

Copyright and the right to the city

DR MARTA ILJADICA

*University of Aberdeen**

Introduction

In walking, loitering, performing, taking photos and in a number of other ways individuals inhabit the public spaces which make up the shared physical environment of the city. In inhabiting these public spaces individuals encounter a variety of copyright-protected works – for example, public sculptures, murals, images and text on advertising billboards, street art. Yet, even though individuals have little choice but to encounter these works, copyright law does not offer a means of (legally) interacting with them. This results in widespread, if unconscious, infringement of copyright law via the flouting of the relevant legal rules, even as this flouting enables inhabitants to make a vital contribution to the development of culture within the intellectual commons. That such infringement occurs has come to broader attention recently in the calls made for the adoption of a ‘right of panorama’ at the EU level.¹

The analysis presented here is situated, in broad terms, within the literature on the ‘right to the city’.² That literature has, for academic lawyers at least, focused upon the laws of real property, planning, protest and the like,³ with intellectual property law largely absent from discussions of the regulation of public spaces. This article seeks to bring the right to the city into the domain of intellectual property law, specifically copyright law. It explores the ramifications of viewing, reproducing and disseminating publicly placed works by focusing on s 62 of the Copyright Designs and Patents Act 1988 (CDPA) and its historical antecedents, which provide defences to copyright infringement for certain

* Thank you to Merima Bruncevic, Dan Burk, Elena Cooper, Jonathan Griffiths, Fiona Macmillan, Danilo Mandic, Maria Lilla Montagnani, Betsy Rosenblatt, and other participants at the International Society for the History and Theory of Intellectual Property workshop held at the University of Glasgow in June 2016 for their engagement with the workshop draft of this paper, and Lucy Finchett-Maddock and Maria Frabboni. Thank you also to Paul Scott and the NILQ’s anonymous reviewer for their comments on earlier drafts.

1 Anne-Catherine Lorrain and Julia Reda, ‘Freedom of Panorama: A Political “Selfie” in Brussels’ (2015) 37(12) *European Intellectual Property Review* 753–5; for a comparative perspective, see Bryce Clayton Newell, ‘Freedom of Panorama: A Comparative Look at International Restrictions on Public Photography’ (2011) 44 *Creighton Law Review* 405–27.

2 Associated primarily with the work of Henri Lefebvre but also holding a life of its own within a variety of scholarly literatures including sociology, anthropology, law and geography.

3 On the legal construction and control of space, see e.g. Nicholas K Blomley, David Delaney and Richard Thompson Ford (eds), *The Legal Geographies Reader: Law, Power, and Space* (Blackwell 2001).

works permanently situated in public places. The article argues that, while copyright law ought to have a public placement exception to infringement, s 62 fails to safeguard the promotion and dissemination of creativity in public places and thus harms copyright law's purported aim of promoting creativity and culture. In order to fulfil that aim, the relevant copyright exceptions ought to focus not on simply balancing the interests of the author of a work and its user, but instead should operate in a manner reflective of the *space* in which the work at issue is encountered. Thus, for example, the wholesale reproduction of a sculpture in a park would be defensible while the same reproduction of that sculpture in the artist's studio (without permission) would not be. The difference is that the public is compelled to encounter the former, in that those who enter that park have no choice but to view it, and so lawful interaction should be less restricted in such a location.

The discussion below addresses, first, the nature of publicly placed art and the way in which the inhabitation of a city makes interaction with certain works unavoidable; second, whether interactions with publicly placed works constitute copyright infringements; third, the historical evolution and operation of s 62 CDPA and whether the fair dealing for quotation exception – as a proxy for fair use – might be useful in its stead. In concluding, the paper considers the (potential) implications of attempting to make copyright rules consistent with the right to the city.

1 Art in public

This part addresses the relationship between creativity and space by focusing on artistic works. It offers a definition of publicly placed artistic works before seeking to address some of the issues arising from the public placement of works. The next section discusses inhabitants' experience of creativity in the city by focusing on artistic works, rather than other types of authorial works, which also form part of the fabric of the city's public spaces, meaning that inhabitants are compelled to experience these works.⁴

DEFINING PUBLICLY PLACED WORKS

In considering what works are publicly placed (a category which overlaps but is broader than the category of 'public art'),⁵ we are concerned with those works with which inhabitation of public spaces might bring us into contact and which we are, by virtue of that inhabitation, compelled to view. When we speak of publicly placed works, do we include only the obvious types of works such as commissioned sculptures gracing a town square or public garden? Is a permanent collection in an art gallery a collection of public art? And, to give a specific example, is a sculpture in the Tate Modern's Turbine Hall⁶ publicly placed? What about the same sculpture in a shopping mall? There is also a less obvious but no less public, and vitally important, form of publicly placed art gracing the street-facing walls of buildings – street art, graffiti-writing and the like – which the city's inhabitants also experience. Primarily, this article is concerned with interactions with

4 Arguably, in the case of musical works the position is exacerbated since an individual usually has no choice but to hear music.

5 'Public art' as a category tends to refer to commissioned works of public art and the literature dealing with such works includes discussion of, for example, the disputes between artists, local authorities and the general public, provides useful insights into how public art controversies are, or are not, resolved and what is at stake in the determination. See e.g. Hall and Robertson who usefully summarise these as including, amongst others, claims relating to the development of community including through participation in public art decision-making: Tim Hall and Iain Robertson, 'Public Art and Urban Regeneration: Advocacy, Claims and Critical Debates' (2001) 26 *Landscape Research* 5–26, 10–12.

6 The copyright case law demonstrates some fascination with the Tate Modern, e.g. *Lucasfilm v Ainsworth* [2009] EWCA Civ 1328, [54].

artistic works of a kind that track the existing definition of the artistic work in the CDPA to include sculptures, paintings and works of architecture.⁷ It is the determination of the placement of these works as *public* that is liable to cause difficulty, rather than their categorization as artistic works. This is not to suggest, however, that other artistic works (such as works of artistic craftsmanship) and authorial works more generally are irrelevant to the inhabitation of a city.

INHABITANCE AND CREATIVITY IN THE CITY

The nature of the relationship between creativity and the city is not settled in the literature and, indeed, the meaning of ‘space’ in the context of creativity studies can refer to a number of categories including location, areas in which creativity is circumscribed by rules, and environment.⁸ This is relevant in particular to questions of how and why creators produce works and how space both constrains⁹ such works and shapes the form that creative outputs take. One example is the way in which the creativity of architects is constrained by the need to tailor their work to a particular space and their use of certain materials to ensure the building is safe, but also that it meets any relevant legal standards.¹⁰ Certain works, especially works of architecture, when publicly placed become objects encountered by others and used to create new works,¹¹ or reproduced and disseminated by passers-by.

One way to understand the significance of public placement is to broaden out the discussion to consider the nature of creativity within the city, specifically in the context of political claims to the right to the city. The phrase ‘right to the city’ tends to be attributed to Lefebvre who conceived of the right to the city as part of various ‘rights’ including also a ‘right to information’ both of which arise from collective political struggles and demands.¹² It is not a legal right in the vein of a human right.¹³ Rather, the right to the city is described as:

[T]he right to claim presence in the city, to wrest the use of the city from privileged new masters and democratize its spaces.¹⁴

Central to the political struggle, and indeed the concept of a right to the city, is the notion of *inhabitation*.¹⁵ Inhabitation is an aspect of the ‘lived experience’ of a space.¹⁶ For

7 CDPA, s 4.

8 Peter Meusburger, ‘Milieus of Creativity: The Role of Places, Environments, and Spatial Contexts’ in Peter Meusburger, Joachim Funke and Edgar Wunder (eds), *Milieus of Creativity: An Interdisciplinary Approach to Spatiality of Creativity* (Springer 2009) 112–14.

9 On creative constraints generally, see Stef van Gompel, ‘Creativity, Autonomy and Personal Touch: A Critical Appraisal of the CJEU’s Originality Test for Copyright’ in Mireille van Echoud (ed), *The Work of Authorship* (Amsterdam University Press 2014).

10 Ibid 113.

11 An example is the work of street artists and graffiti writers which, whether consciously or not, acts as a form of resistance to private property relations. See, generally, e.g. Andrea Mubi Brighenti, ‘At the Wall: Graffiti Writers, Urban Territoriality, and the Public Domain’ (2010) 13 *Space and Culture* 315–32.

12 Mark Purcell, ‘Possible Worlds: Henri Lefebvre and the Right to the City’ (2013) 36 *Journal of Urban Affairs* 141–54, 146.

13 Antonia Layard, ‘Property Paradigms and Place-Making: A Right to the City; a Right to the Street?’ (2012) 3 *Journal of Human Rights and the Environment* 254–72, 254.

14 Henri Lefebvre quoted in Eugene J McCann, ‘Space, Citizenship, and the Right to the City: A Brief Overview’ (2002) 58 *GeoJournal* 77–79, 77.

15 Purcell (n 12) 146.

16 Both inhabitation and the lived experience are Lefebvrian terms that have been taken up to varying extents in geography and other literatures. See Henri Lefebvre, *The Production of Space*, Donald Nicholson-Smith (trans) (Blackwell 2009).

Lefebvre, ‘urban inhabitation’ trumps nationality/citizenship as the primary identification of a political community and so it is inhabitation and not citizenship that gives rise to the right to participate in decision-making that affects urban space.¹⁷ In contrast, this article adopts Lefebvre’s concept of inhabitation purely in relation to movement through space (whether walking or in a wheelchair, on a bicycle, in a car, a train etc.) although such a leap might, for good reason, horrify geographers.¹⁸ A question for this article is what inhabitation means in the context of photography (or other reproduction) of works located in public space.

Specifically, this part, and indeed the subsequent parts dealing with copyright infringement of publicly placed works (and defences to claims of infringement), are concerned with exploring the *material point of access* to copyright-protected work in public space.¹⁹ Access to works in public space (the physical commons) acts as a point of access to the work in intellectual space (the intellectual commons) or, put another way, provides a co-existent physical location for a work within the intellectual commons that – once the physical object ceases to exist – may continue its life purely within intellectual space.²⁰ We are thus primarily concerned with the potential to reproduce works, rather than the creation of new works such as stencils or tags, in the physical commons.²¹ This conception of inhabitation is thus relevant for our purposes because of the emphasis placed on participation in, and appropriation of, space,²² the former of which includes the right of inhabitants to *play*²³ while moving through the city.

In developing the notion of inhabitation, let us consider here the practical ways in which the free circulation of people within and through public spaces facilitates access to and interaction with creative works and the way this is hampered by copyright. We might link this notion of inhabitation specifically to the idea of the *flâneur*,²⁴ the aimless wanderer of the city. As de Certeau puts it in *The Practice of Everyday Life*, ‘the street geometrically defined by urban planning is transformed into a space by walkers’²⁵ – that is, a space comes to exist only once it is inhabited. The claim to free, reasonably unencumbered movement through space is a political claim to the city and, specifically, a form of resistance to real property, planning and other laws²⁶ that inhibit movement and

17 Mark Purcell, ‘Excavating Lefebvre: The Right to the City and its Urban Politics of the Inhabitant’ (2002) 58 *GeoJournal* 99–108, 103, 105.

18 The concept itself is, of course, more complex and part of a broader political project centred on resistance to existing economic structures. By stripping away the critical deployment of *inhabitation* in Lefebvre’s discussion of the right to the city, this article does not directly engage with that project.

19 But note that the political potential of the claim to the right to the city certainly does not relate only to public spaces. Indeed, a core aspect of it relates precisely to problematising *private* property.

20 For useful frameworks explaining the intellectual commons, see e.g. Ronan Deazley, ‘Copyright’s Public Domain’ in Charlotte Waelde and Hector MacQueen (eds), *Intellectual Property: The Many Faces of the Public Domain* (Edward Elgar 2007); Fiona Macmillan, ‘Altering the Contours of the Public Domain’ in *ibid.*

21 But it is worth noting that the distinction between the physical and intellectual commons is an artificial one to the extent that, for example, an artistic work painted on a building is in a physical public space and, indivisibly, within the intellectual commons.

22 Purcell (n 17) 102–3.

23 Purcell (n 12) 149.

24 Benjamin adopted the concept of the *flâneur* having been influenced by Baudelaire: Lila Leontidou, ‘Urban Social Movements: From the “Right to the City” to Transnational Spatialities and Flâneur Activists’ (2006) 10 *City* 259–68, 264.

25 Michel de Certeau, *The Practice of Everyday Life*, Steven Rendall (trans) (University of California Press 1988) 117.

26 See, generally, for an account of this, Antonia Layard, ‘Shopping in the Public Realm: The Law of Place’ (2010) 37 *Journal of Law and Society* 412–41.

action in public spaces in particular.²⁷ But such a right to freedom of movement within public space is difficult to protect where the would-be flâneur's desires conflict with those of the owners of private property, or perhaps overzealous regulation by public authorities. As Layard points out:

[F]or activities for which there is no recognized and protected right (the abilities, for example, to play, to picnic, to take photographs, ride a bike or simply to be an urban flâneur), no requirement of proportionality is imposed upon the landowner.²⁸

There is also no, or certainly an insufficient, requirement for proportionality in preventing or inhibiting such movement placed on the owner of copyright in publicly placed works. Given the multitude of ordinary ways in which the inhabitation of a city is manifested through photography and the sharing of photographs (the tourist taking a photograph is an obvious but not a special example of such interaction, the posting of selfies on social media is another),²⁹ it is these ordinary ways of inhabiting the city and, in particular, navigating its public spaces – by, for example, moving and recording experience – that matter.

Burrowing further into the notion of inhabitants' movement through the city, it is worth considering such movement in more detail. Again we might make use of Lefebvre's work, this time on the concept of rhythm. While acknowledging that rhythm may have a special relevance to 'established sectors of knowledge and creation',³⁰ our concern is with Lefebvre's exploration of the rhythm of ordinary life in the city. While the former seems the obvious – and no doubt a fruitful – starting point for intellectual property scholars, it is the latter that is of interest in discussing publicly placed works. Specifically, we are concerned with the 'rhythm' of walking as a confluence of place, time and energy;³¹ not a bare physical act but rather 'a cultural practice that is . . . productive of culturally oriented experiences'.³² The rhythms of walking have been classified to include a number of types including the saunter, amble and hike.³³ Publicly placed works institute their own peculiar rhythm on the commuter, ambler, or whichever type of walker and so we might add to this the act of walking while stopping to take photographs. Indeed, the significance of the way in which publicly placed works may influence movement ought not to be restricted to walkers but to encompass the rhythm of other forms of movement through public space (for example, observing trackside graffiti from a train).

A discussion of forms of movement brings us back again to the camera. In moving through space individuals are presented with an environment that lends itself to photography. Given the prevalence of digital cameras in smartphones, every individual in possession of a smartphone is potentially a photographer. The specific issue of interest to us here is the relationship between the constitution of public space through movement

27 Specifically, the right to the city is characterised as a form of resistance to private property and highlighting, in contrast, that it is the needs of inhabitants that must be put first: Layard (n 13) 261.

28 Referring to England: *ibid.*

29 As an aside, a town in Texas recently unveiled a sculpture of two women taking a selfie in the square in front of city hall: Cady Land, 'A Selfie Statue has Divided this Texas Town' *Time*, 1 June 2016 <<http://time.com/4354114/selfie-statue-sugar-land-texas>>. It seems perverse that an inhabitant taking a selfie with a selfie sculpture might be liable for copyright infringement.

30 Henri Lefebvre, *Rhythmanalysis: Space, Time and Everyday Life*, Stuart Elden and Gerald Moore (trans) (Bloomsbury Academic 2004) 3. The concept of rhythm, loosely adopted in this article, is explored in detail in *Rhythmanalysis*.

31 Lefebvre in Tim Edensor, 'Walking in Rhythms: Place, Regulation, Style and the Flow of Experience' (2010) 25 *Visual Studies*, 69–79, 69.

32 *Ibid.* 74.

33 *Ibid.*

and the reproduction of the particular space in which an individual finds themselves. For now it suffices to note that photography, in reproducing a work at the material point at which it is accessed in public space, is ordinary: it is a 'tool to register personal experience'.³⁴ The very act of registering an experience in this way produces a 'hybridization . . . between physical and digital experiences'.³⁵ As already alluded to, the freedom to move in public space and reproduce what is experienced there is relevant not only to being physically present in any particular place but also in being 'present' and contributing to the development of culture within intellectual space³⁶ (the intellectual commons) through digital participation.

Moreover, making images, specifically of ordinary experiences in the city, is potentially – whether or not intended as such – a political act; one which allows an individual to propose or effect an understanding, not only of the physical space in which they find themselves, but also their place within the wider environment of which that particular public space is one part. This includes being able to record (reproduce) and ascribe meaning to the objects found there³⁷ (for our purposes, the specific interaction with, and evaluation of, artistic works) by, for example, communicating new works based on the viewed objects virtually. The discussion here does not treat the ability to photograph as an ancillary 'right' to the right to the city, but rather as a crucial aspect of the inhabitation of a city and, especially, a city's public spaces. One would do as well to tell the public not to walk in public space as not to photograph it. The effect would be much the same.

2 Interaction as copyright infringement

Interactions of inhabitants with publicly placed works are viewed here through the lens of copyright law by focusing on reproduction and communication to the public (other rights, such as the moral right of integrity, are also potentially significant to our exploration of interactions with publicly placed works, but are not discussed here).³⁸

WALKING ALONG QUEEN STREET

To illustrate some of the points made in this part, the Wellington statue in Queen Street, Glasgow, serves as a useful example. The statue was created by Carlo Marochetti in 1844³⁹ and placed in front of the Glasgow Gallery of Modern Art (GOMA), which was originally the private residence built in 1778–1780 for a wealthy tobacco merchant, William Cunninghame.⁴⁰ The statue, notwithstanding the talent of the sculptor, is famous for the ever-present traffic cone on Wellington's head that has transformed it into

34 Dong-hoo Lee, 'Digital Cameras, Personal Photography and the Reconfiguration of Spatial Experiences' (2010) 26 *The Information Society* 266–75, 267. This was an empirical research study based on interviews with Korean digital-camera users.

35 *Ibid.*

36 Using the terminology in Fiona Macmillan, 'Many Analogies, Some Metaphors, Little Imagination: The Public Domain in Intellectual Space' (2010) 2 *Polemios* 25–44.

37 Mía A Hunt, 'Urban Photography/Cultural Geography: Spaces, Objects, Events' (2014) 8 *Geography Compass* 151–68, 160.

38 Most famously perhaps, at least for intellectual property lawyers, are disputes – such as the Canadian case *Snow v Eaton Centre* (1982) 70 CPR (2d) 105 – over the moral rights of artists where the artist's vision of how the work ought to be viewed conflicts with what others expected or wished to see in that (shared) space. On the particular challenges posed by moral rights protection for publicly placed works, see Patricia Loughlan, 'Moral Rights (a View from the Town Square)' (2000) 5 *Media and Arts Law Review* 1–11.

39 Stephanie Todd, 'Council in Road Cone Statue Plea' *BBC News* (16 February 2005) <<http://news.bbc.co.uk/1/hi/scotland/4264683.stm>>.

40 Robert Crawford, *On Glasgow and Edinburgh* (Belknap Press of Harvard University Press 2013) 220–1.

a ‘Glaswegian tradition’.⁴¹ The identity of the first person to have placed the cone on the statue is unknown, but one report suggests it to have been placed there by a student at some point in the 1980s.⁴² Recent attempts by Glasgow City Council to remove, and prevent the replacement of, the cone were met with public outcry, including a petition to ‘save Wellington’s cone’, and the plans were quickly abandoned.⁴³

The aim here is not to make any special claims about the statue itself or interference with it, nor indeed to comment on the esteem (or not) in which the inhabitants of the city of Glasgow hold it. In particular, while fun, this is not necessarily the best example of publicly placed art that might be used here seeing as the Marochetti sculpture itself is out of copyright and therefore already within the public domain of the intellectual commons. Rather, the Wellington statue is being used simply to illustrate some of the arguments made which will be relevant to other works and other places, and to the inhabitants of other cities.

AN ORIGINAL WORK

Before considering the ways in which interactions with publicly placed works constitute copyright infringement, we must, briefly, identify some of the relevant copyright subject matter we encounter. In walking down a street, for example, we might encounter a statue or sculpture (artistic work – sculpture), a mural (artistic work – painting), or a museum (artistic work – work of architecture).⁴⁴ In the context of walking down Queen Street, we might – though of course, the GOMA banners will change depending on the exhibition being shown – at a particular point come into contact with a number of potentially copyright-protected works. Imagine that our vantage point is standing across the street from GOMA. First, in the foreground there is the Wellington statue, cone in place. This would qualify as a work of sculpture and, indeed, an original work of sculpture.

Having identified the sculpture by Marochetti as out of copyright, the next question is whether the sculpture in the form it has taken since the 1980s is an original artistic work. Assuming our creator is a qualifying person,⁴⁵ the question, in the UK, is whether the simple addition of the cone produces a work of sufficient ‘skill, labour or judgment’ or, insofar as the originality requirement has been harmonised at EU level, it is the author’s ‘own intellectual creation’.⁴⁶ It seems at least arguable that making the creative choice to place the cone there is enough to make the work original.⁴⁷ However, the very power of the cone-*ed* statue lies in the placement choice – a busy city street and the placing of a cone on the statue of a politically significant figure – but it is not clear that the placement figures as a creative choice of the kind recognised by copyright. In other situations – such as the creation of a site-specific sculpture – the status of publicly placed creativity will more evidently constitute an original artistic work in which copyright subsists.

41 Ibid.

42 ‘Scots Monuments: Glasgow Duke of Wellington statue’ *The Scotsman* (15 October 2013) <<http://www.scotsman.com/heritage/people-places/scots-monuments-glasgow-duke-of-wellington-statue-1-3142725>>.

43 ‘Plans to End Cone Tradition on Glasgow’s Wellington Statue’ *BBC News* (11 November 2013) <www.bbc.co.uk/news/uk-scotland-glasgow-west-24901596>; ‘Plan Dropped to End Cone Tradition on Glasgow’s Wellington Statue’ *BBC News* (12 November 2013) <www.bbc.co.uk/news/uk-scotland-glasgow-west-24907190>.

44 CDPA, s 4.

45 Ibid s 217.

46 E.g. Case C-145/10 *Painer v Standard Verlags GmbH* [2012] ECDR 6, [87]–[88], [94].

47 Of course, while the work may be original it would be difficult to demonstrate infringement where someone placed a cone atop a different statue – that would appear to be the taking of an idea rather than its expression.

Our stroll down Queen Street reveals a number of other artistic works, including the graphic work in the form of, what appears to be, a mural below the roof line of the gallery.⁴⁸ Third, although we are focusing on publicly placed artistic works, we also encounter a number of literary works on the banners hung from the gallery including the text ‘Ripples on the pond’.⁴⁹ Fourth, there is GOMA itself, also an artistic work, that is a work of architecture which is – by reason of its age – out of copyright. Finally, were we outside of the gallery around December 2015 we would have seen a number of works relating to an exhibition held in the gallery at that time. The outside of the gallery was adorned by a number of neon-light sculptures by artist Ross Sinclair, spelling out in cursive script phrases such as ‘We [hear] the Highland Clearances’ and ‘We [hear] Failure’.⁵⁰ These works may be both literary and artistic⁵¹ and would on the face of it appear to be ‘intellectual creations’. Or, in terms of UK law, even if the text itself is insufficiently original, there would be an original artistic work here as a sculpture, the letters being formed in a manner requiring a certain level of skill and judgement.⁵²

If we were to walk down Queen Street today our experience would be different again and this brings us to another relevant point: that recording of our experience matters in the sense of preserving the public space as it was at a particular point in time. In ignoring copyright law and taking a photograph to reproduce the streetscape, we are thus reacting to our environment and the works within it. We may, for example, seek to take a photo to record our visit to Glasgow for a conference or to use a photograph in order to produce a stencil or screen print or some other creative work. We may simply want to share the work on social media at a later date. (Certainly it is hard to imagine someone clearing copyright for #throwbackthursday on Instagram or Twitter.) Walking along Queen Street then, or indeed any street, we may wish to interact with works while remaining uncertain of, or oblivious to, their status as copyright-protected works.

REPRODUCTION AND COMMUNICATION TO THE PUBLIC

As indicated in the discussion of inhabitation in part 1 above, encounters with publicly placed works may lead us to photograph these works or, perhaps, if we are of a more artistic bent, to sit and sketch out the streetscape in charcoal or pencil or to set up an easel and paint the scene before us. In this context, the legal regulation – including by copyright

48 A mosaic by Niki de Saint Phalle.

49 Gallery of Modern Art, *Ripples on the Pond, Gallery 4*, 10 April 2015, <<https://galleryofmodernart.wordpress.com/2015/04/10/ripples-on-the-pond-gallery-4>>. Note, however, that while the phrase ‘Ripples on the pond’ is a literary work, it may not meet the originality requirement even accounting for the harmonised test under which, following *NLA v Melwater* [2011] EWCA Civ 890, short phrases may potentially be an author’s ‘own intellectual creation’. On the difficulties posed by words and phrases, see Jennifer Davis and Alan Durant, ‘To Protect or Not to Protect? The Eligibility of Commercially Used Short Verbal Texts for Copyright and Trade Mark Protection’ (2011) 4 Intellectual Property Quarterly 345–70.

50 For press coverage, see e.g. Laura Piper, ‘Duke Gets a New Neon Look as GOMA Lights Up Art World’ *STV News* (16 September 2015) <<http://glasgow.stv.tv/articles/1328865-glasgow-gallery-of-modern-art-lights-up-ross-sinclair-installation>>.

51 See *Anacon Corp Ltd and Another v Environmental Research Technology Ltd and Another* [1994] FSR 659.

52 Note that similar issues arise with respect to any graphic works consisting primarily of text or ‘fancy’ fonts. On this last point, see, most recently, *Westwood v Knight* [2011] EWPC 8.

law – that seeks to restrict such sensory experience matters.⁵³ It does not matter in the sense that it might not physically prevent us from taking a photograph of a street art stencil, but it permeates what we, walking or loitering on the street, see or hear or smell.⁵⁴ In choosing to take that photograph of the Wellington statue or some other publicly placed work, we are (unconsciously) resisting copyright in refusing to abstain from an infringing act. The relevant infringing act is the reproduction of the whole or a substantial part of the protected work.⁵⁵

With respect to the reproduction of works as a form of resistance to copyright, the discussion here has an affinity with the work of Bertoni and Montagnani who argue that a study of works of architecture reveals the fundamental instability of copyright law.⁵⁶ This is because such works are public and therefore, besides contests between copyright owners, real property owners and the public, such works raise the prospect of a contest regarding ‘the public interest in preserving architectural heritage and the public interest in altering cities and urban landscapes’.⁵⁷ A similar point applies to publicly placed works more broadly with respect to interactions that seek to leave a material work intact, but to reproduce it and perhaps alter it.⁵⁸

It is fairly uncontroversial to note that the internet has had an impact on modes of political and cultural communication. This brings us to the second form of infringement that our interactions with publicly placed works might take and this is – having reproduced a work – communicating the work to the public⁵⁹ by sharing it, for example, on social media, a blog, a newspaper site and the like. This might be seen, for example, in relation to Glasgow City Council attempts to remove the cone from the Wellington Statue in Queen Street and the flurry of comments this generated in newspapers and on social media, complete with reproductions of the statue itself. Even before that, a cursory search of Twitter reveals interaction with the work and a discussion of viewers’ responses to it. An inhabitant may, quite reasonably, choose to reproduce and communicate it as a means of making sense of both the individual experience of being in public space as well as contributing to the development of culture within the intellectual commons by sharing their experience via the work’s reproduction, and perhaps by creating a new work based on it.

53 There are other relevant forms of regulation that may restrict the experience of a space. For example, photography in a public space may be an offence insofar as photography may constitute ‘a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism’ in s 58 Terrorism Act 2000, but the phrasing is broad enough to cover even the most innocuous photography. Specific prohibitions, with respect to certain sensitive areas such as military installations, can also be found in s 1(1)(c) Official Secrets Act 1911 regarding the recording of information that ‘may be useful to an enemy’. The Public Space Protection Orders in s 59 Anti-Social Behaviour Crime and Policing Act 2014 are framed so broadly that one might imagine they may potentially prohibit all kinds of behaviour, including photography in a particular public place. All of this is quite apart from rules on the misuse of private information that may apply.

54 On the regulation of the senses in the context of intellectual property law, see Andreas Philippopoulos-Mihalopoulos, ‘Atmospheres of Law: Senses, Affects, Lawscapes’ (2013) 7 *Emotion, Space and Society* 35–44.

55 CDPA, s 17.

56 Aura Bertoni and Maria Lilla Montagnani, ‘Public Architectural Art and its Spirits of Instability’ (2015) 5 *Queen Mary Journal of Intellectual Property* 247–63.

57 Ibid 252. See also Aura Bertoni and Maria Lilla Montagnani, ‘Public Art and Copyright Law: How the Public Nature of Architecture Changes Copyright Protection’ (2016) 12 *Future Anterior* 46–55, 48.

58 But note that there would likely be integrity right implications here. On public art and moral rights, see Elizabeth Adeney, ‘Authors’ Rights in Works of Public Sculpture: A German/Australian Comparison’ (2002) 32 *International Review of Intellectual Property and Competition Law* 164–84.

59 CDPA, s 18. We are not concerned with the virtual public space of the internet except insofar as works interacted with in material spaces come to be reproduced and communicated digitally (and this raises a host of other issues relating to digital reproductions of public art), on which see Jennifer Kwong, ‘Photographs of Public Art in the Digital Environment’ (2014) 36(7) *European Intellectual Property Review* 428–37.

REPRODUCTION, COMMUNICATION AND THE COMMONS

That communication of works may be an infringing act is especially problematic given the way in which social media serves to extend urban spaces. The reproduction and communication of publicly placed works may be described as part of the 'prolongations between the material and the immaterial that constitute urban mediations'.⁶⁰ More importantly, this mediation does not somehow flow from the material space – in our case, the publicly placed object – to immaterial space, but in other ways too. New media, here referring to social media, can also encourage play within the city.⁶¹ For example, social media suggestions may encourage a visit to GOMA or a walk along Queen Street which, in turn, might lead the walker to take a photograph and share it on Facebook, and so on.

The point is not that the virtual space of the internet ought to be equated with the intellectual commons, but rather that a work located in a physical public space and the same work shared on the internet will in both scenarios be also placed within the intellectual commons. Access to these works then provides the potential for developing culture within the intellectual commons. The problem, as identified above regarding infringement by reproduction, for example, is that copyright does not provide an easy, lawful means by which to encourage this development. What we need instead is a set of copyright rules that will take into account the importance of interacting with publicly placed works as a precursor to the enrichment of the intellectual commons.

Bruncevic offers a suggestion as to how such interactions may be approached in comparing access to the intellectual commons with the (Swedish) 'right to roam':

Access to art through a cultural commons is the equivalent of the hiking, camping and the picking of berries in the cultural environment . . . [The] notion of 'environment' is also what further enables the connection with the natural commons and *allemansrätten* to be made even more comfortably. It has to do with the public's cultural health and wellbeing . . . [The] approach is both an economically and democratically sustainable management of our common cultural resources.⁶²

An even stronger case might thus be put for enabling interaction with publicly placed works which are relevant to the management of both types of 'environments'. Indeed, following Gray⁶³ on the right to roam in the countryside,⁶⁴ we might usefully take up the same concept to argue for a form of 'pedestrian democracy' that includes walking, and photography, in places other than the natural landscape where, more in Scotland than elsewhere in the UK, rights to wander more freely are granted.⁶⁵ Such access rights are important in a broader political sense too: access to property, whether public or private,

60 Andrea Mubi Brighenti, 'New Media and Urban Motilities: A Territorilogic Point of View' (2012) 49 *Urban Studies* 399–414, 403. Note that Brighenti is not discussing photography, but rather theories of new media and urban motilities.

61 Referring to Galloway's work, Andrea Mubi Brighenti, 'New Media and the Prolongations of Urban Environments' (2010) 16 *Convergence: The International Journal of Research into New Media Technologies* 471–87, 484. An example given is of the 'Undersound' project in London. It refers also to Iveson's work on the importance of media to the 'definition of the public realm' at 476.

62 Merima Bruncevic, 'Fixing the Shadows: Access to Art and the Legal Concept of Cultural Commons' (PhD thesis, University of Gothenburg 2014) 142.

63 Kevin Gray, 'Pedestrian Democracy and the Geography of Hope' (2010) 1(1) *Journal of Human Rights and the Environment* 45–65.

64 *Ibid* describing 'pedestrian democracy' as 'the self-determining, self-empowering, self-fulfilling entitlement of the citizen to walk or climb over natural terrain' at 45.

65 Land Reform (Scotland) Act 2001, s 1.

is necessary for the exercise of free expression and association.⁶⁶ We might add then that, alongside the necessity for a right to roam in order to access creativity in the intellectual commons, the right to roam in the city's public spaces – where works are encountered, reconfigured and simultaneously given over to the intellectual commons – must also be encouraged to promote creativity and culture. Such interactions are as necessary as camping is to the walker roaming the countryside.

Making acts consequent on inhabitation infringing interferes not only (as discussed above) with the recording of the individual experience of the city but also with communication, in particular as a means of further enriching culture within the intellectual commons. Yet, if claiming a right to the city leads to copyright infringement, the next question to ask is whether the scope of copyright exceptions is up to the task of protecting the types of interactions that are a necessary part of inhabiting a space.

3 Exceptions

A number of defences might be available to an individual who has infringed copyright in a publicly placed work, including the various fair dealing defences. However, while useful, these defences also require something to be done for a particular purpose, for example, research, private study, news reporting.⁶⁷ The point of taking inhabitation seriously is that it makes interaction a part of being in the city and experiencing public space; it need not have some defined purpose beyond that. Section 31 CDPA which provides a defence where the inclusion of works is purely incidental is also relevant but of little use given we are concerned with the reproduction of publicly placed works in full as part of recording the experience of moving through public space.

Section 62 CDPA is highlighted in this part because it alone directly addresses the issue of the public placement of certain works as an exception to infringement. This part thus proceeds by considering the (relatively) recent history of the public placement exception in the UK, the operation of s 62 CDPA and the possibility of using the new quotation exception to excuse the infringement of copyright in publicly placed works.

HISTORICAL DEVELOPMENT OF THE PUBLIC PLACEMENT EXCEPTION

The antecedents to s 62 CDPA are twentieth-century additions to copyright legislation, but the inclusion of a public placement exception must also be viewed in light of broader debates over the meaning of the public interest that developed over the course of the nineteenth century.⁶⁸ In particular, an exception relating to works of architecture needs to be understood in the context of a lack of copyright protection for works of architecture altogether prior to the Copyright Act 1911: the question of a public placement exception thus simply did not arise in the nineteenth century insofar as copyright did not subsist in such works. The Royal Commission on Copyright noted – following vigorous representations from the Institute of British Architects – that providing even the modest (to contemporary eyes) 20-year term of protection sought

66 Jacob Rowbottom, 'Property and Participation: A Right of Access for Expressive Activities' (2005) 2 European Human Rights Law Review 186–202.

67 CDPA, ss 29, 30, 30A.

68 On which see Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Hart 2010) ch 7. Relevant discussion of the public interest will be found in ch 6, 'Art, Copyright and the Public Interest' in Elena Cooper, *Art and Modern Copyright: The Contested Image* (Cambridge University Press forthcoming 2017).

against reproduction would be 'impracticable'.⁶⁹ Indeed, at the time, some Members of Parliament showed their unease with the extension of copyright protection to architecture.⁷⁰ Sculpture, of course, had already been the subject of its own statute for some time before this discussion under the Sculpture Copyright Act 1814 and, before that, in a more limited fashion under the Models and Busts Act 1798.

This article does not consider the meaning of the public interest, but the consideration of what the public interest is and how it might be served, though the defences to copyright infringement is plainly relevant to the public placement exception and the public placement of works more generally. This is made clear in the House of Lords debate over the inclusion of the exception in the 1911 Act in which the 'public interest' is cited in response to criticism that sculptors would be disadvantaged by the new exception.⁷¹ Hansard shows Viscount Haldane observing: '[I] think it would be going a great deal too far to take away from the public the right which they now have to sketch, for instance, a statue in Trafalgar Square.'⁷²

Yet such an exception, it was suggested, ought to be limited and, indeed, was less broad than it might have at first appeared. Two points of particular relevance arise from the debate relating to place and exploitation. First, the limitation centred on the meaning of a *public* place:

To-day you may make a sketch of a statue or public building as freely as you please. The Bill does give protection, and the only question is what are the restrictions which are necessary in the public interest. We have drawn the line at buildings and public places, subject to the qualification which I am prepared to accept as to places kept up mainly or in part by public funds.⁷³

What we see here, and in the above reference to Trafalgar Square, is a concern with where a work is situated and, consequently, how members of the public in that space experience it. We thus also see, at least impliedly, a broader concern with how individuals already inhabit the public spaces of the city.

Second, the issue of commercial exploitation is raised by the Earl of Plymouth and worth quoting at length:

If under certain circumstances reproductions by photograph or in other ways are made of large sculptural monuments in public places, and if large profits are made by those who take advantage of the new processes of reproduction, is it not fair to consider whether sculptors ought to be placed in this position, that the work of their brains is to be turned into money by other people, and that they should suffer certainly more than other artists who produce their work in a different manner. I do not wish to suggest that it is easy to frame a Bill which is perfectly fair to everyone, but I do think my noble friend has raised a serious point, and that it is, not quite fair to imagine that those representing the great art of sculpture in stone, marble, and bronze can be satisfied to remain in a position

69 Copyright Commission, *The Royal Commissions and the Report of the Commissioners* (1897) xxii. The document does, however, note existing protections against the copying of architectural drawings indicating that 'such protection should be preserved'.

70 Alexander (n 68) 274.

71 See *ibid* 285.

72 HL Deb 14 November 1911, vol 10, col 118. Viscount Haldane also observes that prior to the Act there was no limitation placed on two-dimensional reproductions of a 'statue or public building' and so the public placement exception was in that sense beneficial to authors.

73 HL Deb 14 November 1911, vol 10, col 118. This would make for a potentially broad definition were it to take into account the number of private enterprises that may be in receipt of public funds.

where the work of their brains can be turned into money by persons who reproduce their work.⁷⁴

Immediately then we can see a tension between enabling the movement within public space and the necessary reproductions and disseminations of certain works found within that space that such movement entails. The conflict with an author's ability to exploit the work and not to have the work exploited unfairly by others is one that this article returns to in considering whether a functioning public placement exception ought to be limited to non-commercial uses. Indeed, the speaker was concerned about an author's creativity being 'turned into money' at the author's expense. Viscount Haldane in response to the above criticism referred to the example of the Queen Victoria Memorial which had been reproduced extensively and noted that to prevent such reproductions would not be in the 'public interest'.⁷⁵

In the event it was a broad public placement exception that was adopted, with s 2(1)(iii) Copyright Act 1911 providing that:

The making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, if permanently situate in a public place or building, or the making or publishing of paintings, drawings, engravings, or photographs (which are not in the nature of architectural drawings or plans) of any architectural work of art.⁷⁶

What is interesting about this, apart from the failure to exclude underlying drawings and thus perhaps inadvertently giving the Earl of Plymouth what he wanted, is that the final incarnation of the section was so broadly construed in terms of the places it covered. An earlier version of the clause – that being discussed in the House of Lords debate, also considered above – referred instead to 'a public place or building the maintenance of which depends wholly or in part on public funds'.

A particular point is also worth highlighting here regarding the relevance of both space and the type of work covered in the adoption of the 1911 Act exception. A compelling reason for including only three-dimensional artistic works within the scope of the exception is that it is only non-competing two-dimensional reproductions that will be made of such works.⁷⁷ Another possible reason is revealed in the minutes of a House of Lords Select Committee in which the views of the Academy⁷⁸ are discussed, specifically why paintings are privileged over sculptures, since sculptures in public places may be reproduced while paintings may not be. Viscount Knutsford observes that the difference between the two forms of artistic work has to do with placement. Placement is inherently relevant to works of sculpture:

You do not usually exhibit paintings in the open air for everybody to look at, while sculpture is constantly bought for places where everybody can see it, and it is placed in public places.⁷⁹

74 HL Deb 14 November 1911, vol 10, col 118.

75 Ibid.

76 Note also of more general relevance, Copyright Act 1911, s 2(1)(i), providing a defence for 'Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary.'

77 This argument is made regarding the New Zealand iteration of the exception: Anna Kingsbury, 'Copyright Law, Designs Law, and the Protection of Works on Public Display' (2007) 15 Waikato Law Review 78–94.

78 Presumably referring to the Royal Academy of Arts.

79 Report from the Select Committee of the House of Lords on the Copyright Bill [HL] and the Copyright (Artistic) Bill [HL]; together with the proceedings of the committee, minutes of evidence and appendix. Session 1900. Quotation from: *Minutes of Evidence Taken before the Select Committee*, 19 June 1900, 62.

The view raises an intriguing question about the ways in which particular notions of space are used implicitly to categorise works as holding characteristics besides their inherent qualities as creative expressions. This concern with the types of work thus reveals itself to be at least in part a concern with space.

The subsequent incarnation of the public placement exception in the Copyright Act 1956 was broadly similar. Section 9(3) provided:

The copyright in a work to which this subsection applies which is permanently situated in a public place, or in premises open to the public, is not infringed by the making of a painting, drawing, engraving or photograph of the work, or the inclusion of the work in a cinematograph film or in a television broadcast. This subsection applies to sculptures, and to such works of artistic craftsmanship as are mentioned in paragraph (c) of subsection (1) of section three of this Act.

Section 9(10) also provided an exception for underlying drawings, though only where works of architecture are concerned and only with respect to the reconstruction of the building.⁸⁰

The meaning of ‘permanently situated’ is similar to that in s 62 CDPA, seeing as it refers to both a ‘public place’ and ‘premises open to the public’. What is interesting about this is that it may well have covered places that were privately owned but which gave permission to the public to enter. Certainly, it would seem to have included public galleries. The breadth of the places covered troubled Earl Jowitt who asked during a debate on the Bill in the House of Lords:

I am worried about the words ‘permanently’ and ‘making.’ So far as the adverb ‘permanently’ is concerned, the Tate Gallery and all modern galleries try, if possible, to re-arrange their pictures from time to time. Some of them go down to the cellars, and then come up again and see the light of day. Whether a picture in those circumstances could be said to be ‘permanently situated in a public place,’ I am not sure. I suppose a member of the public can, if he wishes, say, ‘You have not got this picture on exhibition to-day. May I go down to your cellars and look at it?’⁸¹

A response resolving this point did not appear to be forthcoming, but the interesting point here is the alertness to what it means for a work to be publicly placed and, albeit indirectly, noting that such placement would alter individual calculations about the accessibility of the work. Given what we have seen in relation to inhabitation, it seems obvious that the placement of the work in a public space would lead to an expectation of being able to freely view, and potentially to interact, with the work.

However, the 1956 version of the public placement exception omitted what was parenthesised in the 1911 iteration, namely the exclusion from the scope of the exception works ‘which are not in the nature of architectural drawings or plans’. Having specified such underlying works, the omission of a similar reference to underlying works relating to sculpture and artistic craftsmanship would suggest that the underlying graphic works were caught by implication in the exception.⁸² To the extent that underlying works could

80 ‘... a building has been constructed in accordance with architectural drawings or plans in which copyright subsists, and has been so constructed by, or with the licence of, the owner of that copyright, any subsequent reconstruction of the building by reference to those drawings or plans shall not constitute an infringement of that copyright’.

81 HL Deb 15 November 1955, vol 194, col 535.

82 On this and for a useful overview of the evolution of the public placement precursors to s 62 CDPA: Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press 2005) 233–4.

not be said to have even been impliedly covered in the 1956 Act, the public placement exception was excessively narrow both in failing to account for different types of artistic works that individuals view in public spaces (such as murals), as well as in failing to place underlying works within the scope of the exception. Yet, arguably, Parliament had intended to recreate the 1911 exception,⁸³ so this may have been a case of unfortunate drafting. Whatever the reason, the latest iteration of the public placement exception is little better.

SECTION 62 CDPA

The current public placement exception in the CDPA is found in s 62 and reads:

- (1) This section applies to—
 - (a) buildings, and
 - (b) sculptures, models for buildings and works of artistic craftsmanship, if permanently situated in a public place or in premises open to the public.
- (2) The copyright in such a work is not infringed by—
 - (a) making a graphic work representing it,
 - (b) making a photograph or film of it, or
 - (c) making a broadcast of a visual image of it.
- (3) Nor is the copyright infringed by the issue to the public of copies, or the communication to the public of anything whose making was, by virtue of this section, not an infringement of the copyright.⁸⁴

The section has a number of flaws. It omits from the scope of the defence underlying drawings; it allows commercial publication of works and, related to this, it is concerned with three-dimensional works only, thus allowing for greater exploitation of some works than others; and the wording of the section is potentially vague in referring to *permanently* situated works.⁸⁵ These difficulties are exacerbated by the lack of case law that might guide our interpretation. There is only one mention of the section, without the section being applied, in *Shelley Films v Rex Features*.⁸⁶ Without further guidance then as to what the wording of s 62 adds up to, it remains an exception whose existence is necessary if copyright law is to take space seriously as a factor in determining the acceptable use of works, but which does not fulfil the end it aims at. At the very least, we need to open up a conversation about how the public interest may be protected when it comes to publicly placed artistic works.⁸⁷ In the context of this article that means supporting inhabitants in being able to interact with publicly placed works.

First, the failure to include underlying drawings of sculptures, works of artistic craftsmanship and works of architecture within the ambit of the exception (explicitly or by implication) makes it almost certainly ineffective. Burrell and Coleman contrast the wording of s 62 with that of s 65 CDPA regarding the reconstruction of buildings which

83 Nicholas Caddick, Gillian Davies and Gwylm Harbottle, *Copinger and Skone James on Copyright* (17th edn, Sweet & Maxwell 2016) [9-267].

84 It is notable that this section applies retrospectively so that, even if our example of the Wellington statue with the cone was a copyright-protected work, the section would have applied notwithstanding that it was created prior to 1988: CDPA, sch 1, para 14(4).

85 The particular flaw consequent upon the wording 'in such a work' has also been identified in e.g. Caddick et al (n 83) [9-267].

86 *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134: '... the effect of this provision seems to me to be highly arguable either way' at 143. Nothing turned on this point, relating to a film set, in the case.

87 Noting the lack of debate over the protection of publicly placed art: Bertoni and Montagnani (n 57) 48.

specifically excludes underlying drawings.⁸⁸ There appears to have been no discussion of the inclusion of s 62 into the 1988 Act during parliamentary debates over its adoption, so it is difficult to see what, if any, rationale there was for such an omission or, indeed, for the exception as a whole. Thus, while it would appear that in walking down the street and seeking to reproduce and communicate a sculpture that captures our imagination we might not be infringing the copyright in the sculpture, we may well be infringing copyright in the author's sketches or other drawings. Based only on this, s 62 is not only unfit to vindicate an inhabitant's claim to the right to the city, but is incapable of achieving even the more limited end at which it aims (i.e. to provide a defence to the infringement of certain categories of publicly placed artistic work).

Second, s 62 refers to a particular type of publicly placed work reflecting perhaps certain assumptions about the sorts of works that will typically be encountered in public space – namely sculptures.⁸⁹ It excludes a variety of works encountered by inhabitants in a city's public spaces, including works of street art and graffiti. Burrell and Coleman suggest that the fateful inclusion of the words 'such works' in s 62 – a qualifier that was not present in the 1911 Act – limits its scope.⁹⁰ To that extent the slightly broader wording of Article 3(h) of the Infosoc Directive ('use of works, *such as* works of architecture or sculpture, made to be located permanently in public places')⁹¹ is to be preferred. It potentially leaves open the inclusion of other forms of publicly placed works, putting the emphasis on works located in public rather than works that are necessarily *like* sculpture. Nevertheless, in referring to works *made* for public spaces, Article 3(h) would seem narrower than s 62 which, while it insists on permanence, does not insist on a work having been made for the public place (thus also suggesting that s 62 may be incompatible with EU copyright law).

However, such an interpretation is overly hopeful, given the current EU Commission consultation on the 'panorama exception'.⁹² It may be that, in light of the consultation, we will see a more sensible EU-wide approach to this issue, but the parameters of the consultation – in focusing on only certain three-dimensional works – seem already to be too narrow to capture the richness of inhabitation-as-play. Furthermore, a recent Swedish decision, having adopted the three-step test from Article 5(5) of the Infosoc Directive,⁹³ provided a very narrow reading of Sweden's public placement exception.⁹⁴ In excluding most works, including two-dimensional artistic works, the inhabitant of the city encountering works is not given the means to interact with these works legally.

Third, s 62, while narrow in the types of works it covers (so that any reproduction does not produce a competing work), is overly broad in the sense of providing a defence for infringement, including, it would seem, where the work has been reproduced for

88 Burrell and Coleman (n 82) 233.

89 Yarn bombing could arguably be classified as a work of artistic craftsmanship as well as a sculpture, but the coverage of such work placed without permission in public space is entirely coincidental.

90 Burrell and Coleman (n 82) 233–4.

91 Emphasis added.

92 European Commission, 'Commission Seeks Views on Neighbouring Rights and Panorama Exception in EU Copyright' 23 March 2016 <<https://ec.europa.eu/digital-single-market/en/news/commission-seeks-views-neighbouring-rights-and-panorama-exception-eu-copyright>>.

93 'The exceptions and limitations . . . shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.'

94 Eleonora Rosati, 'Swedish Supreme Court Uses Three-step Test to Interpret Restrictively Freedom of Panorama' IPKat, 6 April 2016 <<http://ipkitten.blogspot.co.uk/2016/04/swedish-supreme-court-uses-three-step.html>>.

commercial purposes.⁹⁵ At this point the argument for an all-encompassing public placement exception seems to unjustifiably ignore authors who (certainly in the case of local street artists and graffiti writers) will also be inhabitants of the city and therefore will have an equally valid right-to-the-city claim.

A reformulated s 62 would need to be improved in a number of ways. The primary way to do so would be to allow, for example, the reproduction of any publicly placed works, but to disallow their commercial reproduction. Yet this would pose its own challenges and, so, at least we might also expect that the moral right of integrity ought to apply to publicly placed works.⁹⁶ Any adoption of a new public placement exception that takes seriously the extent to which the viewing of such works is a necessary feature of inhabitation must recognise the countervailing expectations that, at least, the right of attribution is respected. Of course, this would bring with it its own host of problems, not least that works of publicly placed art do not usually come with neat explanations attached that give information, such as that of the name of the author and other biographical details. An alternative might be to provide in short form identifying *placement* information, providing basic detail of when and where a photograph was taken. But then, in relation to the kinds of interactions described in part 1, especially reproduction and sharing of the recording and reproduction of the space itself, this would not necessarily be problematic. Indeed, it would serve to accurately record the space and time of an inhabitant's interaction with a publicly placed work.⁹⁷

Finally, there is a lack of clarity over the meaning of 'permanently situated' in s 62.⁹⁸ How is an inhabitant to know that any publicly placed work is permanent? To the inhabitant taking photographs and the like it may not be at all obvious from simply looking at a work whether its status is permanent or temporary.⁹⁹ A work of architecture might be the exception here – that it is indeed permanently situated in the place where the would-be photographer has encountered it.¹⁰⁰ The requirement of permanence in any event makes little sense in the context of an argument that the viewing of *any* publicly placed work is an ordinary part of *being* in the city. In summary, s 62 does not help to ameliorate the concerns identified above regarding the free and full circulation of a city's inhabitants in public space and, consequently, the sharing of artistic works as a means of participating (legally) in the development of creativity and culture within the intellectual commons.

REORIENTATION: QUOTING THE STREET

The preceding section has identified a number of difficulties and uncertainties in the adoption of a public placement exception. The discussion here considers whether the recently enacted fair dealing exception for quotation in the UK might serve as an

95 Argument made in relation to the equivalent New Zealand provision and the case *Radford v Hallensteins Bros Ltd* High Court, Auckland, CIV 2006–404–004881 (unreported 2007): Kingsbury (n 77).

96 On the public placement exception and its relationship to the moral right of integrity, see Adeney (n 58).

97 The other, less desirable, alternative here may be to adopt something akin to the exception found in s 79 CDPA to the moral right of attribution, excepting in cases such as the reporting of current events, the granting of attribution so that, similarly, identification of the author could be dispensed with entirely as a condition for the reproduction and dissemination of publicly placed works.

98 For one treatment of this point, and the relevance of moral rights, see Deming Liu, 'English Copyright Law Makes the Poor "Snowman" Sculptor Poorer' (2013) 35 *European Intellectual Property Review* 674–84.

99 As explored elsewhere, this is particularly problematic when it comes to graffiti writing: Marta Iljadica, *Copyright beyond Law: Regulating Creativity in the Graffiti Subculture* (Hart 2016) ch 10.

100 Though we can imagine plenty of structures – a shed, demountable building – where it may not at all be obvious that the work was a 'permanent' work of architecture.

alternative route for protecting certain uses of publicly placed artistic works. However, it is worth noting at the outset that a specific public placement exception that deals directly with the infringement of copyright in publicly placed works is to be preferred over the possibility of making out a fair dealing defence to copyright infringement. The inhabitation of the city makes the viewing of publicly placed works unavoidable and interaction a part of a claim to the right to the city, as well as the development of culture within the intellectual commons. Therefore, the potential to argue after the fact that a use was ‘fair’ – is walking down the street and seeking to interact with a work for no other reason than your inhabitation of the city ‘fair?’ – does not address the point that inhabiting the city may be, as is the case with the flâneuse, entirely aimless. We could argue that we need an open defence such as US-style fair use, but even the adoption of such a defence would not, unless courts were so inclined, lead to the acknowledgment of public placement as a factor in determining a use to be fair.¹⁰¹

However, if we consider re-orienting UK copyright law towards including space as a relevant criterion in addressing copyright infringement,¹⁰² we find a good candidate, if not for incorporating space as a criterion, at least for a potentially less constrained understanding of purpose, in the s 30(1ZA) CDPA exception for quotation. The exception applies to ‘the use of a quotation from the work (whether for criticism or review or otherwise)’. Yet, even accounting for the welcome breadth of the word ‘otherwise’, the scope of the defence is limited to situations where:

- (a) the work has been made available to the public,
- (b) the use of the quotation is fair dealing with the work,
- (c) the extent of the quotation is no more than is required by the specific purpose for which it is used, and
- (d) the quotation is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).¹⁰³

A number of issues are raised by these factors in the context of publicly placed artistic works and are briefly discussed here.

Although not necessarily what we might immediately think of in the context of the phrase ‘making available’,¹⁰⁴ a work displayed in public space may, with some certainty, be said to have been ‘made available to the public’. The bigger problem for us in seeking to interpret the quotation exception in a manner consistent with the right to the city is in identifying whether it covers the quotation of an entire work.¹⁰⁵ Unless it does, it will be of little use to the inhabitant seeking to take a photograph, for example, of a sculpture or, indeed, a streetscape with a number of copyright-protected works in the frame.

101 See e.g. the approach in *Gaylord v United States* 595 F3d 1364 (2010) where a fair use defence was not made out with respect to the reproduction, for commercial purposes, of a publicly placed work.

102 In fact, space as a relevant aspect of the process of creating works ought also to be taken seriously in determining subsistence.

103 CDPA, s 30(1ZA).

104 This difficulty tends to come up in the context of the scope of infringement by communication to the public on the internet.

105 Bently and Sherman suggest that it might well be ‘fair’ to take a whole work for the purpose of quoting it: Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 240. In its guidance to artists the UK IPO suggests that the reproduction of a photograph may ‘in exceptional circumstances’ constitute a fair dealing for quotation: IPO, *Exceptions to Copyright: Guidance for Creators and Copyright Owners* October 2014 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/448274/Exceptions_to_copyright_-_Guidance_for_creators_and_copyright_owners.pdf> 7.

Particular problems would be raised in having to demonstrate that wholesale quotation was fair (in accordance with subsection (b)) and that the extent taken is necessary for a 'specific purpose' (per sub-s (c)). The UK Intellectual Property Office (IPO) suggests that a quotation is allowed only where it is 'genuinely for the purpose of quotation', giving the example of a quotation in academic work.¹⁰⁶ Yet, while it might seem far-fetched, there does not really seem to be a reason why photographing the street is not a 'specific purpose' (e.g. to record the streetscape, or to incorporate its elements in a different work altogether), but *play* is perhaps not the kind of purpose the IPO has, or a court would have, in mind. The problem with quotation, as with the other exceptions, lies again in the potential narrowness of its interpretation.¹⁰⁷

A further problem with the usefulness of the quotation defence as a potential replacement for a dedicated public placement defence similar to s 62 is that the act of quotation presupposes that the quotation itself is for an audience – such as citation within an academic work – whereas an inhabitant may well choose to simply take a photograph of a street and keep it for themselves.¹⁰⁸ Both documenting and sharing the documentation of a space might be considered crucial to the experience of that space, whereas the quotation exception would seem more readily to embrace sharing but not mere documentation. In the latter scenario then, the reproduction of a publicly placed work would have been covered by the now quashed private copying exception.¹⁰⁹ That exception would have been perhaps the most obviously useful in protecting the individual who wishes simply to record their experience. Ultimately, the copyright defences prove to be unsatisfactory here from the perspective of the individual seeking a lawful means of interacting with publicly placed works.

Finally, there is the problem of the nature of 'sufficient acknowledgement' which may, in the case of publicly placed works, be almost impossible to discern (unless there is a plaque and, for works placed in public without permission, there will not be). While s 30(1ZA) CDPA notes that this might not be possible, the inclusion of relevant information, such as the place where the artistic work was encountered, may go some way to providing an acknowledgment of the work's *place*, if not of its author. This brings us back again to inhabitance as a crucial part of making a claim to the right to the city. The nature of the kinds of interactions we considered in the first part of this article are non-commercial; they are either for the recording of personal, private experience or purely communicative in communicating a work or incorporating the work in a new work and communicating that (and so enriching the intellectual commons). The question remains, however, whether this constitutes a conflict with how the owner of a copyright work might seek to exploit it.

The discussion above suggests that a copyright sensitive to an inhabitant claiming the right to the city would produce a functioning public placement exception. Such an exception would allow inhabitants to reproduce and disseminate images of publicly placed works as one part of recording and sharing their 'lived experience' of the city.

106 IPO (n 105) 7.

107 As has been argued in relation to a failure to take into account 'community interests' in copyright law: Helena R Howe, 'Copyright Limitations and the Stewardship Model of Property' (2011) 2 Intellectual Property Quarterly 183–214, 196–7.

108 I am grateful to the anonymous reviewer for highlighting this issue.

109 CDPA, s 28B (repealed). *BASCA v Secretary of State for Business* [2015] EWHC 1723 (Admin). It is worth noting that the section likely would not have applied in all cases of reproduction seeing as certain reproductions of publicly placed works may be infringing (e.g. infringing an underlying drawing of a publicly placed sculpture, for example). The section did not apply to a personal copy that was 'an infringing copy': CDPA, s 28B(2)(b).

First, it would enable the recording of works *as placed*, ensuring that they remain within the intellectual commons even after they are no longer accessible in public space. The continued recording (reproduction) and dissemination of publicly placed works enables the flow of information about the city as it has been and as it is. Second, this would also help to preserve the image of public spaces as they undergo change. As the discussion above has indicated, an artistic work is unlikely to have one location given its reproduction on social media, for example. As works are removed from the physical commons or destroyed,¹¹⁰ the reproduction of the work remains within the intellectual commons. There, the work has the capacity both to act as a record of a certain space as well as to be used as part of the creative processes of others (and so enriching the intellectual commons).

Conclusion

As it stands, copyright law is an inadequate means of encouraging the development of creativity and culture as it relates to publicly placed works. This article has sought to explain the intuitive response to the reproduction and sharing of publicly placed works – that, for example, photography should be allowed – by interpreting these acts as one element of a claim to the right to the city. This conceptualisation of the issue provides a compelling reason for believing that the manner in which public placement is treated by UK copyright law is unsatisfactory and, moreover, assists us in understanding the nature of the solution which is required. The appropriate starting point in determining the acceptability of the use of a particular work is not the identity of the user nor the use that is made of that work, but rather the question of where the work is found. In the public placement exception in s 62 CDPA there is a limited recognition that space and place are relevant to the endeavour of creativity and, in turn, to copyright, but the existing exception fails to adequately safeguard the lawfulness of inhabitants' legitimate interactions with the works they encounter. A reframing of s 62 and other relevant copyright exceptions in a way that is sensitive to the role of space in the production and promotion of creativity and culture would be a welcome development, not least because it would bring copyright law into harmony with unarticulated public understandings of the appropriate scope of copyright protection.

¹¹⁰ Destruction of graffiti writing is especially common as local authorities seek to remove all traces of it, making the image of the work the only record of its existence. We might argue that the photograph itself becomes the work. On the 'photo culture' amongst graffiti writers, for example, see Iljadica (n 99).