyright provides little certainty for users of copyright-protected material that their parodic or satirical commentaries are exempt. See also Nicolas Suzor, ‘Where the Bloody Hell Does Parody Fit in Australian Copyright Law?’ (2008) 13 Media and Arts Law Review 218, 224. Suzor noted that the definitions of 'criticism', 'review' and 'news' are drawn restrictively in De Garis v Neville Jefress Pidler (1990) 37 FCR 99 at 107, and that there is little room for unlicensed use of copyright-protected material to make a general comment on society or unrelated works.
291. Although a recent European Court of Justice’s decision suggests a sophisticated interpretation of the expression 'parody', which takes into account the striking of a 'fair balance' between the interests and rights of copyright holders and the freedom of expression of users. Furthermore, whether a defendant has used the original copyright work to convey a discriminatory message is potentially relevant to the assessment of this 'fair balance'; see Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others (Court of Justice of the European Union, C-201/13, 3 September 2014) [26]. The relevance of this decision to the UK (owing to Brexit) is uncertain. See also Jonathan Griffiths, ‘Fair Dealing after Deckmyn: The United Kingdom’s Defence for Caricature, Parody or Pastiche’ in Megan Richardson and Sam Ricketson (eds), Research Handbook on Intellectual Property in Media and Entertainment (Edward Elgar, 2017) 64.
293. UK Copyright Act, s 30(1ZA).
In respect of the second condition, the UK Intellectual Office’s guidelines suggest that it would be a matter of fact, degree and impression in each case, and of asking how a fair-minded and honest person would have dealt with the work. Relevant factors considered include the amount of the work quoted and if the use would affect the market for the original work. For the third condition, the use has to be fair and reasonable (ie, a shorter quotation is likely to be more permissible than a longer extract). In respect of the last condition, I see few instances on social media where sufficient acknowledgement could be impossible for reasons of practicality or otherwise. See Intellectual Property Office, Exceptions to Copyright: Guidance for Creators and Copyright Owners (October 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448274/Exceptions_to_copyright_-_Guidance_forCreators_and_CopyrightOwners.pdf>.

See, for example, TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (2002) 55 IPR 112 (Full Federal Court, see particularly Sundberg J’s judgement at [2]); Hubbard v Vosper [1972] 2 QB 84 at 94.

See, for example, Kevin Taylor, ‘Copyright in Practice: The Publisher Perspective’ in Trevor Fenwick and Ian Locks (eds), Copyright in the Digital Age: Industry Issues and Impacts (Wildy, Simmons & Hill Publishing on behalf of The Stationers Company and individual contributors, 2010) 159, 162.

See, for example, American Law Institute, Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes (2007) (ALI Principles) § 101(6). A ‘transnational civil dispute’ is defined to mean a civil action in a court of the forum state in which there is a claim or defence under the intellectual property rights of another state (ie, non-forum state), or a claim arising out of activities that implicate intellectual property rights where the activities occur, at least in part, outside the forum state.

This uncertainty can be caused as much by conflicting demands imposed under varied copyright provisions from different jurisdictions, as well as by overlapping rights under the same. See Graeme B. Dinwoodie, Rochelle Dreyfuss and Annette Kur, ‘The Law Applicable to Secondary Liability in Intellectual Property Cases’ (2010) 42 New York University Journal of International Law and Politics 201, 206.


See, for example, Dinwoodie, G. 2009, 718. Dinwoodie has also argued that the unexamined invocation of the principle of territoriality has undermined the maturing of a properly developed private international law of intellectual property, as the principle has led erroneously to the vesting of exclusive jurisdiction over intellectual property litigation in the courts of the country for which protection is sought (788–9). He noted further that article 5(2) has been alternatively read to institute a rule of lex fori, as the forum is ‘the country where protection is claimed’, although the accepted reading is that the article refers to the country where the infringement is alleged to have occurred (ie, the country in which protection is claimed). See also Graeme W. Austin, ‘Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation’ (1999) 23 Columbia-VLA Journal of Law & Arts 1, 24–5.

See Dinwoodie, G. 2009, 730. In this respect Dinwoodie noted that the US courts have articulated choice of law rules that admit greater flexibility on the question of infringement, without jettisoning respect for the claims of the lex loci protectionis. Instead the lex loci delicti (ie, the law of the place where the wrong was committed) is identified as the applicable choice of law rule in the infringement context.

ALI Principles.


ALI Principles, § 201(1).

CLIP Principles, art 2.101.

ALI Principles, § 204(1) – (2) (the person must have substantially acted, or taken substantial preparatory acts, to initiate or further the infringement); CLIP Principles, art 2.202.

ALI Principles, § 321(1); CLIP Principles, art 3.603(1).
310. **ALI Principles**, § 321(1).
311. **CLIP Principles**, art 3.603(2).

316. See **UK Copyright Act**, ss 153–5; **Australian Copyright Act**, s 32(2). These factors are less relevant when we consider if the same content is copyright protected in the US, as such content (likely considered to be unpublished instead) is copyright protected irrespective of the nationality or domicile of the relevant author. See **US Copyright Act**, § 104(a). See also the discussion in Part I, sub-section (D).

317. See **US Copyright Act**, § 106(1); **UK Copyright Act**, ss 16(1) and 17; **Australian Copyright Act**, ss 31(1)(a)(i), 31(1)(b)(i), 85(1)(a) and 86(a).

318. **US Copyright Act**, §§ 107(1) and (4). The second fair use factor (ie, the nature of the copyright-protected work) is likely to be neutral to both the copyright holder and Jane; see § 107(2).

319. See **US Copyright Act**, § 107(3).
320. **UK Copyright Act**, s 30.
321. **UK Copyright Act**, s 30A.

323. **Australian Copyright Act**, ss 41 and 103A.
324. **Australian Copyright Act**, ss 41A and 103AA.
325. **Australian Copyright Act**, ss 42 and 103B.
326. See **Australian Copyright Act**, ss 43C, 47J, 109A, 110AA and 111.
327. **Australian Copyright Act**, ss 43C, 47J, 109A and 110AA.
328. Jane’s use is likely exempt as a fair use in the US.
329. **US Copyright Act**, § 106(3).
330. **UK Copyright Act**, s 16(1).
331. **Australian Copyright Act**, s 31(1).
332. **US Copyright Act**, §§ 106(4) and 106(5).
333. **UK Copyright Act**, s 16(1).
334. **Australian Copyright Act**, ss 31(1)(a)(vi), 31(1)(a)(iv), 31(1)(b)(iii), 85(1)(c) and 86(c).
336. **UK Copyright Act**, s 20(2).
337. See *Information Society Directive*, art 3(1); **ITV Broadcasting Ltd** (Court of Justice of the European Union, C-607/11, 7 March 2013) [32].
338. The expression ‘in public’ is considered in relation to the owner of the copyright (ie, the copyright holder’s public). The question is whether the audience is one which the copyright holder would fairly consider to be a part of his or her public (ie, whom the copyright holder would expect to receive remuneration from). This can refer to a small portion of the public and neither the size of the audience nor the privacy of the surroundings is decisive. See, for example, **Rank Film Production Ltd** (1983) 2 IPE 113 (Rank Film); **Telstra Corporation v Australasian Performing Right Association** (1997) 191 CLR 140.
339. ‘To the public’ (in relation to the right to communicate) conveys a broader concept than ‘in public’ (in relation to the right to perform, show or play). A communication to the public includes a communication to individual members of the public in a private setting. See, for example, **Rank Film** (1983) 2 IPE 113; **Telstra Corporation v Australasian Performing Right Association** (1997) 191 CLR 140. Apart from defining ‘to the public’ to refer to the public within or outside Australia, see **Australian Copyright Act**, s 10, ‘in public’ and ‘to the public’ is left largely to judicial determination. See also Ricketson, S., Richardson, M. and Davison, M. 2013, 358–61.
These countries are contracting parties to the Berne Convention. Copyright protection will be conferred even if the venue of first publication (if published) cannot be ascertained. See the discussion in Part I, sub-section (D).

I note that substantial similarity appears to be an elusive concept, not subject to precise definition. See, for example, Concrete Machinery Co Inc v Classic Lawn Ornaments Inc, 843 F 2d 600 (1st Cir, 1988); Atari Inc v North American Philips Consumer Electronics Corp, 672 F 2d 607 (7th Cir, 1982). Under the ‘ordinary observer’ test, as the original commentary is not identifiable in Jane’s new commentary, an ordinary, reasonable person is not likely to conclude that the two commentaries are substantially similar, and that Jane has appropriated Evangeline’s expression.

This is regardless of whether the allegedly infringing work is original enough to constitute a separate, copyright-protected, derivative work.

See UK Copyright Act, ss 16(1) and 21(3); Australian Copyright Act, ss 31(1)(a)(vi) and 10.

Although Evangeline’s commentary is not reproduced substantially so as to be recognisable by anyone, the quality of what is copied (linked to the factor of originality of the part copied) is critical to the assessment as to whether a substantial part is copied. See UK Copyright Act, s 16(3); Australian Copyright Act, s 14. See also Hawkes & Son (London) Ltd v Paramount Films Service Ltd [1934] 1 Ch 593; Ice TV [2009] HCA 14.

In particular, the right against false attribution; see Australian Copyright Act, ss 195AC–AH.

See US Copyright Act, § 101. There is also no breach of the right to prohibit the removal or alteration of copyright management information under the DMCA, § 1202(b), given that there are no facts in the case study which establish that Jane knows, or has reasonable grounds to know, that she is assisting or hiding an infringement of Evangeline’s copyright.

UK Copyright Act, ss 77(1) and 78(2).

UK Copyright Act, s 30. I add that Jane will not likely be able to satisfy all the conditions to avail herself of the newly extended fair dealing exception for the purpose of quotation under s 30(1ZA) [in particular, that sufficient acknowledgement is impossible for reasons of practicality or otherwise under s30(1ZA)(d)]. On the facts, it cannot be ascertained if Jane’s use is a fair dealing and if the amount of material quoted from Evangeline’s commentary is required for the specific purpose. These will be matters of fact, degree and impression.

Australian Copyright Act, ss 41 and 103A.

Circumstances such as the purpose for which the work is used, the context, any practice and so on will be taken into account; see Australian Copyright Act, s 195AR.

See, for example, Koons II, 467 F 3d 244 (2nd Cir, 2006).


UK Copyright Act, s 30A.

Australian Copyright Act, ss 41 and 103A. This exception has been restrictively interpreted. This is also the case under the UK Copyright Act, s 30.

Jane’s use is likely exempt as a fair use in the US and a fair dealing in the UK.

There are no facts in the case study which establish that Zee knows, or has reasonable grounds to know, that he is assisting or hiding an infringement of Jane’s copyright. As such, there is no breach of the right to prohibit the removal or alteration of copyright management information under the DMCA, § 1202(b).

Again circumstances such as the purpose for which the work is used, the context, any practice and so on will be taken into account; see Australian Copyright Act, s 195AR.

Zee’s use is likely exempt as a fair use in the US.

UK Copyright Act, s 30A.

Australian Copyright Act, ss 41 and 103A. This exception has been restrictively interpreted. This is also the case under the UK Copyright Act, s 30.
365. Jane’s use is likely exempt as a fair dealing in the UK.
367. *UK Copyright Act*, s 17(4).
368. *Australian Copyright Act*, s 10.
369. *Australian Copyright Act*, s 86. This includes the exclusive right to make a copy of the film, cause the film to be seen or heard in public and to communicate the film to the public.
371. *US Copyright Act*, §§ 107(1) and (4).
372. *US Copyright Act*, § 107(3). The third factor refers to the ‘amount and substantiality of the portion used in relation to the copyrighted work as a whole’.
373. Cheryl’s use is likely exempt as a fair use in the US.
374. *UK Copyright Act*, s 30A.
375. These uses are likely exempt as fair uses in the US and fair dealings in the UK.
376. The reproduction occurs through the conversion of the collage from a digital form. Each magazine embodying the collage is taken to be a single reproduction. See *Australian Copyright Act*, s 21(1A).