

THE ROSATI CHECKLIST

Aspects to consider when addressing potential copyright infringements under UK law

- **Is the allegedly infringed work protected by copyright in the first place?**
- Does the work belong to one of the categories of works protected under UK copyright?[1] If so, which one?[2]
- Is the work sufficiently original?[3]
- Who owns the copyright?[4]

- **What rights have been potentially infringed?**
- a) **ECONOMIC RIGHTS** (test is in s16 CDPA)
 - (What kind of infringement are we talking about here, primary or secondary?)
 - Is/was there a licence - whether express or implied - in place? If so, what is/was its scope?[5]
 - What rights have been potentially infringed?[6]
 - Is there a case of independent creation (no infringement) or rather derivation (this is the causal connection required by s16 CDPA)?
 - Has there been the taking of the work as a whole or a substantial part of it?
 - As to “substantial part”, the question you have to ask yourself is: is this part sufficiently original?

- b) **MORAL RIGHTS**
 - Never forget that they can be waived under UK law, and that integrity requires a “treatment” (see s80 CDPA)

- **Do any defences (also known as 'permitted acts' and 'exceptions') apply?**
- a) Is there any defence available under UK law?[7]
- b) If so, can the dealing at hand be considered fair (matter of fact)? Factors to consider include:
 - Amount and quality of what has been taken
 - Could have the same purpose been achieved otherwise?
 - Use made of the original work, including whether commercial advantage and motives of the dealing
 - Effects on the market for the original work, eg substitution effect
 - Is the original work unpublished?
 - How was the original work obtained?

[1] If not, eg it is an unconventional work, then you should recall potential implications of CJEU decisions in *Infopaq*, C-5/08 and its progeny, notably *BSA*, C-393/09.

[2] This is key when the economic right that has been potentially infringed is one of those rights, eg adaptation, that are not available to every protected subject-matter.

[3] This may prove tricky when dealing with works which might qualify for copyright protection under the traditional skill, labour or effort approach, but might be considered sub-original if CJEU understanding of originality as author's own intellectual creation is to be intended as requiring something more than sufficient skill, labour or effort.

[4] This requires consideration of issues such as authorship, joint authorship, works created in the course of employment, copyright assignment, etc.

[5] For instance, you might have granted a licence to reproduce a work, not also to communicate it to the public. If an act of communication to the public takes place, it may be an issue of infringement.

[6] See fn 2 above.

[7] Do not forget that, except Article 5(1), all the exceptions in Article 5 of the InfoSoc Directive are optional for EU Member States to implement into their own national laws.