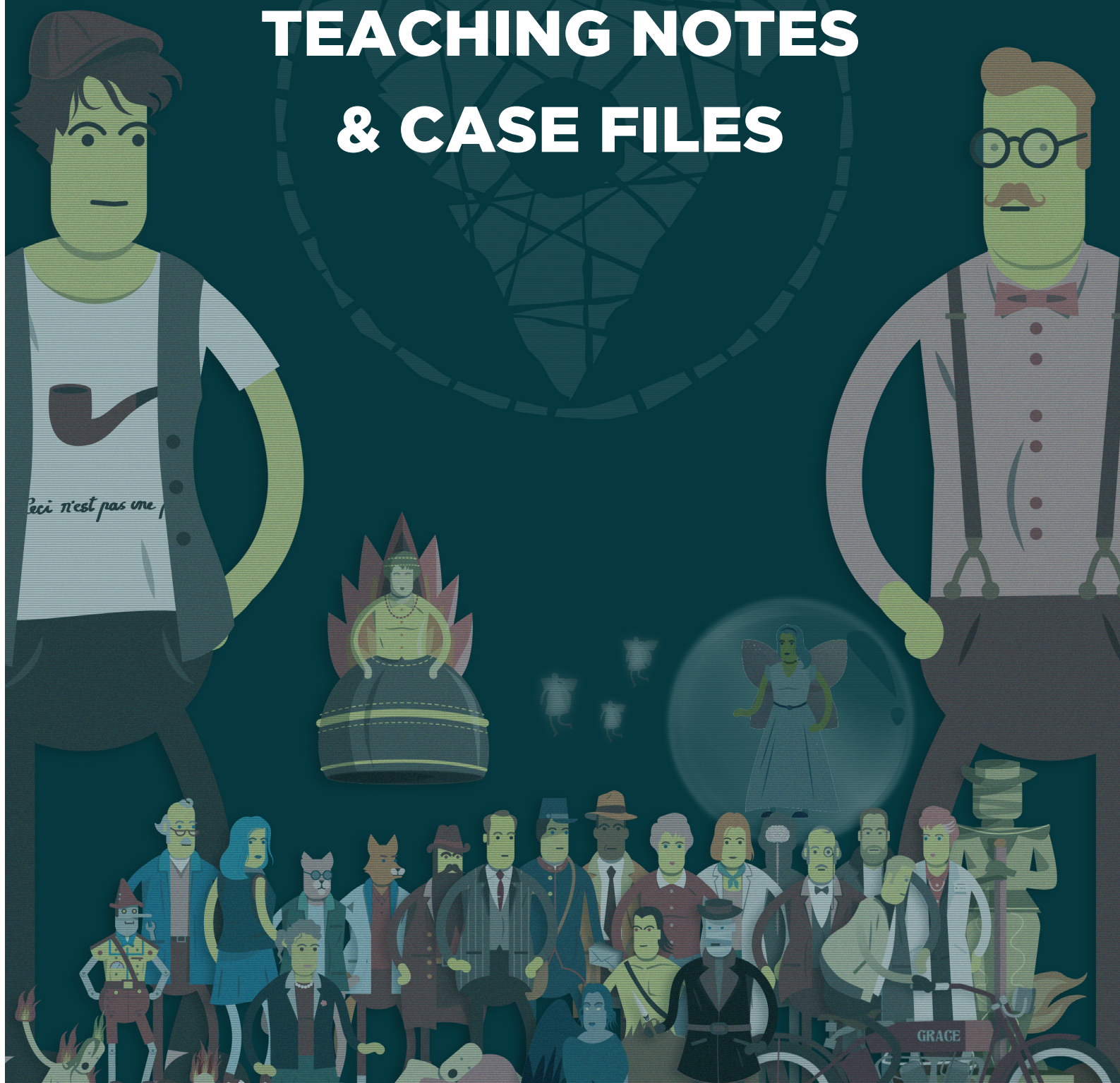


The Game is On!

TEACHING NOTES & CASE FILES



THE GAME IS ON! – TEACHING NOTES and CASE FILES

A free resource from the makers of *The Game is On!*

By Ronan Deazley and Bartolomeo Meletti (eds)

Version 1.0

April 2019

Produced with the support of the UK Intellectual Property Office

The teaching materials developed to accompany *The Game is On!* are made available under a CC-BY 4.0 licence (a creative commons licence). This means that you can share, remix, adapt and build on this content for any purpose – including commercial purposes – so long as you give an appropriate credit to the authors of the content. You can find out more about the CC-BY 4.0 licence [here](#).

A NOTE ON THE CONTRIBUTORS TO THIS RESOURCE

When we first developed *The Game is On!* we invited a number of UK-based experts on copyright law to contribute CASE FILES to accompany each of the six films in the TGIO series. Each person we approached generously agreed to contribute.

When the Intellectual Property Office offered to support the development of this suite of additional materials to accompany TGIO we approached each of the original authors of the CASE FILES once more, asking if they would contribute material and commentary for these TEACHING NOTES. Every author agreed to contribute their time and expertise once again. For that, we are extremely grateful.

Thanks are also due to Catherine Davies of the UK Intellectual Property Office for her feedback and advice on these materials.

The contributors to this set of TEACHING NOTES are as follows:

Dr Megan Blakely, Lancaster University (CASE FILES 13-14 AND 21)

Dr Hayleigh Boshier, Brunel University, London (CASE FILES 8-11)

Prof Ronan Deazley, Queen's University Belfast (CASE FILES 1-33)

Prof Daithí Mac Síthigh, Queen's University Belfast (CASE FILES 31-32)

Bartolomeo Meletti, Worth Knowing Productions (CASE FILES 1-33)

Prof Dinusha Mendis, Bournemouth University (CASE FILES 3-6)

Dr Claudy Op den Kamp, Bournemouth University (CASE FILES 24-25)

Dr Mathilde Pavis, University of Exeter (CASE FILES 26-27)

Dr Andrea Wallace, University of Exeter (CASE FILES 15-17)

TABLE OF CONTENTS

AN INTRODUCTION TO THE TEACHING NOTES	1
SUGGESTED ACTIVITIES (COMPILED)	3
ADDITIONAL TEACHING AND LEARNING STRATEGIES	11
TEACHING NOTES AND CASE FILES	13
<i>Case File #0: Some Copyright Basics</i>	13
<i>Case File #1: The Red Bus</i>	17
<i>Case File #2: The Monster</i>	23
<i>Case File #3: The Baker Street Building</i>	29
<i>Case File #4: The Anonymous Artist</i>	35
<i>Case File #5: The Terrible shark</i>	41
<i>Case File #6: The Famous Pipe</i>	47
<i>Case File #7: The Matching Wallpaper</i>	53
<i>Case File #8: The Dreadful Image</i>	61
<i>Case File #9: The Improbable Threat</i>	67
<i>Case File #10: The Uncertain Motivation</i>	73
<i>Case File #11: The Mutilated Work</i>	79
<i>Case File #12: The Hollywoodland Deal</i>	87
<i>Case File #13: The Multiple Rights</i>	93
<i>Case File #14: The Missing Manuscript</i>	97
<i>Case File #15: The Dream Job</i>	103
<i>Case File #16: The Pantages</i>	109
<i>Case File #17: The Typewriter</i>	115
<i>Case File #18: The Purloined Letters</i>	121
<i>Case File #19: The Fateful Eight Seconds</i>	127
<i>Case File #20: The Lawful Reader</i>	133
<i>Case File #21: The Six Detectives</i>	137
<i>Case File #22: The Two Heads</i>	143
<i>Case File #23: The Eight Categories</i>	149
<i>Case File #24: The Retrieved Image</i>	157
<i>Case File #25: The Accidental Image</i>	163
<i>Case File #26: The Recorded Performance</i>	171

<i>Case File #27: The Interview Tape</i>	179
<i>Case File #28: The Musician and the Machine</i>	185
<i>Case File #29: The Double Score</i>	193
<i>Case File #30: The Creative Copy</i>	199
<i>Case File #31: The Arcade and the App</i>	205
<i>Case File #32: The (Un)Popular Clone</i>	211
<i>Case File #33: The (In)Complete Message</i>	217

AN INTRODUCTION TO THE TEACHING NOTES

THE GAME IS ON! (TGIO) resource includes 33 CASE FILES relating to the six films. These CASE FILES draw on stimulus from the films in order to create teaching and learning opportunities. Each CASE FILE from the online resource has been reproduced in this booklet, presenting the text in numbered boxes for ease of reference. Accompanying each CASE FILE is a set of TEACHING NOTES that can be used for delivering lessons to pupils.

Each CASE FILE (or combination of CASE FILES) and its accompanying TEACHING NOTE does not provide you with a lesson plan, per se. The materials can be used as such, or, depending on the context, they can be developed further for exploration across more than one session. In short, these materials are flexible and can be adapted to suit teacher needs.

Also, the CASE FILES do not need to be used in chronological order or in full. The TGIO resource is intended to enable teachers to select whatever CASE FILES they want to use based on their planning needs and objectives.

That said, CASE FILES 1-12 (relating to the first film – *The Adventure of the Girl with the Light Blue Hair*) provide a useful, user-friendly, introduction to key concepts. If teachers are planning lessons for ages 11-16, they may want to begin by focussing on these CASE FILES.

Each TEACHING NOTE begins with clearly defined teaching aims to help communicate the core learning. (Of course, depending on your planning and objectives, these can be adapted to include further aims.)

These aims are followed by key questions, providing a focus for the learning. Different opinions and possible talking points have been included to encourage discussion. When discussing these key questions, the TEACHING NOTE also clearly directs you to the relevant part of the text from the accompanying CASE FILE. In addition, some TEACHING NOTES offer further questions, to allow for deeper exploration.

Many of the individual TEACHING NOTES also provide suggestions for additional activities, such as developing and pitching ideas for a tv or film production, negotiating a commercial contract, or organising a mock trial. We hope these will help teachers plan active, engaging lessons. For ease of reference, all the suggested activities have also been compiled into one section of this booklet.

Moreover, in addition to the specific activities suggested in individual TEACHING NOTES, a set of general activities have also been included in the introduction to this booklet (these follow next) which offer alternate active learning strategies.

Finally, it is worth noting that throughout the films, the accompanying annotations, as well the CFs, we make numerous references to specific TV programmes, films and other media to aid understanding of key terms and ideas. For example, in the annotations that accompany Episode 3, we explain a hidden reference to the film *Pulp Fiction* (1984, dir. Quentin Tarantino) which is rated 18 by the BBFC. Our reference is perfectly innocuous and very fleeting,

but it also allows us an opportunity for introducing the concept of non-linear narrative in film. In any event, teachers are asked to use their own judgement when drawing on or exploring these references to gauge age appropriateness.

SUGGESTED ACTIVITIES (COMPILED)

FROM CASE FILE #1: THE RED BUS

Before discussing the *Temple Island* case, you might ask the students to create a drawing which illustrates London in a 'shorthand' way. An image that most viewers would immediately associate with London.

Once they have created their drawings, show them the photographs from the case, and discuss the **KEY QUESTIONS** set out above. In theory, have the students infringed copyright in Mr Fielder's photograph? Are there obvious similarities between their drawings and Mr Fielder's photographs? Do the students believe that their drawings are protected by copyright?

FROM CASE FILE #2: THE MONSTER

Before discussing the **KEY QUESTIONS** above, you might ask the students to read **TEXT BOX #2** and 'pitch' an idea for a creative production based on public domain works. For example, a graphic novel featuring Pinocchio and *Oliver Twist* or a Sherlock Holmes vs Dracula video game. Once they have pitched their ideas, discuss the **KEY QUESTIONS** above. Did the students feel limited in their choices? Can they think of famous films, video games or other productions that are based or inspired by public domain works?

FROM CASE FILE #4: THE ANONYMOUS ARTIST

One way of encouraging the lawful consumption of creative works is through legal services that satisfy customer expectations for quick and easy access to content, while rewarding the creators of that content. Think of Spotify, Netflix or iTunes.

After discussing the **KEY QUESTIONS** above, you might ask the students: what do you think is more effective in order to encourage lawful online consumption? Enforcing copyright through blocking injunctions and upload filters, or developing more innovative services such as Netflix and Spotify?

Can the students think of other services or business models that would satisfy customer expectations while rewarding creators?

FROM CASE FILE #5: THE TERRIBLE SHARK

After discussing the **KEY QUESTIONS** above, show the students the following memes:



Ask the students to identify the difference between the two memes. The one on the left hand side can be considered a 'target parody' (the target of the parody is the person appearing in the photo, the actor Chuck Norris), whereas the one on the right hand side is a 'weapon parody' (it uses a still from the series *The Fresh Prince of Bel-Air* to criticise something else).

But how about this one?



This meme combines a still from the film *Labyrinth* with distorted lyrics of the song *Call Me Maybe*. What or who is the target of the parody? Is it a 'target parody' or a 'weapon parody'?

Should the makers of these memes get permission from the copyright owners of the works they use? Should the online platforms that distribute these memes pay compensation to the copyright owners of the works being used in the memes? What do the students think?

FROM CASE FILE #7: THE MATCHING WALLPAPER

Before discussing the *Designer Guild* case, you might ask the students to create their own wallpaper design based on the points of similarity between the two wallpapers identified in the case itself.

- Vertical stripes with spaces between the stripes equal to the width of the stripe
- Flowers and leaves scattered over and between the stripes
- The centre of the flower should be represented by a strong blob, rather than a realistic representation
- The flowers should be painted in an impressionistic style [the impressionists]

You could even suggest a colour scheme, whether similar or different to the existing wallpapers.

Once they have created their designs, show them the designs from the case, and discuss the **KEY QUESTIONS** set out above. In theory, have the students also infringed the original wallpaper design? Have they copied indirectly? Are their designs visually similar? Does it matter whether they are?

FROM CASE FILE #8: THE DREADFUL IMAGE

Organise a debate on the following topic (or something of your own choice): 'Unlawful graffiti is a blight on the urban landscape – it should not be protected by copyright.'

Split the class into four groups, two in favour of the proposition and two against. Give them time to research and plan their arguments. Encourage them to find commentary and analysis, opinions, news articles and other texts online that support their arguments.

For the debate, pick two teams to present. The other teams will serve as judges and decide which side presented the stronger case, voting for the winners of the debate at its conclusion.

FROM CASE FILE #10: THE UNCERTAIN MOTIVATION

In addition to the suggested discussion topics, you might organise a debate about why we have copyright, and what benefits it brings. However, instead of just focussing on whether we should or should not have copyright, you could ask the students to think about whether copyright should last as long as it does.

For example, today, the duration of copyright lasts for the life of the author plus 70 years after they die. However, when copyright was first introduced in 1710, it lasted only for 14 years, plus a further 14 years if the author will still be alive when the first period expired. Key issues might be:

- What economic incentive do authors need to create? A 25-year term of protection? Are they likely to be more incentivised to create with a 50-year term? Or a term that lasts for life plus 70 years?
- What economic incentives do the creative industries need to invest in authors, musicians, and so on? Do film companies or music companies normally expect to recoup their investment within five years?, or ten years?, or longer?
- Should duration only be determined by economic incentives? Should duration last for at least the lifetime of the author?
- Why should duration of protection last beyond the life of the author? In the late Victorian period, it was thought that an author should be entitled to rely on their work to provide for their children, and for their children's children. Does this still make sense in today's world?

For further insights on copyright duration, see **Case File #2**.

So, the debate topic might be:

'Copyright lasts too long. It should last no more than 25 years.'

Split the class into four groups, two in favour of the proposition and two against.

Give them time to research and plan their arguments. Encourage them to find commentary and analysis, opinions, news articles and other texts online that support their arguments.

For the debate, pick two teams to present. The other teams will serve as judges and decide which side presented the stronger case, voting for the winners of the debate at its conclusion.

FROM CASE FILE #11: THE MUTILATED WORK

In some countries, such as France, moral rights lasts in perpetuity (rather than for the life of the author plus 70 years). So, for example, Victor Hugo's descendants have often tried to prevent adaptations and sequels to his works from being made on the basis of Hugo's moral rights (Hugo died in 1885). Indeed, in 2004, a Paris Court of Appeal ruled that the publication of two unauthorised sequels to his *Les Misérables* violated Hugo's moral right of integrity (Victor Hugo died in 1885). However, this decision was later overturned.

Invite the students to think about why we have moral rights and how long they should last? Or indeed, why should they last beyond the life of the author at all?

Show them a picture of Da Vinci's Mona Lisa (available [here](#)) – perhaps the most famous, most copied, and most parodied artwork in the world. Next show them a picture of L.H.O.O.Q. by Marcel Duchamp (available [here](#)).



Is Duchamp's famous work derogatory to the original? Da Vinci died in 1519 (500 years ago). What if he still enjoyed moral rights in his work? Should his descendants be able to prevent works like L.H.O.O.Q. being made?

FROM CASE FILE #15: THE DREAM JOB

After reading the Case File and discussing the **KEY QUESTIONS** above, you might ask the students to divide into groups of two. Each small group will consist of a 'film producer' and a 'screenwriter'. You can ask each group to negotiate and agree a contract – drafted as a list of bullet points – on the use of the script in the film. Assignments of rights are usually paid more than licences (see [Case File #12](#)), so this may be reflected in the outcomes of the exercise.

FROM CASE FILE #16: THE PANTAGES

Before discussing the **KEY QUESTIONS** above, you can show the short animated video [Copying & Creativity](#), which explores the complex relationship between copying and creativity through the eyes of a young art student. What literary, artistic or other influences can the students identify in the video?

FROM CASE FILE #21: THE SIX DETECTIVES

While discussing the **KEY QUESTIONS** above, you might ask the students to think about their favourite fictional character and whether they have ever seen it in a work different from the original, e.g. in fan fiction or an adaptation.

Is the character remarkable and distinctive enough to merit copyright protection outside of the work in which it appears? If they wanted to create a work of fan fiction featuring their favourite character, do the students think they would need permission from the creator of the character?

FROM CASE FILE #22: THE TWO HEADS

Working in pairs, ask the students to produce a one-page outline for a new film, thinking about plot, setting and characterisation. Next, ask them to swap their pitch with another pair of students to receive feedback and suggestions for developing their ideas. Based on the feedback received, the students should revise their original outline.

When complete, ask them to discuss who has authored the one-page plan. Have both students contributed equally to the creation of the work (perhaps, perhaps not)? Even if they haven't, are they both authors (almost certainly, yes)?

What have the 'reviewers' added to the creation of the work? Are they also authors (probably not – if anything, they have probably offered no more than ideas)?

Ask them to consider the following hypothetical scenario – one of the students (student A) is approached by a film producer to write a full screenplay for their film. But the producer does not want the other student (student B) involved in the project. Can student A proceed without student B's permission (a legal question)? Should student A proceed without student B's involvement (an ethical question)?

FROM CASE FILE #26: THE RECORDED PERFORMANCE

Before discussing the topic in **TEXT BOX #6**, you might ask the students to look for examples of famous creations (films, books, music etc.) where the author is more famous than the performer, and for other examples where the performer is more famous than the author.

They can use these practical examples to analyse the contribution of the author and that of the performer to the final work. They can use their examples and their analysis to evaluate whether it is fair that performers should receive less protection than authors.

FROM CASE FILE #27: THE INTERVIEW TAPE

In discussing who owns the rights (copyright and/or performers' rights) in the interview, you might ask the students whether their answer will be different depending on the type, or 'genre' of the interview. Do they think that interviewee or the interviewer contribute to the interview differently depending on whether it is the interview of a politician on *BBC One Breakfast Show* or on *Radio 4 Today's* program, and that of a celebrity on the *Graham Norton Show*?

FROM CASE FILE #29: THE DOUBLE SCORE

Before discussing the KEY QUESTIONS above, you might show the short animated video *Going for a Song*: www.copyrightuser.org/create/creative-process/going-for-a-song/

The video tells the story of Tina and Ben, a music composer and a lyricist who create an original song and discuss how to market it. After screening the video, you can ask the students the following preliminary questions: who do you think is the copyright owner of the song created by Tina and Ben? If someone wanted to use their song, whom should they get permission from?

FROM CASE FILE #30: THE CREATIVE COPY

Organise a mock trial.

The creators of *The Game is On!* are on trial for copyright infringement. The descendants of Nino Rota are suing for damages. They are accusing *The Game is On!* team of infringing Rota's copyright in the main melody from *The Godfather*.

Split the class into four groups. Two groups are lawyers for Nino Rota's descendants. Two groups are lawyers for *The Game is On!* team. Give them time to prepare the arguments for and against the allegation of copyright infringement. You might direct the groups to think about:

- How much of the original musical work has been copied? Is it too much? Too little?
Suggested answer: even if the melody is short, they have probably copied too much – after all, even this snippet of melody is very famous, and very recognisable.
- Does it make any difference that the melody has been altered?
Suggested answer: no; it doesn't make any difference if they have changed and altered the work in a significant way; all that matters is whether they have copied without permission, and, if they have, then in theory, they should be liable for infringement.
- If they have copied too much without permission, can they rely on any of the exceptions to copyright?
Suggested answer: this is where the argument for the defence is probably strongest. The exceptions discussed above are likely to be very relevant, especially the exception for quotation, as well as criticism and review, parody and so on. But all these exceptions also depend on the use being fair. Is the use fair? This is likely to produce some interesting debates.

Once the groups have had time to discuss their arguments, they should appoint someone to present those arguments before the court.

For the mock trial itself, pick two teams to present. Each team should appoint someone to present their team's argument before the court.

In addition, appoint one student from each of the other two groups to act as judges. Working together, they can ask questions during and after each of the presentations to the court, asking for further clarification of arguments, trying to explore any potential weaknesses in reasoning, and so on.

All the remaining students are appointed to the jury. Once both arguments have been presented, and the judges have concluded their questions, the jury vote either in favour of Nino Rota's descendants, or in favour of *The Game is On!* team.

If more than two-thirds of the jury vote in favour of Nino Rota's descendants, then *The Game is On!* team have been found guilty of copyright infringement!

FROM CASE FILE #31: FROM ARCADES TO APPS

Consider introducing the students to a machinima video (see the links at the bottom of Case File #31). Contrast this (and indeed modern high-definition console gaming) with a 'simpler' game (a classic e.g. [Pac-Man](#) or an app-based game from the present day volunteered by a student).

Ask the students to discuss points and similarity and difference between the two.

Two obvious points to make are as follows: (a) that games have always involved some measure of music and visual art, but (b) the processing power of today's hardware is such that the look and feel of a game is now very close to film and television (not least because film and TV increasingly use similar techniques e.g. computer-generated imagery).

FROM CASE FILE #32: THE (UN)POPULAR CLONE

As an activity, ask students to come up with their own 'clone' of a popular game, and debate whether this would be lawful or unlawful. Use this to explore the consequences of overprotection (no scope for new games) vs underprotection (unfair competition with no real creativity).

FROM CASE FILE #33: THE INCOMPLETE MESSAGE

Pick one film and its accompanying set of annotations (or, alternatively, give different groups a different film to consider and discuss).

Working in groups, ask the students to identify examples of copying, and to explain why the copying is lawful. For example, the copying might involve ideas, or facts and information. Alternatively, the copying might involve quotation or parody.

Are there any instances of copying that the group cannot agree on? Do the students think there are any examples of copying that might be unlawful? Ask them to explain why.

ADDITIONAL TEACHING AND LEARNING STRATEGIES

The following are teaching and learning strategies that could be incorporated into each unit of learning.

1. MAKING THINKING VISIBLE

The following 'Making Thinking Visible' routines could be used for a variety of tasks.

1.1. THINKING ROUTINES FOR SYNTHESISING AND ORGANISING IDEAS

Headlines: good as a plenary as pupils are asked to "Write a headline for this topic or issue, that summarises and captures a key aspect that you feel is significant or important."

Generate – Sort – Connect – Elaborate: Concept Maps: useful when pulling together different ideas and points about copyright law. Generate – list of ideas and initial thoughts that come to mind when you think about the topic; Sort – organise your ideas to how central/tangential they are; Connect – look for connections in ideas by drawing lines between ideas that have something in common and explaining how they are connected; and, Elaborate – extend any ideas/thoughts by adding new ideas or expanding/extending them.

Connect – Extend – Challenge: could be used to assess prior knowledge. How are the ideas and information presented connected to what you already know? What new ideas did you get that extended your thinking? What challenges have come to mind?

I used to think / Now I think: another good plenary activity. Reflect on understanding of the topic and respond to each sentence stem.

1.2. THINKING ROUTINES FOR DIGGING DEEPER INTO IDEAS

What makes you say that?: Useful questioning tool to follow up a statement, assertion or opinion expressed by someone to encourage more detail/depth in the answer.

Red Light, Yellow Light: As you read, view or listen to the materials, consider the following questions: What are the red lights here? What stops you in your tracks because you doubt their truth or accuracy? What are the yellow lights here? That is, what slows you down a bit or gives you pause and makes you wonder what is true and accurate?

1.3. THINKING ROUTINES FOR INTRODUCING AND EXPLORING IDEAS

See – Think – Wonder: Provide an image/object to the class and ask them to write down what they see, what they think is going on and what it makes them wonder.

2. COOPERATIVE LEARNING STRATEGIES

Numbered Heads: Provide each pupil with a different task and they need to work together to share ideas. Can also be used to randomise feedback.

Graffiti Boards: Pupils update their ideas on flipchart paper and each group has to choose the best answers from their 'graffiti'.

Placemats: Each pupil completes the same task and then work together to choose the top 5 answers.

Quiz Quiz Trade Trade: Pupils are given a vocabulary word/concept/idea and they must move around the room quizzing each other and swapping answers. Upon return to their home table, pupils then complete a tally table using their trade answers.

Value Line: Pose a question and ask pupils to place themselves on a spectrum of agreement/disagreement and then justify their opinions.

Four Corners: Put up four different images linked to the concept. These images can be metaphorical or literal. Pupils choose a corner to answer a question and justify their choice.

Make a Date: Pupils identify a partner at the start of the period and make a date. They are then given an individual task and meet up with their partner to share ideas.

3. DRAMA STRATEGIES

Conscience Alley: A drama activity that can be used to explore a key question within the units. The pupils form two lines facing each other. Each line represents an opposing opinion. One pupil should walk down the line as the pupils give their statements in support of an opinion. The pupil walking down the line could be encouraged to reach a conclusion on the question based on the statements they heard.

Hot seating: Pupils take on the role of a character in a scenario and should sit in the 'hot seat'. Pupils are then asked questions to further explore key questions within the units of learning.

Thought Tracking: Pupils create a freeze frame taking on a character. When the pupil is tapped on the shoulder, they are required to express their opinions/feelings relating to the specific situation.

CASE FILE #0: SOME COPYRIGHT BASICS

There are no specific LEARNING AIMS or KEY QUESTIONS associated with Case File #0.

Instead, with this Case File, we provide both you and the students with a basic overview of the economic rights that copyright owners enjoy. We include it here to supplement the other materials provided.

Before undertaking work with any of the other Case Files, you might think about allowing the students some time to read over Case File #0, so that everyone gets to know the 'copyright basics'. Alternatively, you may simply want to discuss some of those basic concepts with the students as part of your planned activities. Or, you might opt to ignore this Case File altogether, and dive right into the other Case Files.

The choice is yours.

CASE FILE #0: SOME COPYRIGHT BASICS

1. INTRODUCTION

In the various Case Files that accompany the six episodes of *The Game is On!* – 33 in all – we explore a wide range of issues relating to core aspects of copyright law. For example, we consider the justifications for copyright protection, the criteria for copyright protection, what it means to author or own a copyright work, how recent developments in technology have prompted changes in the law, and much more.

In this introductory Case File #0, we provide a basic overview of the economic rights that copyright owners enjoy. It is crucial to understand when permission to make use of someone's work is required. And, when we understand when permission is required, we also begin to appreciate when permission to make use of someone's work is not.

2. COPYRIGHT: A BUNDLE OF RIGHTS

Copyright owners enjoy a bundle of economic rights, defined within the Copyright Designs and Patents Act 1988 (CDPA). This bundle of rights is set out in section 16 of the CDPA; it includes the right to:

- Copy the work: the reproduction right (further defined in s.17 of the CDPA)
- Issue copies of the work to the public: the distribution right (see s.18)
- Rent or lend the work to the public: the rental right (s.18A)
- Perform, show, or play the work in public: the public performance right (s.19)
- Communicate the work to the public, whether online or otherwise: the communication right (s.20)
- Make an adaptation of the work or do any of the above in relation to an adaptation: the adaptation right (s.21)

Doing any of these acts without permission will infringe copyright in the work, and the owner will be entitled to some form of relief or compensation (but see further below).

Moreover, it will generally not make any difference that the infringing copy takes a different form to the original. For example, converting a two-dimensional image into three dimensions, and vice versa, will still constitute infringement; similarly: turning a story into a ballet; copying a photograph by painting; turning a drawing such as a cartoon into a sketch or a piece of theatre, and so on.

3. NOT EVERY OWNER ENJOYS EVERY ECONOMIC RIGHT

It is important to understand that not every economic right is granted to every copyright owner. There are eight different types of work that benefit from copyright protection under UK law, and the bundle of rights an owner enjoys varies depending on the type of work you are dealing with.

For example, while performing or showing a musical work in public without permission is an offence under s.19, performing or showing an artistic work is not. Similarly, the right to make an adaptation of a work only applies to literary, dramatic and musical works, but not to artistic works, sound recordings, films or broadcasts. (Although, if you make an adaptation of an artistic work, for example, or of a film, you will still probably infringe the owner's right to make a copy of their work; see [Case File #17](#) for more details.)

In the table that follows, we set out the economic rights provided under the CDPA (along the top row) indicating which rights apply to each of the eight types of protected copyright work. You'll find more information about each of these types of protected work throughout the Case Files.

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

Table 1: Economic rights and types of work

For further details, see the [Copyright Cortex, 'Economic Rights and Infringement'](#).

4. A BUNDLE OF QUALIFIED RIGHTS

Above, we mentioned that doing any of the acts protected under the CDPA without permission will infringe copyright in the work.

However, we need to qualify that statement in three important ways.

First, while s.16 of the CDPA sets out the various acts restricted by copyright, the legislation also states that you only infringe by doing those acts in relation to 'the work as a whole or any substantial part of it'. This means it is permissible to make use of another's copyright work so long as you are not copying any more than an insubstantial part of that work.

Second, although copyright protects works against certain types of unauthorised use, there will always be elements of the work that remain unprotected and so free to use without permission. Consider, for example, the so-called [idea-expression dichotomy](#). Essentially, copyright does not protect ideas, only the way in which an author has expressed her ideas. So, to copy ideas is lawful. But, to copy the way in which an idea has been expressed by another author without permission is not lawful. Moreover, it is not just ideas that remain in the public domain. Copyright does not protect information, facts, theories or commonplace themes ordinarily used when creating cultural works.

Third, and most important, are the [exceptions](#) to copyright. Every copyright regime throughout the world limits the copyright owner's rights in specific ways by allowing certain things to be done with their work without the need for the owner's permission. These permitted acts (referred to as copyright exceptions) represent an attempt to strike a balance between the economic rights of the copyright owner and other uses considered to be socially, culturally, politically or economically beneficial.

In the UK, these exceptions are set out in sections 28-76 of the CDPA. There are general exceptions designed to facilitate the use of work by anyone, for example, for the purposes of [research and private study](#), for [criticism and review](#), or for [reporting current events](#). Other exceptions are intended to enable the use of copyright material within certain institutional contexts, for example, by [educational institutions](#), or by [libraries](#) and [archives](#).

We address each of these issues in greater detail throughout the Case Files.

5. USEFUL REFERENCES

Copyright Designs and Patents Act 1988:

<http://www.legislation.gov.uk/ukpga/1988/48/contents>

COPYRIGHT CORTEX, 'Economic Rights and Infringement', available:

<https://copyrightcortex.org/copyright-101/chapter-5>

CASE FILE #1: THE RED BUS

LEARNING AIMS

- Understand that copyright does not protect ideas themselves, but only the expression of ideas
- Be able to provide two real-life examples of works that are protected by copyright as 'artistic works'

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- Can you protect your ideas with copyright?
- Did the judge decide the *Temple Island* case correctly?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

CAN YOU PROTECT YOUR IDEAS WITH COPYRIGHT?

- See **TEXT BOX #2**
- The answer here is **NO**. Copyright does not protect ideas themselves, only the expression of ideas. In legal terms, this is known as the 'idea-expression dichotomy'.

Similarly, copyright does not protect information, facts, common themes, concepts and techniques. These are free for everyone to use and copy.

Do the students think that creators should be able to protect their ideas with copyright? We don't think they should (and legislators all around the world agree): if it were not possible to borrow ideas and concepts, the creative process would not be viable. But, other people may have a different point of view.

DID THE JUDGE DECIDE THE TEMPLE ISLAND CASE CORRECTLY?

- See **TEXT BOX #2, #4 and #5**
- There is plenty of room for discussion and disagreement here. Even today, academics and lawyers still disagree over the correctness of the decision.

However, many experts agree that the decision is **probably incorrect**. We also believe that the elements that the judge identified as obvious similarities between the two images – such as the same buildings in black and white with a bright red bus driving from right to left and the blank white sky – should be treated as *ideas*, and therefore should be free for everyone to borrow.

As Susie Brooks' illustration demonstrates (see **TEXT BOX #5**), elements such as the Houses of Parliament and the red bus are iconic elements that many artists and

photographers would use to illustrate London in a 'shorthand' way. Similarly, the creative choice of making a red object stand against a black and white background is a common technique that can't be protected with copyright.

- What do the students think?

SUGGESTED ACTIVITIES

Before discussing the *Temple Island* case, you might ask the students to create a drawing which illustrates London in a 'shorthand' way. An image that most viewers would immediately associate with London.

Once they have created their drawings, show them the photographs from the case, and discuss the **KEY QUESTIONS** set out above. In theory, have the students infringed copyright in Mr Fielder's photograph? Are there obvious similarities between their drawings and Mr Fielder's photographs? Do the students believe that their drawings are protected by copyright?

CASE FILE #1: THE RED BUS

1. INTRODUCTION

The Adventure of the Girl with the Light Blue Hair starts with a red double-decker bus travelling across Westminster Bridge, with the Houses of Parliament in the background. The choice of starting the video with this particular image and colour scheme – a red bus on a black and white background – is intentional. It explicitly refers to a recent copyright case involving similar photographs: *Temple Island Collections Ltd v New English Teas Ltd & another* [2012] EWPCC 1.

In the digital age, copyright in photography is being challenged in many ways. On the one hand, it is extremely easy to copy a digital photograph and share it via social networks; on the other hand, it is often difficult or even impossible to identify the copyright owner of that photograph and get their permission to use it.

This Case File #1 briefly explores the delicate relationship between copyright and photography and considers the *Temple Island* case to generate points of discussion around this topic.

2. COPYRIGHT AND PHOTOGRAPHY

Copyright protects different types of work, such as books, songs, films and images. In the UK photographs are protected by copyright as 'artistic works', a category that also includes paintings, illustrations and sculptures. In order to receive copyright protection, photographs need to be original. The artistic quality of the photo is not a requirement for copyright, so original amateur pictures are protected too. According to UK copyright law a photograph is considered original if it is created by the author using his own 'skill, labour, effort and judgement'. Recent European case law indicates that originality arises from the author's 'own intellectual creation'. Either way, it has to be the author's own creation and should not be copied from other protected works.

As soon as you take a photo that is original you become the copyright owner of that photograph. This is because copyright is granted automatically, with no need to register your work. You can find more information about copyright protection [here](#).

It is important to know that copyright only protects the expression of an idea, not the idea itself (in legal terms: the idea-expression dichotomy). In other words, copyright protection does not cover ideas, concepts or techniques, but only the expression of these.

For example, the idea of painting a flower in an impressionistic style is not protected, whereas the actual painting expressing that idea can be. Similarly, the idea of photographing a particular landscape cannot be protected by copyright; what is protected is the photograph itself. This means that if you take a photo of Westminster Bridge using your smart phone, automatically you have copyright in the image you produce; if anyone else wanted to use that particular photograph (e.g. on their Facebook page), they would need to get your permission first.

However, the *idea* of photographing Westminster Bridge cannot be protected. In fact, the defendants in the *Temple Island Collections Ltd* case argued that Westminster Bridge, the Houses of Parliament and the iconic London Routemaster bus were 'common elements' in the claimant's photograph which could not be protected (see the discussion below). Anyone else, they argued, remained free to create a photograph incorporating the same objects.

Ideas and works that are not original enough to receive copyright protection are in the public domain, meaning that anyone can freely use them. What makes a work original and thus copyright protected is the creative input of the author. In the case of photography, originality can be achieved in several ways, for example, by: i) choosing a special angle of shot, setting up the camera in a particular way, editing the photo afterwards and so on; ii) creating a scene to be photographed; iii) being in the right place at the right time.

3. CURIOSITY

Recently there was a lot of online discussion and debate about whether or not copyright existed in a photograph taken by a monkey: the infamous monkey 'selfie'. You can read about this curious case [here](#).

4. THE CASE: *Temple Island Collections Ltd v New English Teas Ltd & another* [2012] EWPCC 1



Mr Fielder's work (the claimant)



Mr Houghton's work (the defendant)

The photo on the left was taken in 2005 by Mr Fielder, who wanted to create a modern and iconic scene of London to be used on souvenirs. Using Photoshop and taking inspiration from the film *Schindler's List*, Mr Fielder edited the photo to make the red bus stand against a black and white background. He also removed the sky and some people from the picture. In 2010 Mr Houghton, who was aware of the existence of Mr Fielder's picture, took three photos of the Houses of Parliament and one of a red Routemaster bus. These photos were edited together with another iStockphoto image of a red Routemaster bus to create the picture on the right, which was used on souvenir tins for tea.

Mr Fielder claimed that Mr Houghton's work reproduced a substantial part of his original work and so infringed his copyright. Mr Houghton contested that in terms of copyright protection his picture was sufficiently different from Mr Fielder's work, which was so ordinary that copyright could be infringed only by copying it

exactly, for example by making a photocopy. According to Mr Houghton, Mr Fielder could not rely on copyright law to establish a monopoly on black and white images of the Houses of Parliament with a red bus in frame. Mr Houghton argued that these elements are 'common elements' in everyday life, which cannot be copyright protected.

Justice Birss gave judgement in favour of Mr Fielder: he found that Mr Houghton copied a substantial part of Mr Fielder's picture and thus infringed his copyright. The judge held that there were obvious similarities between the two images – such as the same buildings in black and white with a bright red bus driving from right to left and the blank white sky – and that these similarities were due to the fact that Mr Houghton saw Mr Fielder's work before creating his own image, had copied it, and had copied too much of it.

5. FOR DISCUSSION: COPYRIGHT INFRINGEMENT OR JUST COMMON ELEMENTS?

What do you think? Was the judge right to decide that Mr Houghton's work infringed Mr Fielder's copyright? Or should Mr Houghton have been free to produce that image without Mr Fielder's permission, according to the idea-expression dichotomy explained above?

Or what about this drawing created in 2011 by the artist Susie Brooks? It is, essentially, a black and white image of Westminster Bridge that also features a red Routemaster bus and the Houses of Parliament. If the artist was aware of Mr Fielder's photograph when she created her work, do you think her drawing might infringe copyright?



In fact, Susie Brooks had never seen Mr Fielder's photograph. She wrote to Copyright User about the creation of her work as follows: '[This artwork] was part of a series of drawings of a person crossing London and featuring Thames crossings from East to West. ... As I print in silkscreen, which is laborious, the medium dictates that I use as few colours as possible to say what I had to say ...

In this case I only wanted to draw attention to the bus, as this is where my fictional traveller is sitting, and also tells the viewer it is London in shorthand.'

The artist's comment that she used a red bus as a 'shorthand' way of communicating that this is London is interesting, especially in light of the kind of arguments presented to the judge in the Temple Island case.

You can find out more about Susie Brooks and the artwork she creates [here](#).

6. USEFUL REFERENCES

Temple Island Collections Ltd v New English Teas Ltd & another [2012] EWPCC 1 is available here: <http://www.bailii.org/ew/cases/EWPCC/2012/1.html>

The government have produced some advice for individuals or businesses who want to make use of photographs and other images online. You can read this guidance here: <https://www.gov.uk/government/publications/copyright-notice-digital-images-photographs-and-the-internet>

CASE FILE #2: THE MONSTER

LEARNING AIMS

- Understand how long copyright lasts
- Be able to provide a few examples of public domain works and works that are still in copyright

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- Do you think that copyright duration is too long, too short, or just right?
- What are the benefits of the public domain?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

DO YOU THINK THAT COPYRIGHT DURATION IS TOO LONG, TOO SHORT OR JUST RIGHT?

- See **TEXT BOX #2, #3 and #5**
- There is no right or wrong answer to this question, it is a matter of opinion. But most copyright scholars agree that copyright duration – life of the author + 70 years – is **probably too long**.

As explained in **TEXT BOX #5**, ultimately, the goal of the copyright system is the creation and dissemination of new work and new knowledge. While the production of new knowledge is encouraged by giving creators the right to control the use of their work and the ability to earn from it, the dissemination of knowledge is guaranteed by limiting those rights in several ways, including a limited time duration.

Without these limits, copyright owners would be able to create a monopoly over their work, which would create a barrier to access to information and knowledge.

- Long copyright protection may be beneficial to companies who own rights in extremely valuable and successful works such as Mickey Mouse or Harry Potter. In fact, extensions of the copyright term have traditionally been the result of strong lobbying by companies wishing to extend their ability to exploit these valuable copyright assets.

However, only a very small amount of creative works enjoy a long commercial life. In fact, less than 10% of published works remain commercially available 50 years after publication. In other words, the vast majority of published (and unpublished) works have a short or no commercial life but they remain protected for a very long period, hindering their dissemination and reuse.

WHAT ARE THE BENEFITS OF THE PUBLIC DOMAIN?

- See **TEXT BOX #5**
- The public domain offers many benefits to members of society. Creators such as writers, filmmakers, musicians, painters, illustrators and video game developers often rely on the public domain to create new work. Not only individual creators but also big creative companies benefit from the public domain.

Think of Disney: most blockbuster films that determined the huge success of the Disney corporation – including *Snow White*, *Pinocchio*, *The Little Mermaid*, and *Cinderella*, among others – were based on public domain works.

- The public domain plays a crucial role in helping us to collect, preserve and learn about our past. When works are in the public domain, libraries, museums, archives and other cultural heritage institutions can freely store, digitise and make them available online for all the world to access and use. When works are still in copyright, it is usually more complicated and more expensive to do this.
- The public domain also makes education more comprehensive and affordable. Teachers can freely use a constantly increasing amount of works in their teaching, from Homer's *Odyssey* and Dante's *Inferno* to the work of Shakespeare, Dickens, Mozart, Leonardo da Vinci, and Joyce.

Free use also means that teachers can translate, annotate, combine, adapt, or excerpt from these works to create new educational resources, and publish them online without restrictions.

SUGGESTED ACTIVITIES

Before discussing the **KEY QUESTIONS** above, you might ask the students to read **TEXT BOX #2** and 'pitch' an idea for a creative production based on public domain works. For example, a graphic novel featuring Pinocchio and Oliver Twist or a Sherlock Holmes vs Dracula video game.

Once they have pitched their ideas, discuss the **KEY QUESTIONS** above. Did the students feel limited in their choices? Can they think of famous films, video games or other productions that are based or inspired by public domain works?

CASE FILE #2: THE MONSTER

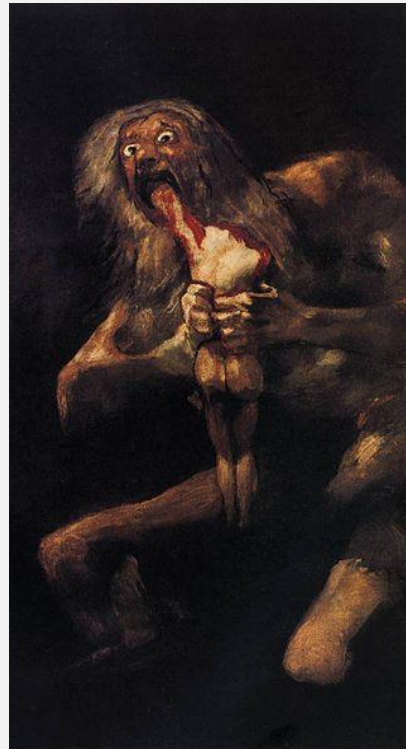
1. INTRODUCTION

One of the graffiti that scare the toymaker Joseph portrays a monster eating his 'beautiful, wonderful toy'. The image of the monster is inspired by two different artistic works: a drawing of the Green Fisherman eating Pinocchio by Carlo Chiostri (1863 – 1939), who illustrated one of the first editions of Carlo Collodi's (1826 – 1890) *The Adventures of Pinocchio*, and the famous painting by Francisco Goya (1746 – 1828) *Saturn Devouring His Son*. In producing our graffiti of the monster, we were free to mash-up those works of art as we wished, since both works are out of copyright.

This Case File #2 considers the length of time that copyright normally lasts, and what it means when a work is in the [public domain](#).



The Green Fisherman Eating Pinocchio, 1902, Carlo Chiostri



Saturn Devouring His Son, 1819-1823, Francisco Goya

2. COPYRIGHT DURATION: LIFETIME OF THE AUTHOR + 70 YEARS

In the UK, generally copyright lasts for the life of the author plus 70 years. After that period of time (often referred to as the 'copyright term'), copyright expires and the works of the author enter the public domain. Public domain works can be used for free by anyone for any purpose, without having to ask for permission. So in order to know if a work is in the public domain in the UK you need to identify its creators – bearing in mind that a single work can have more than one creator – and check the date of their death. If the creator(s) died more than 70

years ago the work is in the public domain and free to be used by all (at least in theory).

For example, anyone is free to create a video game based on the painting *The Starry Night* by Vincent Van Gogh (1853 – 1890) or use the *Symphony No. 9* of Ludwig van Beethoven (1770 – 1827) as part of a soundtrack to a film, since both Van Gogh and Beethoven died more than 70 years ago. The video game and the film would be protected by copyright as new, original works, whereas Van Gogh's *The Starry Night* and Beethoven's *Symphony No. 9* remain in the public domain. Indeed, an adaptation of a public domain work creates a new copyright work with a new 'copyright life'. But this has no effect on the public domain status of the underlying work: everyone remains free to make use of Van Gogh's and Beethoven's work in whatever way they want. Similarly, if you want to create a video based on *The Jungle Book*, you are free to use Kipling's stories (Rudyard Kipling, 1865 – 1936); but to use clips from Disney's movie adaptation would require permission from the rightsholders.

3. TWO IMPORTANT THINGS TO BEAR IN MIND

There are two other important things to bear in mind when dealing with public domain works:

Copyright law differs from country to country

A work that is in the public domain in the UK is not necessarily in the public domain in the US as well (and vice versa). This is because each country's copyright law is different (in legal terms: copyright law is territorial).

The difference between an original work and its reproduction

It is important to know that while an original work might be out of copyright, a later reproduction or recording of that work might be in copyright. For example, while the music for Beethoven's *Symphony No. 9* is out of copyright, a recording of that work made in 2009 by the London Philharmonic Orchestra is in copyright. So in order to use *Symphony No. 9* without the need to clear any rights at all, you should find a recording that is free to use, for example, because it is distributed under an open licence such as [Creative Commons](#). You can find classical music distributed under Creative Commons licences on [FreePD.com](#) and on Kevin MacLeod's [Incompetech.com](#).

Similarly, a photographic reproduction of a work of sculpture in the public domain, such as Michelangelo's (1475 – 1564) *David*, or the works of the 19th century Scottish sculptor John Henning (1771 – 1851), may be considered protected by copyright.

However, whether a photograph of a painting (or any other two-dimensional work of art) attracts copyright protection is a more controversial and unsettled issue. So, if you wanted to use a photograph of Van Gogh's *The Starry Night* without having to get permission, the safest thing to do would be to find one that has been distributed under an open licence. A good source for this is [Wikimedia Commons](#).

4. CURIOSITY

Although JM Barrie died in 1937, his most famous work, *Peter Pan*, is still in copyright. An amendment to the 1988 Copyright Designs and Patents Act was passed to allow the copyright for *Peter Pan* to run indefinitely in the UK; royalties are to be allocated to the trustees of the Hospital for Sick Children, Great Ormond Street, London, for as long as the hospital exists.

Also, some very old unpublished works remain in copyright until 31 December 2039, even though their authors have been dead for hundreds of years. Imagine, for example, that you discovered an unpublished manuscript by William Shakespeare. As incredible as it seems, that unpublished manuscript would still be in copyright today.

5. FOR DISCUSSION: TOO LONG, NOT LONG ENOUGH OR JUST RIGHT?

The ultimate goal of copyright is the creation and spread of knowledge. To achieve this goal, copyright needs to strike a fair balance between the interests of authors and creators, and the interests of the general public. By giving creators economic and personal rights, copyright allows them to be rewarded for their efforts, thereby promoting the creation of new work. At the same time, copyright puts some limits on those rights in order to encourage learning and access to information and knowledge. One of these limits is the copyright term explained above: after a certain period of time, copyright expires and the work can be freely enjoyed and re-used by the members of society.

What do you think? Is the current copyright term appropriate?

6. USEFUL REFERENCES

For useful information on the creative re-use of public domain works, see: www.create.ac.uk.

For a guide to the copyright term and the public domain in the US, take a look at [this useful resource](#) produced by the Cornell Copyright Information Centre.

For a resource to help you calculate whether a work is in the public domain in the UK or other EU Member States, see www.outofcopyright.eu.

For further information about the copyright status of Peter Pan, see www.gosh.org.

For further information on the odd situation of unpublished works, see www.gov.uk.

CASE FILE #3: THE BAKER STREET BUILDING

LEARNING AIMS

- Understand that different types of artistic works are protected by copyright
- Understand that certain works on public display can be copied without permission

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- What are artistic works and what do they protect?
- Is it possible to make copies of artistic works on public display or in public premises without infringing copyright?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHAT ARE ARTISTIC WORKS AND WHAT DO THEY PROTECT?

- See **TEXT BOX #2 and #3**
- 'Artistic works' is one of the eight categories of works protected by the CDPA (the UK Copyright Act) (for more information, see [Case File #23](#)). It is a broad category that includes a variety of works such as graphic works (e.g. paintings, drawings, diagrams, maps, charts or plans), photographs, sculptures and collages irrespective of their artistic quality. It also includes works of architecture (buildings and models of buildings) and works of artistic craftsmanship.
- While the CDPA does not specifically say so, graffiti is widely accepted as a type of artistic work too.

IS IT POSSIBLE TO MAKE COPIES OF ARTISTIC WORKS ON PUBLIC DISPLAY OR IN PUBLIC PREMISES WITHOUT INFRINGING COPYRIGHT?

- See **TEXT BOX #5 and #6**
- **YES.** In the UK, you can copy certain types of artistic works on public display in certain ways. If a building or sculpture is *permanently* situated in a 'public place or in premises open to the public', you can make a graphic work representing it (e.g. a painting or a drawing), take a photograph or film it without having to get permission from the copyright owner (see s.62 of the CDPA).
- However, graphic works on public display (e.g. paintings in galleries or murals on walls) can't be reproduced without permission (although galleries often permit the taking of photographs of their permanent collection).
- The possibility of reproducing artistic works on public display without permission from the copyright owner is often referred to as **freedom of panorama**.

- Some European countries – e.g. Italy – do not recognise this freedom. So, if you are on holiday in Italy, in principle even taking a selfie in front of a Calatrava bridge or a building by Renzo Piano would require permission from the copyright owner.
- The Eiffel Tower, in Paris, provides another interesting example.

Copyright in the Eiffel Tower expired in the 1990s, so, anyone is free to photograph it, and to share, sell or publish those photographs – **but only during the day**. This is because a night-time lightshow was added to the Tower in 1985, and this lightshow is protected under French copyright law as an artistic work. This means that, technically, although everyone is free to photograph the Tower by day, one should not take photographs of the Eiffel Tower at night without permission. (In practice though, the owner of the copyright in the lightshow has never tried to prevent tourists taking photos at night.)

CASE FILE #3: THE BAKER STREET BUILDING

1. INTRODUCTION

Sherlock Holmes and John Watson discuss Joseph's case at 221B Baker Street. The above illustration is inspired by two sources: the fictional address of Holmes' apartment in the Arthur Conan Doyle stories, and 187 North Gower Street, in London, where the BBC filmed exterior shots of Holmes' building for its TV adaptation, *Sherlock*.

This Case File #3 explores the copyright status of buildings, designs and architectural plans, and considers when buildings can be copied by other creators, such as artists, photographers and film makers, without permission.

2. COPYRIGHT AND BUILDINGS

Architects depend on copyright to protect their work. While copyright protects different types of work, such as books, songs and films, works of architecture are protected as artistic works. A work of architecture is defined as 'a building or a model for a building', and a building is defined to include 'any fixed structure, and a part of a building or fixed structure'. The term 'structure' is not defined in the legislation. The London Eye or the Nemesis rollercoaster at Alton Towers are good examples of structures that would qualify for copyright protection, but so too would more ordinary structures, such as a bridge, an outdoor swimming pool, or a garden that was landscaped to include features such as stone walls, steps and a pond.

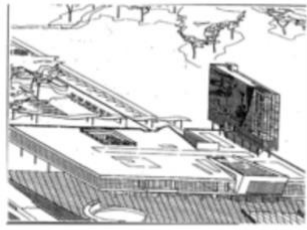
It is important to note that in order to enjoy copyright in a building it does not need to be of a certain aesthetic or artistic quality. This means that even very simple buildings could, in theory, be protected by copyright. But, to attract copyright the work must be original, and so claiming copyright in a very simple building may be difficult.

3. CURIOSITY

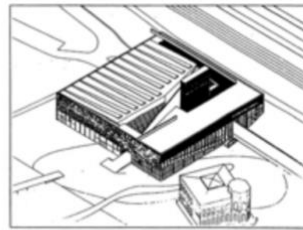
Just as a building or a structure is protected by copyright, the architect's drawings and plans (that is, the preparatory sketches for the building or structure) are also protected by their own copyright. Under the 1911 Copyright Act, these drawings, maps and plans were protected as if they were literary works. Today, they are protected under the Copyright Designs and Patents Act 1988 as artistic works.

4. THE CASE: *Pearce v Ove Arup Partnership* [2001] EWHC Ch 455

Infringement of copyright happens if a person copies the whole or a substantial part of a protected work without permission or without the benefit of a [copyright exception](#). When dealing with works of architecture, however, it is not always so easy to establish that unlawful copying has taken place.



(Docklands)



(Kunsthal)

In this case the architect Rem Koolhaas designed the Kunsthal museum in Rotterdam, but was accused of copying the designs for a town hall in Docklands created by the claimant Gareth Pearce as part of his final year project for his Diploma in Architecture. The court had to decide if Mr Koolhaas had copied the Docklands plans.

Mr Pearce argued that there were a number of similarities between the Kunsthal designs and the Docklands plans which, taken together, established that Mr Koolhaas must have copied his designs.

The Court took a different view. Just because Mr Pearce had identified a number of similar dimensions between the two buildings did not mean anything. Acknowledging that architects were often limited in their options when trying to achieve a particular structure or effect, the judge observed that you could take thousands of measurements to compare the two different designs and many were bound to be similar. That did not mean there had been copying, or that the copying was infringing. All that Mr Pearce had established was 'a collection of 'similarities' amounting individually and collectively to nothing'. 'You do not have to be an architect,' the judge said 'to recognise the absurdity of the comparison as evidence of copying'. The case had 'no foundation whatsoever'; it was 'pure fantasy – preposterous fantasy at that.'

5. COPYING ARTISTIC WORKS ON PUBLIC DISPLAY

Although buildings are protected by copyright the law allows you to make copies of the building in certain circumstances. For example, you can make your own painting or drawing of a building, just as we have done in our video, without infringing copyright. You can also photograph it, or include it in a film. And, you can distribute copies of your work to the public or post it online.

Copyright law also lets you make copies of other types of artistic work on public display. For example, you can paint, draw, photograph and film works of sculpture permanently situated in a public place or in premises open to the public, such as The National Gallery or TATE Modern (although public galleries may rely on contract law to set their own rules about what you can or cannot photograph within the building).

6. FOR DISCUSSION: NOT ALL WORKS ARE EQUAL

Why does the law let you make copies of certain artistic works on public display, such as buildings and sculptures, but not all artistic works on public display?

Think of a gallery, open to the public, that contains paintings as well as works of sculpture, or what about public graffiti or a mural on a wall? Why do you think the law distinguishes between different types of artistic work in this way?

7. USEFUL REFERENCES

Pearce v Ove Arup Partnership Ltd and Others [2001] EWHC Ch 455 is available here: <http://www.bailii.org/ew/cases/EWHC/Ch/2001/455.html>

The Copyright, Designs and Patents Act 1988 is available here: <http://www.legislation.gov.uk/ukpga/1988/48/contents>.

Section 4 provides the legal definition of artistic works, including works of architecture. Section 62 sets out which artistic works on public display can be copied and under what circumstances.

CASE FILE #4: THE ANONYMOUS ARTIST

LEARNING AIMS

- Be able to discuss the relationship between copyright and new technologies
- Understand some of the challenges related to enforcing copyright in the digital age

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- What is the relationship between copyright law and new technologies and how has it developed over the years?
- Can copyright law be enforced in a technologically advanced world, where copying can be carried out with ease?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHAT IS THE RELATIONSHIP BETWEEN COPYRIGHT LAW AND NEW TECHNOLOGIES AND HOW HAS IT DEVELOPED OVER THE YEARS?

- See **TEXT BOX #1 and #2**
- Ever since the printing press came into being, copyright and new technologies have shared an inevitable link. Before the printing press, books and other creative works could only be copied manually, so their reproduction and dissemination were easier to control. But the printing press turned books into easily multipliable commodities. As a result, a legal tool was developed to control the unauthorised copying: copyright.

Since then, technological innovations such as cameras, pianolas, photocopiers, home recording devices, computers, and so on, have made copying more accurate, easier, cheaper, and faster, requiring copyright law to adapt to these rapid changes.

Typically, law makers respond to these challenges mainly with a conservative approach: strengthening copyright and making it last longer and longer.

- Today, copyright law is still trying to adapt to the challenges and opportunities posed by the Internet and digital media production tools, while monitoring current advancements such as 3D printing and Artificial Intelligence (AI).

CAN COPYRIGHT LAW BE ENFORCED IN A TECHNOLOGICALLY ADVANCED WORLD, WHERE COPYING CAN BE CARRIED OUT WITH EASE?

- See **TEXT BOX #3 and #4**
- Enforcing copyright is particularly challenging in the digital age, when users can easily share and modify protected works. Trying to enforce copyright against each

infringing user would be impossible without interfering with their fundamental right to privacy. Therefore, over the last few years enforcement strategies have focused more on the people and organisations that make unlawful content available, rather than on the users of that content.

- One enforcement system that has become more and more popular are blocking injunctions: following a request from a copyright owner, courts can grant an order to block a website that provides access to unlawful material.

While blocking injunctions have proved to be useful, questions can be asked about their long-term effectiveness (users often can easily bypass the block or find the material they are looking for on other illicit websites) and about their interference with fundamental rights, such as freedom of expression.

- Other enforcement systems currently in use are 'upload filters', such as the YouTube's Content ID: an automated system that enables copyright owners to identify YouTube videos that include content they own. After identifying the infringing content, copyright owners can decide to take the video down or to monetise it by running ads against it.

One controversial aspect of these automated enforcement systems concerns their ability to identify videos in which protected content has been lawfully reused under [copyright exceptions](#) (see also [Case Files #5](#) and [#6](#)).

SUGGESTED ACTIVITIES

One way of encouraging the lawful consumption of creative works is through legal services that satisfy customer expectations for quick and easy access to content, while rewarding the creators of that content. Think of Spotify, Netflix or iTunes.

After discussing the **KEY QUESTIONS** above, you might ask the students: what do you think is more effective in order to encourage lawful online consumption? Enforcing copyright through blocking injunctions and upload filters, or developing more innovative services such as Netflix and Spotify? Can the students think of other services or business models that would satisfy customer expectations while rewarding creators?

CASE FILE #4: THE ANONYMOUS ARTIST

1. INTRODUCTION

Joseph, the toymaker, has asked the police to identify the culprit making 'dreadful images' of his toy, portraying it in violent situations. However, as Joseph tells Holmes, he has been told by the police that 'these anonymous street artists are almost impossible to track down'.

In the video, this sentiment is visualised by numerous copies of the Guy Fawkes mask, from the graphic novel *V for Vendetta* written by Alan Moore and illustrated by David Lloyd. Moore and Lloyd appropriated the legacy, myth and image of Fawkes for their story. In turn, their own Fawkes mask was subsequently co-opted by the hacktivist group *Anonymous* and has become an icon of protest movements around the world. (*Anonymous*, among other things, are known for their virtual attacks on media conglomerates and copyright industry organisations.)

This Case File #4 considers the often problematic relationship between copyright and digital technology, as well as how copyright law is enforced in the online world.

2. UNLAWFUL USE OF COPYRIGHT MATERIAL ONLINE

Copyright law and policy has a close relationship with the advancement of new technology. Recent developments in online technologies have had a significant effect on the copyright landscape, bringing benefits and challenges for creators, copyright owners and the public.

Technology provides new opportunities for the production and spread of knowledge by creating new ways to innovate. Whether people are recording music in their bedroom or creating video mash-ups to post online, it is now cheaper and easier than ever before to make new work which, in turn, can encourage people to be more creative. New technologies have also made it much easier and cheaper for creators and copyright owners to make their work available online to a global audience. And, digital technologies can be used to help safeguard copyright work, for example, by using tools that notify the owner when their work has been uploaded online without permission.

On the other hand it is now also easier to access, copy and share copyright protected material unlawfully, and this has caused considerable difficulties for copyright owners. If creators cannot rely on their copyright to benefit financially from their creations, they may decide not to create any work at all which could have a negative impact on the development and spread of knowledge and culture in general.

3. BLOCKING INJUNCTIONS

One way that creators and rightsholders have tried to overcome the challenge of online copyright infringement in the UK is to ask courts to grant an order to block a website that provides access to unlawful material.

To do this, copyright owners apply to the court for an injunction against Internet Service Providers. If the injunction is granted the Internet Service Provider must take technical steps to block access to the infringing website which means their customers will not be able to access that particular website.

Website blocking is becoming more and more common. However, it is considered by some to be a controversial measure. Some believe that this type of copyright enforcement is too strong and interferes with people's fundamental rights, such as free speech and the freedom to access and distribute information.

It is also unclear how effective website blocking is as a long term solution because users often can easily bypass the block or find the material they are looking for on other illicit websites. In addition, the process of securing an injunction takes time and this gives website operators the opportunity to change the location of the website long before any injunction comes into force.

4. THE CASE: *Dramatico Entertainment v British Sky Broadcasting* [2012] EWHC 268

This case concerned a well-known website called The Pirate Bay. This website provided links to infringing content, much in the same way that a search engine does to legal content.

The *Pirate Bay* argued that they were not infringing copyright because they did not actually host any illegal content on their website. However, the Court decided that as they were providing links to illegal content they were facilitating infringement.

As a result, the court ordered five leading British Internet Service Providers (ISPs) to take steps to prevent their users from accessing *The Pirate Bay* website.

This did not stop users from accessing *The Pirate Bay* site, however. Indeed, *The Pirate Bay* claimed that it received [12 million more visitors](#) on the day *after* the court order came into effect than it had received before the ISPs took steps to block access to their site. This demonstrates the limitations that legal and technological mechanisms alone can achieve in trying to overcome the challenge of online infringement.

5. FOR DISCUSSION: ENFORCE, ENGAGE, ENABLE

The case above demonstrates some of the tensions between copyright and technology. New innovation does not always promote compliance with copyright, and using technological enforcement measures to protect work is not always effective.

Recently, though, some creators and copyright industries have been developing new ways to continue to benefit from copyright works while also making these works more easily accessible to their customers online.

Can you think of any examples of innovative ways of rewarding creators while satisfying customer expectations for quick and easy access to copyright works?

6. USEFUL REFERENCES

Dramatico Entertainment Ltd and Others v British Sky Broadcasting Ltd and Others [2012] EWHC 268 (CH) is available

here: <http://www.bailii.org/ew/cases/EWHC/Ch/2012/268.html>

For a list of websites that have been blocked in the UK by court orders to protect the interests of copyright owners, see: <http://www.ukispcourtorders.co.uk/>

CASE FILE #5: THE TERRIBLE SHARK

LEARNING AIMS

- Understand why we have exceptions to copyright
- Be able to discuss the importance of having an exception for parody, caricature and pastiche

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- What are copyright exceptions?
- What are parodies, caricatures and pastiches, and why is it important to have copyright exceptions to enable them?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHAT ARE COPYRIGHT EXCEPTIONS?

- See **TEXT BOX #1 and #2**
- Copyright exceptions are specific circumstances when it is possible to use protected works without permission from the copyright owner. There are a number of copyright exceptions set out in the CDPA (the UK Copyright Act), concerning [non-commercial research and private study](#), [quotation](#), [news reporting](#), [education](#), and other uses.
- Copyright law permits these uses because they are socially, culturally, politically or economically beneficial. Also, practically, the process and costs of getting permission might prevent these useful activities.

For example, think of a large digitisation project conducted by a library or a museum. Because they may be digitising thousands of works, it would be almost impossible (or too time-consuming and expensive) for these organisations to get permission from every single copyright owner of each of the items in their collections.

At the same time, preserving our cultural memory is vital for helping people connect with and understand their identities, their communities and their cultural heritage. This is why there is an exception in copyright law that allows archivists to make copies of any type of work for preservation purposes (see [Case File #24](#)).

WHAT ARE PARODIES, CARICATURES AND PASTICHES, AND WHY IS IT IMPORTANT TO HAVE COPYRIGHT EXCEPTIONS TO ENABLE THEM?

- See **TEXT BOX #3 and #4** and the Copyright User page on [Parody](#).

- The Oxford English Dictionary defines parody as 'an imitation of the style of a particular writer, artist, or genre with deliberate exaggeration for comic effect'. It further explains caricature as 'a grotesque usually comically exaggerated representation especially of a person; ridiculously poor imitation or version'; and pastiche as 'an artistic work in a style that imitates that of another work, artist, or period'.

From a copyright perspective, there are two main types of parody: 'target parody', which directs its critique to the work being used or its author; and 'weapon parody', which uses an original work to critique a third party or phenomenon.

- Digital technology has made parody, caricature and pastiche much more accessible to the general public, in terms of both production and consumption. Think of how many parodies of famous songs or mash-ups of TV series are uploaded and watched every day on YouTube; or the millions of memes that are shared via other social networks.

While many of these are created purely for fun, often parodies and mash-ups are also produced to make a critique of a well-known artist or her work; and/or to draw attention to or comment upon a particular social phenomenon or political issue. As such, they are a crucial tool to exercise our freedom of expression.

- There are many obvious reasons why a copyright owner would not grant permission to make a parody of her own work: she may not have a great ability to laugh at herself (if she or her work are the target of the parody), or she may not agree with the political message behind the parody.

But, as we noted above, parodies are a fundamental aspect of our freedom of expression. For this reason, it is important to have exceptions for parody, caricature and pastiche: without these exceptions, copyright could be used to hinder political dissent and social commentary.

SUGGESTED ACTIVITIES

After discussing the KEY QUESTIONS above, show the students the following memes:



Ask the students to identify the difference between the two memes. The one on the left hand side can be considered a 'target parody' (the target of the parody is the person appearing in the photo, the actor Chuck Norris), whereas the one on the right hand side is a 'weapon parody' (it uses a still from the series *The Fresh Prince of Bel-Air* to criticise something else).

But how about this one:



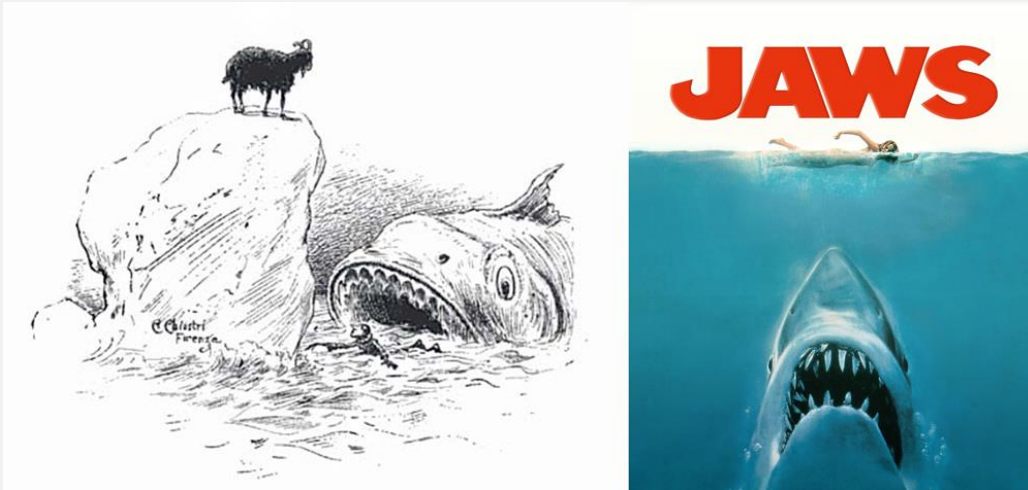
This meme combines a still from the film *Labyrinth* with distorted lyrics of the song *Call Me Maybe*. What or who is the target of the parody? Is it a 'target parody' or a 'weapon parody'?

Should the makers of these memes get permission from the copyright owners of the works they use? Should the online platforms that distribute these memes pay compensation to the copyright owners of the works being used in the memes? What do the students think?

CASE FILE #5: THE TERRIBLE SHARK

1. INTRODUCTION

This illustration from our video depicts a terrible shark-like creature about to eat Joseph's toy. It was inspired by two different images: an illustration of the 'Terrible Shark' by Carlo Chiostrì (1863 – 1939), from one of the first editions of Carlo Collodi's (1826 – 1890) *The Adventures of Pinocchio*, and a theatrical release poster for Steven Spielberg's classic film *Jaws* (1975).



While the former is in the public domain because Chiostrì died more than 70 years ago, the poster for *Jaws* is still in copyright. So, if you want to copy the artwork from the *Jaws* poster you need to ask for the copyright owner's permission unless, that is, you can rely on one of the exceptions to copyright.

This Case File #5 demonstrates that you are free to make use of a copyright work, without seeking the owner's permission, if your use falls within one of the copyright exceptions.

2. COPYRIGHT EXCEPTIONS

UK copyright law provides for a number of [exceptions](#) to copyright, specific circumstances when work can be used without the need to get permission from the copyright owner. There are a number of copyright exceptions set out in the Copyright, Designs and Patents Act 1988, concerning [non-commercial research and private study](#), [quotation](#), [news reporting](#), [education](#), and other uses.

A number of these exceptions are sometimes referred to as 'fair dealing' exceptions because the law often requires that your use of the material for that particular purpose must be fair. Indeed, each copyright exception has specific requirements about how and when the material can be used without permission, and in order to benefit from an exception you must make sure you fulfil the relevant requirements.

For our illustration above, we have relied on the exception for Caricature, Parody or Pastiche in referencing the iconic artwork for the *Jaws* poster.

3. CARICATURE, PARODY AND PASTICHE

To parody a work is to use it a humorous way to make a particular point. This might be to make a comment on the work that you have parodied, or you might be making fun of, criticising or drawing attention to a different work or issue altogether.

Before October 2014, creating a parody of a copyright work in the UK would typically have been considered copyright infringement. However, with the introduction of a new exception for parody, copyright material can now be parodied without the permission of the owner, in certain circumstances. Specifically, your use of the copyright work must be fair.

How much copying from a work is fair or unfair is an issue ultimately decided by a court of law on a case-by-case basis, taking into account the interests and rights of the owner as well as the freedom of expression of the person relying upon the parody exception. In making this decision, a court will typically take a number of different factors into account, such as the amount of the work that has been copied.

As the exception is new, the government have produced guidelines to help owners and users understand what it means in practice. The government's guidance is available [here](#). It suggests that you should only make a limited or moderate use of someone else's work to create your parody. For example, it is unlikely to be considered 'fair' to use an entire musical track, without any alteration or change, to create a spoof video to post online. If you are using someone else's work in its entirety, you should almost certainly get permission from the owner.

On the other hand, there are plenty of circumstances under which the new exception can be relied upon: a comedian using a few lines from a film or song for a parody sketch; a cartoonist referencing a well-known artwork or illustration for a caricature; or an artist using small fragments from a range of films to compose a larger pastiche artwork.

We have parodied the poster from *Jaws* to make the point that parody is now lawful under the UK copyright regime. What do you think? Can we rely on the new exception? Is our use fair?

For more information on the exception for caricature, parody and pastiche, see the copyrightuser.org page [here](#).

4. THE CASE: *Twentieth Century Fox Film Corp v Anglo-Amalgamated Film Distributors [1965]*

This case also concerned movie posters. The defendants created a poster for their film *Carry on Cleo* that was based on the artwork for Twentieth Century Fox Film's film *Cleopatra* starring Richard Burton and Elizabeth Taylor.

The judge decided that as 'the defendant's poster reproduce[d] a material part of [Twentieth Century's] poster', their use amounted to [substantial copying](#) and so infringed the copyright in the original work. On this basis the judge granted an injunction against the second work, stopping the defendants from distributing or displaying their poster.

[See the posters on the next page.]



5. FOR DISCUSSION: A CLEOPATRA FOR THE 21ST CENTURY?

As mentioned, in October 2014 new copyright exceptions were introduced into UK copyright law. One of the new exceptions permits the use of copyright material for the purposes of parody. The Cleopatra case, referred to above, was decided before the introduction of this exception, but what if the case were decided today? The defendants would certainly argue that their use fell within the exception for parody. Do you think they would be successful? Is their work really a parody? Is it fair? Does it matter that they were parodying the work for their own commercial purposes?

Do you think the law today strikes a better balance between the rights of copyright owners and the interests of the general public, compared to the law before an exception for parody was introduced?

6. USEFUL REFERENCES

Twentieth Century Fox Film Corp v Anglo-Amalgamated Film Distributors [1965] 109 SJ 107 (unfortunately, this is not freely available online)

CASE FILE #6: THE FAMOUS PIPE

LEARNING AIMS

- Explain how the exceptions for quotation and for criticism or review apply
- Understand that more than one exception can apply to the same use

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- What are the differences between the exception for quotation and that for criticism or review?
- Can more than one copyright exception apply at the same time?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHAT ARE THE DIFFERENCES BETWEEN THE EXCEPTION FOR QUOTATION AND THAT FOR CRITICISM OR REVIEW?

- See **TEXT BOX #1, #2 #3** and the [Copyright User page on Quotation](#).
- The copyright exception for the purpose of criticism and review allows everyone, under certain conditions, to use substantial parts of copyright works for the purpose of criticism and review. For example, you could use clips from the film *Goodfellas* as part of a documentary discussing Martin Scorsese's work. Importantly, this exception only applies if your use is genuinely for criticism or review.
- The quotation exception was introduced into UK copyright law in 2014. Under this exception, you do not have to be engaging in criticism or review. You can quote for any reason, for example, for artistic and expressive purposes.

We made use of the quotation exception a lot when creating *The Game is On!* You can find lots of examples in the annotations accompanying each episode. We also discuss one specific example in the next section, below.

- Both exceptions – (i) criticism and review, and (ii) quotation – only apply under the following conditions:
 - the material used is available to the public
 - the use of the material is fair
 - where practical, the use is accompanied by a sufficient acknowledgement
- The quotation exception is also subject to one further condition: the use of the quotation must extend no more than is required to achieve your purpose (which can be any purpose).

CAN MORE THAN ONE EXCEPTION APPLY AT THE SAME TIME?

- See **TEXT BOX #4, #5 and #6**
- **YES.** It is possible to benefit from more than one exception at the same time.
- For example, in *Ashdown v Telegraph Group Ltd* (2001), the *Sunday Telegraph* argued that their use of the claimant's work was covered by two different exceptions: (i) criticism or review, and (ii) reporting current events.

In the Court of Appeal, it was accepted that both exceptions could be relied on at the same time – in theory at least. Based on the facts, Lord Phillips accepted that the defendants were using the work to report a matter of interest to the public, however, he rejected their argument that they were using the work for the purpose of criticism and review.

- We believe that our use of Magritte's *The Treachery of Images* in episode one is covered by the quotation exception. We wanted to depict the iconic pipe element of the Sherlock Holmes character by quoting a famous artwork featuring a pipe. The quotation exception has never been tested in courts, so we can't be 100% certain that our use is lawful. However, even if our use isn't covered by this exception, there are at least two other exceptions we could rely on:
 - the exception for parody, caricature and pastiche (see [Case File #5](#)) (our illustration could be considered a parody of Magritte's work)
 - the exception for the sole purpose of illustration for instruction (see [here](#)) – that is, we used Magritte's work as part of an educational resource to illustrate a pedagogic point: to explain what the quotation exception is, and that more than one exception can apply to the same use.

CASE FILE #6: THE FAMOUS PIPE

1. INTRODUCTION

The pipe has been associated with the image of Sherlock Holmes since Sir Arthur Conan Doyle's (1859 – 1930) stories were first published in *The Strand Magazine* with illustrations by Sidney Paget (1860 – 1908). You can see an illustration by Paget of Holmes with his pipe below (there are others available on [Wikimedia Commons](#) if you want to search for them).



In our video Sherlock wears a T-shirt with a pipe and some writing below, not all of which is visible. The inspiration for this illustration is René Magritte's (1898 – 1967) famous painting *The Treachery of Images*, which depicts a pipe with the words 'Ceci n'est pas une pipe' [this is not a pipe] underneath.

Like [Case File #5](#) (The Terrible Shark), this Case File #6 demonstrates that you are free to make use of a copyright work, without seeking the owner's permission, if your use falls within one of the copyright exceptions.

2. COPYRIGHT EXCEPTIONS

UK copyright law provides for a number of [exceptions](#) to copyright, specific circumstances when work can be used without the need to get permission from the copyright owner. There are a number of copyright exceptions set out in the Copyright, Designs and Patents Act 1988, concerning [non-commercial research and private study](#), [news reporting](#), [parody](#), [education](#), and other uses.

A number of these exceptions are sometimes referred to as 'fair dealing' exceptions because the law often requires that your use of the material for that particular purpose must be fair. Indeed, each copyright exception has specific requirements about how and when the material can be used without permission, and in order to benefit from an exception you must make sure you fulfil the relevant requirements.

For our illustration above we are relying on the exception which allows quotation from a copyright work, whether for criticism, or review, or for some other

purpose, and in this *Case File* we discuss the circumstances in which it can be used.

3. QUOTATION FOR CRITICISM OR REVIEW OR OTHERWISE

Before October 2014, copyright law permitted use of a work for the purpose of criticism and review, but it did not allow quotation for other more general purposes. Now, however, the law allows the use of quotation more broadly, so long as the work in question has been made available to the public, you only use as much of the work as you need to make your point, and your use is accompanied by a sufficient acknowledgment.

The quotation exception also requires that your use of the work is fair. What is meant by fair is not defined in the statute, so this is something that will ultimately be decided by judges on a case-by-case basis.

For example, in *Time Warner Entertainment v Channel Four Television* [1994] (the *Clockwork Orange* case) Channel 4 made a documentary titled *Forbidden Fruit* which included a number of clips from Stanley Kubrick's (1928 – 1999) film *A Clockwork Orange*. The court decided that including clips making up 8% of the film, which amounted to 40% of the entire documentary, was fair.

Compare the case of Ben Goldacre (author of *Bad Science*) who embedded a 44-minute clip from a three-hour radio programme on a blog post about irresponsible media coverage of the [MMR vaccine](#). Specifically, Mr Goldacre sought to demonstrate how the media often misrepresent the evidence on MMR, and to draw attention to the serious consequences that irresponsible journalism of this kind can have on public health.

The London Broadcasting Corporation threatened to sue Mr Goldacre for copyright infringement if he did not take down the clip immediately. Lacking the financial resources to cover the potential costs of litigation, Mr Goldacre removed the clip from his blog.

Had the case made it to court much of the discussion would have focussed on whether the use of the 44-minute clip from the radio programme was fair in the circumstances. Mr Goldacre has explained why he used such a long clip as follows: 'it was so long, so unrelenting, and so misinformed that I really couldn't express to you how hideous it was. If I tried, without the audio, you might think I was exaggerating. You might think that I was biased'. You can read more about this case [here](#). Do you think Mr Goldacre's use of the copyright material was fair?

For more information on the quotation exception see the [copyrightuser.org](#) page [here](#).

4. MORE THAN ONE EXCEPTION

Each copyright exception has specific requirements about how, when and what material can be used without permission, and in order to benefit from an exception you must make sure you fulfil the relevant requirements.

These requirements can differ from exception to exception. For example, whereas the quotation exception permits copying photographs, the exception for reporting current events does not. Similarly, whereas the quotation exception only allows copying work that has been made available to the public, the exception for [research and private study](#) allows you to copy unpublished material as well.

People making use of copyright protected work often argue that their use of the work falls within more than one of the copyright exceptions. There is nothing wrong with this at all. For example, what if we are wrong to claim that our use of Magritte's painting in the video falls within the quotation exception.

Is there another exception that we might be able to rely upon?

5. THE CASE: *Ashdown v Telegraph Group* [2001] RPC 659

The background to this case is that Paddy Ashdown, the former leader of the Liberal Democrats, and Prime Minister Tony Blair held secret talks in October 1997 about a possible future Labour/Liberal Democrat coalition government. Ashdown wrote up notes of the meeting, which were later leaked to the *Sunday Telegraph*. In November 1999 the paper published an article about these secret talks, reproducing lengthy quotes from Ashdown's notes.

The *Sunday Telegraph* argued that their use of the work (the notes) was fair dealing for the purpose of criticism and review and for the purpose of reporting current events.

In the Court of Appeal Lord Phillips rejected the argument that they were using the work for the purposes of criticism and review, but accepted that they were using it to report a matter of interest to the public.

However, the judge continued that although the newspaper was reporting current events their use of the work was not fair. The fact that the notes had not previously been published or released to the public by Ashdown was an important consideration for the judge, as was the amount of material which had been used.

6. FOR DISCUSSION: BALANCING INTERESTS

It is important that there is an exception to copyright for the purpose of quotation, criticism and review so that works protected by copyright can be used for critique or comment by other people; this is important for free speech and for the benefit of society as a whole.

In this case the court had to balance the use of Ashdown's notes by the newspaper in the interests of public and political discussion against the copyright owner's rights. Indeed, Ashdown was planning to publish his own political diaries including the note from this meeting with Tony Blair. This was an important factor for the court.

Also, Lord Phillips made it very clear that while the newspaper was not allowed to use lengthy verbatim extracts from the notes, it was still free to report to the public the *information* contained in the notes accompanied perhaps by one or

two short quotes (to make it clear that they were able to give an authentic account of the meeting).

Do you think the court struck the right balance of interests in this case?

7. USEFUL REFERENCES

The government has produced [advice on recent changes to the exception for quotation](#).

Time Warner Entertainment Company LP v Channel Four Television Corporation Plc and Another [1994] EMLR 1 (unfortunately, this case is not readily available online)

Ashdown v Telegraph Group [2001] RPC 659 is available here:
<http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2001/1142.html>

CASE FILE #7: THE MATCHING WALLPAPER

LEARNING AIMS

- Understand that copyright does not protect ideas
- Understand how a person's work is protected by copyright

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- Can you infringe copyright in a work that you have never seen?
- Does it matter if the designs look similar?
- Did the House of Lords decide the case correctly?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

CAN YOU INFRINGE COPYRIGHT IN A WORK THAT YOU HAVE NEVER SEEN?

- See **TEXT BOX #2 and #5**
- The answer here is **YES**. Unlawful copying can take place indirectly. The person creating the copy does not need to have seen the original work.

If you gave an illustrator very detailed verbal or written instructions, based on the design of an existing wallpaper, so that she could produce a new design that was almost identical to the original work, this would amount to copyright infringement by indirect copying.

Do the students think that the instructions we gave Davide were too detailed? Has he indirectly copied the original wallpaper? We don't think they are, and we don't think he has. But, other people may have a different point of view.

- Alternatively, you could argue that designing a wallpaper featuring vertical stripes with flowers and leaves does not involve copying a work. Instead, you are simply copying ideas from someone else's work.

As discussed below, the idea or ideas for a song, a novel, or a wallpaper design are free for anyone to use and take inspiration from. But what you cannot copy is the original way an author has expressed his or her idea(s) in that song, that novel, or that painting.

However, it is not always easy to draw the line between the lawful borrowing of simple ideas and when borrowing becomes unlawful because you have copied, for example, too many ideas from the plot of a play or a film or have copied just one or two ideas but in too much detail.

DOES IT MATTER IF THE DESIGNS LOOK SIMILAR?

- See **TEXT BOX #4 and #6**

- The **Court of Appeal** thought that **it did matter**.

They thought that, when dealing with artistic works, if the allegedly infringing work does not look sufficiently similar to the original work, then it did not infringe.

- However, the **House of Lords disagreed**.

From their perspective, even if the two designs don't look very similar, so long as you have established that copying has taken place, then copyright has been infringed.

- What do the students think?

DID THE HOUSE OF LORDS DECIDE THE CASE CORRECTLY?

- See **TEXT BOX #3, #4 and #6**

- First, it is worth noting that the House of Lords is now called the Supreme Court.

- As explained, there were three different decisions taken in this case, with different judges taking different views on whether the defendant's copying was substantial and so infringing.

Copyright litigation often involves borderline decisions about which reasonable people might disagree.

Ultimately, the decision of the House of the Lords (now the Supreme Court) is the most important. It takes precedence.

- Did the Lords decide the case correctly?

There is plenty of room for discussion and disagreement here. Even today, academics and lawyers still disagree over the correctness of the decision.

But, on balance, we think the decision is **probably correct**.

The defendants did set out to copy the claimant's wallpaper design, although they did introduce some changes and variations. But, even though they changed the design – creating their own new design – they still copied too much from the original work.

- What do the students think?

SUGGESTED ACTIVITIES

Before discussing the *Designer Guild* case, you might ask the students to create their own wallpaper design based on the points of similarity between the two wallpapers identified in the case itself.

- Vertical stripes with spaces between the stripes equal to the width of the stripe
- Flowers and leaves scattered over and between the stripes

- The centre of the flower should be represented by a strong blob, rather than a realistic representation
- The flowers should be painted in an impressionistic style [the impressionists]

You could even suggest a colour scheme, whether similar or different to the existing wallpapers.

Once they have created their designs, show them the designs from the case, and discuss the **KEY QUESTIONS** set out above. In theory, have the students also infringed the original wallpaper design? Have they copied indirectly? Are their designs visually similar? Does it matter whether they are?

CASE FILE #7: THE MATCHING WALLPAPER

1. INTRODUCTION

In the background of Holmes and Watson's apartment you can see wallpaper with 'flowers scattered over it in a somewhat impressionistic style'.

There is a famous copyright case involving the design of two different wallpapers: *Designer Guild Limited v Russell Williams (Textiles) Limited* [2000]. In this case, the judge identifies seven points of similarity between the claimant's wallpaper and the defendant's infringing copy. We gave our illustrator Davide Bonazzi the same seven points as a guideline for creating the wallpaper in our video.

This Case File #7 offers points of discussion about fundamental copyright concepts, such as the difference between an idea and the expression of an idea, and what it means to copy a substantial part of an existing work. The *Case File* also reminds us that judges do not always agree on how these issues should be resolved, or whether a particular instance of copying is unlawful or not.

2. IDEA AND EXPRESSION

When creating new work it is natural to be inspired by the work of others. Indeed, one of the ways that copyright promotes the creation of new work and the spread of knowledge is by providing authors with rights in their work while, at the same time, allowing the public to make use of that work in certain ways.

One way in which copyright does this is by protecting [only the expression of ideas](#) and not ideas themselves. This means that the idea or ideas for a song, a novel, or a painting are free for anyone to use and take inspiration from. But what you cannot copy is the original way an author has expressed his or her idea(s) in that song, that novel, or that painting. In this way creators are given the opportunity to benefit from their own personal expression, while the general ideas underpinning a work remain available for others to use.

However, it is not always easy to draw the line between the lawful borrowing of simple ideas and when borrowing becomes unlawful because you have copied, for example, too many ideas from the plot of a play or a film, or have copied just one or two ideas but in too much detail.

So, feel free to be inspired by other people's ideas but make sure you bring something new to those ideas and express them in your own individual way.

For an interesting video on copyright and the balance between protecting creative works and allowing the public to use them [click here](#).

3. SUBSTANTIAL TAKING

Infringement of a copyright work occurs when the whole or a [substantial part](#) of a protected work is used without permission or without the benefit of a [copyright exception](#). Therefore, taking an *insubstantial* part of a copyright work without

permission is allowed. This is because the law recognises that no real injury is done to the copyright owner if only an *insignificant* part of the work is copied.

Under UK copyright law substantial taking is considered by the courts to be a matter of quality, not quantity. So it is not just about how much you copy from someone else's work, it is about the importance of the parts that you take from that work. This makes it difficult to define exactly what amounts to a substantial part of a work.

For example, copying one table or a graph from a textbook on mathematics might be regarded as substantial copying – even though it is only one from hundreds of pages – on the basis that it took considerable effort to produce and that it conveys a lot of important information in a simple and easily digested form.

In one case making use of 50 seconds of a song was found to be a substantial part because that particular part was recognisable by the public. The 50-second sequence within the song does not need to have copyright protection in its own right, but, taken as a whole, it was understood by the courts to be a substantial part of the work.

4. THE CASE: *Designer Guild Limited v Russell Williams* [2000] UKHL 58



Designer Guild (the claimant's work)



Russell Williams (the defendant's work)

In this case the claimant, Designer Guild, designed and manufactured fabrics and wallpapers. One of their wallpaper designs, called the *Ixia*, had been inspired by the work of the French impressionist painter Henri Matisse and was a great commercial success. Designer Guild sued Russell Williams for copying the *Ixia* design. The defendants denied any copying.

Identifying seven similarities between the two wallpapers, the trial judge held the defendant had copied the *Ixia* design, and that the copying was substantial.

Russell Williams appealed, arguing that if there was copying they had not copied a substantial part of the claimant's work. The Court of Appeal agreed and overturned the trial judge's decision: the court considered that while the defendant had borrowed ideas and artistic techniques from the *Ixia* design, their copying had not been substantial. One of the Court of Appeal judges said the wallpapers 'just do not look sufficiently similar'.

Designer Guild then appealed to the House of Lords (what is now referred to as the Supreme Court). On a technical point of law, the House of Lords unanimously agreed to overturn the Court of Appeal's decision and reinstate the trial judge's original ruling: the defendant had infringed the claimant's copyright.

However, a number of the judges in the House of Lords did also say they thought the defendant's copying had been substantial. Lord Hoffman commented that substantial copying did not have to involve *literal* copying. One could infringe copyright by copying a particular feature or a combination of features from someone's work without slavishly copying the work itself. He also pointed out that it was irrelevant whether the defendant's wallpaper looked like the claimant's wallpaper: all that mattered was whether a substantial part of the original work had been copied.

5. A CASE OF INDIRECT COPYING?

As we mentioned, we gave our illustrator Davide Bonazzi the same seven points of similarity from the *Designer Guild* case as a guideline for creating the wallpaper in our video. For example, we asked Davide to produce a design consisting of 'vertical stripes, with spaces between the stripes equal to the width of the stripe', with flowers and leaves 'scattered over and between the stripes', and that the centre of the flower heads should be represented by 'a strong blob, rather than by a realistic representation'.

When Davide created his wallpaper design he had never heard of the *Designer Guild* case (we didn't tell him about it) and he had never seen the wallpaper designs from the case. But in producing a design in accordance with the seven points of similarity, has Davide created a work that potentially infringes the Designer Guild wallpaper?

Can you copy a work without ever having seen it simply by following a set of instructions describing the essential features of that work?

6. FOR DISCUSSION: THE SIMILAR AND THE DIFFERENT

One of the Court of Appeal judges commented that the wallpapers 'just do not look sufficiently similar' whereas one of the judges in the House of Lords said that 'they looked remarkably similar to me.'

What do you think? Do you think the two wallpaper designs look similar? Does it matter whether they look similar?

As explained there were three different decisions taken in this case, with different judges taking different views on whether the defendant's copying was substantial and so infringing. Copyright litigation often involves borderline decisions about which reasonable people might disagree. Ultimately, though, the decision of the House of Lords (or what is now the Supreme Court) is the most important. It takes precedence.

What do you think about the different decisions in this case? Do you think that the Court of Appeal or the House of Lords made the decision in the correct way?

Why is it challenging for courts determine copyright infringement in something like wallpaper?

7. USEFUL REFERENCES

Designer Guild Limited v Russell Williams (Textiles) Limited (Trading As Washington Dc) [2000] UKHL 58 is available here: <http://www.bailii.org/cjibin/markup.cgi?doc=/uk/cases/UKHL/2000/58.html>

CASE FILE #8: THE DREADFUL IMAGE

LEARNING AIMS

- Be able to explain what types of work are protected by copyright
- Understand that the law can refuse to grant copyright protection for policy reasons
- Be able to debate concepts such as immoral and illegal as factors for refusing copyright protection

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- What types of work are protected by copyright?
- Should works that are immoral be denied copyright protection?
- Should works that are unlawful be protected by copyright?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHAT TYPES OF WORK ARE PROTECTED BY COPYRIGHT?

- See **TEXT BOX 2**
- Copyright protects different types of original creative work, under the CDPA (the UK Copyright Act) (sections 3-8).

The law lists the eight different categories of work that enjoy copyright protection in the UK. These include, for example, literary works such as books.
- Other categories include musical works, films, and artistic works. The artistic work category includes things such as graphics, photographs, sculptures or collages irrespective of artistic quality. Graffiti is a type of graphic work.
- However, copyright can be refused for policy reasons, on the basis that the work is obscene, blasphemous, immoral or otherwise illegal (such as defamation, breach of confidence or criminal damage).
- See also [Case File #23](#) for further information about all eight different categories of work protected by copyright.

SHOULD WORKS THAT ARE IMMORAL BE DENIED COPYRIGHT PROTECTION?

- See **TEXT BOX 2**
- What is immoral to one person may not seem immoral to another, it is a subjective concept that changes over time. In addition, a person's interpretation of what is

moral or immoral is affected by their social and economic circumstances as well as factors such as age, gender, religious and political beliefs, and level of education.

- When the courts have had to decide if something is immoral in a copyright case, they can consider (1) the work itself, (2) the context within which the work was created, and (3) the attitudes towards the work.
- The courts have stated that copyright will be refused in works that are 'immoral, scandalous or contrary to family life,' as well as to works that are 'injurious to public life, public health and safety or the administration of justice'.

SHOULD WORKS THAT ARE UNLAWFUL BE PROTECTED BY COPYRIGHT?

- See **TEXT BOX 3 and 4**
- Copyright protection can be refused for policy reasons such as if a work is created in illegal circumstances. This would be, for example if it was defamatory, in breach of confidence or caused criminal damage.

Graffiti, also known as aerosol art or street art, is a genre of art that is often created without permission in public places, and so would be illegal under criminal law (Criminal Damage Act 1971).

- There are two cases that might be helpful to think about when discussing this issue.

A-G v Guardian (No.2) (1990) involved the book called *Spycatcher*, written by Peter Wright, a former MI5 agent. The book included secret information about MI5 that Wright had published in breach of confidence – that is, he was breaking the law. The Court denied him copyright in his work because of the 'disgraceful circumstances' under which the book had been written. (However, this also meant that anyone was free to copy the work.)

A more recent example, which can be used to compare is the *5 Pointz in New York* case.

5 Pointz was a famous graffiti site in New York, America, considered 'the world's largest open-air aerosol museum'. However, the owner of the property wanted to demolish the building, but the artists argued for the protection of their work.

In this case, the owner of the building had allowed artists to graffiti the inside and outside of the buildings. Interestingly, the agreement included the terms that immoral works were not permitted, restricting any work that were 1) political, 2) religious and 3) pornographic.

The court decided that the works could not prevent the demolition of the building, but that the artists could be compensated for the destruction of their work.

For further details, see: www.nytimes.com/2018/02/12/nyregion/5pointz-graffiti-judgment.html (Graffiti Artists Awarded \$6.7 Million for Destroyed 5Pointz Murals)

NB: The law in America is different to the law in the UK, but this example can be used to encourage discussions about when a work is immoral or illegal, depending on the location.

SUGGESTED ACTIVITY

Organise a debate on the following topic (or something of your own choice): 'Unlawful graffiti is a blight on the urban landscape – it should not be protected by copyright.'

Split the class into four groups, two in favour of the proposition and two against. Give them sufficient time to research and plan their arguments. Encourage them to find commentary and analysis, opinions, news articles and other texts online that support their arguments.

For the debate, pick two teams to present. The other teams will serve as judges and decide which side presented the stronger case, voting for the winners of the debate at its conclusion.

CASE FILE #8: THE DREADFUL IMAGE

1. INTRODUCTION

The 'dreadful images' that scare Joseph, the toymaker, are graffiti drawn all over the 'fictional land called London'. The illustration above, depicting Joseph's toy hung from a tree, is based on an actual place in London: the corner of Pollard Street and Pollard Row, in Bethnal Green. This is where the English graffiti artist and political activist Banksy created [*Yellow Lines Flower Painter*](#), one of his famous pieces of street art.

Graffiti and street art raises interesting questions about copyright. This Case File #8 explores when the law refuses to grant copyright protection to original work for policy reasons.

2. COPYRIGHT AND PUBLIC POLICY

Copyright protects different types of work, such as books, songs, films, as well as artistic works. In the UK, an artistic work is defined to include a graphic work, photograph, sculpture or collage irrespective of artistic quality, and graffiti is a type of graphic work.

However, just because the mysterious girl with the light blue hair has created original works of graffiti this does not necessarily mean they will be protected by copyright.

Historically, as a matter of public policy, the courts have refused to protect works which they considered to be immoral, obscene or irreligious. For example, in the early 20th century, one judge refused protection to an author's dramatic work because it advocated 'free love and justifies adultery'. He commented: 'It is clear that copyright cannot subsist in a work of a tendency so grossly immoral as this.'

Today, that judge's attitude seems rather prudish but the courts have recently reaffirmed that copyright will be refused to works that are 'immoral, scandalous or contrary to family life,' as well as to works that are 'injurious to public life, public health and safety or the administration of justice'.

Lots of local authorities throughout the UK provide 'free walls' on which graffiti artists can create their works lawfully, but anyone caught doing graffiti on buildings and other public spaces without permission can be arrested and prosecuted under the Criminal Damage Act 1971. Also, the Anti-Social Behaviour Act 2003 introduced new powers for local councils to punish offenders and require them to help clear up any unwanted graffiti.

So, even though the graffiti in the video are original artistic works created by the mysterious girl, it seems they are also acts of criminal damage. For this reason, they may not be protected by copyright.

3. THE CASE: *A-G v Guardian (No.2)* [1990] AC 109

This case concerned the work *Spycatcher* written by Peter Wright (1916 – 1996) a former MI5 officer. The book was a part memoir, part exposé of MI5 and its operations.

The UK government tried to ban *Spycatcher* in the UK and prevent its publication elsewhere in the world, unsuccessfully. However, as Mr Wright's memoir had been written in breach of the duty of confidence he owed to the Crown (his employer), he was denied copyright in his work. The House of Lords held that Mr Wright would not be able to bring an action for copyright infringement because of the 'disgraceful circumstances' under which the book had been written.

That is, it was not the nature of the content in the book but the circumstances under which the work had been created that meant Mr Wright could not enjoy copyright in his work.

4. FOR DISCUSSION: THE RIGHT POLICY?

Should works that are immoral be denied copyright protection? What exactly does it mean to say that a work is immoral? Or can you think what might be meant by works that are 'contrary to family life'?

What about works created in breach of the criminal law or that are otherwise unlawful? Should unlawful graffiti be regarded as protected by copyright? What about the work of Banksy, and other underground graffiti artists. Is it in copyright or not?

5. USEFUL REFERENCES

A-G v Guardian (No.2) [1990] AC 109 (the Spycatcher case) is available here: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/1988/6.html>

You can find out the location of legal graffiti walls around the world here: <https://legal-walls.net>

Graffiti Artists Awarded \$6.7 Million for Destroyed 5Pointz Murals: <https://www.nytimes.com/2018/02/12/nyregion/5pointz-graffiti-judgment.html>

CASE FILE #9: THE IMPROBABLE THREAT

LEARNING AIMS

- Know what substantial taking means in relation to copyright infringement
- Understand that substantial taking is decided by considering the quality (not only the quantity) of what is borrowed
- Be able to discuss whether the examples demonstrate the taking of a substantial or insubstantial borrowing of someone else's work – and therefore whether it is infringement or not

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- What is copyright infringement?
- How do the courts decide if what was borrowed is substantial or not?
- How does this apply to the case example of eleven words from a newspaper article?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHAT IS COPYRIGHT INFRINGEMENT?

- See **TEXT BOX 1 and 2**
- Copyright infringement occurs when someone takes the whole, or a substantial part of, a copyright protected work without permission or the benefit of a copyright exception.

So, taking an insubstantial part of a copyright work without permission would not be infringement.

HOW DO THE COURTS DECIDE IF WHAT WAS BORROWED IS SUBSTANTIAL OR NOT?

- See **TEXT BOX 2**
- When the courts have to decide if the amount taken from a copyright work is substantial or not, they look at the quality of what is taken, not only the quantity. This means that it is not so much about how much is taken, but the importance of the part that is taken.
- So, it is possible to take only a very small part of someone else's work and still be infringing their copyright. Equally, it is possible to borrow larger amounts that are general and not be infringing. This is explained in more detail below.
- The importance of the part that is taken relates back to the originality element of a copyright protected work. For a work to be protected by copyright it must be

original. Originality in copyright law means that the creator used their own 'skill, labour and effort' or, in other words, that the work is their own 'intellectual creation'. The important parts of the work, which would be the substantial parts, are the original parts.

- It is also important to remember that copyright only protects the expression of an idea, not an idea in general. For example, the general idea of a boy wizard who goes to wizardry school with his wizard friends is simply an idea that is in the public domain and everyone is free to use it. However, *Harry Potter and The Philosopher's Stone* is J. K. Rowling's individual expression of that idea, which is protected by copyright.
- So, when deciding if something is a substantial part the courts consider the following factors:
 - The quality of what is taken, not just the quantity
 - Quality is about the importance of what is taken
 - The importance of what is taken relates to the originality of the work
 - Copyright only protects the expression of ideas, not ideas themselves and so it is okay to borrow ideas which are in the public domain and free for everyone to use.

HOW DOES THIS APPLY TO THE CASE EXAMPLE OF ELEVEN WORDS FROM A NEWSPAPER ARTICLE?

- See **TEXT BOX 3 and 4**
- The *Infopaq* case concerned whether eleven-word snippets of text taken from newspaper articles could be considered to be protected by copyright.
- Ultimately, the Court of Justice of European Union (CJEU) stated that storing and printing an eleven-word extract can be an infringement if those eleven words reflect the expression of the intellectual creation of the author.
- **NB:** This was a case that happened in Denmark. The Danish Court referred a question to the European court, the CJEU, asking them to clarify how the law would apply in this circumstance. The case then went back to the Danish Court where they applied the judgement of the CJEU. The outcome of the case was that Infopaq was found to be infringing copyright by taking the eleven-word extracts.

CASE FILE #9: THE IMPROBABLE THREAT

1. INTRODUCTION

In trying to persuade Holmes to take Joseph's case, Watson asks: 'What if it's a threat? That's what the graffiti might mean.' These eleven words are based on dialogue from *The Blind Banker*, an episode of the BBC TV series *Sherlock*, in which Holmes, played by Benedict Cumberbatch, declares: 'It's a threat. That's what the graffiti meant.' That is, in writing our script for the video, we copied and slightly adapted nine words from the screenplay for *The Blind Banker*.

Like [Case File #7](#) (The Matching Wallpaper), this Case File #9 concerns the concept of 'substantial taking'. But whereas Case File #7 discussed substantial taking in the context of non-literal copying, in this Case File we explore what substantial or insubstantial copying means when borrowing literally from someone else's work.

2. SUBSTANTIAL TAKING

Copyright infringement occurs when someone takes the whole, or a [substantial part of](#), a copyright protected work without permission or the benefit of a [copyright exception](#). So, taking an insubstantial part of a copyright work without permission is allowed. This is because the law recognises that no real injury is done to the copyright owner if only an *insignificant* part of the work is copied.

But what constitutes a substantial part? Substantial taking is considered by the courts to be a matter of quality, not quantity. So it is not just about how much you copy from someone else's work, it is about the importance or value of the copied parts in relation to that work. This is because a small part of the original work may be highly significant to the piece as a whole.

For example, in one case the court decided that copying only a few lines from an unpublished version of *Ulysses* by James Joyce (1882 – 1941) was substantial because of the particular importance of those lines to the unpublished text. Another judge has commented that: 'only a section of a picture may have been copied, or even only a phrase, from a poem or a book, or only a bar or two of a piece of music, may have been copied ... In cases of that sort, the question whether the copying of the part constitutes an infringement depends on the qualitative importance of the part that has been copied, assessed in relation to the copyright work as a whole.'

This focus on the quality rather than the quantity of what has been copied can make it difficult to define precisely what amounts to a substantial copying.

3. THE CASE: *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569

Infopaq International is a media monitoring and analysis company that provides its customers with summaries of selected articles from Danish daily newspapers and other periodicals. Articles are selected for summarising on the basis of search

criteria agreed with Infopaq's customers, and the selection is made by means of a 'data capture process'. This process involved scanning articles to produce searchable text files, and then searching the text files to generate eleven-word snippets of text (the search word plus five words either side) which were both printed out and stored electronically. The text files were subsequently deleted.

One of the key questions to be answered in this case concerned whether the text extracts of eleven words amounted to unlawful copying from the original articles. Or, in other words, did copying just eleven words of text constitute substantial copying?

The Danish Supreme Court referred the issue to the Courts of Justice of the European Union. The judges decided that 'an act occurring during a data capture process, which consists of storing an extract of a protected work comprising 11 words and printing out that extract, is such as to come within the concept of reproduction ... if the elements thus reproduced are the expression of the intellectual creation of their author; it is for the national court to make this determination.'

That is, the Court of Justice considered that an extract of eleven words taken from a newspaper article could constitute a substantial part of that work, provided the extract conveys to the reader an element of the work which represents an expression of the intellectual creation of the author. In short, copying a sentence or even a part of a sentence from a literary work might be regarded as substantial copying.

When the case returned to the Danish Supreme Court Infopaq were found guilty of copyright infringement.

4. FOR DISCUSSION: QUALITY OR QUANTITY

What do you think about this case? Do you think that copying a short extract of just eleven words taken from a newspaper article should amount to substantial copying which might require the permission of the copyright owner? What if it was eleven words taken from an extremely long book or from a short poem? Or what if you are copying eleven words from a blog or a post on a social media platform such as Twitter?

When we copied nine words from the BBC screenplay for The Blind Banker did we engage in substantial or insubstantial copying? Does it matter that we slightly adapted the original text so that the statement from The Blind Banker became a question in our video? Or, if you copied our eleven-word text without our permission would you be infringing our copyright?

5. USEFUL RESOURCES

The Copyright, Designs and Patents Act 1988 is available here: <http://www.legislation.gov.uk/ukpga/1988/48/contents> (see s.16(3)(a)).

Designer Guild Limited v Russell Williams (Textiles) Limited [2000] UKHL 58 is available here: <http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/2000/58>

Infopaq International A/S v Danske Dagblades Forening [2009] ECR I-6569 is available here: <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62008CJ0005>

Sweeney v MacMillan Publishers (2002) RPC 35 (the James Joyce case) (unfortunately, this case is not readily available online)

You can also read a summary of the Sweeney decision here: <https://www.twobirds.com/en/news/articles/2001/james-joyce-ulysses>

CASE FILE #10: THE UNCERTAIN MOTIVATION

LEARNING AIMS

- Understand the theories of why we have copyright
- Be able to debate the arguments for and against having copyright

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- Why do we have copyright?
- What are the theoretical arguments for having copyright?
- What are the reasons against / what if there was no copyright?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHY DO WE HAVE COPYRIGHT?

- See **TEXT BOX 2**
- Copyright is a law that provides the creators of protectable works with rights that stop others from using their work without permission.
- In addition, the law also balances the rights of other stakeholders by limiting the rights given to the copyright owners. Some of the ways that copyright is restricted are: duration, copyright exceptions and by only protecting the individual expression of ideas, not ideas themselves.
- More generally, we can say that the goal of copyright is the creation and spread of knowledge. Indeed, one of the main purposes of copyright regulation is to strike an appropriate balance between production and dissemination of knowledge. In other words, copyright should reward and incentivise creators to produce new works, while also allowing the public to access and use these works in certain ways.

WHAT ARE THE THEORETICAL ARGUMENTS FOR HAVING COPYRIGHT?

- See **TEXT BOX 2 and 3**
- There are different theoretical arguments for why we have copyright. Two key explanations are known as the economic and natural rights theories.
- **Economic Theory**

In the UK we tend mostly to consider copyright from the economic perspective. This means that copyright is understood to provide an economic incentive for creativity and dissemination of things such as books, films, music, and art for the benefit of society as a whole.

Since copyright allows creators to own their work, they are able to make money from it, for example by selling or licensing it. If their work was free to copy without any copyright protection, the potential monetary value of the work would be lost.

And then, if a creator is not able to make money from their work, they might be discouraged from creating at all, and perhaps decide to do something else instead. For example, if a photographer is unable to sell their photographs, how would they pay for their equipment, or living costs?

The economic perspective argues that, without copyright, creators would not be able to sustain a creative career, and society would be disadvantaged by this lack of creativity. By compensating creators for the time, skill and effort they put into their creative endeavours with an income, copyright ensures the production of new materials and thereby the development of society through innovation and cultural resources.

- **Natural Rights Theory**

Natural rights theory is a different justification for copyright that is favoured in some other countries such as France. According to natural rights theory, copyright is granted in recognition of the fact that creative works are expressions of the creator's own personality and therefore they should have ownership of their creative outputs. According to natural rights theory, these rights exist simply because the work has been created, and because it represents an aspect of the creator.

WHAT ARE THE REASONS AGAINST / WHAT IF WE THERE WAS NO COPYRIGHT?

- See **TEXT BOX 2, 3 and 4**
- Some people believe that copyright is not always a good thing. Some of the key arguments in this debate are as follows:

- **Copyright protection is too long**

Generally, copyright expires 70 years after the death of the creator. After that time, the work becomes part of the public domain. Once in the public domain, copyright is no longer attached to the work and this can be used by anyone without permission.

Some stakeholders believe that copyright protection lasts too long and therefore does not balance the different interests fairly. They suggest that copyright protection should be shorter, so that works can become part of the public domain sooner. This would mean that the public has the ability to access and use the works within a shorter period of time.

- **Copyright regulation is too broad**

Some stakeholders also argue that copyright regulation is too broad. By this they mean that copyright prohibits too many activities. As a result, it is felt by some that the balance of copyright falls in favour of the copyright owners.

One aspect of copyright that determines what activity is allowed without permission, and what is not, are the exceptions to copyright. Copyright exceptions are circumstances in which a person does not need the permission from the copyright owner to use his or her work. These include quotation, news reporting, education, private study and parody. Some people believe that these exceptions are too narrow.

- **Artists are not always motivated to create by copyright**

Some people believe that copyright does not motivate creators. A convincing argument for this is the consideration of creators who wrote books and plays before copyright existed, such as Shakespeare.

However, although Shakespeare didn't benefit from copyright law as we understand it today, he was still paid for his work and was therefore still able to make a living from his creative work. So, while he was not motivated by copyright, he may have been motivated by making money from his work.

- **Would people still create without copyright?**

Probably. People created literary, artistic and musical works before copyright was even thought of, and they would probably keep creating even if copyright no longer existed. The urge to create and be creative is a natural human phenomenon. Some people would continue to create, perhaps to entertain themselves, or their families, or maybe others. But it would certainly be much more difficult to make a living through creating stories or music or artwork without a copyright regime.

SUGGESTED ACTIVITY

In addition to the suggested discussion topics, you might organise a debate about why we have copyright, and what benefits it brings. However, instead of just focussing on whether we should or should not have copyright, you could ask the students to think about whether copyright should last as long as it does.

For example, today, the duration of copyright lasts for the life of the author plus 70 years after they die. However, when copyright was first introduced in 1710, it lasted only for 14 years, plus a further 14 years if the author will still be alive when the first period expired. Key issues might be:

- What economic incentive do authors need to create? A 25-year term of protection? Are they likely to be more incentivised to create with a 50-year term? Or a term that lasts for life plus 70 years?
- What economic incentives do the creative industries need to invest in authors, musicians, and so on? Do film companies or music companies normally expect to recoup their investment within five years?, or ten years?, or longer?
- Should duration only be determined by economic incentives? Should duration last for at least the lifetime of the author?
- Why should duration of protection last beyond the life of the author? In the late Victorian period, it was thought that an author should be entitled to rely on their work to provide for their children, and for their children's children. Does this still make sense in today's world?

For further insights on copyright duration, see **Case File #2**.

So, the debate topic might be:

'Copyright lasts too long. It should last no more than 25 years.'

Split the class into four groups, two in favour of the proposition and two against. Give them time to research and plan their arguments. Encourage them to find commentary and analysis, opinions, news articles and other texts online that support their arguments.

THE GAME IS ON! – CASE FILE #10: THE UNCERTAIN MOTIVATION

For the debate, pick two teams to present. The other teams will serve as judges and decide which side presented the stronger case, voting for the winners of the debate at its conclusion.

CASE FILE #10: THE UNCERTAIN MOTIVATION

1. INTRODUCTION

Joseph, Sherlock Holmes and the 'girl with the light blue hair' are all creators: Joseph draws and designs toys; Sherlock composes music; and the mysterious girl is an accomplished street artist. However, they all create for different reasons.

This Case File #10 considers the role that copyright plays in incentivising the creation of literary and artistic works, before inviting you to think about the different motivations each of our characters may have for creating their own work.

2. ECONOMIC ROLE OF COPYRIGHT

In [common law jurisdictions](#) such as the UK and the US the justification for copyright is often presented in economic terms. Copyright provides an economic incentive to encourage the creation and dissemination of cultural goods such as books, music, art and films. It does this by giving the creators of those works the right to prevent others from making use of their work without permission. Without the protection of the law, other people could simply make use of the work for free and the creator may not be able to earn a living from his or her work. And if creators weren't able to earn money from their work, they may be discouraged from creating new work at all, which would have a negative effect on society as a whole.

However, it is understood that the copyright regime should also deliver significant benefit to the public as well. For one thing, by giving authors the right to control the use of their work, copyright encourages and incentivises the creation of new work which contributes to the encouragement of learning, the dissemination of knowledge and the promotion of culture. But also, copyright does not give creators absolute control over the use of their work: they are granted only certain economic rights, and these rights are subject to various exceptions. This means that, under the right circumstances, everyone is able to draw inspiration from, and make use of, existing copyright works in the creation of new work.

That copyright plays this dual role of securing private rights and public benefit was evident from the very start of the copyright regime. The first copyright act in the world was passed in the UK. Popularly referred to as the Statute of Anne 1710, it was passed 'for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies'. That is, the 1710 Act granted copyright to authors (by vesting the copies of printed books) for the public good (to encourage learning).

3. WHY PEOPLE CREATE

We are all creators, and we all create copyright works all the time. Whether you are writing an email, taking some photos or videos with your phone, or preparing an essay or report for school or for work, you are creating something that is probably protected by copyright. These may not be the kind of things that we

normally think of as literary, artistic or musical works but they are still works protected by copyright. And obviously, we would create them whether or not the copyright regime exists.

So, while copyright provides an important incentive for the creation of certain types of work, it does not incentivise the creation of all types of copyright-protected work. Different people have different motivations for creating, and some people will always create whether copyright exists or not.

Joseph is a toymaker. He draws and designs toys for a living, and he sells his 'beautiful, wonderful toy' in order to be financially rewarded for his creative efforts. He creates work safe in the knowledge that the law provides him with economic rights in his work that he can exploit commercially.

On the other hand, Sherlock composes music because he enjoys it; it helps him think and he believes that 'the work is its own reward'. He is not incentivised to create by the copyright regime as he is not interested in commercially exploiting his compositions. (Indeed, he doesn't appear to know anything about copyright at all!) Rather he simply enjoys creating and composing music in the privacy of his home.

The mysterious 'girl with the light blue hair' is also motivated to create, although her reasons for creating the 'dreadful images' are not as obvious as for Joseph or Sherlock. She does not appear to be creating her works of art for commercial gain. But neither is she simply creating for herself, as Sherlock does. She is creating work for public consumption, work that engages the public. Her works are a form of communication, but communication without any obvious economic agenda. As with Sherlock, the copyright status of her works does not appear to be a relevant consideration in motivating her to create.

4. FOR DISCUSSION: IS IT ALL ABOUT THE MONEY, MONEY, MONEY?

Do you agree that copyright protection helps creators, and that it encourages people to create? What if copyright did not exist? Would people still create? How would writers, artists and musicians make a living out of their creative works, if not by copyright?

Why do you think the 'girl with the light blue hair' is creating her images featuring Joseph's beautiful, wonderful toy?

5. USEFUL RESOURCES

What are the arguments for and against contemporary copyright regulation? You can find some here: <https://www.copyrightuser.org/educate/a-level-media-studies/prompt-2/>

CASE FILE #11: THE MUTILATED WORK

LEARNING AIMS

- Know what moral rights are and that they mean different things in different countries
- Understand the concepts of attribution and integrity
- Be able to discuss whether certain acts amount to derogatory treatment

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- What are moral rights?
- What does the right of attribution mean?
- What does the right of integrity mean?
- When is something derogatory?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHAT ARE MORAL RIGHTS?

- See **TEXT BOX 2**
- Copyright is known as a bundle of economic rights. But, in addition to the economic rights provided by copyright, creators are also granted moral rights for their work. Moral rights protect the creator's non-economic rights.
- Just like economic rights, moral rights are territorial in nature. This means that they can be different in different countries. So, the level of protection for moral rights in one country might be stronger, or weaker, than in another.

WHAT DOES ATTRIBUTION MEAN?

- See **TEXT BOX 3**
- The right to attribution means that a creator has the right to be identified as the author of their work. In the law it is also referred to as the right to paternity. This right applies to the author of literary, dramatic, musical and artistic works, and to the director of a film.
- However, this right does not apply in certain circumstances, such as work created for reporting current events, newspapers, magazines, computer programs, computer generated works or typefaces.
- The right to attribution can be waived or given up, but it cannot be licensed or assigned like the economic rights of copyright.

- In the UK, the right to attribution and other moral rights last for as long as copyright subsists in the work – 70 years after the death of the creator.
- It is important to know that the right to attribution does not arise automatically, like copyright. It must first be asserted or claimed. This means making a statement that asserts the rights of the author. This is why, if you turn to the front page of a book, you will usually see a statement such as 'all rights reserved' or 'the author asserts her moral rights' or 'the moral rights of the author have been asserted'.

WHAT DOES THE RIGHT OF INTEGRITY MEAN?

- See **TEXT BOX 4**
- The right to integrity is the right to object to derogatory treatment of your work. It lasts for the same amount of time as the copyright in the work.

The reason we have this right for creators is that it is understood that creators embody and express themselves or their personality in their work, which should be protected against mutilation. In addition, it can protect the reputation of the author.

- As with the right of attribution, this right applies to the author of literary, dramatic, musical and artistic works, and to the director of a film.

But this right does not apply in certain circumstances, such as work created for reporting current events, newspapers, magazines, computer programs, computer generated works or typefaces.

- It is important to know that there are some exceptions to the right to integrity, for example in relation to work created in the course of employment, or where there is a duty imposed by another law, such as the BBC cutting offensive scenes.

WHEN IS SOMETHING DEROGATORY?

- See **TEXT BOX 4, 5 and 6**
- If someone was to bring a claim for breach of integrity to a court of law, they would have to prove that there has been derogatory treatment of their work. This involves two things: there must be a relevant treatment of the work, and the treatment must be derogatory.
- Treatment of a work means any addition, deletion, alteration, or adaptation of the work. For example, re-sizing and re-colouring an image, adding words to a written piece, or colourising a black-and-white film.
- A treatment is derogatory when it is a distortion or mutilation of the work, or if it is prejudicial to the reputation of the author.

For example, the cropping of a photograph has been considered a distortion of the photograph, and tying Christmas ribbons and decorations around a public sculpture has been considered to prejudice the artist's reputation.

- In the UK, the courts use an objective approach to decide if there has been derogatory treatment. They do not consider the individual author's opinion of whether the treatment was derogatory. Instead, they ask whether a reasonable and

objective person would regard the treatment as derogatory and damaging to the author's reputation.

- In some other countries, however, the courts pay much more attention to the views of the author of the work (that is, they take a more subjective view).

LEARNING AIMS

- Know what moral rights are and that they mean different things in different countries
- Understand the concepts of attribution and integrity
- Be able to discuss whether certain acts amount to derogatory treatment

SUGGESTED ACTIVITY

In some countries, such as France, moral rights lasts in perpetuity (rather than for the life of the author plus 70 years). So, for example, Victor Hugo's descendants have often tried to prevent adaptations and sequels to his works from being made on the basis of Hugo's moral rights (Hugo died in 1885). Indeed, in 2004, a Paris Court of Appeal ruled that the publication of two unauthorised sequels to his *Les Misérables* violated Hugo's moral right of integrity (Victor Hugo died in 1885). However, this decision was later overturned.

Invite the students to think about why we have moral rights and how long they should last? Or indeed, why should they last beyond the life of the author at all?

Show them a picture of Da Vinci's Mona Lisa (available [here](#)) – perhaps the most famous, most copied, and most parodied artwork in the world. Next show them a picture of L.H.O.O.Q. by Marcel Duchamp (available [here](#)).



Is Duchamp's famous work derogatory to the original? Da Vinci died in 1519 (500 years ago). What if he still enjoyed moral rights in his work? Should his descendants be able to prevent works like L.H.O.O.Q. being made?

CASE FILE #11: THE MUTILATED WORK

1. INTRODUCTION

In trying to persuade Holmes to take the case, Watson argues that: 'If you were a professional musician, you wouldn't want people copying or mutilating your work'.

UK copyright law gives creators both economic rights and moral rights. While 'copying' someone else's work without permission may constitute an infringement of their economic rights (such as the reproduction right or the right of communication to the public), 'mutilating' it might infringe the creator's moral rights. In the UK, moral rights include the right to be identified as the author of the work (the right of attribution) and the right not to have your work subjected to 'derogatory treatment' (the right of integrity).

This Case File #11 considers the two principal moral rights held by creators in the UK, and investigates why it can be difficult to determine what amounts to 'derogatory treatment'.

2. MORAL RIGHTS

Moral rights are concerned with the non-economic rights of a creator. They protect the creator's connection with a work as well as the integrity of the work. The two principal moral rights in the UK are the right of attribution (sometimes referred to as the right of paternity) and the right of integrity (or the right to object to derogatory treatment).

Unlike economic rights, which can be licensed or assigned to another person, moral rights remain with the creator of the work and cannot be exercised by anyone else. However, creators can waive their moral rights if they so wish.

In some EU countries, such as France, moral rights last indefinitely. In the UK, however, moral rights are finite. That is, the right of attribution and the right of integrity last only as long as the work is in copyright. When the copyright term comes to an end, so too do the moral rights in that work. This is just one reason why the moral rights regime within the UK is often regarded as weaker or inferior to the protection of moral rights in continental Europe and elsewhere in the world.

3. RIGHT OF ATTRIBUTION

The right of attribution provides the creator of certain types of work with the right to be identified as the author of their work, so long as the creator has asserted his or her right.

The right of attribution covers works of literature, drama, music, art and films, and generally applies whenever the work is published commercially, performed in public or communicated to the public. However, there are a number of exceptions to this basic rule. For example, the right of attribution does not apply to works created for the purpose of reporting current events, contributions to

newspapers, magazines and periodicals, works owned by the Crown or Parliament, or computer programs and computer-generated work.

Also, the right of attribution does not arise unless it has been asserted by the creator of the work. In practice, a statement such as the example given below is often included in published work in order to make clear that the creator has asserted their moral rights:

'The right of Joseph the Toymaker to be identified as author of this work has been asserted by him in accordance with the Copyright, Designs and Patents Act 1988.'

4. RIGHT OF INTEGRITY

The right of integrity allows the creator to object to derogatory treatment of his or her work, or any part of it.

Like the right of attribution, the integrity right covers works of literature, drama, music, art and film. Similarly, the right of integrity does not apply to works created for the purpose of reporting current events, contributions to newspapers, magazines and periodicals, or computer programs and computer generated work. However, unlike the right of attribution, the integrity right does not need to be asserted.

Subjecting something to a derogatory treatment means adding to, deleting from, altering or adapting the work in such a way that it amounts to a distortion or mutilation of the work, or is otherwise prejudicial to the honour or reputation of the creator. Put another way, the right to integrity stops other people from modifying an author's work in a way that may have a negative effect on the author's reputation.

This does not mean that all forms of addition, deletion, alteration or adaptation will amount to a derogatory treatment.

For one thing, the law specifically provides that certain types of treatment fall outside the scope of the right. For example, translations of literary and dramatic works do not infringe the right of integrity, nor does simply arranging or transcribing a musical work into another register or key.

Also, your treatment of the work must be derogatory in that it is prejudicial to the honour or reputation of the person who created the work. But as we shall see, establishing prejudice to honour or reputation is not always straightforward.

5. THE CASE: *Confetti Records v Warner Music UK Ltd* [2003]

This case involved a piece of garage music composed by Mr Andrew Alcee, titled *Burnin'*, which he sold to Confetti Records. Confetti Records arranged to license the song to the defendant, Warner Music UK Ltd. Warner Music produced an album including a rap version of Mr Alcee's song by The Heartless Crew in which the band overlaid lyrics containing various references to violence and drug culture. In turn, Mr Alcee complained that his right of integrity in the music had been infringed.

Mr Alcee complained that the words overlaying his music glorified violence and drug culture. However, one problem he faced in establishing his case was that, when played at normal speed, the words of the rap were very hard to decipher. And even when played at half speed, it was not always clear what the phrases were, or what they meant. In short, if the lyrics could not be understood, it was difficult for Mr Alcee to claim that they were damaging to his reputation.

Another problem concerned evidence of harm to reputation. The court made clear that merely distorting or mutilating a work did not infringe the right of integrity unless the author could show prejudice to his honour or reputation. 'However,' the judge commented, 'it seems to me that the fundamental weakness in this part of the case is that I have no evidence about Mr Alcee's honour or reputation. I have no evidence of any prejudice to either of them.' In the absence of any evidence that Mr Alcee's honour or reputation had been harmed, the judge was not prepared to find that his right of integrity had been infringed.

6. FOR DISCUSSION: DEROGATORY OR NOT, WHO DECIDES?

In some countries, determining whether the right of integrity has been infringed depends on the subjective view of the author. That is, the courts will generally be guided by the author's assessment in deciding whether the work in question has been subjected to a derogatory treatment.

In the UK, however, the courts have preferred a more objective approach. So, it is not sufficient that the author is annoyed or aggrieved by what has occurred. Instead the court must be convinced that a reasonable and objective person would regard the treatment as derogatory and damaging to the author's reputation.

Did the court come to the right decision on Mr Alcee's claim regarding his right of integrity? Should the courts take a subjective or a more objective approach regarding infringement of the integrity right?

Having watched the video, do you think that by portraying Joseph's toy hanging from a tree, the street artist has infringed Joseph's moral rights? Do the graffiti amount to a derogatory treatment of Joseph's copyright work? Is some of the graffiti more derogatory than the other?

7. USEFUL REFERENCES

Confetti Records v Warner Music UK Ltd [2003] EMLR 35 is available here: <http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Ch/2003/1274.html>

The Copyright, Designs and Patents Act 1988 is available here: <http://www.legislation.gov.uk/ukpga/1988/48/contents>.

Sections 77-83 set out the scope of the right of attribution and the right of integrity.

CASE FILE #12: THE HOLLYWOODLAND DEAL

LEARNING AIMS

- Understand who owns the copyright in a work
- Understand how a person makes money from their copyright work
- Be able to explain the difference between assigning your rights and licensing your rights

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- When an employee creates a work, who owns the copyright?
- Did the judge decide the case correctly?
- Does copyright law treat employees fairly?
- Should Joseph assign his rights or license them?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHEN AN EMPLOYEE CREATES A WORK, WHO OWNS THE COPYRIGHT?

- See **TEXT BOX #2**
- In general, the author of a work will be the person who owns the copyright work.
- However, if the author is employed by someone else, their employer will **normally** own the copyright in the work.

NOAH v SHUBA (1991): DID THE JUDGE DECIDE THE CASE CORRECTLY?

- See **TEXT BOX #5 and #6**
- We think the judge did decide the case **correctly**.

Even though Dr Noah made use of resources in the workplace to produce and publish his work, ultimately, what mattered was that he wrote pamphlet on his own time, and outside working hours.

- The decision is helpful for demonstrating that, even when a copyright work is created by an employee, the copyright in the work will not necessarily belong to her employer.

If the work was not created 'in the course of employment' the copyright will belong to the employee.

DOES COPYRIGHT LAW TREAT EMPLOYEES FAIRLY?

- See **TEXT BOX #5 and #6**
- The law is trying to strike the right balance between the interests of employers and employees in saying that the copyright in some works created by employees should belong to their employer – that is, works that have been created in the course of their employment. For example, as a school teacher, you probably create copyright works all the time, when developing resources and exercises for your classroom. The copyright in these works will belong to your employer.

But, what if you wrote a children's novel in your spare time? Should that work belong to your employer regardless of how and when you created it?

We don't think it should. Moreover, decisions like *Noah v Shuba* (1991) suggest that you would own the rights in your novel, and not your employer. We think this is the right approach. Although you are a teacher who has written a children's novel, you did not write it in the course of your employment.

- In what ways might the law strike a different balance?

The law could say that an employer owns all work created by all employees regardless of how and when the work was created. Would that be fairer? We don't think so.

Alternatively, what if none of the work created by employees belonged to their employers? Would that be fair? Again, we don't think so.

SHOULD JOSEPH ASSIGN HIS RIGHTS OR LICENSE THEM?

- See **TEXT BOX #3 and #4**
- There are **pros and cons to both approaches**.
- With an assignment the key point to emphasise is that you are divesting yourself entirely of any rights in the work. The copyright will no longer belong to you, and you cannot control any future use of the work. All of the rights would now lie with the film-makers.
- With a licence you still retain some control over the economic rights in the work. For example, Joseph might agree to grant the filmmakers a licence to make use of his work to make a film, and to market and distribute that film worldwide. But, he would still retain rights to exploit his work in other ways, for example, the right to turn his creation into a stage play or a musical.
- Practically speaking, if you assign all your rights in your work to someone else, you would expect to receive more money in return than if you only licence certain types of use.

So, the question for Joseph is: does he want to take more money upfront and sell all his rights in one go? Or, should he take less money for a more limited licence, in the hope that he can exploit his work in other ways in the future?

There is no correct answer here.

CASE FILE #12: THE HOLLYWOODLAND DEAL

1. INTRODUCTION

Joseph explains to Holmes and Watson when and why the dreadful images of his beautiful, wonderful toy began to appear all over London. When 'some guys' from Hollywoodland approached him 'to option a movie' featuring his toy, Joseph decided to go along with the deal: after all, 'they offered lots of money'. But as soon as word got out about the deal, that's when the graffiti started.

This Case File #12 considers who owns the copyright in a work when it is first created, as well as different ways in which the copyright in a work can be commercially exploited, whether by assignment or by licence.

2. FIRST OWNERSHIP OF COPYRIGHT

The Copyright Designs and Patents Acts 1988 sets out that the author of a work is also the first owner of the copyright in that work. There is, however, one major exception to this basic rule: if you are employed by someone else, and you create work during the course of your employment, the copyright in that work will generally belong to your employer.

Joseph is self-employed. As such he is the first owner of the copyright in the original drawings for his beautiful, wonderful toy. As the copyright owner, Joseph enjoys a bundle of exclusive economic rights such as the right to copy his work, the right to issue copies of his work to the public and the right to communicate the work to the public, for example, by posting it online. This means that Joseph can prevent others from doing any of these things without his permission, unless their use is otherwise permitted by law.

When he is approached by the businessmen from Hollywoodland about making use of his toy in their movie, Joseph has a choice: he can assign the rights in his work to them, or he can grant them a licence to make use of his work.

3. ASSIGNMENTS

An assignment of copyright involves a transfer of the ownership of the copyright from one person to another.

However, there is no need to assign the entire bundle of economic rights in a work at the same time to the same person. Indeed, assignments of copyright can be quite specific about what rights are being transferred (what you are allowed to do), for how long (a year, or ten years, or perhaps for the entire copyright term), and jurisdiction (where in the world you can make use of the work). For example, an author might assign the right to turn her work into a film to an American production company, while assigning the right to publish the work to a British-based publisher. The publisher, in turn, might assign the right to publish the work in a foreign language, whether in Europe, Asia or South America, to an overseas publisher.

Whatever the nature of the assignment, it is important to know that the assignment must be in writing and signed by or on behalf of the assignor (that is, the person making the assignment).

4. LICENCES

A licence is essentially a permission to make use of a work in a way that, without permission, would constitute copyright infringement. In other words, the grant of a licence means the licensee (the person to whom the licence is granted) can make use of the work without infringing the copyright in the work.

When granting a licence the copyright owner retains an interest in the copyright; that is, unlike an assignment, with a licence no property interest passes from the copyright owner to the licensee.

As with assignments, licences can be quite specific in terms of the rights involved, and the duration and geographic reach of the permissions granted. You can read more about licensing and exploiting copyright works on the Copyright User website.

People often get the two different spellings of licence/license confused. To clarify:

- licence (spelt with a 'c') is the noun: 'I grant you a licence to make use of my work'
- license (spelt with an 's') is the verb: 'I license the use of my work to you'

5. THE CASE: *Noah v Shuba* [1991] FSR 14

Dr Noah was a specialist medical practitioner who worked as a consultant in the Communicable Disease Surveillance Centre of the Public Health Laboratory Service (the PHLS). While he was working for the PHLS he wrote a medical pamphlet, *A Guide to Hygienic Skin Piercing*.

The PHLS claimed that, as Dr Noah's employer, it owned the copyright in the pamphlet. PHLS pointed to a number of factors in support of its claim: Dr Noah had discussed the content of the pamphlet with his colleagues in work; he made use of the PHLS library in preparing his manuscript; he asked his secretary to type up the manuscript; and, the PHLS had agreed with Dr Noah to cover the costs of printing and publishing the *Guide*. For all these reasons, PHLS claimed copyright in the work.

Dr Noah disagreed. Although he was PHLS's employee, he argued that the work had not been written in the course of his employment.

The judge agreed with Dr Noah. Of particular importance, in the judge's view, was that Dr Noah had actually written his manuscript at home in the evenings and at the weekends, and that he had done so on his own initiative and not at the request or on the direction of his employers.

6. FOR DISCUSSION: WHOSE IS WHAT?

When considering copyright ownership disputes between employers and employees the courts often consider whether making the work falls within the normal type of activity that an employer could reasonably expect from or demand of the employee. That certainly seemed to be a relevant consideration for the judge in this case.

Do you think the judge came to the correct decision?

Do you think the law strikes the right balance between the interests of employers and employees in presuming that employers typically own the copyright in work created by their employees? Can you think of any professions in which the presumption should be that employees retain the copyright in their work?

What would your advice be for Joseph? Should he assign rights to the Hollywoodland film-makers, or grant them a licence?

7. USEFUL REFERENCES

Noah v Shuba [1991] FSR 14 (unfortunately, this case is not readily available online)

The Copyright, Designs and Patents Act 1988 is available here: <http://www.legislation.gov.uk/ukpga/1988/48/contents>.

Section 11 sets out the basic rules on the first ownership of copyright. Also, sections 90-92 for relevant provisions on assignments and licences.

You can find lots of information about copyright licensing and managing your rights on various UK collecting society websites, such as [Authors Licensing and Collecting Society](#), [PRS for Music](#), [DACs](#), and others.

CASE FILE 13: THE MULTIPLE RIGHTS

LEARNING AIMS

- Understand that there are multiple rights in cinematographic works
- Understand the relationship between authorship and ownership in regard to film

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- Who is an author of a film, and who is the owner?
- What types of copyright-protected works comprise a film?
- Should influential, creative contributions in a film be enough to attract copyright protection?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHO IS AN AUTHOR OF A FILM UNDER THE COPYRIGHT DESIGNS AND PATENTS ACT 1988, AND WHO IS THE OWNER?

- See **TEXT BOX #2**
- The CDPA (the UK Copyright Act) says that the joint authors of a film are the producer and the principal director, and for a television broadcast, the person making the broadcast is the author.
- As the joint authors of a film, the producer and the principal director are the first owners of any copyright in the film. However, as any other authors, they may transfer their copyright to new owners (e.g. a film production company) via an assignment of rights. For more information about the difference between a licence and an assignment, see [Case File #12](#).
- As discussed below, many different creative contributions go into making a film. Under the CDPA, the contributors are seen as working for the principal director and producer because these are in charge of financing the project, making creative decisions, and retain ultimate creative control over the final product.
- Does this allocation of copyright make sense?

WHAT TYPES OF COPYRIGHT-PROTECTED WORKS COMPRISE A FILM?

- See **TEXT BOX # 3**
- The types of works in a film include:
 - Recorded visuals

- The written words in the script
- Musical soundtrack
- Visual framing of cinematography
- Illustrations and sketches (storyboard)
- Graphics (e.g. title sequence)
- And more (e.g. fonts)
- The film itself – which often includes all the works listed above – is also protected as a separate copyright work.

SHOULD INFLUENTIAL, CREATIVE CONTRIBUTIONS IN A FILM BE ENOUGH TO ATTRACT COPYRIGHT PROTECTION?

- See **TEXT BOX #2 and #3**
- Many of the works in a film might be sufficiently original and creative on their own to attract copyright. However, the CDPA limits the authorship (and ownership) of the film to the producer and the principal director.
- Whether other people who make creative, influential decisions during the creation of the film – e.g. screenwriters and composers – should also be considered the authors of the film, it is a matter of opinion. However, under the CDPA, they are not: in the UK, the authors of a film are only the producer and the principal director.
- Different jurisdictions take approaches that do not limit the copyright in a film to the producer and principal director. What do the students think about the CDPA approach? Should authorship and ownership of films be extended to other creative contributors such as screenwriters and composers?

CASE FILE 13: THE MULTIPLE RIGHTS

1. INTRODUCTION

Mary Westmacott is a freelance screenwriter; she writes scripts for films. Scripts are written works that contain the words of a film (or a play, television programme, video game, and so on), describing and narrating the movement, actions, expression, and dialogue of the characters. As the author of the script, Mary is the first owner of any copyright in it. However, the film based on Mary's script constitutes a new copyright work with different owners, usually the producer and the principal director. Films often include various works created by different people and protected by copyright, such as texts, images and music.

This Case File #13 investigates the multiple rights involved in a film, and the relationship between authorship of a work and the ownership of the copyright in that work.

2. AUTHORS OF A FILM

Section 9(1) of the Copyright Designs and Patents Act 1988 (the CDPA) tells us that an 'author' of a work is the person who creates the work. But many people work on a film, such as directors, producers, script writers, composers, camera operators, actors and more. So who creates a film? Is everyone involved in the creation of a film an author of that film?

In certain circumstances, the law provides specific definitions about the authorship of certain types of work. For example, for a television broadcast, the author is defined as 'the person making the broadcast' (CDPA, s.9(2)(b)). In the UK, the legal authors of a film are the producer and the principal director of the film (CDPA, s.9(2)(ab)).

Together, they are the joint authors of the work. The decision to grant authorship in this way reflects the idea that the producer and principal director are responsible for both financing the film and for exercising creative control over the film. Ultimately, everyone else who works on the film is working for the producer and the director.

3. COPYRIGHT WORKS IN A FILM

Many different kinds of copyright works are brought together to make a film. A film includes not only the recorded visual element but also a written script, still images, music and more. Each of these works has an author who is the first owner of the copyright in the work.

Often, these works are created specifically for the film. That is, they are commissioned by the producer and the director as part of the creative development of the film. Sometimes, however, these works might have been created long before the producer and director ever decided to make their film. In this case, the producer will clear rights to make use of the work; that is, she will negotiate with the copyright owner about making use of the work in the film, either by way of a *licence* or an *assignment*.

For instance, if a director wanted to include a certain piece of music on the film's soundtrack, the producer might agree to pay a fee to the person who owns the copyright in the music (also known as buying a *licence*). Normally, this will be the author of the music (so long as the author hasn't sold or transferred their rights to

someone else). Although the producer pays for a licence to make use of the music in the film, the copyright in the music remains with the copyright owner.

Alternatively, the producer might buy the copyright to the music from the copyright owner outright (*an assignment*). In this case, the producer would become the owner of the copyright in the music and could use it on the film soundtrack or for any other purpose. After the original copyright owner assigns their copyright to the producer they no longer own any rights in the music.

When making a film, the producer and director will need to make these kinds of negotiations for all the elements they want to include in the film. Depending on how and when contracts are negotiated, the authors of the film might own all of the different copyright works that also feature as part of the film, or they might simply have been granted a licence to make use of certain works, like the music, specifically for making the film.

For further information about assignments and licences, see [Case File #12](#).

4. FOR DISCUSSION: REWARDING AUTHORS OR REWARDING INVESTORS?

Copyright is often understood as a way of rewarding authors for their creative expressions. For this reason, the author is generally the first owner of the copyright in their work. However, if an author is creating work as an employee then the copyright in the work is presumed to belong to their employer.

There are many people who make influential, creative decisions during the creation of a film including screenwriters and composers. If their contributions are sufficiently original, should they also be considered authors of the film? If so, is there a practical way for many people to have copyright in a film?

Or is it more appropriate that only the producer and principal director of a film are defined in law as the authors and therefore copyright owners of a film?

5. USEFUL REFERENCES

You can find lots of information about licensing the use of works protected by copyright on various UK collecting society websites, such as [Authors' Licensing and Collecting Society](#), [PRS for Music](#), [DACs](#), and others.

In particular, the [Motion Picture Licensing Company's](#) website provides information about when or whether you need permission or a licence to show or play a film in public.

If you are interested in films that are no longer in copyright (as well as links to those films) you could browse or search on Wikimedia Commons here:

https://commons.wikimedia.org/wiki/Category:Films_in_the_public_domain

Please note that a work that is in the public domain in the US is not necessarily in the public domain in the UK as well (and vice versa). For further information, see [Case File #2](#) and [here](#).

CASE FILE #14: THE MISSING MANUSCRIPT

LEARNING AIMS

- Understand what criteria creative works have to satisfy before they are protected by copyright (protection criteria)
- Be able to explain why works need to be original in order to attract copyright protection

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- What criteria does a work need to satisfy in order to attract copyright protection?
- What does 'fixation' mean?
- Why does a work need to be original in order to attract copyright protection?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHAT CRITERIA DOES A WORK NEED TO SATISFY IN ORDER TO ATTRACT COPYRIGHT PROTECTION?

- See **TEXT BOX #2 and #3**
- The short answer here is: fixation and originality.
- As well as falling into one of the eight categories of protected works prescribed by the law (see [Case File #23](#)), a work needs to be original and in fixed or permanent form in order to attract copyright protection.
- A third requirement (not addressed in this Case File) is 'qualification'. The work is protected by UK copyright law if it was created by a British citizen or someone resident or domiciled within the UK; or if it was first published within the UK.

WHAT DOES 'FIXATION' MEAN?

- See **TEXT BOX #2**
- Fixation means that – in order to attract copyright protection – a work must be in some permanent or fixed form that can be copied. For example, written on paper, recorded on a CD or film, or fixed in a photograph. In most cases, especially with artistic works, the point at which the work is created is also generally the point of fixation. For example, as soon as you take a photograph, that photograph is necessarily in fixed form (whether analogue or digital).

- That is not necessarily true for other types of works, e.g. literary or musical works. For example, an improvised poem is not in permanent form unless it is written down or recorded in some other way (e.g. audio recording).

WHY DOES A WORK NEED TO BE ORIGINAL IN ORDER TO ATTRACT COPYRIGHT PROTECTION?

- See **TEXT BOX #3 and #4**
- In addition to being in fixed form, a work must be 'original' to attract copyright protection. In the UK, the courts have set a fairly low bar for satisfying the requirement of originality. So long as the creation of the work involves some labour, skill, judgement or effort, the work will be considered to be original. For an example of how UK courts interpret the originality requirement, see **TEXT BOX #5**
- Originality ensures that the work protected by copyright reflects the author's personality and expression and that the effort the author expends in creating the work is substantial enough to justify legal protection.
- This also means that copyright protection is limited to each author's expression, leaving non-original expressions and works free for others to use in the creation of new works.
- Copyright protection depends on originality as this maintains the incentive for authors to use their skills and efforts to keep making new works for the public to enjoy.

CASE FILE #14: THE MISSING MANUSCRIPT

1. INTRODUCTION

The missing manuscript is the original script written by Mary and commissioned by Money Tree Productions. The term 'original' has different meanings depending on the context. In the film industry, an original script is usually considered a new story specially created for a film as opposed to an adaptation of an existing novel or play (see [Case File #17](#)). In copyright law, originality is one of the main requirements for many types of creative works to attract copyright protection.

This Case File #14 considers the criteria required by UK copyright law for certain types of creative works to attract copyright protection, focusing on fixation and originality.

2. FIXATION AND COPYRIGHT PROTECTION

It is a general presumption of UK copyright law that works should exist in some permanent form before they will attract copyright protection. That is, they should be 'fixed'. For most artistic works, such as a photograph, the point at which the work is created is also generally the point of fixation. But, this is not necessarily true for literary, dramatic or musical works. For example, a musician might improvise a new tune while performing on stage, without ever writing it down or recording it. Unless it is fixed, the improvised tune will not be protected by copyright. Indeed, UK copyright law expressly states that copyright will not exist in a literary, dramatic or musical work 'unless and until it is recorded, in writing or otherwise', although it does not matter whether the fixation is carried out by the author or by someone else. What matters is that the work is fixed.

3. WHAT DOES 'ORIGINALITY' MEAN IN COPYRIGHT?

In order to receive copyright protection, literary, dramatic, musical and artistic works must be original. Originality is a threshold for attaining copyright protection, meaning a work will not be eligible for copyright protection without it. However, the legislation says very little about what originality actually means. Therefore, what is original, for copyright purposes, is guided by facts and decisions from case law.

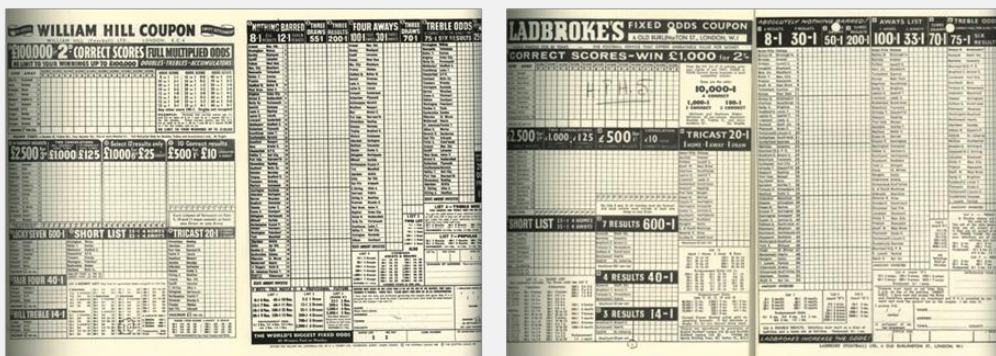
In the UK, the courts have set a fairly low bar for satisfying the requirement of originality. They do not expect a work to be novel, inventive or even useful. Nor do they judge the quality of the work. In general, so long as the creation of the work involves some labour, skill, judgement or effort, the work will be considered to be original. However, it is important to note that not all types of labour, skill and judgement will be sufficient in a copyright context. For example, if the effort you have made in creating the work is very trivial or insignificant this will not be enough. Similarly, while it might require great skill to make an exact copy of a drawing or a painting, the copy that you make will not be protected by copyright. In this way, the originality requirement ensures that copyright protects only an author's own intellectual creation.

4. WHY REQUIRE ORIGINALITY?

Copyright requires originality for several reasons. For one thing, it ensures that the work protected by copyright reflects the author's personality and expression and that the effort the author expends in creating the work is substantial enough to justify legal protection. This also means that copyright protection is limited to each author's expression, leaving non-original expressions and works free for others to use in the creation of new works: in this way, the originality requirement protects the creative and intellectual freedom of other creators. Additionally, copyright protection depends on originality as this maintains the incentive for authors to use their skills and efforts to keep making new works for the public to enjoy.

5. THE CASE: LADBROKE v WILLIAM HILL (1964)

This case involved a bookmaker, William Hill, bringing an action for copyright infringement of their betting slips (a 'fixed odds football betting coupon') against another bookmaker, Ladbroke. You can see copies of each bookmaker's betting slips below.



Source: <http://www.cipil.law.cam.ac.uk/virtual-museum/ladbroke-v-william-hill-1964-1-all-er-465>

In the Court of Appeal, William Hill argued that their betting slip could be considered to be a literary or an artistic work. Either way, they claimed, the work was original and so protected by copyright. The Court of Appeal rejected the argument that the betting slip was an artistic work, but decided that it was an original 'compilation' and as such it was protected by copyright as a literary work. The House of Lords agreed. Commenting on the 'vast amount of skill, judgement, experience and work' that had gone into creating the betting coupon, the House of Lords confirmed that the work was protected by copyright and that Ladbroke had infringed that copyright.

6. FOR DISCUSSION: PUBLIC ART OR PRIVATE RIGHTS?

Art galleries and museums often take photographs of works of art within their collection and then claim that the photograph is protected by copyright, even when the work of art itself is no longer in copyright. That is, while the artworks themselves are in the public domain, the galleries claim copyright in their photographs of those works (see also [Case File #2](#)).

Why do you think galleries and museums claim copyright in photographs of existing works of art? Should these photographs be protected by copyright? Are they original?

7. USEFUL REFERENCES

For further discussion of the decision in *Ladbroke v William Hill* [1964] 1 All ER 456 see here: <http://www.civil.law.cam.ac.uk/virtual-museum/ladbroke-v-william-hill-1964-1-all-er-465>

For further information about the concept of the public domain, see here: <https://www.copyrightuser.org/create/public-domain/>

CASE FILE #15: THE DREAM JOB

LEARNING AIMS

- Understand what contracts are, and their role in creative productions
- Be able to explain why screenwriters and other authors would benefit from the introduction of an unwaivable right to remuneration

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- What is the role of contracts in creative productions like films?
- What is the difference between assigning rights and waving them?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHAT IS THE ROLE OF CONTRACTS IN CREATIVE PRODUCTIONS LIKE FILMS?

- See **TEXT BOX #2**
- Contracts are voluntary agreements between two (or more) parties in which one party makes an offer which the other party formally accepts.
- In film and other creative productions, contracts are used for all sorts of things, from insurance to renting studios, hiring camera operators and other members of the crew, distribution arrangements, etc.
- From a copyright perspective, one of the main roles of contracts in film productions is to set out ownership and conditions of use of the various creative contributions included in the film. For example, when a film production company commissions a screenwriter like Mary to write a script for a film, they need to sign a contract with her in order to be able to use the script lawfully. This is because – as the author of the script – the screenwriter would automatically own copyright in the script she produces. There are two main types of contract that authorise production companies to use scripts and other creative contributions:
 - Assignment of rights: which transfers ownership of copyright from the author to the assignee (in this case the film production company)
 - Licence: which authorises the licensee (again, the film production company) to use the work in certain ways but does not transfer ownership of copyright (which stays with the author)

For more information about licences and assignments, see [Case File #12](#).

- In addition to setting out ownership and permissions, contracts can also address deadlines for delivery, conditions of payment, and future obligations, among many other things.

- One of the most important things to understand about the relationship between copyright law and contracts is that, while copyright law automatically gives authors certain economic and moral rights on the work they create, these rights can be transferred, licensed or waived through contracts.

This means, for example, that even if the law says that the authors (and owners) of a film are the producer and the principal director, in practice copyright ownership of a film will often be decided through contracts.

WHAT IS THE DIFFERENCE BETWEEN ASSIGNING RIGHTS AND WAVING THEM?

- See **TEXT BOX #3, #4, #5 and #6**
- If an author either assigns or waives her rights, in both cases she will no longer be the copyright owner of the work she created.

However, while an assignment would transfer the ownership of copyright from the author to someone else (e.g. a film production company), a waiver is just a way for authors to give up their rights. That is, if an author waives her rights, these will not belong to anyone.

- In the UK, moral rights (see **TEXT BOX #6** and [Case File #11](#)) can't be assigned but they can be waived. Think of a publishing contract with a ghost writer to write the biography of a celebrity: if the ghost writer did not waive her moral rights, it would not be possible to credit the celebrity as the author.
- Moral rights waivers are often included in contracts of employment too. This is usually because the employer wants complete freedom to exploit the work created by her employees, without having to worry about moral rights. What do the students think? Is this a fair practice?

SUGGESTED ACTIVITIES

After reading the Case File and discussing the **KEY QUESTIONS** above, you might ask the students to divide into groups of two. Each small group will consist of a 'film producer' and a 'screenwriter'. You can ask each group to negotiate and agree a contract – drafted as a list of bullet points – on the use of the script in the film. Assignments of rights are usually paid more than licences (see [Case File #12](#)), so this may be reflected in the outcomes of the exercise.

CASE FILE #15: THE DREAM JOB

1. INTRODUCTION

Mary accepts a commission to write 'an original script' for 'a film about a missing boy,' not just for the 'intriguing premise' but also because 'for once the contract terms were great; a dream job that would pay the bills for many years'.

Contracts play a crucial role in relation to copyright and the way creative works are exploited commercially and authors remunerated. This Case File #15 explores various issues of importance for screenwriters and other authors when negotiating and signing contracts relating to the use of their work.

2. CONTRACTS

A contract is formed when a voluntary arrangement is made between two (or more) parties in which one party makes an offer which the other party formally accepts. The contract protects the interests of each party by setting out clearly the specific terms governing the agreement and the various rights and obligations of each party.

When a screenwriter signs a contract with a film production company she might assign the rights in her work to the company or license the use of the work under certain conditions (see [Case File #12](#)). But in addition to setting out who owns or can make use of the copyright in the work, contracts can also address a number of other issues. For example, a contract between a writer and a film company might contain details about the deadline for delivery of a script, or what type of remuneration is to be paid for the use of the work and when, or it might contain an agreement about the creation of derivative works and future obligations (such as who will be involved in producing sequels or adaptations in other formats like a book, video game or television).



Contracts can also include terms that forbid certain types of activity. For example, a screenwriter might sign a contract with a famous production company to turn her script into a film. That contract might include a term that prevents the company from selling on its right to make the film to another less well-known film production company without her permission. This gives the author a degree of control over who produces her script should the famous film production company decide not to make the film for some reason.

Whatever terms it contains, it is important to remember that contracts are legal documents: they are legally binding and can be enforced in a court of law. Failure to perform a contract could result in legal liability. As such, parties should

always make sure they understand the full implications of a contract before signing.

3. RIGHT TO REMUNERATION

The right to remuneration is the right to receive payment in exchange for work or services performed. The scope of the payment is defined by the contract.

For example, a screenwriter might decide to accept a 'buy out' for her work. Essentially, this means that she accepts a one-time payment for her script and waives the right to any remuneration from the future exploitation of her work. Should the film become a blockbuster, the screenwriter might seriously regret her decision.

By contrast, the contract might entitle the writer to payment for delivery of the script as well as additional payments for future exploitation, for example, through DVD sales, online distribution of the film, and so on. This type of arrangement protects the author's economic interests in other types of use and exploitation of the work.

4. PROTECTING THE RIGHT TO REMUNERATION: THE C.R.E.A.T.O.R. CAMPAIGN

Screenwriters are not always in a position to negotiate favourable contract terms when dealing with an influential or well-established film production company. For example, an inexperienced or unknown writer might feel compelled to accept less favourable terms in order to get her script produced by the company. In this type of situation, it is said the two parties do not have 'equal bargaining power'.

The Society of Authors is an organisation that protects the rights and campaigns for the interests of all types of authors. In July 2015, they launched the C.R.E.A.T.O.R. Campaign for Fair Contracts to help ensure that the contracts offered to authors are reasonable and balanced. One of the key principles of the C.R.E.A.T.O.R. campaign concerns fair remuneration for authors. That is, writers should enjoy fair remuneration for all forms of exploitation of the work that they create, not just one-off upfront payments. Put another way, creators should be fairly paid at all stages of a work's development and commercial exploitation.

In addition to the right of remuneration, the C.R.E.A.T.O.R. campaign provides guidance on a number of other issues of particular importance to authors. These include:

- Clear contract terms that set out the exact scope of the rights granted under the contract
- Reasonableness in all contractual provisions
- Unwaivable economic and moral rights for authors

You can find out more about the C.R.E.A.T.O.R. Campaign for Fair Contracts here: <http://www.societyofauthors.org/Where-We-Stand/C-R-E-A-T-O-R-Campaign-for-Fair-Contracts>

5. WAIVABLE AND UNWAIVABLE RIGHTS

During contract negotiations, an author may decide to waive certain of her rights for various reasons. For example, an author may waive any right to royalties during the future exploitation of the work in favour of receiving a larger upfront payment. Alternatively, they might have been offered the contract on a take-it-or-leave-it-basis and don't feel in a position to negotiate better contract terms.

It has often been argued there are certain rights, whether economic or moral, that should always remain with the author, and that the author should not be able to contract them away. When a right cannot be contracted away it is said to be 'unwaivable,' meaning it always remains with the creator of the work and cannot be exercised by anyone else.

The C.R.E.A.T.O.R. campaign advocates that an author's right to future remuneration for all forms of exploitation of their work should be unwaivable under the law.

The Society of Audiovisual Authors (the SAA), an organisation that was established in 2010 to represent the interests of screenwriters and directors, believe that authors should be financially rewarded in line with the successful exploitation of their works. Similar to the C.R.E.A.T.O.R. campaign, the SAA argue that authors should enjoy an unwaivable right to remuneration, based on revenues generated from the online distribution and use of their work.

There is a strong argument for making certain economic rights unwaivable. For one thing, it would help improve an author's negotiating position when dealing with large multinational publishers or film production companies. If certain rights are deemed unwaivable by law, they are unable to be contracted away and will remain with the creator.

6. FOR DISCUSSION: WAVING RIGHTS GOODBYE?

In addition to the right to remuneration, the C.R.E.A.T.O.R. principles also suggest that an author's moral rights should be unwaivable. In the UK, moral rights (or non-economic rights) include the right to be identified as the author of the work (the right of attribution) and the right not to have your work subjected to 'derogatory treatment' (the right of integrity). In many countries, these moral rights are already unwaivable, but not in the UK. For further information about moral rights, see [Case File #11](#).

Why do you think a publisher or a film producer would want an author to waive her moral rights of attribution or integrity?

If you had to choose between making either economic rights or moral rights legally unwaivable, which would you choose and why?

7. USEFUL REFERENCES

For further information about the C.R.E.A.T.O.R. Campaign for Fair Contracts, see here: <http://www.societyofauthors.org/creator-campaign-fair-contracts>

For further information about the Society of Audiovisual Authors (SAA), see here: <http://www.saa-authors.eu/>

If you are interested in screenwriting, the Writers' Guild of Great Britain produce a helpful guide to the role that writers play in the film making process, as well as the principles and terminology of traditional contracts for screenwriters. *Writing Film: A Good Practice Guide* is available here: https://writersguild.org.uk/wp-content/uploads/2015/02/WG_film_Oct09_LR.pdf

CASE FILE #16: THE PANTAGES

LEARNING AIMS

- Understand what type of material cannot be protected by copyright
- Be able to explain the difference between influence and appropriation

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- What type of material cannot be protected as a matter of law?
- When creating new work, what is the difference between influence and appropriation?
- Is it okay to appropriate material from someone else's work?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHAT TYPE OF MATERIAL CANNOT BE PROTECTED AS A MATTER OF LAW?

- See **TEXT BOX #2** and see also [Case File #7](#)
- As discussed in [Case File #7](#), copyright does not protect ideas, only the expression of ideas.
- Similarly, copyright does not protect data, information, facts, and the details of historic events. These are free for everyone to use in their own artistic expressions.
- The particular way in which someone uses certain facts and information in their own work – e.g. a history book or a TV show about Henry VIII – can be protected by copyright if they meet the protection criteria (see [Case File #14](#)). However, the underpinning facts and information remain in the public domain: everyone is free to write their own history book or produce a TV show based on those historic events.

WHEN CREATING NEW WORK, WHAT IS THE DIFFERENCE BETWEEN INFLUENCE AND APPROPRIATION?

- See **TEXT BOX #3** and **#4**
- When creating new work, it is only natural to be inspired by other people's work. For example, if you write a TV series about time travelling, you will be inevitably influenced by other works you previously enjoyed, whether it is *Doctor Who*, *Rick & Morty* or something else. From a copyright perspective, this is absolutely fine. Concepts such as time travelling or parallel universes are free for everyone to use.
- Appropriation involves the incorporation of certain aspects of an existing work, or even the entire work, into a new creation. Appropriation is a creative technique,

which we adopted in producing *The Game is On!* Some 'appropriation artists', such as those mentioned in this Case File, borrow entire works and incorporate them into their own work with little or no transformation. In these cases, some question whether the derivative work is sufficiently original to attract copyright protection.

IS IT OKAY TO APPROPRIATE MATERIAL FROM SOMEONE ELSE'S WORK?

- See **TEXT BOX #3, #4** and [Case File #18](#)
- Under UK copyright law, copyright infringement occurs when you copy (or appropriate) a protected work in its entirety, or any substantial part of it, without permission from the copyright owner.
- However, copyright law also allows several forms of appropriation. For example, you can lawfully appropriate insubstantial parts of protected works, or entire works whose copyright term has expired (see [Case File #2](#)). Of course, you can also appropriate entire works if you have permission from the copyright owner. In certain cases, permission to reuse the work is granted to everyone through open licences such as Creative Commons.
- Under certain circumstances, you can also appropriate substantial parts of protected works without permission. These cases are known as copyright exceptions (see for example [Case Files #5](#) and [#6](#)).

SUGGESTED ACTIVITIES

Before discussing the **KEY QUESTIONS** above, you can show the short animated video [Copying & Creativity](#), which explores the complex relationship between copying and creativity through the eyes of a young art student. What literary, artistic or other influences can the students identify in the video?

CASE FILE #16: THE PANTAGES

1. INTRODUCTION

When Mary sees Lord Vane at the entrance of the Pantages theatre, there is a paperboy distributing copies of the Evening Paper with the headline 'The Suicide of the sculptor Harkin and tonight's play at the Pantages'. This is a reference to *Each In His Own Way*, a work by the Italian playwright Luigi Pirandello (1867 – 1936). *Each In His Own Way* is a play about the production of a play based on 'real' events.

Producing creative works based on real facts and events raises interesting questions about the complex relationship between reality and artistic expression, and the role that copyright plays. This relationship is further complicated when a work draws upon copyright works made by another author. Some of these questions are explored and discussed within this Case File #16.

2. NON-COPYRIGHTABLE MATERIALS

As discussed in previous case files (see for example [Case File #7](#)), copyright does not protect an idea. In addition, copyright does not protect other materials like data, information, facts, and the details of historic events.

Even so, there may be situations in which an author takes these materials and reworks them into a creative work that attracts copyright protection. Consider the life of Henry VIII. The facts and events surrounding his life are not copyrightable, but the original way in which someone might turn them into a book or movie *is* copyrightable. Several examples of this exist: the television show *The Tudors*, the novel *Wolf Hall* by the award-winning author Hilary Mantel, and the National Geographic documentary 'The Madness of Henry VIII.' In each instance, the author enjoys copyright in their creative work, but the underlying information and facts remain available for anyone to use.

This is also briefly explored in [Case File #18](#) in relation to the lawsuit about Dan Brown's blockbuster thriller, *The Da Vinci Code*. It was alleged that Mr Brown had copied substantial material from an earlier book *The Holy Blood and the Holy Grail*. Mr Brown disagreed, arguing that he simply copied information, facts and ideas from the other book. For details of how the case was resolved, see [Case File #18](#).

3. INFLUENCE AND APPROPRIATION

Authors do not create their work in a vacuum. They often have similar ideas and are influenced by the ideas of others when creating new works. In itself, this is not a bad thing. Indeed, copying can be very creative, and creativity often involves copying. What is important is that the copying is lawful and does not infringe another author's rights. Ideas, though, are not protected by copyright.

For example, imagine a movie in which a group of social outcasts travels the galaxy to fight evil and save the universe.

Do you have a one in mind? Is it Star Wars? Galaxy Quest? The Hitchhiker's Guide to the Galaxy? Guardians of the Galaxy? Each is based on a common premise or idea, but the films themselves are very different and benefit from each creator's own personal expression. At the same time, the basic underlying science-fiction plot remains available for others to use to create new works, so long as the new work does not copy a substantial or whole part of one of the earlier films.

But what about when an author *does* want to make use of someone else's work in creating something new? In doing so, the author might incorporate certain aspects of another work – or even the entire work – in her creation. This is often referred to as 'appropriation', or the use of pre-existing works, sometimes with little to no transformation. Appropriation involves 'borrowing' creations from other authors and including or assimilating them into new works.

Indeed, many authors consider themselves to be 'appropriation artists,' meaning they create new works which intentionally draw on the works of others. Doing so is considered key to the artists' concept for making the work: they create new work by recontextualising the existing work. The works created by appropriation artists may well be eligible for copyright protection, however, some question whether appropriation art is sufficiently original to enjoy copyright protection at all.

4. FOR DISCUSSION: APPROPRIATE APPROPRIATION?

So, what happens when an author appropriates another author's copyright work into a new creation? In some cases, things can get quite controversial as to where inspiration ends and plagiarism or copyright infringement begins (see for example [Case File #18](#)).



Consider the two images above. The image on the left is an illustration by Antony Roberts for the cover of Robert A. Heinlein's novel *Doublestar*, published in 1974. The image on the right is a 2000 Turner Prize nominated work by Glenn Brown, titled 'The Loves of Shepherds.' In the Turner Prize catalogue, Brown's entry made no reference to Robert's illustration or Heinlein's novel. At first glance, it might seem that the image on the right has simply 'copied' the other. Others might describe this as creative appropriation.

Indeed, appropriation is at the heart of Brown's work. Brown meticulously recreates images 'borrowed' from art and popular culture by transforming the appropriated image, whether changing its colour, position, orientation, mood or

size. Brown begins by importing the original image into an image editing programme like Photoshop and alters the image and its subject matter to form his desired composition. He then paints the image by painstakingly applying thin layers of paint to a canvas. The process produces a painting with a mirror-smooth surface which, in some cases, can take more than a year to create.

In order to receive copyright protection under UK law, literary, dramatic, musical and artistic works must be original and, in general, so long as the creation of the work involves some labour, skill, judgement or effort, the work will be considered to be original. However, when dealing with works that expressly copy from an existing work, satisfying the originality criterion may not be so straightforward. For example, in the case of *Interlego AG v Tyco Industries Inc* (1989) Lord Oliver commented as follows: 'copying *per se*, however much skill or labour may be devoted to the process, cannot make a work original'. He continued: '[A] well executed tracing is the result of much labour and skill but remains what it is, a tracing'. In relation to artistic works, he considered, the change in the work must be 'visually significant'; there must be 'some element of material alteration or embellishment' to make the new work an original work.

Based on this premise, do you think Brown's appropriation is 'original'? To follow that, even if it is, do you think Brown's appropriation infringes on Roberts' copyright?

Brown has appropriated works from other science-fiction illustration artists, such as Chris Foss.



Both images on the left are by Chris Foss. Both images on the right are by Glenn Brown. Foss originally gave Brown permission to remix his work, but later became upset when he saw the final result. Indeed, both Roberts and Foss have expressed frustration with Brown's appropriations. Roberts feels, 'None of this would have been possible without my painting.' Foss has also questioned the

fairness of Brown's use of his imagery because, although Foss created the original image, 'this man gets all this kudos from basically lovingly repainting it.'

Brown has appropriated works of other artists, like Salvador Dali and Rembrandt. His work and technique draws on a long history of appropriation by other artists, like Picasso and Warhol, stressing the importance of appropriation in his own work and in seeking to make the relationship with art history as obvious as possible. Brown defends his work, saying his versions never look like the originals due to the alteration in colour, the difference in scale, redrawing, and embellishments. Indeed, many would advise witnessing the paintings in person to fully appreciate the scale of Brown's work.

What do you think?

5. USEFUL REFERENCES

Interlego AG v Tyco Industries Inc [1989] UKPC 3 is available here:

<https://www.bailii.org/uk/cases/UKPC/1988/3.html>

For useful information on the creative re-use of public domain works, see:

www.create.ac.uk.

For a resource to help you calculate whether a work is in the public domain in the UK or other EU Member States, see www.outofcopyright.eu.

For more information on Glenn Brown's works see:

<http://www.independent.co.uk/arts-entertainment/art/features/a-real-scene-stealer-glenn-browns-second-hand-art-is-the-subject-of-a-tate-retrospective-1622648.html#gallery>.

For more information on Chris Foss' see:

<http://www.newyorker.com/culture/culture-desk/the-5-7-million-magazine-illustration>.

CASE FILE #17: THE TYPEWRITER

LEARNING AIMS

- Understand what adaptation means
- Be able to explain that an original work and its adaptation are two different works with separate copyright status

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- What does it mean to adapt a work?
- If you adapt a public domain work, is your adaptation also in the public domain?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHAT DOES IT MEAN TO ADAPT A WORK?

- See **TEXT BOX #2 and #3**
- The Cambridge Dictionary defines *adaptation* as 'a film, book, play, etc. that has been made from another film, book, play, etc.'
- In the film industry, adaptations are very common. Think of famous films like *The Shining*, *The Hunger Games*, *The Godfather*, or *The Silence of the Lambs*: they are all based on pre-existing novels. Or think of how many films and TV series based on comics and graphic novels from Marvel and DC Comics come out every year: these are all adaptations of existing works.
- The adaptation right is one of the six economic rights that UK copyright law grants to authors (for more information, see [Case File #0](#)). This means that if you want to adapt a work that is in copyright, you will need permission from the copyright owner of that work. Usually, permission to adapt a work is granted through a licence (for more information on licences and assignment, see [Case File #12](#)).

IF YOU ADAPT A PUBLIC DOMAIN WORK, IS YOUR ADAPTATION ALSO IN THE PUBLIC DOMAIN?

- See **TEXT BOX #2 and #4**.
- The answer here is **NO**.
- From a copyright perspective, an original work and its adaptation are two completely different works, with separate copyright status. If you create an adaptation of a work that is in the public domain because its copyright term has expired (see [Case File #2](#)) – for example Charles Dickens' *Great Expectations* – your adaptation will constitute a new copyright work. Your adaptation will be in copyright for your lifetime

plus 70 years, but *Great Expectations* will remain in the public domain, meaning that anyone will be free to create their own adaptations of Charles Dickens' work.

CASE FILE #17: THE TYPEWRITER

1. INTRODUCTION

The design of the typewriter that Mary uses to write her scripts was inspired by Jack Torrance's typewriter in Stanley Kubrick's *The Shining*. Famously, Kubrick's *The Shining* is a film adaptation of Stephen King's novel with the same title. In fact, *The Adventure of the Six Detectives* includes numerous references to and quotations from famous film and theatrical adaptations of literary works, and is itself an homage to those creative works.

This Case File #17 illustrates the conditions under which an adaptation of an existing work can be created, and examines the copyright status of original works and their adaptations.

2. ADAPTATION AND COPYRIGHT IN THE DERIVATIVE WORK

A lot of creative works are adapted from other works. The film industry provides many examples of this: movies are often adapted from short stories, books and plays. This is made possible through a licence: the filmmaker obtains permission to adapt a story from the copyright owner through the licence. However, both the film and the work upon which it was based are two freestanding copyright works in their own right.

To illustrate, Stephen King published the novel *The Shining* in 1977. Three years later, Stanley Kubrick released his popular film adaptation of the book under the same title. To do so, Kubrick negotiated a licence to adapt King's novel for the big screen. Both the book and the movie are protected by their own independent copyright.

In addition, the copyright in the original work remains separate from the copyright in the adaptation, and vice versa. For example, with regards to *The Shining*, while the copyright in the novel will expire 70 years after Stephen King's death the duration of copyright in the film adaptation has got nothing to do with Stephen King at all.

3. THE ADAPTATION RIGHT AND ITS LIMITS

Under UK copyright law, authors are granted a bundle of different economic rights in their work. All authors are granted the reproduction right: that is, the right to control how and when copies of their work are made. The other rights that make up the 'copyright bundle' are the distribution right, the rental right, the public performance right, the communication right, and the adaptation right. However, not all of these economic rights are granted to all types of copyright owner. What rights the copyright owner will have will depend on the type of work in question. So, for example, the public performance right does not apply to works of art.

In the UK the adaptation right only applies to literary, dramatic and musical works, not to artistic works, sound recordings, films or broadcasts. Moreover, the CDPA defines the concept of adaptation differently depending on the type of work concerned. For example, for literary works the adaptation right is defined to

include turning a novel into a film, translating a work into another language, or converting a computer program into a different language or code. For a musical work, the adaptation right includes making a new arrangement of the work or making a transcription of the work for new instruments or voices.

It may seem unfair that some creators – such as writers, playwrights and musicians – are granted an adaptation right under UK copyright law, whereas other creators such as artists and filmmakers are not. In reality, however, making an adaptation of someone's work will almost always involve copying that work which will, in any event, fall within the scope of the reproduction right (the right to prevent someone copying your work). Indeed, the line between reproduction and adaptation is not always easy to draw.

Imagine, for example, rewriting a popular novel for a new audience of primary school children, shortening it in length and making the language more age appropriate. Technically speaking, under UK copyright law, this is not an adaptation (as it does not fall within the narrowly defined adaptation right). But it will infringe the author's reproduction right (unless, of course, the relevant permissions have been granted).

4. FOR DISCUSSION: TO ADAPT OR NOT TO ADAPT?

The works of William Shakespeare are in the public domain. Many films have produced or adapted his plays; some have even used Shakespeare himself as a character. Films which reproduce his plays include Franco Zeffirelli's *Romeo and Juliet* in 1968 and Baz Luhrmann's *Romeo + Juliet* in 1996. Other films might adapt Shakespeare's plays and take another name, such the 1999 adaptation of *The Taming of the Shrew* called *10 Things I Hate About You*. Another film, *Shakespeare in Love*, is a fictional story about his romance with noblewoman, and features performances of Shakespeare's plays throughout the film.



Can you think of other adaptations of Shakespeare's works?

Apart from the continuing appeal of Shakespeare's stories, one reason for adapting his work is that all of those stories are in the public domain: that is, anyone can make use of his work without having to ask or pay for permission. It is all out of copyright. Can you think of any other television or screen adaptations you have seen that might also be based on a public domain work? How do you know when a work is out of copyright (see, for example, [Case File #2](#))?

5. USEFUL REFERENCES

The Copyright, Designs and Patents Act 1988 is available here: <http://www.legislation.gov.uk/ukpga/1988/48/contents> (the definition of adaptation provided by UK copyright law can be found in s.21(3))

CASE FILE #18: THE PURLOINED LETTERS

LEARNING AIMS

- Understand what plagiarism means
- Be able to discuss the difference between plagiarism and copyright infringement

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- What does copyright infringement mean?
- What is plagiarism?
- Is it okay to copy information, facts and ideas from someone else's work?
- Did Melania plagiarise Michelle?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHAT DOES COPYRIGHT INFRINGEMENT MEAN?

- See **TEXT BOX #2** and see also [Case File #0](#)
- Copyright law provides copyright owners with a bundle of economic rights, including the right to copy the work, the right to distribute copies of the work to the public, the right to perform or show the work in public, the right to put the work on the internet, and more.

Doing any of these acts without permission will infringe copyright in the work, and the owner will be entitled to some form of relief or compensation.

- So: copyright infringement occurs when you make use of a copyright owner's work without their permission.

For example, by watching a film online through an unauthorised website.

- Also, it doesn't matter whether you know you are doing something wrong or not. With copyright infringement, ignorance is no defence.

WHAT IS PLAGIARISM?

- See **TEXT BOX #2, #3, #4 and #6**
- Plagiarism occurs when you present someone else's thoughts, ideas or expression as if they were your own, without properly attributing the original author of the work.

- One difference between plagiarism and copyright, is that plagiarism always involves one person attempting to present someone else's thoughts, ideas or expressions *as if they were their own original work*.

By contrast, many people infringe copyright without ever claiming to be the author of the work they are copying.

IS IT OKAY TO COPY INFORMATION, FACTS AND IDEAS FROM SOMEONE ELSE'S WORK?

- See **TEXT BOX #3 and #7**
- Copyright does not protect information, facts or ideas. So, **copying information, facts or ideas does not infringe copyright**.
- Simply copying facts and information from someone else's work does not amount to plagiarism. Facts and information are free for all to use and share.
- However, copying ideas (or text) from someone's work without acknowledging where they came from could be regarded as plagiarism. If you borrow or make use of ideas from another author, it is always advisable to acknowledge your source of inspiration.
- Although the *Da Vinci Code* case was widely reported in the media as a case about plagiarism, it was primarily a case about copyright infringement.

DID MELANIA PLAGIARISE MICHELLE?

- See **TEXT BOX #8**
- She has certainly borrowed ideas from Michelle Obama's speech, and appears to have passed them off as her own. Also, nowhere in the speech does she acknowledge that she borrowed from the Obama speech.

She has almost certainly plagiarised parts of her speech from Michelle Obama's speech.

- But, has she infringed copyright?

Copyright stops someone from copying your work in its entirety. But, it also stops someone copying parts of your work. The key question will always be: how much have they copied?

It may be interesting to ask the students to search for the full speech by both women, and then think about how much material was taken from Obama's speech and incorporated into Trump's speech. Do they think she has copied too much?

The answer is: **probably not**.

CASE FILE #18: THE PURLOINED LETTERS

1. INTRODUCTION

Before she was murdered, Mary Westmacott had become increasingly concerned for her safety and state of mind. In her letter to Holmes she describes how, one night, she was woken by the sound of someone working at her typewriter but when she got downstairs there was nothing to be found except three words on the page: 'Where's My Story?' The precise meaning of these words is ambiguous but they seem to hint at an accusation of plagiarism: in producing her script for the film about the missing boy, has Mary stolen someone else's ideas or story?

This Case File #18 considers the similarities and differences between plagiarism and copyright infringement, two concepts that are often discussed as if they were one and the same.

2. PLAGIARISM AND COPYRIGHT INFRINGEMENT

Plagiarism occurs when you present someone else's thoughts, ideas or expression as if they were your own, without properly attributing the original author of the work. Copyright infringement occurs when you make use of an author's copyright work, without their permission, in a way that is expressly prohibited by law.

People often discuss plagiarism and copyright infringement as if they were one and the same thing, but that is misleading. It is true that both plagiarism and copyright infringement concern inappropriate copying but it is important not to confuse the two concepts.

Plagiarism can occur without infringing copyright, just as someone can infringe copyright without plagiarising the original author's work. At the same time, if someone copies your work and then presents it as if it was their own they may be guilty of both plagiarism and copyright infringement. Everything will depend on the facts and circumstances of each particular case.

One of the main differences between these two concepts is that plagiarism always involves one person attempting to present someone else's thoughts, ideas or expressions *as if they were their own original work*. That is, the copier claims to be the original author of those ideas or that work. By contrast, many people infringe copyright without ever claiming to be the author of the work they are copying. For example, if you download a film or an ebook from an unauthorised website rather than accessing that content legally online you are infringing copyright in that work. But this has absolutely nothing to do with plagiarism. By unlawfully downloading the work you are not claiming to be the author of that work.

Also, whereas copyright infringement might result in someone taking or threatening to take legal action against you, an accusation of plagiarism rarely gives rise to litigation. In short, we might say that while plagiarism is unethical or is a moral wrong, copyright infringement is a legal wrong.

3. PLAGIARISM BUT NO COPYRIGHT INFRINGEMENT: COPYING IDEAS

Imagine you created an original poem, picture or story, and someone copies your idea to create their own work. Why might this be plagiarism but not copyright infringement?

A basic principle of copyright law is that copyright does not protect ideas, only the way in which those ideas have been expressed by the author of a work. For this reason, while copying someone's ideas without properly acknowledging the source may be regarded as plagiarism, it will not necessarily amount to copyright infringement. That is, if the plagiarist copies ideas but not the way in which you expressed your ideas – for example, by using your actual words – then they are not infringing copyright.

So, from a copyright perspective, ideas are free to be used and reused. But you should always be careful to acknowledge the source of your ideas whenever appropriate. Nobody wants to be accused of being a plagiarist!

4. PLAGIARISM BUT NO COPYRIGHT INFRINGEMENT: COPYING PUBLIC DOMAIN WORKS

Imagine that someone has copied both the ideas and exact expression of another author's work. For example, they might have copied another person's poem and they are trying to pass it off as their own work, whether to their friends and family, to their teacher or classmates, or to the wider world.

This is plagiarism. But is it also copyright infringement?

Whether copyright in the poem is infringed will depend, among other things, on whether the original work is still in copyright or not. For example, imagine the work was first written by one of the many poets who died during the First World War: Julian Grenfell (1888 – 1915), John McCrea (1872 – 1918) or Wilfrid Owen (1893 – 1918). Their work is no longer in copyright; it is now in the public domain. So, from a copyright perspective, everyone is free to copy these poems without the need for permission. Just don't be tempted to pretend that you have written any of these works yourself, or any other work that is in the public domain. Nobody wants to be accused of being a plagiarist!

5. PLAGIARISM, REAL AND IMAGINED

Many famous writers, musicians, journalists and politicians have been accused of plagiarism. Some accusations turn out to be true, but not every allegation of plagiarism is well-founded or fair.

Adrian Jacobs was a children's author who died in 1997. In 2004 those responsible for managing his literary estate claimed that the plot of J.K. Rowling's novel *Harry Potter and the Goblet of Fire* bore a number of similarities to a book first published by Jacobs in 1987: *The Adventures of Willy the Wizard*. Ultimately, the case against Rowling was dismissed by the UK courts. The literary estate also attempted to sue Rowling in a number of other countries, such as Australia and the US, but in each case they were unsuccessful.

Kaavya Viswanathan, a young American author, published her first book – *How Opal Mehta Got Kissed, Got Wild, and Got a Life* – in 2006, just as she was beginning her studies as an undergraduate student at Harvard University. Soon after, allegations of plagiarism began to emerge, and it transpired that portions of the Viswanathan's book had relied on a number of other sources, including two books by Megan McCafferty – *Sloppy Firsts* (2001) and *Second Helpings* (2003) – as well as works by Salman Rushdie, Sophie Kinsella and Meg Cabot. The publisher recalled and destroyed all copies of *Opal Mehta* and cancelled their contract with Viswanathan for a second book.

6. UNCONSCIOUS PLAGIARISM

Cryptomnesia is a term that describes the phenomenon of having a thought that we think is original when in fact it is no more than a memory. In other words, it helps to explain what is often referred to as *unconscious plagiarism*. That is, sometimes we are not always aware that we are copying someone else's work: sometimes we copy unconsciously.

7. THE CASE: Baigent v. Random House [2007] EWCA Civ 247

The claimants were the authors of a book published in 1982, *The Holy Blood and the Holy Grail*. They alleged that Dan Brown had infringed their copyright by incorporating a substantial part of their work within six chapters of *The Da Vinci Code*, Brown's blockbuster thriller first published in 2003. Mr Brown's publisher disagreed. If Mr Brown copied anything, they argued, he simply copied information, facts and ideas from *The Holy Blood and the Holy Grail*, rather than the way in which the authors had expressed their ideas.

The case was settled in favour of Mr Brown.

In the Court of Appeal, Lord Justice Mummery commented that the material alleged to have been copied from the claimants' book was simply an assortment of historical fact and information, events, incidents, theories and arguments: this was raw research material and nothing more. The claimants were not entitled to rely on copyright law to 'monopolise historical research or knowledge and prevent the legitimate use of historical and biographical material'. No copyright infringement had occurred.

When the final decision of the Court of Appeal was handed down, the case was widely reported in the press as a case about plagiarism.

But is it really about plagiarism? Or was it simply a case about copyright infringement? Or is it about both plagiarism and copyright infringement?

Is it okay to copy information, facts and ideas from someone else's work?

8. FOR DISCUSSION: POLITICS AND PLAGIARISM

During the 2016 US presidential election, Melania Trump, wife of the Republican candidate Donald Trump, gave a campaign speech that appeared to borrow from a speech given by Michelle Obama at the 2008 Democratic Convention. The

relevant extracts from each speech are set out in the table below. You can also view clips from each speech [here](#).

Following the speech, and various allegations of plagiarism, the Trump campaign released a statement that Melania Trump's speech 'in some instances included fragments' from the earlier speech that reflected Melania's own thoughts. It seems clear that copying did occur.

But does it constitute plagiarism? Does it constitute copyright infringement?

In considering these questions, it might help to search online for more information and commentary about this incident.

Michelle Obama (2008)	Melania Trump (2016)
And Barack and I were raised with so many of the same values: that you work hard for what you want in life; that your word is your bond and you do what you say you're going to do; that you treat people with dignity and respect, even if you don't know them, and even if you don't agree with them.	From a young age, my parents impressed on me the values that you work hard for what you want in life, that your word is your bond and you do what you say and keep your promise, that you treat people with respect. They taught and showed me values and morals in their daily lives. That is the lesson that I continue to pass on to our son.
And Barack and I set out to build lives guided by these values, and pass them on to the next generation.	And we need to pass those lessons on to the many generations to follow.
Because we want our children – and all children in this nation – to know that the only limit to the height of your achievements is the reach of your dreams and your willingness to work for them.	Because we want our children in this nation to know that the only limit to your achievements is the strength of your dreams and your willingness to work for them.

9. USEFUL REFERENCES

There are various websites that provide information and guidance about plagiarism and how to avoid it! Many of these websites have been developed by Universities seeking to educate their students about this increasingly important issue. One particularly helpful resource is 'What Constitutes Plagiarism' within the Harvard Guide to Using Sources: <http://usingsources.fas.harvard.edu/what-constitutes-plagiarism>

Other resources have been developed by commercial companies that specialise in developing tools and strategies to help students and educators understand and detect plagiarism within an educational context. For example, see: <http://www.plagiarism.org/>

CASE FILE #19: THE FATEFUL EIGHT SECONDS

LEARNING AIMS

- Understand that copying part of a work can infringe copyright
- Understand that the law allows you to copy someone's work when you are reporting newsworthy events

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- What does substantial copying mean?
- What is the difference between quantitative and qualitative copying?
- Why does the law provide an exception for reporting current events?
- Why do you think photographs are not included within the exception?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHAT DOES SUBSTANTIAL COPYING MEAN?

- See **TEXT BOX #2**
- Copyright protects works in their entirety. But it also prevents others from copying parts of your work, e.g., a chapter from a book, or a 10-second sample from a song recording.
- Copying a substantial amount of someone's work will infringe copyright. But copying an insubstantial amount will not.
- Determining whether a substantial amount has been copied is not always easy to do. Everything will depend on the facts of that specific situation.

WHAT IS THE DIFFERENCE BETWEEN QUANTITATIVE AND QUALITATIVE COPYING?

- See **TEXT BOX #2 and #3**
- When deciding whether someone has copied a substantial amount, the courts will consider both the quantity of what has been copied, as well as the quality of what has been copied.
- If you copy too much, in terms of quantity, you will almost certainly be infringing.
- The *Tixdaq* (2016) case concerned the use of 8-second clips from a two-hour sports broadcast. Quantitatively, these were very short clips.

- But, the judge decided that the clips were qualitatively important. Each short clip captured something of special interest – a highlight moment. For that reason, the use of each clip was considered to be substantial copying.

WHY DOES THE LAW PROVIDE AN EXCEPTION FOR REPORTING CURRENT EVENTS?

- See **TEXT BOX #4**
- Copyright law provides for a number of exceptions that allow you to make use of someone else's work without having to ask for permission. One such exception is for reporting current events.
- The exception exists to promote freedom of expression and the public interest.
It allows journalists and others to report the news accurately, openly and independently, without having to ask anyone's permission to make use of their works.
- In the *Tixdaq* case the judge acknowledged that the exception no longer only applies to professional journalists. Any member of the public can rely on the exception if they are commenting on a newsworthy event on a social media platform.

WHY DO YOU THINK PHOTOGRAPHS ARE NOT INCLUDED WITHIN THE EXCEPTION?

- See **TEXT BOX #5**
- It is often said that a picture is worth a thousand words.
- Historically, photographs were not included in the scope of the exception because they were so important to selling newspapers. Often, the image on the front of the newspaper (or inside) can have an enormous impact on sales of that issue.
- Also, just because you cannot use someone else's photograph under this exception, that doesn't stop you from reporting the news. You can still convey the *information* captured in the photograph, in words or in some other way.

CASE FILE #19: THE FATEFUL EIGHT SECONDS

1. INTRODUCTION

As Watson enters the room we see Sherlock reading a newspaper. On one page, the headline reads: 'Eight Seconds of Sporting Genius!' The choice of headline was intentional. It refers to a copyright case involving the use of eight-second clips of a sports broadcast.

In this Case File #19 we consider how the concept of substantial copying applies to broadcasts and films, and why the exception to copyright for reporting current events is important for both media organisations and 'citizen journalists'.

2. SUBSTANTIAL COPYING

Copyright protection is not confined to preventing the copying or use of works in their entirety. Simply copying part of the work can also infringe. On the other hand, copying an insubstantial part of a copyright work without permission is allowed. This is because the law recognises that no real injury is done to the copyright owner if only an *insignificant* part of the work is copied.

In earlier Case Files we consider the concept of substantial copying in relation to artistic works (see [Case File #7](#) The Matching Wallpaper) and literary works (see [Case File #9](#) The Improbable Threat). In this Case File #19 we consider what substantial copying means in relation to broadcasts, films, and other types of audiovisual work.

Whatever type of work you are dealing with, substantial copying is considered by the courts to be a matter of quality, not quantity. So, it is not just about how much you copy from someone else's work, it is about the importance or value of the copied parts in relation to that work. This is because a small part of the original work may be highly significant to the piece as a whole. This focus on the quality rather than the quantity of what has been copied can make it difficult to define precisely what amounts to a substantial copying.

This distinction between quantitative copying (that is: how much have you copied?) and qualitative copying (that is: how important or significant is the part that you have copied?) is well illustrated by the decision of *England and Wales Cricket Board v Tixdaq* (2016).

3. THE CASE: *England and Wales Cricket Board v. Tixdaq* (2016)

The England and Wales Cricket Board (the ECB) own copyright in the television broadcasts and films of most cricket matches played by the England men's and women's cricket teams. The defendants, Tixdaq, operate a website (www.fanatix.com) and an App that provides users with eight-second clips of broadcasts of cricket matches. Many of these clips were uploaded by the defendants themselves, but users also uploaded clips to the App service. These clips could also be seen on the defendants' Facebook page and Twitter feed.

The ECB sued for copyright infringement. They argued that the use of an eight-second clip from over two hours of footage amounted to substantial copying. The

defendants disagreed, arguing that a single eight-second clip could not be considered to be substantial. Mr Justice Arnold, the presiding judge, held for the ECB on this point. He commented as follows:

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

The fact that the clips were very short did not matter. What mattered was that they showed something of interest; they were *qualitatively* significant.

4. REPORTING CURRENT EVENTS

UK copyright law provides a number of [exceptions](#) to copyright for specific circumstances when work can be used without needing permission from the copyright owner. There are various exceptions set out in the Copyright, Designs and Patents Act 1988 concerning [non-commercial research and private study](#), [quotation](#), [news reporting](#), [education](#), and other uses.

In the Tixdaq case, the defendants argued that, even if the clips used amounted to a substantial part of the ECB's work, they still had a defence in the guise of the exception for reporting current events. But, were the clips posted by the defendants and by users of fanatix.com *really* uploaded for the purpose of reporting the news? Traditionally, this exception has been relied upon by professional journalists and the newspapers, broadcasters and media organisations for which they work. The question for the court was whether the exception *also* extended to use on social media by fans creating and sharing their own reports; that is: 'citizen journalists'.

In considering this question Mr Justice Arnold observed that the purpose of the exception for reporting current events was 'to provide an exception to copyright in the public interest, namely freedom of expression'. It is an exception, he continued, that must take into account 'recent developments in technology and the media'. With that in mind, the judge commented that '[i]f a member of the public captures images and/or sound of a newsworthy event using their mobile phone and uploads it to a social media site like Twitter, then that may well qualify as reporting current events even if it is accompanied by relatively little in the way of commentary'.

In this particular case, however, Mr Justice Arnold decided the exception did not apply. The main purpose of fanatix.com, he concluded, was simply to share clips of footage of sporting events, rather than to provide information or commentary about those events. Ultimately, the judge decided, the purpose of fanatix.com was purely commercial and not informative.

5. FOR DISCUSSION: NO PHOTOGRAPHY PLEASE

Newspapers often use photographs to accompany and illustrate their reports and stories. Indeed, in our film, the article in the newspaper that Sherlock is reading is accompanied by a photograph of a cricketer. However, the exception for reporting

current events applies to all types of copyright work *except* photographs. That is, you cannot use photographs protected under copyright for reporting current events without obtaining the permission of the respective copyright owner.

So, if you were a 'citizen journalist' with your own blog on newsworthy events the exception for reporting the news allows you to upload short clips of other people's broadcasts or films to your blog (so long as your use is considered fair) but not to make use of other people's photographs.

Why do you think photographs are treated differently under this exception from every other type of protected work?

6. USEFUL REFERENCES

The Copyright, Designs and Patents Act 1988 is available here: <http://www.legislation.gov.uk/ukpga/1988/48/contents>

England and Wales Cricket Board Ltd [the ECB] v Tixdaq Ltd [2016] EWHC 575 (Ch) is available here: <http://www.bailii.org/ew/cases/EWHC/Ch/2016/575.html>

For further commentary on the exception for reporting current events, see here: <https://www.copyrightuser.org/understand/exceptions/news-reporting/>

CASE FILE #20: THE LAWFUL READER

LEARNING AIMS

- Understand that using the internet involves making copies
- Understand that browsing the internet does not infringe copyright

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- Is reading a book different from reading online?
- Does reading material online involve making infringing copies?
- Is it okay to stream or download material that you know is infringing?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

IS READING A BOOK DIFFERENT FROM READING ONLINE?

- See **TEXT BOX #2**
- Intellectually, there is no difference.
- But, **technologically**, reading online is different from reading a book. This is because, when you read a webpage online temporary copies of that page are made on your screen, as well as in the 'cache' of your device's hard drive.

DOES READING MATERIAL ONLINE INVOLVE MAKING INFRINGING COPIES?

- See **TEXT BOX #3 and #4**
- **NO.** Even though, technologically, reading online involves making copies of the work, this does not mean that reading or browsing the internet infringes copyright.
- In *Public Relations Consultants Association* (2013), the Supreme Court confirmed that a copyright exception applies to this type of situation: the exception allows you to make temporary copies of material online to enable you to access and read that material
- The exception for temporary copies allows you to read online, but nothing more. It would not let you download, or print out, or make a permanent of that material.

IS IT OKAY TO STREAM OR DOWNLOAD MATERIAL THAT YOU KNOW IS INFRINGING?

- See **TEXT BOX #4**

- **NO.** In general, courts consider it unlawful to access or view content online when you know that it has been made available without permission.

So, even though you didn't post the material, simply watching it online will infringe copyright.

- However, it is not always easy to know whether the website you are visiting is providing lawful content or not.

One source of information about lawful sites is [*Get It Right from a Genuine Site*](http://www.getitrightfromagenuinesite.org) (www.getitrightfromagenuinesite.org) which provides guidance and information about how to get music, TV, films, games and more from genuine and lawful online services.

CASE FILE #20: THE LAWFUL READER

1. INTRODUCTION

As Watson enters the room we see Sherlock reading a newspaper. On one page, the headline reads: 'News Just In! Reading the internet is the same as reading a book.' The choice of headline was intentional. It refers to a copyright case in which the courts were asked to consider whether simply reading material online might infringe copyright.

In this Case File #20 we consider the legality of browsing the internet and whether, from a copyright perspective, reading online is fundamentally different from reading a physical book, newspaper or magazine.

2. WHEN READING INVOLVES COPYING

Using the internet involves copying. Simply browsing a website involves the transmission of copies through internet routers and proxy servers to your computer or mobile device. When you view a webpage online, temporary copies of that page are made on your screen and also in the internet 'cache' on your hard drive. The use of an internet cache is a universal feature of browsing technology: it allows you to search and browse the internet efficiently and effectively. Indeed, without the use of a cache the internet would not function properly.

For this reason, reading online is *technologically* different from reading a book or a magazine. That is, whereas reading a physical book does not involve making copies of the text in that book, reading the same text online does involve copying. So, when you read or browse online are you infringing copyright? This was the question which the UK Supreme Court had to address in *Public Relations Consultants Association v The Newspaper Licensing Agency* (2013).

3. THE CASE: *Public Relations Consultants Association v. The Newspaper Licensing Agency* (2013) UKSC 18

At the heart of this case was a very simple question: does reading material online involve making infringing copies? European and UK copyright law contains an exception that permits making temporary copies of protected works as long as the temporary copy: i) is transient or incidental; ii) is an integral part of a technological process intended to enable the lawful use of a work; and iii) has no independent economic significance.

The Newspaper Licensing Agency (the NLA) argued that this exception did not apply to browsing material online. One of their main arguments concerned copies that were made in the cache. Normally, material copied to the cache will remain there for two to three weeks before it is automatically deleted by the computer as a result of the continued use of the browser. However, the NLA pointed out that it is possible to adjust the settings on a computer to enlarge the cache and so extend the time it retains the copies while the browser is in use. Moreover, if a user simply closed down their computer or device, then copies in the cache might remain there indefinitely until the browser was used again. The NLA argued that in neither of these situations could cached material be regarded as *temporary copying*.

In the Supreme Court, Lord Sumption rejected these and other arguments put forward by the NLA. The purpose of the exception, he commented, was to enable the internet to function correctly and efficiently. That, in turn, required making temporary copies within the cache of an end user's computer. Without caching material, the internet would not function properly. With that in mind, he continued, it would make no sense if the exception did not permit the ordinary technical processes associated with browsing (that is, making copies on screen and copies in the cache). In short: browsing is lawful.

It is important, however, to distinguish between simply reading material online and making a more permanent copy or record of that material. That is, while browsing is lawful, downloading or printing out material made available online will typically require the permission of the copyright owner (unless another copyright exception applies, for example, fair dealing for private study). The exception for temporary copies allows you to read online, but nothing more.

4. FOR DISCUSSION: READING IS READING IS READING

In delivering his opinion, Lord Sumption was keen to make the point that reading copyright material on the internet should be treated in the same way as reading a physical book, newspaper or magazine. That is, while technologically reading online might involve making temporary copies on the screen and in the cache, the law should not make any distinction between reading online and reading offline. He continued:

If it is an infringement merely to view copyright material, without downloading or printing out, then those who browse the internet are likely unintentionally to incur civil liability, at least in principle, by merely coming upon a web-page containing copyright material in the course of browsing. This seems an unacceptable result, which would make infringers of many millions of ordinary users of the internet ...

However, what if the content you are reading online has been posted there unlawfully? That is, what if the copyright owner has not granted permission for their material to be made available online in the first place?

Should the law draw a distinction between browsing lawful and unlawful content? If so, how would *you* know whether the material has been posted lawfully or unlawfully?

USEFUL REFERENCES

The Copyright, Designs and Patents Act 1988 is available here: <http://www.legislation.gov.uk/ukpga/1988/48/contents>

Public Relations Consultants Association Ltd v The Newspaper Licensing Agency Ltd & Others [2013] UKSC 18 is available here: www.bailii.org/uk/cases/UKSC/2013/18.html

CASE FILE 21: THE SIX DETECTIVES

LEARNING AIMS

- Understand if and how fictional characters are protected under copyright law
- Appreciate that different types of law, other than copyright, might protect fictional characters

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- Does copyright protect fictional characters?
- What other types of law might protect fictional characters?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

DOES COPYRIGHT PROTECT FICTIONAL CHARACTERS?

- See **TEXT BOX #2 and #4**
- In the UK, it is unclear whether fictional characters can be protected by copyright on their own. That is: while the stories featuring fictional characters are protected by copyright as literary works, the characters themselves may not be protected.
- This issue is particularly important in the context of fan fiction (see **TEXT BOX #4** for more on fan fiction) or when someone's adaptation of an existing work focuses primarily on the characters from the original work.
- In *Kelly v Cinema Houses*, a judge commented that if a defendant's work had involved 'a character as distinctive and remarkable ... as Sherlock Holmes', then he might have to give greater thought to whether the character was protected in its own right. That is, the more distinctive the character, the more likely that it will be protected.
- Some legal scholars have interpreted these comments to mean that copyright protection probably does not exist for literary characters outside of the work in which they appear. However, the judge's comments are not conclusive on the issue and if the case were decided today the courts may well take a different approach – one that was more in line with contemporary commercial attitudes to character merchandising.
- In other jurisdictions, such as Germany and the United States, there are clearer rules about protecting fictional characters (see **TEXT BOX #2**).

- At best, all that can be said is that there is no decisive case law in the UK about whether characters should be protected by copyright. What do the students think? Should fictional characters be protected by copyright?

WHAT OTHER TYPES OF LAW MIGHT PROTECT FICTIONAL CHARACTERS?

- See **TEXT BOX #3**
- Although fictional characters may not be protected by copyright separately from the work in which they appear, they may be protected by other forms of intellectual property law.
- Passing off is a form of intellectual property that protects the goodwill someone has established in their product or services, like a form of unregistered trade mark. Goodwill can be established in many different things: a brand name, a form of packaging, or an advertising style.

Based on this, in *Doyle v London Mystery Magazine* (1949) the Conan Doyle Estate attempted to prevent a newly established magazine from using the name 'Sherlock Holmes' and the address '221B Baker Street' as part of their promotional activities for a new magazine: the *London Mystery Magazine*. However, they were unsuccessful.

The court decided that readers would not be confused into thinking that the magazine was produced by, or had anything to do with, the Conan Doyle estate. As such, the magazine was free to continue making use of the character's name and his fictional address.

- Sometimes a character could also be registered as a trade mark. Even when a work goes into the public domain (for more information about copyright duration and the public domain, see [Case File #2](#)), the character might still be protected by trade mark law, like Beatrix Potter's Peter Rabbit.
- In these areas of law, a court would consider whether or not a member of the public would be confused about whether the original author had authored the new work.

SUGGESTED ACTIVITIES

While discussing the **KEY QUESTIONS** above, you might ask the students to think about their favourite fictional character and whether they have ever seen it in a work different from the original, e.g. in fan fiction or an adaptation.

Is the character remarkable and distinctive enough to merit copyright protection outside of the work in which it appears? If they wanted to create a work of fan fiction featuring their favourite character, do the students think they would need permission from the creator of the character?

CASE FILE 21: THE SIX DETECTIVES

1. INTRODUCTION

Mary's problems began when she 'started fleshing out the main character: the hero-detective'. Before settling on one and starting seeing the others everywhere, she considered six potential protagonists for her story. As some may notice, each of the six detectives (and Mary herself) are inspired by and based on famous existing characters from various books, films, TV shows, plays, and graphic novels, as well as real people.

This Case File #21 explores the conditions for the protection and lawful reuse of fictional characters.

2. COPYRIGHT AND FICTIONAL CHARACTERS

Copyright law protects the unauthorised reproduction of literary and artistic works, but how copyright protects specific elements of these works, such as the characters in a story, is less clear. Invented names are not protected by copyright law because the name itself is not an original literary work. We know, however, that fictional characters are much more than just an invented name: they are often well-defined personalities with distinctive looks, habits and speech patterns. But should they enjoy protection outside of the story?

Within the UK, there is little legal guidance on this issue. In *Kelly v Cinema Houses* (1933), the author Joan Kelly sued a film production company for copying her book adaptation of *The Outsider*, a play originally written by another author Dorothy Brandon. Mrs Kelly had Ms Brandon's permission to turn the play into a book. The film production company also had permission from Ms Brandon to adapt her play for the screen, but they had not acquired any rights from Mrs Kelly. When the film was released, Mrs Kelly argued that, in adapting the Ms Brandon's play for the screen, the filmmakers had also copied aspects of her novel both in terms of plot and character.

Ultimately, the court decided in favour of the film projection company: the film, essentially, was an adaptation of the play alone; if the filmmakers had borrowed from Mrs Kelly's novel, they had only borrowed trivial or commonplace elements. There was no copyright infringement. But, in handing down his decision, Mr Justice Maugham commented as follows:

If, for instance, we found a modern playwright creating a character as distinctive and remarkable ... as Sherlock Holmes, would it be an infringement if another writer, one of the servile flock of imitators, were to borrow the idea and to make use of an obvious copy of the original? I should hesitate a long time before I came to such a conclusion.

Some legal scholars have interpreted these comments to mean that copyright protection probably does not exist for literary characters outside of the work in which they appear. However, the judge's comments are not conclusive on the issue and if the case were decided today the courts may well take a different, more contemporary approach. At best, all that can be said is that there is no

decisive case law in the United Kingdom indicating whether characters should be protected by copyright.

By contrast, other jurisdictions around the world have established clearer rules about protecting literary characters through extensive litigation. For example, a German court recently held that the fictional character Pippi Longstocking, created by the Swedish author Astrid Lindgren, had a 'unique personality' and was protected by copyright as a literary work. Similarly, in the United States characters are generally considered independently copyrightable so long as the character is 'sufficiently delineated'.

Indeed, Sherlock Holmes, as a character, has been the subject of litigation in the United States (you can read a press release about this recent litigation from the Conan Doyle Estate [here](#) as well as further reports about the case on this [Free Sherlock!](#) blog).

3. OTHER FORMS OF LEGAL PROTECTION

Despite the fact that UK copyright law may not protect characters separately from the work in which they appear, those characters may enjoy protection through other forms of intellectual property law, such as trade mark law or passing off.

This is particularly true when the character in question is represented by drawings or on film. For example, many of the character illustrations from Beatrix Potter's children's books are registered trade marks even though her works are no longer in copyright (Beatrix Potter, 1866 – 1943). So, even though her work is in the public domain (from a copyright perspective), the use of the characters' names and likenesses, such as the much beloved Peter Rabbit, is still protected by other forms of intellectual property law.

Using other forms of intellectual protection is not always successful, though. Passing off is a form of intellectual property that protects the goodwill someone has established in their product or services, like a form of unregistered trade mark. Goodwill can be established in many different things: a brand name, a form of packaging, or an advertising style. In *Doyle v London Mystery Magazine* (1949) the Conan Doyle Estate attempted to prevent a newly established magazine from using the name 'Sherlock Holmes' and the address '221B Baker Street' as part of its promotional activities.

When Conan Doyle originally wrote the Sherlock Holmes stories, 221B Baker Street did not exist: it was a fictional address. However, in 1949 the Abbey National Building Society owned the block of buildings from 219-223 Baker Street. The magazine reached an agreement with the Abbey National to use the famous address for all of the magazine's correspondence. In turn, The London Mystery Magazine was advertised to readers as coming from '221B Baker Street ... the address of the late Sherlock Holmes, Esq'. Bringing an action based on passing off, the Conan Doyle Estate argued that readers might be misled into thinking the magazine had something to do with the Sherlock Holmes stories, or might even feature Sherlock Holmes.

In court, the judge decided in favour the magazine: while the Conan Doyle Estate might enjoy goodwill in the actual stories relating to Sherlock Holmes, the

magazine publishers were doing nothing wrong. Readers would not be confused. The magazine was free to continue using the character's name and address.

The *London Mystery Magazine* went on to become the longest running British mystery magazine, lasting from 1949 to 1982.

4. FOR DISCUSSION: THE AFTERLIFE OF CHARACTERS

Do you think that a character in a literary work should be protected by copyright? Do any of the approaches adopted by other jurisdictions make sense?

One area where character protection is contentious concerns fan fiction, that is fictional stories written by fans about characters from a favourite TV show or film and then shared with other fans online. These stories are rarely written with the permission or authorisation of the original author or copyright owner. At the same time, very few of these stories are ever commercially or professionally published: rather, they represent a form of creative, non-commercial reuse of literary characters by fans who love or enjoy those characters. In some jurisdictions, fan fiction might be protected as a form of parody under fair dealing or fair use, but this will not always be the case. Indeed, some copyright owners are attempting to introduce licensing systems specifically for this type of character reuse.

Should fan fiction authors be required to obtain a licence to reuse characters from a literary work that is still in copyright? Should fans be able to write and share creative stories about their favourite characters without having to seek permission or pay a fee? Would it make a difference if they are sharing those stories for free, or trying to make some money out of them?

5. USEFUL REFERENCES

A press release from the Conan Doyle Estate about the case *Klinger v Conan Doyle Estate* can be found

here: <http://www.conandoyleestate.com/index.php/press-release-klinger-v-conan-doyle-estate/>

Further reports about the case *Klinger v Conan Doyle Estate* can be found on the Free Sherlock! blog: <https://free-sherlock.com/>

For further information about the concept of the public domain, see here: <https://www.copyrightuser.org/create/public-domain/>

For further information about Fan Fiction, see here: https://en.wikipedia.org/wiki/Fan_fiction

CASE FILE #22: THE TWO HEADS

LEARNING AIMS

- Understand the concept of joint authorship
- Understand how joint authorship affects the copyright term
- Understand how joint ownership of a work affects how it can be used

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- When is a work jointly authored?
- When does a work of joint authorship enter the public domain? (That is, when does copyright come to an end?)
- How is the duration of copyright in a film calculated?
- When a work is jointly owned, do the owners have to agree on how the work is used?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHEN IS A WORK JOINTLY AUTHORED?

- See **TEXT BOX #2**
- The law defines when a work has been jointly authored. There are three key criteria to satisfy.
 - Did each of the authors contribute something to making the work?
 - Did they plan to create the work collaboratively?
 - Are their contributions distinct from each other?

- For example, if John writes the music for a song and Paul writes the lyrics they have collaborated to produce a song, but this is **not** a work of joint authorship.

Instead, John has authored the music on his own, and Paul has authored the lyrics on his own. Their contributions are distinct from each other. And, each will have a separate copyright in the music and lyrics respectively.

- However, if John and Paul collaborate on both the music and the lyrics, each working together, their work will be jointly authored. That is, each person's contribution to writing both the music and the lyrics cannot be untangled from the other.

WHEN DOES A WORK OF JOINT AUTHORSHIP ENTER THE PUBLIC DOMAIN?

- See **TEXT BOX #3**
- Copyright duration for creative works is calculated with reference to the life of the author. That is, copyright in literary, dramatic, musical and artistic works lasts for the life of the author plus 70 years.

So, 70 years after the author has died, copyright comes to an end. Another way of saying this is that the work enters the public domain: it can be freely used by anyone for any purpose without having to ask anyone for permission.
- If a work has been jointly authored, this affects how duration of copyright is calculated. That is, copyright will last for 70 from the end of the year in which the last of the joint authors dies.

HOW IS THE DURATION OF COPYRIGHT IN A FILM CALCULATED?

- See **TEXT BOX #4 and #6**
- Calculating the duration of copyright in a film is more complicated than for a literary, dramatic, musical or artistic work.
- The law defines the authors of a film as: the producer and the director (co-authors).

However, the duration of copyright in a film is calculated according to the last to die of four different persons: the director, the author of the screenplay, the author of the film dialogue (if different), and the composer of any specifically created film score.

That is, copyright lasts for 70 years after the last of these four people to die.
- Why is this the case? A cynical explanation would be because it is economically beneficial for the producer of the film (who almost always owns the copyright). If four people must die before the 70-year post mortem term starts to run, the film will likely stay in copyright for longer.
- In addition, the UK law provides for a category of films created without authors which only receive protection for 50 years from the year in which they were made.

The shorter term reflects the idea that these films do not really involve creative or imaginative choices on the part of a director or filmmaker. Spontaneous filming or the type of casual everyday footage we routinely take with mobile phones would fall within this category.

WHEN A WORK IS JOINTLY OWNED, DO THE OWNERS HAVE TO AGREE ON HOW THE WORK IS USED?

- See **TEXT BOX #5**
- In a word: **YES**. If you jointly author a work, then you will also jointly own that work with your co-author. All decisions about how a work is exploited economically – whether it is sold or licensed to someone else – must be jointly agreed. One joint owner cannot decide to do something with the work without the permission of the other joint owner.

SUGGESTED ACTIVITIES

Working in pairs, ask the students to produce a one-page outline for a new film, thinking about plot, setting and characterisation. Next, ask them to swap their pitch with another pair of students to receive feedback and suggestions for developing their ideas. Based on the feedback received, the students should revise their original outline.

When complete, ask them to discuss who has authored the one-page plan.

Have both students contributed equally to the creation of the work (perhaps, perhaps not)? Even if they haven't, are they both authors (almost certainly, yes)?

What have the 'reviewers' added to the creation of the work? Are they also authors (probably not – if anything, they have probably offered no more than ideas)?

Ask them to consider the following hypothetical scenario – one of the students (student A) is approached by a film producer to write a full screenplay for their film. But the producer does not want the other student (student B) involved in the project. Can student A proceed without student B's permission (a legal question)? Should student A proceed without student B's involvement (an ethical question)?

CASE FILE #22: THE TWO HEADS

1. INTRODUCTION

In *The Forger's Apprentice*, Sherlock and John recall meeting with a film producer who asks them to investigate the disappearance of the star of the film. In [Case File #13](#) we considered how the law defines the concept of the author in relation to different types of protected work, including films. We also considered how a film based on an existing screenplay or script constitutes a new copyright work with different owners, usually the producer and the principal director.

In this Case File #22 we consider the concepts of joint authorship and joint ownership of a copyright work.

2. JOINT AUTHORSHIP

Section 9(1) of the Copyright Designs and Patents Act 1988 (the CDPA) tells us that an 'author' of a literary, dramatic, musical and artistic work is the person who creates the work. However, the CDPA provides a specific definition of authorship when dealing with a film: the legal authors of a film are the producer and the principal director of the film (CDPA, s.9(2)(ab)). Together they are the joint authors of the film.

More generally, the CDPA defines a work of joint authorship as one 'produced by a collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors' (s.10(1)). So, when trying to establish whether a work has been jointly authored, ask whether:

- each of the authors contributed in some way to the making of the work
- the work has been produced through a process of collaboration, meaning that, when setting out to create the work, the authors were working to some form of shared plan
- the respective contributions are not distinct or separate from each other

If the answer to each of these questions is yes, the work has been jointly authored.

The case of *Beckingham v Hodgens* (2003) provides a good illustration of when the law considers a work to be jointly authored. In this case, a session musician was hired to play the fiddle (the violin) at a recording session in 1984 organised by the band *The Bluebells*. The band were recording their version of the song *Young at Heart*, a song first recorded in 1982 by the female pop group *Bananarama*. The session musician contributed a new fourteen-note introduction to the song. Years later, he based his claim of joint authorship on the introduction he had contributed. The court held that he had jointly authored the new version of the work.

Have you ever created a work of joint authorship?

3. JOINT AUTHORSHIP AND COPYRIGHT DURATION

In [Case File #2](#) we saw that, generally, copyright in literary, dramatic, musical and artistic works lasts for the life of the author plus 70 years. After that time, copyright expires and the work enters the public domain.

However, one of the important consequences of establishing that a work is a work of joint authorship concerns how duration of protection is calculated. If a work has been jointly authored, copyright lasts for 70 years from the end of the year in which the longest surviving joint author dies.

Consider, for example, the songs of John Lennon and Paul McCartney.

John Lennon was shot and killed on 8 December 1980. The best-selling single of Lennon's solo career was *Imagine*, first released in 1971. It remains in copyright for 70 years from the end of the year in which Lennon died: that is, until 31 December 2050. However, all the songs that Lennon co-wrote with McCartney during their time in *The Beatles* will remain in copyright for 70 years from the end of the year in which Paul McCartney dies. If, for example, McCartney were to die in 2020, the Lennon and McCartney songbook will remain in copyright until 31 December 2090.

4. CURIOSITY

Given that the legal authors of a film are defined by the CDPA to be the producer and the principal director, one might also expect the duration of copyright in a film to be calculated with reference to these two individuals. But in fact, copyright duration in a film is calculated in accordance with the last to die of four specifically designated persons: the director, the author of the screenplay, the author of the film dialogue (if different), and the composer of any specifically created film score (s.13B(2)).

Why do you think this is?

5. JOINT OWNERSHIP

Normally, the joint authors of a work will also be the joint owners of the copyright in the work. Moreover, joint authors will typically own the copyright in equal shares even if they have not contributed equally to the creation of the work. In the *Beckingham* case, discussed above, although the session musician's contribution to the creation of the song was based primarily on the new fourteen-note introduction, the court decided that he was entitled to an equal share in the copyright.

Another important consequence of joint ownership is that you cannot simply acquire permission to make use of a work from one of the joint owners only. You must get permission to use the work from all the relevant joint owners (CDPA, s.173(2)). And this applies to the joint owners themselves. One joint owner cannot grant permission to someone else to make use of the work without the agreement of the other joint owner(s). Indeed, if one joint owner – let's call him George – granted a licence to a third party to make use of the work without the consent of

the other joint owner(s), George would actually be infringing the copyright of the other joint owners by authorising the use of the work without their permission.

6. FOR DISCUSSION: FILMS WITHOUT AUTHORS

We know that the duration of copyright in films is calculated in accordance with the last to die of four designated persons: the director, the screenplay writer, the author of any film dialogue, and the composer of the film score.

However, if a film does not have a director, a screenplay writer, an author of any dialogue, or a composer, the duration of copyright is calculated differently: copyright expires 50 years from the end of the year in which the film was made (CDPA, s.13B(9)).

What type of works would qualify for protection under this heading? What types of films do not have a director, an author or composer? And why do you think these films are treated differently when calculating duration of protection?

Imagine that you take some spontaneous footage of your friends in the park using your mobile phone. The footage you take is a film, according to the CDPA. But how long will copyright last in that work last?

7. USEFUL REFERENCES

Beckingham v Hodgens [2003] EWCA Civ 143 is available here:

<https://www.bailii.org/ew/cases/EWCA/Civ/2003/143.html>

The Copyright, Designs and Patents Act 1988 is available here: <http://www.legislation.gov.uk/ukpga/1988/48/contents>

For further information on copyright duration in the UK, see *Copyright Bite #1 – Copyright Duration*: <http://copyrightuser.org/copyright-bites/1-copyright-duration/>

For a resource to help you calculate whether a work is in the public domain in the UK or other EU Member States, see: www.outofcopyright.eu

If you are interested in films that are no longer in copyright (as well as links to those films) you could browse or search on Wikimedia Commons:

https://commons.wikimedia.org/wiki/Category:Films_in_the_public_domain

CASE FILE #23: THE EIGHT CATEGORIES

LEARNING AIMS

- Understand that copyright does not protect all types of creative activity
- Understand that multiple rights can exist in the same work at the same time
- Accept that sometimes copyright law can be complicated and confusing

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- What eight categories of work are protected by copyright?
- Can the same work fall into more than one category?
- Why does it matter?
- Can more than one copyright exist in the same work?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHAT EIGHT CATEGORIES OF WORK ARE PROTECTED BY COPYRIGHT?

- See **TEXT BOX #2**
- The law protects eight discrete categories of work. Only these types of work are protected by copyright. Other forms of creative production are not. For example, creating a scent – a perfume – is not protected by copyright.
- The eight types of protected work are as follows:
 - Literary works
 - Dramatic works
 - Musical works
 - Artistic works
 - Sound recordings
 - Films
 - Broadcasts
 - The typographical arrangement of published books (how the page is laid out, the margins, the font, and so on)

CAN THE SAME WORK FALL INTO MORE THAN ONE CATEGORY?

- See **TEXT BOX #2 and #3**
- In a word: **YES**.
- While the legislation has tried to keep these categories quite distinct, the courts have indicated that the same work might fall into two different categories.
- This is well illustrated by the decision of the Court of Appeal in *Norowzian* (1999): they decided that film might be protected by copyright as a film *and* as a dramatic work.

WHY DOES IT MATTER? IF SO, WHY?

- See **TEXT BOX #2, #3 and #5**
- **It does matter.**
- For one thing, the economic rights that a copyright owner enjoys are different depending on which category of copyright work you are dealing with.

For example, if you own the copyright in a literary work, one of your economic rights includes performing or showing the work in public. However, this public performance right does not apply to artistic works.

For further details, see [Case File #0](#).

- Another way in which it matters is that it might affect how the duration of copyright protection is calculated. That is, the duration of protection might be different depending on which category the work falls into.

NOTE: This is explored further in **TEXT BOX #5** although this exercise should only be considered if the students also have access to, or have previously read, [Case File #22](#).

- The answers to the questions in **TEXT BOX #5** are as follows:

Under the CDPA, if a film is protected as a dramatic work who is the author of that work? The author is defined as **the person who creates the work** (this is likely to be the director).

If a film is also protected as a film, who is that author of that film? The author is defined as **the principal director and the producer** (that is, they are joint authors).

How is duration of copyright protection calculated in relation to the film as a dramatic work? Duration lasts for **the life of the author of the dramatic work** plus 70 years.

How is duration of copyright protection calculated in relation to the film as a film? Duration lasts for 70 years after the last of the following four people to die: the **director**, the **author of the screenplay**, the **author of the film dialogue** (if different), and the **composer** of any specifically created film score.

These provisions create a potentially very confusing situation.

One obvious way to simplify the law would be to implement a rule that works can only fall within one of the eight specified categories. That would, in turn, help to clarify who is the legal author of the work in question, and for how long it is protected.

CAN MORE THAN ONE COPYRIGHT EXIST IN THE SAME WORK?

- See **TEXT BOX #2**
- **YES.** This happens all the time.

Think about how music or films or theatre is created. They often involve multiple authors creating individual works that, taken together, make up the album, or the film, or the stage play.

- For example, a recording of a song: there may be copyright in the lyrics (written by one person), in the music (written by another person), in the musical arrangement (again, perhaps devised by someone else), and in the sound recording itself (arranged and coordinated by the producer).

Each of these elements might exist as separate copyright works that, once combined, is released to the public as one song.

(Although often, the contractual agreement between the producer or the music company and the artists will mean that the company holds the rights to all these elements.)

CASE FILE #23: THE EIGHT CATEGORIES

1. INTRODUCTION

Holmes and Watson are being interviewed and filmed at the same time. When the mysterious interviewer asks Sherlock to 'please sit down', we see him appearing in different parts of the room assuming various postures. We adopted this editing technique – known as 'jump cutting' – to refer to a famous case concerning a film: *Norowzian v Arks Ltd* (1999).

Filming an interview of someone will often simply involve setting up a single camera, getting it in the right position, checking the sound levels, and then pressing record. The film of the interview is protected by copyright. However, making a movie such as *The Forger's Apprentice* will involve various works created by different people and protected by copyright, such as texts, images and music.

In this Case File #23 we consider the different categories of work that can be protected by copyright in the UK, as well as whether the same work might sit in more than one category at the same time.

2. EIGHT CATEGORIES OF COPYRIGHT WORK

The Copyright, Designs and Patents Act 1988 (the CDPA) sets out a list of eight different types of work protected by copyright (s.1). These are:

- original literary, dramatic, musical and artistic works (s.1(1)(a))
- sound recordings, films and broadcasts (s.1(1)(b))
- the typographical arrangement of published editions (s.1(1)(c))

While all eight types of protected subject matter are referred to in the legislation as 'works', it is important to appreciate that more than one copyright may exist in a single cultural product or creation. For example, a recording of a song: there may be copyright in the lyrics, in the music, in the arrangement, and in the sound recording itself. With a film, there may be copyright in the original story, in the screenplay (as a dramatic work), in the musical score, as well as in the film (as a recording). It is important to be able to identify the different types of copyright that may be involved as each may have a different author and/or owner.

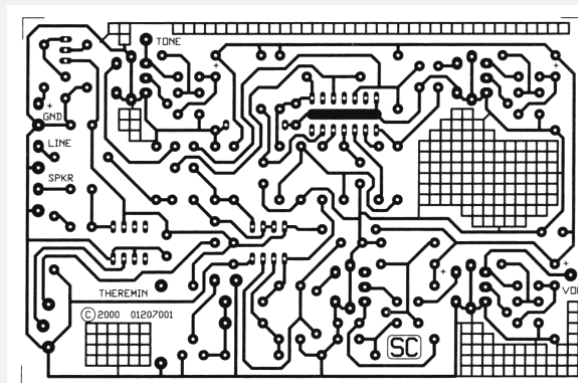


Image source: www.thereminworld.com/pics/schematics/SiliconChip/sc-pcb.gif

One question left open by the CDPA is whether the same work might fall into two different categories at the same time. Consider the above circuit diagram for a silicon chip. The author claims that it is copyright protected (see the bottom left-hand corner of the diagram). But what kind of copyright work is it?

It conveys information and provides a set of instructions that can be read by people skilled in the manufacture of silicon chips, so it could be considered a literary work. Or, is it an artistic work? It certainly has an obvious artistic aesthetic and appeal. Or perhaps it is *both* a literary work and an artistic work?

Whether something can fall into two different categories of copyright-protected work at the same time was considered in *Norowzian v Arks Ltd* (1999): this case concerned a film.

3. THE CASE: *NOROWZIAN v ARKS LTD* (1999)

In *Norowzian v Arks Ltd* (1999) the claimant had made a short film, *Joy*, with a single dancer as the protagonist. The film had no dialogue and made use of an editing technique referred to as 'jump cutting'.

Arks, who were the advertising agents for the Guinness group, approached Norowzian to make an ad campaign entitled *Anticipation*, influenced by *Joy*. Norowzian refused; Arks made their ad campaign anyway (you can watch the advert [here](#)).

Because Arks had not included any actual footage from *Joy* in their advert, Norowzian was not able to claim copyright infringement in his film *as a film*. Instead, however, he argued that in producing an advert influenced by *Joy*, Arks had infringed the copyright in his film *as a dramatic work*.

Under the CDPA, a film is defined as a recording on any medium from which a moving image may be produced by any means (s.5B(1)), a broad definition which encompasses celluloid films, video recordings, disks, and so on. In addition, the CDPA defines a dramatic work as including 'a work of dance or mime' (s.3(1)).

In the High Court, the judge held that *Joy* could not be a recording of a dramatic work as the editing technique employed created a visual image that could not be recreated in the real world. That is, a work of dance or mime had to be capable of being performed.

In the Court of Appeal, however, it was held that the expression 'dramatic work' should be given its ordinary and natural meaning, which was *a work of action, with or without words or music, which was capable of being performed before an audience*. The court continued that a film could be *both* a recording of a dramatic work but also a dramatic work in that it was a work of action that was capable of being performed before an audience.

In other words, a film might be protected by copyright as a film *and* as a dramatic work: that is, it could fall into two of the eight different categories of work protected by copyright.

4. CURIOSITY: FILMS MADE BEFORE 1 JUNE 1957

Whereas the 1988 CDPA protects eight different categories of work, earlier copyright acts did not. For example, under the 1911 Copyright Act copyright was not granted to a film as such. Instead, films were either protected as if they were a series of photographs (for non-fiction and documentary films), or they were protected as if they were a dramatic work, like a play (fiction films).

This had an important consequence for duration of protection in films at that time. That is, under the 1911 Act fiction films (as dramatic works) were protected for the life of the author of the film (at that time, the director) plus 50 years. By contrast, non-fiction and documentary films were protected (as photographs) for 50 years from the year in which they were made.

Under the CDPA today, certain types of films still only receive 50 years protection from the end of the year in which the film was made. Read [Case File #22](#) to find out more.

5. FOR DISCUSSION: LIFE IS A DRAMA (OR MAYBE A FILM) (OR MAYBE BOTH)

In general, the fact that a film might fall within two different categories of protected work – as a film and as a dramatic work – does not give rise to many contradictions or problems, in that both types of work enjoy the same economic and moral rights. One difference, however, concerns duration of protection.

Read [Case File #22](#) and try to answer the following questions:

- under the CDPA, if a film is protected as a dramatic work who is the author of that work (as defined in law)?
- if a film is also protected as a film, who is that author of that film (as defined in law)?

Now ask yourself:

- how is duration of copyright protection calculated in relation to the film as a dramatic work?
- how is duration of copyright protection calculated in relation to the film as a film?

Do think the law is too complicated? Does it make sense? What steps could be taken to simplify the law of copyright in relation to the protection of films?

6. USEFUL REFERENCES

The Copyright, Designs and Patents Act 1988 is available here: <http://www.legislation.gov.uk/ukpga/1988/48/contents>

Norowzian v Arks Ltd [1999] EWCA Civ 3018 is available here: <http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/1999/3018.html>

For further information on copyright duration in the UK, see *Copyright Bite #1 – Copyright Duration*: <http://copyrightuser.org/copyright-bites/1-copyright-duration/>

CASE FILE #24: THE RETRIEVED IMAGE

LEARNING AIMS

- Understand that the law allows archives to preserve works in their collections by making copies
- Be able to discuss the relationship between copyright ownership and film restoration projects

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- What is the 'preservation exception'?
- Why does the law provide an exception for preservation?
- What is the relationship between copyright ownership and restoration projects?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHAT IS THE 'PRESERVATION EXCEPTION'?

- See **TEXT BOX #2**
- You are free to make use of a copyright work, without seeking the owner's permission, if your use falls within one of the [copyright exceptions](#).
- Recent changes in the law have made it easier for galleries, libraries, archives, and museums (the GLAM sector) to make copies of creative works in their collections to preserve and make use of them for future generations. One such exception is 'copying for preservation purposes'.
- An archivist, for example, can make a copy of an item in her institution's permanent collection in order to preserve or replace that item in that collection, or to replace an item in the permanent collection of another library, archive or museum that has been lost.
- There are some conditions to this exception. A particularly interesting condition is that it should not be 'reasonably practicable' to purchase a replacement copy of the work. In the case of films, which are often considered to be unique copies, that should in practice not pose too much of a problem.

WHY DOES THE LAW PROVIDE AN EXCEPTION FOR PRESERVATION?

- See **TEXT BOX #2**

- Having a preservation exception that applies to films is particularly important. Film can be a very fragile material. Indeed, most films from before the 1950s were shot on highly flammable nitrate, which is no longer safe for use. Without an exception allowing copying for preservation purposes many of these historic films could not be copied in their entirety onto a more stable material for preservation, restoration and use.
- Before this exception, format shifting for preservation purposes – copying a celluloid film onto a digital format, for instance – was considered a breach of copyright.

For example, if you were restoring a house or a painting, the restoration work is carried out on the actual physical object itself. But film restoration is different. That is, to preserve a film properly it is essential to copy the film onto a new material or medium. Since copying is a copyright-protected activity, for which you would normally need to seek permission, the preservation exception is particularly useful for heritage institutions.

WHAT IS THE RELATIONSHIP BETWEEN COPYRIGHT OWNERSHIP AND RESTORATION PROJECTS?

- See **TEXT BOX #2, #3, and #4**
- Film restoration projects can often be large international collaborative projects. Part of the project might be a search for additional source elements that might be dispersed over many institutions.

A project can also entail several jurisdictions, which might complicate matters. A film that is in the public domain in its country of origin, for instance, is not necessarily in the public domain of the country where it is restored and distributed.
- Sometimes it is unclear who are the rights holders to a particular film (these films are called *orphan films*), so it is unclear whom you should ask for permission.
- Film restorations can be incredibly expensive projects, especially when the film is restored in a special format, such as the recent 70mm restoration of *2001: A Space Odyssey* (Stanley Kubrick, 1968).

It is very likely that large investments in these projects are mainly made when there is a clear rights situation.

- This doesn't mean that films that are in the public domain (to which the rights have expired) are *not* restored, but in practice these films tend to be restored by public institutions rather than the more commercial ones. Commercial institutions, such as Hollywood studios, arguably deem these kinds of investments not worthy if they can't protect the film.

CASE FILE #24: THE RETRIEVED IMAGE

1. INTRODUCTION

The Adventure of the Forger's Apprentice references many films, such as *Hail, Caesar!* (US, Joel and Ethan Coen, 2016) and *Pulp Fiction* (US, Quentin Tarantino, 1994). *Pulp Fiction* is directed by a filmmaker who is known for his extensive film knowledge and for making numerous references to other films in his own work. *Hail, Caesar!* nostalgically points to a world that doesn't exist anymore by referencing the golden era of Hollywood studio film production. These filmmakers have been able to play freely with their extensive knowledge of film history and to draw creative inspiration from the many films they have seen.

But where do films go after they are out of circulation? Can we still see them when we want to? Does anything need to happen to older film material to bring it back to the screen? No matter how films are produced – digitally, or photochemically as was the industry standard until quite recently – several steps need to be taken before you can enjoy most material on a screen again, whether that's on a cinema screen or on your own laptop. But who is entitled to take those steps?

This Case File #24 considers film as cultural heritage, the preservation exception for archive material, and some of the wider implications of preservation and restoration.

2. PRESERVATION EXCEPTION FOR ARCHIVE MATERIAL

As we have seen in some of the previous Case Files (have a look at [Case Files #5](#), [#6](#) and [#19](#)), you are free to make use of a copyright work, without seeking the owner's permission, if your use falls within one of the [copyright exceptions](#). The Copyright, Designs and Patents Act 1988 (the CDPA) sets out various exceptions, concerning non-commercial research and private study, quotation, news reporting, education, and other uses.

Recent changes in the law have made it easier for galleries, libraries, archives, and museums to make copies of creative works in their collections to preserve and make use of them for future generations (see sections 40A-43A of the CDPA). Here we will focus on just one of those exceptions: copying for preservation purposes (s.42).

Having a preservation exception that applies to films is particularly important. Film can be a very fragile material. Indeed, most films from before the 1950s were shot on highly flammable nitrate, which is no longer safe for use. Without an exception allowing copying for preservation purposes many of these historic films could not be copied in their entirety onto a more stable material for preservation, restoration and use.

Section 42 informs us that a librarian, archivist or curator of a library, archive or museum may, without infringing copyright, make a copy of an item in that institution's permanent collection in order to preserve or replace that item in that collection (s.42(1)(a)), or to replace an item in the permanent collection of another library, archive or museum that has been lost, destroyed or damaged

(s.42(1)(b)). Typically, the item that is being preserved or replaced must be held as part of the institution's collection to enable researchers or members of the public to access and reference the work on the institution's premises.

The condition that a film needs to be part of the collection kept wholly or mainly for the purposes of reference *on the institution's premises* might prove to be a problem. For instance, academic researchers may consult films at the archive itself, but archive films are often screened at international film festivals, shown in local cinemas, or made available online so members of the public can enjoy and appreciate them. Does this mean these films are no longer kept mainly for reference *on the institution's premises*, and so do not fall within the preservation exception? Perhaps yes, perhaps no: it could be argued either way.

The preservation exception also states that if it is 'reasonably practicable' to purchase a replacement copy of the work then you cannot make a preservation copy (s.42(3)). For archivists in general, and film archivists specifically, this condition will generally not prevent relying on the exception. The CDPA does not make it entirely clear what 'not reasonably practicable to purchase a replacement' means, but in the case of certain films, it is easy to understand how purchasing a replacement copy would be impossible. Consider silent cinema, roughly defined as films with no synchronised soundtrack and/or spoken dialogue, produced until the mid-1930s: estimated survival rates are less than 20% of worldwide production. Many of the surviving silent films are considered unique copies; that is, there are no known other copies of the same film in any of the world's other film archives. In most cases, it will therefore not be possible to purchase another copy.

Of course, we should also note that many silent and other historic films will be out of copyright, so an archive would not have to rely on an exception or the former copyright owner's permission for use. For a resource to help you calculate whether a work is in the [public domain](http://www.outofcopyright.eu) in various EU member states, see www.outofcopyright.eu

3. AN AMERICAN IN PARIS

Film preservation is usually only a first step in a larger restoration process. Passive preservation, for instance, can be as simple as improved storage conditions, whereas active preservation can entail the creation of duplicate copies. The 'restoration' of film can encompass anything from minimal interventions – such as image stabilisation to compensate for the film's warping and shrinking over time – to interventions including the reconstruction of the film's story, and digital image restoration in which the film's images are individually retouched.

An interesting example that shows the complexity of some of these restoration processes is a recent French discovery. The negative of the 1916 film *Sherlock Holmes* (US, Arthur Berthelet), starring the American stage actor William Gillette as the title character, was (re)discovered in the vaults of the French national film archive, the Cinémathèque française. The film was found after having been thought lost for nearly 100 years. (It seems obvious that it would be difficult to purchase a replacement.)

American production company Essanay shipped the film negative from the US to France in 1919. Three years after the film had its initial run in the US, and with Europe freshly out of WW1, Essanay saw new opportunities for exploiting its material abroad. The film was cut into 4 chapters for the French market, as serial films were popular in Europe at the time, and the intertitles in English were translated into French. (Before the invention of sound, intertitles – images of text that are inserted in the film – helped explain the story of the film or dialogue between the characters, and in the case of foreign productions these were translated to appeal to a local audience.) The negative was then printed at a French laboratory, observing colouring instructions as indicated on the film rolls. But after it had played in local cinemas for a while – the film was distributed in weekly chapters – the copies disappeared from public view. It is unclear how the negative material ended up and resurfaced in the Cinémathèque’s vaults all these years later.

The San Francisco Silent Film Festival (SFSFF) restored the film in collaboration with the Cinémathèque française. In bringing the film back to the big screen, the SFSFF commissioned one of the leading film restoration laboratories *L’Immagine Ritrovata* in Bologna, Italy, to scan the film’s individual images, so that subsequent digital image restoration – such as dust and scratch removal – could be carried out. It also translated the film’s French intertitles back into English, in consultation with William Gillette’s original manuscripts, which are preserved at the Chicago History Museum.

In this case, the SFSFF did not have to ask anyone for permission to undertake the restoration process. In the US, the film is out of copyright: it is in the public domain, as the film had a theatrical release date from before 1923. (Indeed, in the US, any work with an authorised publication date from before 1923 is automatically in the public domain.) The fact that the film is in the public domain in the US, however, does not mean that the film is also in the public domain in the United Kingdom (or, France). Read [Cases File #22](#) and [#23](#) to see how duration of copyright protection is calculated in relation to film in the UK.

4. THE MISSING LINK

Preservation and restoration processes can have far-reaching cultural implications. In the case of *Sherlock Holmes*, some of them seem obvious. Sherlock Holmes fans as well as William Gillette fans were elated with the news that the long lost film had been found and was going to be restored.

Being able to see the first man who personified Sherlock Holmes, in not only his sole surviving performance as Holmes but also in the only film he ever made, fills in a missing link in the understanding of the character. Gillette had been playing Holmes on stage for a few decades before he took on the role on film. Indeed, the film is a reproduction of Gillette’s four-act play of the same title, so the film also sheds light on the actor’s play of Holmes. Gillette’s portrayal of Holmes is generally understood to be the basis of the modern image of the detective.

5. FOR DISCUSSION: FOR PROFIT OR POSTERITY?

Do you think that the preservation exception is a helpful tool in the daily work of archives?

The Adventure of the Forger's Apprentice also references such film classics as *The Great Escape* (US, John Sturges, 1963) and *8 1/2* (IT, Federico Fellini, 1963). Both films have recently been digitally restored for their 50th anniversary. *The Great Escape*, for example, was restored for a large sum of money by its rights holder MGM.

The film material of *Sherlock Holmes* was found in the French national film archive, which is an institution that is 'not-for-profit'. Do you think that it would have made a difference if the film material had been found elsewhere – in a 'for-profit' institution, for instance? Do you think there is a relationship between copyright ownership and restoration projects? Are copyright owners more likely to spend money and time in preserving and restoring historic films than national libraries and archives?

6. USEFUL REFERENCES

The Copyright, Designs and Patents Act 1988 is available here:

<http://www.legislation.gov.uk/ukpga/1988/48/contents>

Sections 40A-43A set out the exceptions concerning the use of work within certain institutional contexts, such as libraries, archives, and museums.

You can find lots of information about exceptions for libraries, archives and museums in Chapter 8 of 'Copyright 101' of Copyright Cortex, available here:

<https://copyrightcortex.org/copyright-101/chapter-8>

For more information about film restoration, see Mark-Paul Meyer and Paul Read (Eds.), *Restoration of Motion Picture Film* (Oxford: Butterworth-Heinemann, 2000)

CASE FILE #25: THE ACCIDENTAL IMAGE

LEARNING AIMS

- Understand that there are situations in which you are allowed to use the work of others in your own work without asking for their permission
- Be able to discuss the differences between fair use and fair dealing

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- What is the difference between 'fair use' and 'fair dealing'?
- Are fair dealing exceptions helpful tools to documentary filmmakers?
- What is the relationship between digitisation and fair dealing exceptions?
- How would you react if it was your work that was included in someone else's work?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHAT IS THE DIFFERENCE BETWEEN 'FAIR USE' AND 'FAIR DEALING'?

- See **TEXT BOX #3 and #4**
- Copyright law provides for a number of exceptions that allow you to make use of someone else's work without having to ask for permission. In the US this provision is called 'fair use'; in the UK these exceptions are often referred to as the 'fair dealing' exceptions.
- There are important differences between the two: in the US, the list of specified purposes is not exhaustive, meaning that any purpose may be fair use in the opinion of the court. In the UK, however, there is a list of certain specific purposes the use has to meet first; some examples are [criticism or review](#), [research and private study](#), [reporting current events](#), and [enabling access and use for disabled persons](#).
- Fair dealing with a work for these purposes does not infringe copyright in the work.
- The exception for [quotation](#), which was added to the list of exceptions in 2014, is the first ever exception in UK law that is not linked to a specific purpose. (This has moved fair dealing interpretation in the direction of fair use.)

ARE FAIR DEALING EXCEPTIONS HELPFUL TOOLS TO DOCUMENTARY FILMMAKERS?

- See **TEXT BOX #1 and #2**
- When making a documentary, you might want to use a clip of someone else's film to back up your own argument. You might be able to rely on fair dealing exceptions

such as quotation or criticism and review, which means you don't have to ask the rights holder's permission to do so.

- There are a few important factors to consider in reusing other people's work; for instance, the purpose of the work. Does the material have a different effect than in its original use? It is also important to consider the amount of work you use; in general, it is considered fair if you only use the minimum amount that is necessary to make your point. The law does not define the amount precisely: it merely states it should be 'no more than required'.
- To know when you are able to quote from other people's copyright material without having to ask for permission will expand the range of what you can make, and you avoid rights clearance problems dictating what makes it into your film or not.
- Another consequence of relying on fair dealing is that it can save you a lot of money, which is great news for documentary filmmakers who often work with a limited budget.
- We like to think that fair dealing exceptions are fantastic tools for (documentary) filmmakers.

WHAT IS THE RELATIONSHIP BETWEEN DIGITISATION AND FAIR DEALING EXCEPTIONS?

- See **TEXT BOX #2, #3, and #4**
- Creative works, such as photographs and audiovisual clips, are now widely available due to digital means, such as broadband internet and DVDs.
- In the last few decades, digital tools have made copying someone else's work extraordinarily easy.
- New ways of creatively re-using existing material, such as compilation videos and 'supercuts', have become everyday practices.
- Digital technological developments and the expanse of fair dealing exceptions have gone hand in hand.
- (There is another side to the coin to consider: in order to be able to rely on fair dealing, you need access to the source material.)

HOW WOULD YOU REACT IF IT WAS YOUR WORK THAT WAS INCORPORATED IN SOMEONE ELSE'S WORK?

- See **TEXT BOX #2, #3 and #5**
- There is **no one correct answer here**.
- In order to establish whether they had relied on fair dealing in using your work, you could check their use against the same factors you would use if you would reuse someone else's work into yours.

These factors include the purpose for the reuse, the proportion of the work used, the motive for reusing the work, and the status of the original. The courts will, for instance, not allow a defence of fair dealing if they consider that the real motivation behind the use of the work is to produce a commercially competitive product.

- It would be interesting to debate with the students whether their answers would change in case they would strongly disagree with the message the new work conveys, or in case the new work would be commercially successful.

There is a popular belief that fair use/fair dealing exceptions are valid only when the use is non-commercial. Copyright exceptions have been designed to expand the range of cultural production, not just the range of non-commercial cultural production. Currently the simplest calculation, is to find a new purpose and to make sure only as much of the original has been used as is necessary for that purpose.

CASE FILE #25: THE ACCIDENTAL IMAGE

1. INTRODUCTION

In the process of filmmaking, most elements you see on screen have been placed there strategically. In fiction feature filmmaking, for instance, it is the prop(erty) master's job to provide the director with the required 'props' on set: a particular chair or car, for instance, which might help explain some part of a character's story, or motivation.

In animation, in which the images are literally created from scratch, everything you see on screen has been the result of a deliberate decision. Indeed, in each episode of *The Game is On!* visual 'clues', such as the print on a t-shirt, the posters on the wall – or even the wallpaper itself – have been 'planted' for you to discover and link to the theme of the episode.

In other kinds of filmmaking, such as documentary filmmaking, the situation is different. In documentaries – roughly defined as films grounded in real life – the story sometimes develops in front of the camera as it is happening. This means that background elements, such as a television programme playing on a screen in a corner of the shot, the music that is playing in a shopping mall, or a ringtone – in other words, other people's copyright material – may accidentally make it into the film.

Some documentary filmmakers make use of other people's material in a different way: they back up their arguments with historical images, either moving images or photographs. And there are also filmmakers who see themselves primarily as artists and who only use other people's material to create new work: a form of filmmaking often called found footage filmmaking.

When can you use someone else's work in your own work without asking for permission? What are the copyright exceptions that a filmmaker can depend upon? In this Case File #25 we explore the relationship between documentary filmmaking, the re-use of other people's work and copyright exceptions.

2. COPYRIGHT EXCEPTIONS: WHAT IS FAIR?

In some of the previous case files we have seen that UK copyright law provides for a number of exceptions to copyright, specific circumstances when work can be used without the need to get permission from the copyright holder (have a look at [Cases File #5](#), [#6](#), or [#24](#)). There are various copyright exceptions set out in the Copyright, Designs and Patents Act 1988 (the CDPA), concerning non-commercial research and private study, news reporting, parody, education, and other uses.

A number of these exceptions are sometimes referred to as 'fair dealing' exceptions because the law requires that your use of the material for that particular purpose must be fair. Indeed, each copyright exception has specific requirements about how and when the material can be used without permission, and in order to benefit from an exception you must make sure you satisfy the relevant requirements.

Being properly informed as a filmmaker about what is fair dealing will enable you to confidently create your new work, and to avoid rights clearance problems dictating what makes it into your film or not. To know when you are able to quote from other people's copyright material without having to ask for permission will expand the range of what you can make. Another consequence of relying on fair dealing is that it can save you a lot of money, which is great news for documentary filmmakers who often work with a limited budget.

Let's consider the specific section of the CDPA that deals with quotations.

Section 30(1ZA) of the CDPA tells us that you can quote from a work if: the work has been made available to the public, the use of the quotation is fair dealing, the extent of the quotation is no more than is required by the specific purpose for which it is used, and the quotation is accompanied by a sufficient acknowledgement (unless this is impractical).

The CDPA does not specifically define 'fair dealing'. Some factors have been identified by the courts as relevant in deciding whether a particular use is fair, but as the UK Intellectual Property Office (IPO) states: it will always be a matter of fact, degree and impression in each case.

One relevant factor to consider is the purpose behind using the work: does the material have a different effect than in its original use? Is there a clear connection between the use of the clip and the intention of the larger film? Does it add context or has it been used for mere creative value? Consider, for instance, feature films that rely on archival footage to add an air of 'authenticity' to their dramatic stories, such as Kathryn Bigelow's *Detroit* (2017), Roman Polanski's *The Pianist* (2002), or Oliver Stone's *JFK* (1991). The archival clips in those films are used for a creative purpose only, and no new context is given – through the addition of a voice-over, for instance.

If this is the kind of film you intend to make, it may be difficult to argue that your use of the work is fair dealing. You should probably get permission from the rights holders instead. However, if you used the same clip of the Warsaw ghetto from *The Pianist* in a documentary about WW2 ghettos to illustrate your point, it is much more likely that you could rely on the fair dealing exception for quotation.

Another factor to consider, when thinking about 'fair dealing,' is the proportion of the work that is used. The CDPA does not define what 'no more than is required' means exactly, but it is generally understood as the minimum amount of work that is needed to make a certain point. That is, if you want to quote from someone else's film to make a point, you will very likely only have to show a short clip from that work to support your argument. However, depending on the circumstances, it may also be fair to quote a particular work in its entirety. For example, if you want to make use of a photograph for illustrative purposes in an historic documentary then it may well be fair to show the photograph in its entirety. This is what the IPO means with 'it will always be a matter of fact, degree and impression in each case.'

The market for the original work is one of the other determining factors in considering whether a particular dealing is fair. It will not be considered fair if the

new work can be seen as a substitute for the original and will threaten the commercial exploitation of the original work.

Finally, you should never forget that if the film material you want to make use of is out of copyright (that is, it is in the public domain), there is no need to rely on an exception or to seek permission from the former copyright owner. You can make use of material in the public domain without having to ask anyone's permission.

3. FAIRNESS IN SPRINGFIELD

Section 31 of the CDPA addresses incidental inclusion of copyright material. That is, copyright in someone's work is not infringed by its incidental inclusion in another work, such as an artistic work, a sound recording, a film or a broadcast. For example, you might be filming a scene on a busy street, and in the background of your shot is a poster for a new cinema release or an art exhibition. So long as the poster has not been deliberately included – that is, it is not the main focus of interest in the scene, or is of 'secondary importance' – there is no infringement.

Incidental inclusion only applies to 'live-action' material. For instance, it will not apply to animation in which everything on the screen is the result of deliberate decisions made by the filmmaker(s). Think about *The Game is On!* Nothing in these films has been incidentally included. If any aspect of other people's work has been included, it has been included for a purpose. However, the idea that there can be no incidental inclusion in animation does not mean there is no incidental inclusion with animation. Consider the following example from the US.

Sing Faster: The Stagehand's Ring Cycle is a 1999 documentary by Jon Else about the stagehands at the San Francisco Opera during the production of Richard Wagner's 17-hour Ring Cycle opera. To contrast the 'high' culture that is performed on stage with what the stagehands are doing backstage simultaneously, the filmmaker shows them playing cards and watching TV. The few seconds of an episode of (the highly recognisable) *The Simpsons* were shown on a television screen in the corner of the shot. The enormous amount of money that the rights holders wanted for permission to use the clip (\$10,000 for 4 seconds) almost brought the documentary to a halt.

As we have seen in [Case Files #2](#) and [#21](#), copyright laws differ from country to country. Unlike the UK and other EU countries, US copyright law does not include an exhaustive list of specific copyright exceptions such as quotation or incidental inclusion. However, it does allow 'fair use' of another person's work, a very general and open-ended exception. Section 107 of the US Copyright Act states that 'the fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching [...], scholarship, or research, is not an infringement of copyright.' The list of purposes included in the US fair use provision is not exhaustive, meaning that a conduct for any purpose may be fair use if it satisfies the requirement of fairness. The same section of the US Copyright Act provides a list of four factors to be considered in determining whether a particular use is fair:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

At the time, the filmmakers of *Sing Faster: The Stagehand's Ring Cycle* were advised that the inclusion of the clip from *The Simpsons* would probably qualify as fair use, but there was no guarantee that it would. Moreover, they were advised that Twentieth Century Fox, who own the copyright, would be likely to sue for infringement. Because of the risks involved, getting the required insurance for a distribution deal would have been difficult. So, the filmmakers needed to either pay the licensing fee, or not use the clip at all. In the end, they decided to replace the clip in the background with other, more generic and unrecognisable material.

If this film was made today in the UK, the filmmakers would likely be able to rely on the exception for incidental inclusion, or perhaps another copyright exception such as quotation, to ensure they could include the background footage in their documentary.

4. THE SIMPSONS / ENRON

The Simpsons was also at the heart of another dispute. In that scenario, a clip from *The Simpsons* was used to back up an argument in the 2005 documentary *Enron: The Smartest Guys in the Room*, about the collapse of the Enron Corporation. The makers of *The Simpsons* had come up with an amusement park ride called *Enron's Ride of Broken Dreams*. In the particular clip a group of people who believe that they will be rich plummet towards the 'Poor House'. The documentary filmmakers wanted to use the clip as an indication of how Enron's corporate scandal had made its way into popular culture.

In this case, the filmmakers decided to rely on the fair use defence. They considered that the purpose of the clip clearly served the intention of the film; they had used the minimum amount for their purpose, and the context of the material was changed while value was added. The clip was included in the documentary.

If this film was made today in the UK, the filmmakers would be able to rely on the fair dealing for quotation exception: the relevant requirements of the exception would likely be met, and the inclusion of the clip would likely not pose a problem.

5. FOR DISCUSSION: TO ASK OR NOT TO ASK?

Do you think that the exceptions for fair dealing for quotation and incidental inclusion are helpful tools to documentary filmmakers?

Digitisation has made it very easy to duplicate material, and to include that material into your own work. Do you think there is a link between digitisation and fair dealing?

How would you react if it was your work that was included in someone else's work? How would you establish whether they had relied on fair dealing in using your work?

6. USEFUL REFERENCES

The Copyright, Designs and Patents Act 1988 is available here:

<http://www.legislation.gov.uk/ukpga/1988/48/contents>

Chapter III (sections 28-76) sets out the Acts Permitted in relation to Copyright Works

You can find lots of information about Copyright Exceptions in Chapter 7 of 'Copyright 101' of Copyright Cortex, available here: <https://copyrightcortex.org/copyright-101/chapter-7>

For an introduction into documentary film, see Patricia Aufderheide, *Documentary Film. A Very Short Introduction* (Oxford: OUP, 2007)

For a US-specific initiative, see the *Documentary Filmmakers' Statement of Best Practices in Fair Use*, available here: <http://cmsimpact.org/wp-content/uploads/2016/01/Documentary-Filmmakers.pdf>

This statement is based on the study by Patricia Aufderheide and Peter Jaszi, for which they interviewed 45 filmmakers: *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*. (Washington, DC: Center for Social Media, American University, 2004)

CASE FILE #26: THE RECORDED PERFORMANCE

LEARNING AIMS

- Understand the benefits of performers' rights
- Be able to provide a few examples of performances or performers who might be protected by performers' rights
- Be able to explain the difference between the protection given to 'authors' with copyright and the protection given to 'performers' with 'performers' rights

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- Why did we introduce performers' rights into UK copyright law?
- What are the benefits of performers' rights?
- What type of performance (or performer) attract performers' rights?
- Should authors and performers receive the same rights?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHY DID WE INTRODUCE PERFORMERS' RIGHTS INTO UK COPYRIGHT LAW?

- See **TEXT BOX #4 and #6**
- **In theory** - Performers' rights were introduced for the same reasons we introduced copyright for authors: allowing performing artists to be rewarded for their efforts, thereby promoting the creation of new work. Like copyright, the ultimate goal of performers' rights is the creation and spread of knowledge.
- **In practice** - Performers' rights were introduced shortly after recording technologies had made it possible for individuals to record and sell unauthorised copies of live performances. Before then, producers and performers could monetise the showing or viewing of performances relatively effectively by selling tickets at the doors of venues. Performers' rights were introduced to prevent the bootlegging of recorded performance.

WHAT ARE THE BENEFITS OF PERFORMERS' RIGHTS?

- See **TEXT BOX #2 and TEXT BOX #6**
- Like copyright, performers' rights grant economic rights, moral rights and remuneration rights to performing artists. This allows performers to receive remuneration for the use of their performance but also to protect their name and reputation by controlling how the performance is used or edited by others.

WHAT TYPE OF PERFORMANCE (OR PERFORMER) ATTRACT PERFORMERS' RIGHTS?

- See **TEXT BOX #3 and #7**
- Many performances will receive performers' rights. Performers have rights in performances which can be defined as '(a) a dramatic performance (which includes dance and mime), (b) a musical performance, (c) a reading or recitation of a literary work, or (d) a performance of a variety act or any similar presentation'.

This list is exhaustive, but it is rather broad. It will cover any musical or dramatic performances protected under UK copyright law.

- It is not clear whether more contemporary performances like Reality TV performances or football games fit that description. Experts are divided on this question.

The majority are of the view that performers' rights should only apply to conventional performances so to avoid stretching the scope of performers' rights too far.

Others believe that the legislator intended to keep the scope of performers' rights open-ended by providing a broad definition. Therefore, new types of performers should be given performers' rights. They warn us of the 'snobbism' which may subsist in protecting performances given in traditional settings like the theatre, the cinema or the opera but not performances taking place in Reality TV programs, football games or fashion shows.

What do the students think?

SHOULD AUTHORS AND PERFORMERS RECEIVE THE SAME RIGHTS?

- See **TEXT BOX #5 and #8**
- **There is not right or wrong answer to this question.** This is a matter of opinion.
- At present, performers' rights are shorter and narrower than copyright. In practice this means that the average performer receives less remuneration and less rights from intellectual property law than authors do.

Today, many performing artists would like the law to be reformed to improve performers' rights. Experts are divided on this topic. The majority of legal experts think the difference is justified. Experts from the creative industries, performance and creative studies think that the difference is not justified.

- **NO.** Many argue that the difference between copyright and performers' rights is fair because it is more difficult to create a work than to perform it. This view is based on the idea that creating a work (writing a book or composing a piece of music) requires more creativity than interpreting it (playing a character or singing a song).

Those in favour of keeping this imbalance between copyright and performers' rights also say that if it was not for the author of the work there could be no performance, because the performance relies on the work to exist.

- **YES.** On the other hand, those who think that the difference between copyright and performers' rights is not justified argue that performing is just as demanding in terms of creativity and work as composing a piece of music.

They explain that the view that composer creates the work from scratch is outdated because a composer relies on other composers' works to create a piece of music, in the same way the performance (e.g. actor) relies on the work (e.g. the script) to exist. Performers do more than just behaving like the mouthpiece or the puppets of the author whose work they interpret. It takes a lot of skills and practice to give a performance.

Actors playing in a film do more than reading the script out loud. For example, they inject their personality in the performance to make the character come to life. They also have to add elements to the character to perform which cannot be written in the script in enough detail, but which are nevertheless essential for the performance to come across as natural, convincing or authentic. These elements might involve facial expressions, the tone of the voice, the ways of walking or smiling – a myriad of details which only a performer can craft. For this reason, they say, performers should get the same protection for their work as authors get for theirs.

What do the students think?

SUGGESTED ACTIVITIES

Before discussing the topic in **TEXT BOX #6**, you might ask the students to look for examples of famous creations (films, books, music etc.) where the author is more famous than the performer, and for other examples where the performer is more famous than the author. They can use these practical examples to analyse the contribution of the author and that of the performer to the final work. They can use their examples and their analysis to evaluate whether it is fair that performers should receive less protection than authors.

CASE FILE #26: THE RECORDED PERFORMANCE

1. INTRODUCTION

Sherlock and John's investigation takes them to the studio where the film *The Forger's Apprentice* is being made. In [Case File #13](#) we considered how the law defines the concept of the author in relation to films, and how a film might be based on different types of protected works belonging to different copyright owners. We now turn to another group of creative professionals involved in the making of films: actors. In this Case File #26, we look at the protection conferred to actors and other performers by *performers' rights*.

2. PERFORMERS' RIGHTS

As performing artists, actors receive legal rights known as performers' rights, similar in nature to copyright. Performers' rights were introduced shortly after recording technologies had made it possible for individuals to record and sell unauthorised copies of live performances. Before then, producers and performers could monetise the showing or viewing of performances relatively effectively by selling tickets at the doors of venues. However, cheaper recording technologies enabled bootlegging to thrive (making and selling unauthorised records), which motivated the government to introduce new rights to better protect the interests of producers and performing artists.

Like authors' rights (copyright), performers' rights are set out in the Copyright, Designs and Patents Act 1988 (the CDPA). Section 182 of the CDPA gives performing artists the right to authorise the making of a recording of their performance; that is, the right to consent to their work being recorded or not. The CDPA also allows performing artists to control the use of recordings, after authorisation (see, sections 182A-182CA). This right enables artists to seek royalties for the use of records of their performance, in the same way that authors can claim royalties for use of their work.

The CPDA also grants moral rights to performing artists. They have the right to protect the integrity of their performance against 'derogatory treatment' (see section 205F) and the right to be identified as the performers in live performances or on the records of their performance (see section 205C). When artists perform as a group, crediting the band is enough to satisfy this legal obligation: there is no need to name every artist individually.

Performers' rights last for a period of 50 years, from the end of the year in which the performance takes place. However, if during that period a recording of the performance is released to the public, the duration of rights will be extended for another 50 years calculated from the end of the year in which the recorded performance is released.

Also, interestingly, when calculating duration, performances fixed in a sound recording are treated differently from performances recorded by other means. For a sound recording – rather than, for example, an audiovisual recording – the additional period of protection following the release of the recording to the public will be 70 years rather than 50 years. That is, performances captured by sound

recordings are granted an additional 20-year protection compared to other types of recording.

In addition to these economic and moral rights, performers also benefit from what we call 'remuneration rights' to ensure they receive equitable revenues from the owner of the copyright in the sound recording or the film capturing their performance (see, sections 182D and 182CA(2)). And, just as performances fixed in sound recordings enjoy the additional benefit of an extra 20-year protection, they also receive additional remuneration rights, such as the '20% fund' measure (see, sections 191HA(1), 191HA(2) and 191HB(3)): this provision requires record producers and companies to pay organisations representing performing artists 20% of the gross revenues generated by the commercialisation of sound recordings of performances during the additional 20 years of protection.

3. WHAT IS A PERFORMANCE?

Performers' rights only apply to performances as identified by the CDPA. Section 180(2) of the CDPA defines a relevant performance as 'a live performance given by one or more individuals' of either: '(a) a dramatic performance (which includes dance and mime), (b) a musical performance, (c) a reading or recitation of a literary work, or (d) a performance of a variety act or any similar presentation'.

So long as a performance falls within this definition it will be protected. There are no additional conditions or criteria to satisfy. For example, whereas literary, dramatic, musical and artistic works must be original before they will attract copyright protection, a performance does not need to be original to enjoy protection under the law. This means that most traditional forms of performance – such as stage or street acting, musical and dance interpretations, recitations or improvisation – will be protected, even if they are similar or even identical to other, earlier performances.

Live performances of copyright works – such as a literary or a musical work – clearly qualify for protection. But, what about other types of contemporary performance, such as participating in a Reality TV show or modelling on a cat-walk? It is not clear that they are protected. Should they be? Do they fall within the definition of a performance set out above? Or how about the stuntman in the *Forger's Apprentice*? Would his fall from the scaffolding be protected as a performance?

Do you think your school teachers are 'performers' within the meaning of the CDPA? Have you ever been a 'performer'?

4. PERFORMERS' RIGHTS AND COPYRIGHT

In general, performers' rights provide a very similar form of protection to the rights granted to authors by copyright. Nevertheless, there are a few notable differences between the rights enjoyed by authors and those granted to performers. First, the duration of these rights differ, with copyright typically lasting longer than performers' rights. Second, performers' rights only protect the *recording of a performance*; they do not protect the actual performance itself in the way that copyright protects against copying the actual work. For example, it is perfectly lawful to copy or imitate another performing artist's style,

demeanour or mannerisms: these aspects of their performance are not protected. Lastly, and perhaps most surprisingly, performers do not have right to object to false attribution under UK law, which is an important moral right enjoyed by authors (see section 84).

Finally, it is worth noting that the same artist may enjoy both copyright and performers' rights in his or her contribution to a creative work. For example, consider an actor who directs and/or produces his own film, or a singer-songwriter who writes, composes and records her own music. As a songwriter, the musician will enjoy copyright in the songs that she writes. And, when she records her song, she will enjoy performers' rights in the recorded performance.

5. THE CASE: *RICKLESS v UNITED ARTISTS CORP* (1988)

Performers' rights were a relatively late addition to UK law. There were only introduced in 1988, in their current form. One famous case, known as the *Peter Sellers* case (*Rickless v United Artists Corp* (1988)), is understood to have played a significant role in the introduction of the performers' rights regime.

A dispute arose between the makers of the sixth 'Pink Panther' film – *Trail of the Pink Panther* – Blake Edwards and United Artists on the one hand, and the relatives of comedian Peter Sellers on the other. Peter Sellers had played the famous French detective in the first five Pink Panther films. Shortly after Peter Sellers' death in 1980, Blake Edwards and United Artists decided to make a sixth instalment of the Pink Panther franchise from existing footage of his performances in previous films. Peter Sellers' relatives took legal action against the making and release of the film; they objected to re-using the work of the deceased without seeking his or their consent. In effect, Peter Sellers' family were asking for the enforcement of performers' rights which did not exist at the time. Due to the sensitive nature of the facts, the Court accepted their request, urging the legislators to improve the legal protection of performers and to prevent such incidents taking place in the future.

6. FOR DISCUSSION: AUTHORS vs PERFORMERS

Compare the duration of performers' rights to the duration of authors' rights described in [Case Files #2](#) and [#22](#). Which is shorter? Can you think of a scenario where the performers' rights would outlast the copyright vested in a film?

We know that authors and performers do not receive the same level of protection. Why do you think that is? Do you think it is justified?

To help you answer these questions, think of your favourite film. What do you like most about it: the story as it is told by the script, the images created on screen or the performance of the actors? Alternatively, think of your favourite song. Which do you prefer, the singer or the song? Check whether the singer also composed the music and/or wrote the lyrics. Does this change your opinion?

7. USEFUL REFERENCES

The Copyright, Designs and Patents Act 1988 is available here: <http://www.legislation.gov.uk/ukpga/1988/48/contents>

Rickless v United Artists Corp [1988] QB 40 (unfortunately, this case is not readily available online)

CASE FILE #27: THE INTERVIEW TAPE

LEARNING AIMS

- Understand that an interview is made up of different copyright works
- Understand that an interview may attract copyright and performers' rights
- Be able to explain how the rules on authorship may apply in the context of an interview

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- Can interviews be protected by copyright?
- Who is/are the author(s) of an interview?
- What other rights may subsist in an interview?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

CAN INTERVIEWS BE PROTECTED BY COPYRIGHT?

- See **TEXT BOX #2**
- **YES.** In fact, multiple copyright works may subsist in a single interview: the spoken word (as literary works), the recording of the words (the sound recording or film). Most interviews will easily pass the threshold of originality because they will be made of spontaneous responses to questions, therefore it is unlikely that they will re-use substantial parts of protected material.

WHO IS/ARE THE AUTHOR(S) OF AN INTERVIEW?

- See **TEXT BOX #3**
- Although the interview itself is clearly protected by copyright, it is less clear who owns the copyright. The answer to this question will largely depend on the facts and the judge's assessment of who contributed to the originality of the literary work contained in the interview. In most cases, the interview will be jointly-owned by the interviewer and the interviewee. However, if the circumstances of an interview are such that either the interviewer or the interviewee was the only person having contributed to the interview in a significant way, they could be regarded as the sole of author of the interview.
- The recording of the interview will be owned by whomever has made the arrangements to record the interview (typically, the interviewer or the company s/he works for).

WHAT OTHER RIGHTS MAY SUBSIST IN AN INTERVIEW?

- See **TEXT BOX #4**
- It is possible that performers' rights also subsist in interviews, but not certain.

The CDPA (the UK Copyright Act) only mentions the 'reading' or 'recitation' of literary works as covered by performers' rights. It is unclear whether interviews fit this definition as they will often be made of spontaneous or improvised questions and answers.

This question is yet to be clarified by a court, but experts hold the view that performers' rights will apply to interviews because they are supposed to be interpreted broadly by the court.

SUGGESTED ACTIVITY

In discussing who owns the rights (copyright and/or performers' rights) in the interview, you might ask the students whether their answer will be different depending on the type, or 'genre' of the interview. Do they think that interviewee or the interviewer contribute to the interview differently depending on whether it is the interview of a politician on *BBC One Breakfast Show* or on *Radio 4 Today's* program, and that of a celebrity on the *Graham Norton Show*?

CASE FILE #27: THE INTERVIEW TAPE

1. INTRODUCTION

In the *Forger's Apprentice*, Sherlock and John are being interviewed. In this Case File #27, we look at the different types of rights that may be 'caught' in the recording of interviews. We draw on [Case Files #22, #23](#) and [#26](#) which considered questions of sole and joint authorship, categories of copyright works, and performers' rights.

2. INTERVIEWS AND COPYRIGHT

There are eight different categories of works protected by copyright outlined in the Copyright, Designs and Patents Act 1988 (the CDPA) (see [Case File #23](#)). Different aspects of the recorded interview will fall within different categories, depending on the nature of the content and how the interview has been recorded.

First and foremost, the interview itself – that is, the words, the testimony, the questions and answers spoken by the interviewer and interviewee – may qualify as a literary work under the CDPA. Section 3(1) specifically provides that 'spoken' words may be regarded a literary work that attracts copyright protection. As explained in [Case File #14](#), literary works must be 'fixed' in writing or otherwise to be protected. This can be achieved by writing down the interview or by recording it in some way.

Whenever an interview is recorded, the recording itself will give rise to a second layer of copyright protection. An audio recording of an interview will be protected as a 'sound recording' (section 5A), whereas an audiovisual recording will be classed as a 'film' (section 5B).

The requirement of originality, described in [Case Files #1](#) and [#14](#), will almost inevitably be satisfied, regardless whether protection is sought under the category of literary works, sound recordings or films. This is because interviews tend to be the result of improvised or spontaneous conversations between two individuals and are unlikely to be based on pre-existing copyright material.

3. INTERVIEWS AND AUTHORSHIP

In general, interviews take place under the direction of the interviewer who selects the questions and themes to be discussed throughout the interview as well as deciding when to end with one line of questioning before moving on to the next. This may give the impression that the ownership of the interview should exclusively belong to the interviewer.

However, many would argue that interviews are only interesting to readers or listeners for the interviewee's answers. As such, it is the participation of both individuals that gives an interview its substance and value. For this reason, interviews are perhaps better understood to be the work of two contributors: both the interviewer and interviewee. Indeed, just as an interviewee's responses follow the lead of the interviewer's questions, an interviewer's questions are often influenced by preceding answers given by the interviewee. The input and

contribution of both individuals can become so intertwined throughout the course of the interview that they come to be regarded as a single collaborative work. As such, in most instances, an interview that qualifies for protection as a literary work will typically be regarded as a work of joint authorship, jointly owned by the interviewer and interviewee (see [Case File #22](#) for more on joint authorship).

The fact that only one of the two contributors may be responsible for recording the interview (most often, the interviewer) does not affect the recognition of joint authorship of the interview itself. It does not matter who fixes the work in some material form, so long as fixation takes place (section 3(3)).

While the interview may be a work of joint authorship, as we noted above, the recording of the interview will also be protected as a separate copyright work, whether as a sound recording or a film. The person who arranges and controls the making of the recording will be the author and the first owner of the copyright in the recording. Typically, this will be the interviewer (or the organisation or company for which they work).

4. PERFORMERS' RIGHTS IN INTERVIEWS

As explained in [Case File #26](#), any performance of a literary, dramatic or musical work, improvised or not, is eligible for protection under the regime of performers' rights. That is, while interviewers and interviewees jointly create a literary work (the interview), at the same time they are also performing that work: as such, they would be regarded as 'performers' benefitting from performers' right.

Or at least, this appears to be the situation under the current law *in theory*. In practice, however, whether an interviewer and interviewee are the performers of their own (improvised) literary work has not been decided in court. If the question is ever litigated, it is possible that a court would adopt a definition of 'performance' that excludes the performance of improvised literary works in general, or interviews in particular. This is because the CDPA currently defines a 'performance' in relation to an already existing work. That is, section 180(2)(c) states that a performance means 'a reading or recitation of a literary work'. A literal reading of this provision suggests that the literary work *must already exist before it can be performed*. A court may decide that an interview cannot be regarded as 'a reading' or 'a recitation' of a work, since no existing work is in fact being read or recited: rather the literary work (the interview) is being *created at the same time as it is being performed*. If this interpretation were to prevail, neither interviewers nor interviewees would be able to claim protection under performers' rights.

The situation would almost certainly be different if the interview was scripted. That is, if the interviewee received the questions and wrote down his or her answers before starting the interview, they would be 'performing' the scripted answers on camera. What do you think? Should interviewers and interviewees be able to claim performers' rights in interviews? Should it make any difference whether the interview is scripted or not?

In any case, the interviewer and interviewee would still enjoy copyright in the interview as a literary work. Indeed, because performers' rights and copyright overlap in the protection they confer, in many situations interviewers and

interviewees will have little to gain from claiming both kinds of protection simultaneously. Claiming copyright will often be sufficient to address their economic and other interests. However, if they have assigned their copyright in the interview to another party, then trying to claim performers' rights in the interview may still have value and significance.

5. CURIOSITY

Although most countries follow similar principles of copyright law, the rights vested in interviews are one of the few exceptions where the level of protection will vary from one jurisdiction to the next. In the United States, for example, the law pays greater attention to the person in charge of fixing the interview as a literary work. As a result, if the interviewer is solely responsible for recording the interview, it will be owned by him or her alone.

Compare this rule to the position in the UK. Can you think of reasons why the UK has adopted a different approach? Which rule is preferable: the US or the UK?

Also, in France, judges have been reluctant to grant performers' rights to individuals who perform as themselves in front of the camera, whether on a Reality TV show or as part of an interview or documentary. French courts consider that these individuals are not 'performing' in the traditional meaning of the word because they are not 'playing a role', and so should not be granted performers' rights. For this reason, it is unlikely that interviewers or interviewees would be granted performers' rights under French law.

Do you agree with the interpretation of 'performance' given by French courts? Do you think that individuals featured in Reality TV shows or interviews are not 'playing a role'?

6. FOR DISCUSSION: IT'S THE QUESTION THAT DRIVES US ... OR IS IT?

We know that interviews are works of joint authorship owned by the interviewee and interviewer in most cases. Do you think this is fair? Can you think of scenarios or examples where the copyright vested in the interview will (or should) solely rest with either the interviewee or the interviewer?

7. USEFUL REFERENCES

The Copyright, Designs and Patents Act 1988 is available here: <http://www.legislation.gov.uk/ukpga/1988/48/contents>

Ronan Deazley, *An introduction to Copyright for Oral Historians* (13 December 2016): <https://quote.qub.ac.uk/assets/uploads/QUOTE-resources-Introduction-to-Copyright.pdf>

CASE FILE #28: THE MUSICIAN AND THE MACHINE

LEARNING AIMS

- Understand the difference between music and a sound recording
- Be able to explain how copyright law treats music and sound recordings differently

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- How does copyright law define a musical work?
- What is a sound recording?
- How long does copyright last for musical works and sound recordings?
- Not all sound recordings will qualify for copyright protection. Why not?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

HOW DOES COPYRIGHT LAW DEFINE A MUSICAL WORK?

- See **TEXT BOX #2**
- The law defines a musical work as 'a work consisting of music.'

This is a rather circular definition but generally we know music when we hear it, and when we see it written down.
- But music is more than just notes on a page. Copyright will also protect all of the musical phrasing and instructions that accompany those notes.

WHAT IS A SOUND RECORDING?

- See **TEXT BOX #3 and #4**
- The law provides a very broad definition of sound recording. Essentially, if you can record sounds by any means or in any format that allows you to replay those sounds, that will count as a sound recording. It will be protected by copyright.
- Sound recordings can be made on vinyl records, tapes, compact discs, digital audio tapes and any other media. They can even be made on large steel disks (a polyphon).

HOW LONG DOES COPYRIGHT LAST FOR MUSICAL WORKS AND SOUND RECORDINGS PROTECTED?

- See **TEXT BOX #5 and #6**

- The length of copyright protection is different for each type of work.
- The basic rule for musical works is that they are protected for the life of the author plus 70 years after he or she dies.

However, there are also special rules about co-authored musical works discussed in TEXT BOX #5 that you may want to consider or discuss with the students.

- The basic rule for a sound recording is slightly more complicated.

A recording will be protected for 50 years from the end of the year in which the recording is made. But, if the recording is made available to the public during that initial 50-year period, then the work will be protected for 70 years from the year in which it is made available.

For example, the *Rolling Stones* make a sound recording in 1970 that is never released. It will be protected for at least 50 years, that is until 2020.

However, suppose they decide to release the track as part of a new Greatest Hits album in 2015. As the track was made available to the public before the first 50-year period expired (before 2020), it will benefit from an extended protection of 70 years from 2015, that is, until 2085.

NOT ALL SOUND RECORDINGS WILL QUALIFY FOR COPYRIGHT PROTECTION. WHY NOT?

- See **TEXT BOX #7**
- The law requires that different types of work meet certain criteria before they enjoy copyright protection
- For sound recordings, this means they must not be copied from a previous sound recording.

If copyright was granted to a new sound recording of an existing recording, then potentially the original recording could be protected indefinitely. All the copyright owner would have to do is re-record the original recording.

So, the rule that a recording must not be copied from a previous recording ensures that copyright in the original recording will come to an end at some point, and the work will enter the public domain.

- The criteria for protection for a musical work is different. The work is required to be original (rather than simply not copied). We discuss the concept of originality in [Case File #14](#).
- Why does the law apply different criteria to sound recordings and musical works?

There is a perceived difference between literary, dramatic, musical and artistic works and films on the one hand, and sound recordings, broadcasts and the protection of typographical arrangements on the other. (See [Case File #23](#) on the eight categories of work protected by copyright law.)

The former works are considered authorial creations, works that require creativity and inspiration to produce. They are protected for longer (the life of the author plus 70 years), and so the more demanding criterion of originality is required.

Sound recordings and broadcasts are perceived to be more technical or entrepreneurial in nature. They depend on the existence of authorial works, such as songs or scripts. As such, they receive a shorter term of protection, and the criterion for protection is less (not copied).

CASE FILE #28: THE MUSICIAN AND THE MACHINE

1. INTRODUCTION

In *The Missing Note*, a digital file contains a recording of the soundtrack to the film *The Forger's Apprentice*, but with one note missing. The missing note is the key to a cipher that holds the answer to the whereabouts of the anarchist group.

In [Case File #23](#) we considered the different types of work that can be protected by copyright in the UK. In this Case File #28, we consider how copyright protects music and sound recordings – two different categories of copyright work.

2. WHAT IS MUSIC?

Music embodied in print form (that is, sheet music) has been protected by copyright since the late eighteenth century. Consider the sheet music for the song *Too-ra-loo-ra-loo-ra!*, written in 1914 by the Irish-American composer James Royce Shannon (1881-1946). As Shannon died more than 70 years ago, the work is no longer in copyright. However, it provides a useful illustration of what *would be protected* as a musical work under the Copyright Designs and Patents Act 1988 (the CDPA).

First, it is worth noting that, for copyright purposes, the lyrics accompanying the song are not a part of the musical work: the CDPA defines a musical work as ‘a work consisting of music, *exclusive of any words or action intended to be sung, spoken or performed with the music*’ (s.3(1)). Instead, the lyrics would be protected as a literary work, separate from the musical work. (In this case, however, both music and lyrics were written by Shannon.)



The notes on the score – the melody and the accompanying baseline and harmonies – are obviously part of the musical work. But, music is more than just notes on a page. Other elements that contribute to the sound of the music as it is performed can also be protected by copyright, such as the tempo (*Moderately*), instructions concerning the relationship between notes (such as musical phrasing

or an arpeggiated chord), dynamics (*mf* or *mp*), or other directions for performance (*With expression*). Like stage directions accompanying a play, all of these various elements contribute to the musical work and as such may be protected by copyright.

3. WHAT IS A SOUND RECORDING?

Sound recordings were first protected in the UK under the Copyright Act 1911. Interestingly, at that time, they were protected *as if they were musical works*. Today, the situation is different: musical works and sound recordings are two different types of copyright work.

Under the CDPA a sound recording is defined as: '(a) a recording of sounds, from which the sounds may be reproduced, or (b) a recording of the whole or part of a literary, dramatic or musical work, from which the sounds reproducing the work or part may be produced, [and] regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced' (s.5A(1)). This is a very broad definition. As a result, the Act provides protection for vinyl records, tapes, compact discs, digital audio tapes and any other media used to embody recordings.

4. CURIOSITY: POLYPHON FANTASY

Labyrinth (1986) is an adventure fantasy film directed by Jim Henson and executive-produced by George Lucas. It stars the late David Bowie as Jarthe, the Goblin King. Bowie recorded five songs for the film, including *As the World Falls Down* which was also produced in a Polyphon format: that is, the music was cut onto a 19⁵/₈-inch high-nickelled steel disc to be played on a mechanical music box. Only two copies were ever made: one for the recording of the film score, and one for Bowie's personal use.

The Polyphon steel disc format constitutes a sound recording for the purposes of the CDPA. The same would be true of a pin roll from a music box or a length of punched tape to be used in a barrel organ or a pianola.



A Polyphon 11-inch disc musical box, made in Leipzig
(www.mechanicalmusic.co.uk/disc-players/)



David Bowie, *As the World Falls Down*, on a 19⁵/₈-inch Polyphon disc

5. SONGS AND OTHER CO-AUTHORED MUSICAL WORKS: COPYRIGHT DURATION

Copyright in literary, dramatic, musical and artistic works expires 70 years from the end of the year in which the author died (s.12(2)). If a literary, dramatic, musical or artistic work is jointly authored, the 70-year term is calculated from the end of the year in which the longest surviving joint author died.

However, special rules about calculating duration of copyright in songs and other similar musical compositions were introduced in 2013. The CDPA was amended to say that when the author of a musical work and the author of a literary work collaborate to create works intended 'to be used together', the resulting works are treated as a 'work of co-authorship.' The concept of a work of co-authorship is similar to but distinct from the concept of a work of joint authorship. (You can read more about works of joint authorship in [Case File #22.](#))

This change had an important impact on how duration is calculated for these types of work. Previously, duration of copyright in the music and the lyrics of a song would have been calculated independently of each other: that is, copyright in the music would come to an end 70 years following the death of the composer, whereas copyright in the lyrics would end 70 years after the death of the lyricist. Now, however, duration of copyright in a song that has been co-authored will last for 70 years from the end of the year in which the longest surviving co-author died.

This change has also resulted in work that was already in the public domain benefitting from a *revived copyright*.

Consider, for example, the songbook of George and Ira Gershwin. George composed music, and Ira was the lyricist. George died in 1937; Ira survived until 1983. In the UK, before the changes introduced in 2013, copyright in George's music had expired on 31 December 2007. Now, copyright in George's music has been revived and will expire 70 years from the end of the year in which Ira died: that is, on 31 December 2053.

6. SOUND RECORDINGS: COPYRIGHT DURATION

The rules on the copyright term in sound recordings have changed a number of times in recent years – in 1995, in 2001, and then again in 2013 – which can make calculating duration of protection more complicated than it should be. In general, though, copyright in a sound recording will last for 50 years from the end of the year in which the recording is made, or if published, played in public or communicated to the public during that period, 70 years after the end of the year in which the work is first published, played in public or communicated to the public (CDPA, s.13A(2)).

You can read more about the duration of protection in sound recordings [here](#).

7. FOR DISCUSSION: WHEN NOT COPIED IS GOOD ENOUGH

Not every literary, dramatic, musical or artistic work will qualify for copyright protection. There is a minimum criterion set out in the CDPA which requires that all literary, dramatic, musical and artistic works should be *original* before they will

be protected by copyright (s.1(1)). You can read more about the concept of originality in copyright law in [Case File #14](#).

However, sound recordings do not need to be original; the CDPA only requires that a sound recording is *not copied* from a previous sound recording (s.5A(2)). This is a much easier criterion to satisfy than originality. Imagine, for example, a band has written a new song they want to record. In the studio they make various recordings, or 'takes,' each of which is essentially the same as the last. Even though each take is almost identical to every other take, they are all protected by copyright as individual sound recordings. None of them have been copied from a previous recording: each one is a new protected recording, even though they may not be original.

Why do you think the CDPA applies different criteria for protection to music and to sound recordings? Why must a musical work be original, whereas a non-original sound recording will be protected so long as it has not been copied from a previous sound recording?

8. USEFUL REFERENCES

The Copyright, Designs and Patents Act 1988 is available here: <http://www.legislation.gov.uk/ukpga/1988/48/contents>

For further information on copyright duration in the UK, see *Copyright Bite #1 – Copyright Duration*: <http://copyrightuser.org/copyright-bites/1-copyright-duration/>

See also: *Copyright and Digital Cultural Heritage: Duration of Copyright*: <https://copyrightcortex.org/copyright-101/chapter-6>

The Sheet Music Consortium promotes access to and use of online sheet music collections by students, educators and the general public. Much of this material is in the public domain. Search for and download sheet music here: <http://digital2.library.ucla.edu/sheetmusic/index.html>

CASE FILE #29: THE DOUBLE SCORE

LEARNING AIMS

- Understand the different kinds of permission one may need to use music in a film or video
- Be able to explain why it is important for creators to retain their rights

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- How many different copyright works can exist in a recorded song?
- If you want to show in public a film that includes a soundtrack, how many permissions do you need?
- Why do you think Dolly Parton gave permission to Whitney Houston and not to Elvis Presley to cover her song 'I Will Always Love You'?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

HOW MANY DIFFERENT COPYRIGHT WORKS CAN EXIST IN A RECORDED SONG?

- See **TEXT BOX #2**
- Usually, a recorded song will involve three different types of copyright works: the melody (protected as 'musical work'); the lyrics (protected as 'literary work'); and the recording itself (protected as 'sound recording'). For more information on the different types of work protected by copyright, see [Case File #23](#).
- If you want to use an existing recorded song in a video, you need to identify the copyright owners of these works and get their permission (unless your use is covered by copyright exceptions such as parody).

Ownership of rights is often shared among the creators of the song (the music composer and the lyricist); the music publisher (who publishes the melody and the lyrics); and the record label (who produces the sound recording).

IF YOU WANT TO SHOW IN PUBLIC A FILM THAT INCLUDES A SOUNDTRACK, HOW MANY PERMISSIONS DO YOU NEED?

- See **TEXT BOX #3**
- You only need one type of permission: a licence to show the film in public. If you purchase a licence to show a film in public, the licence necessarily covers the soundtrack too.

- This is because, since the 1st of January 1996, the UK copyright act provides that 'the sound track accompanying a film shall be treated as part of the film' (s.5B(2)). However, if you want to use an existing film soundtrack in your own film, you need to treat the soundtrack as a sound recording and get the relevant permissions accordingly (see **TEXT BOX #2**).

WHY DO YOU THINK DOLLY PARTON GAVE PERMISSION TO WHITNEY HOUSTON AND NOT TO ELVIS PRESLEY TO COVER HER SONG 'I WILL ALWAYS LOVE YOU'?

- See **TEXT BOX #4** and [Case File #12](#)
- Dolly Parton did not give permission to Elvis Presley to cover her song because Elvis' managers requested the assignment of part of her publishing rights in the song. Therefore, a plausible explanation is that Whitney Houston only purchased a licence from Parton to cover her song.
- Unlike assignments of rights, licences do not involve a transfer of the ownership of rights from one person to another. By granting permission to Whitney Houston through a licence rather than an assignment, Parton retained her rights in 'I Will Always Love You' and was able to produce a new version of the song with Vince Gill as a duet in 1995. Depending on the type of agreement between Dolly Parton and Whitney Houston, Parton probably still receives royalties from Whitney Houston's cover, one of the most successful songs ever produced for a film (The Bodyguard).

SUGGESTED ACTIVITIES

Before discussing the KEY QUESTIONS above, you might show the short animated video *Going for a Song*: www.copyrightuser.org/create/creative-process/going-for-a-song/

The video tells the story of Tina and Ben, a music composer and a lyricist who create an original song and discuss how to market it. After screening the video, you can ask the students the following preliminary questions: who do you think is the copyright owner of the song created by Tina and Ben? If someone wanted to use their song, whom should they get permission from?

CASE FILE #29: THE DOUBLE SCORE

1. INTRODUCTION

In *The Missing Note*, the key to a cipher is contained in the recording of part of a film soundtrack. In [Case File #28](#), we considered how copyright protects music and sound recordings – two different categories of copyright work. In this Case File #29 we consider these types of copyright works in more detail, with a view to exploring the different kinds of permission one may need when making use of someone else's music in a film or video.

2. OWNERS PERMITTING

As we have seen in [Case File #28](#), melodies and lyrics are treated as two different types of copyright work: melodies are musical works, whereas lyrics are literary works. In addition, sound recordings are protected separately and have a different copyright term.

If you wish to use a song in a film you are creating, you may need permission from different rightsholders depending on the type of use you intend to make. For example, if you wish to create your own version of an existing composition, you need to identify who owns copyright in that melody and get their permission. Copyright in a melody belongs to the person(s) who created it, unless they assigned (all or some of) their rights to a music publisher (which is often the case).

The same is true for lyrics: the writer owns copyright in the lyrics, if she has not assigned it to a third party. So, if you are writing a script and want to use existing lyrics, you need to identify the copyright owners of those lyrics and get their permission, unless your use is covered by a [copyright exception](#) such as [quotation](#) or [parody](#).

If you intend to use an existing sound recording in a film, video game, advert or other audiovisual production, you need multiple permissions from different rightsholders: permission to use the melody embedded in the recording from the people who composed it and/or their music publishers; as well as permission to use the recording from its producer (usually a record label). Using recorded music in moving images is known as 'synchronisation', and the process to get permission to do so lawfully as 'sync licensing'. Sync licensing fees can be negotiated directly with the rightsholders of the sound recording and the music embedded in it or with specialist 'sync' companies who act on their behalf. You can find practical information on how to get sync licences on the PRS for Music website: <https://www.prsformusic.com/licences/releasing-music-products/commercial-music-sync-licensing>

As a film producer you may also try to secure an assignment of rights (rather than a licence) from the song's rightsholders, although this is likely to be more difficult and costlier. For more information about the differences between licences and assignments, see [Case File #12](#).

3. COPYRIGHT AND FILM SOUNDTRACKS

When the Copyright Designs and Patents Act (CDPA) was first enacted in 1988, a sound recording was defined to mean a 'recording of sounds' or 'of the whole or any part of a literary, dramatic or musical work' from which the sounds may be reproduced, regardless of the medium of recording or the method of reproducing the sounds (s.5(1)). Within the same section, a film was defined as 'a recording on any medium from which a moving image may by any means be produced' (s.5(1)). As such, it was generally accepted that a film soundtrack was distinct from the film itself. That is, these were two different works attracting copyright protection separately: copyright in the film, and copyright in the film soundtrack as a sound recording.

On 1 January 1996, the CDPA was amended to bring into force a European Directive on the term of protection of copyright and related rights (the 1993 Term Directive). With the implementation of the Term Directive, the status of film soundtracks changed. Now, the CDPA provides that 'the sound track accompanying a film shall be treated as part of the film' (s.5B(2)). But, in addition, the revised CDPA clarified that this did not affect 'any copyright subsisting in a film sound track as a sound recording' (s.5B(5)). In other words, copyright now exists in a soundtrack *both* as part of a film *and* separately as a sound recording.

This change adds an additional layer of complexity to calculating the duration of copyright in film soundtracks. This is because duration of copyright in a film is different from duration in a sound recording.

Copyright in a film is calculated in accordance with the last to die of four specifically designated persons: the director, the author of the screenplay, the author of the film dialogue (if different), and the composer of the film score (s.13B(2)). By contrast, copyright in a sound recording expires 50 years from the end of the year in which the recording is made, unless, during that period, the recording is *published* or *made available* to the public, in which case copyright expires 70 years from the end of the year in which it was published or made available (s.13A(2)).

In short, different copyright terms apply to films and to sound recordings. In practice, this means that when dealing with the soundtrack as an integral part of a film, duration is calculated by reference to the rules on film copyright. On the other hand, when dealing with a film soundtrack separate from the film itself (for example, when the soundtrack is released on a CD or other format) copyright is calculated by reference to the rules on sound recordings.

This same logic applies to the use of film soundtracks. For example, if you have permission to show a film in public this necessarily includes the film soundtrack. That is, you do not have to get separate permission to play the soundtrack in public when showing the film. The film and the soundtrack are treated as one and the same for this purpose.

4. FOR DISCUSSION: I WILL (NOT) ALWAYS LICENSE YOU

The song *I Will Always Love You* was originally written and recorded in 1973 by American singer-songwriter Dolly Parton, who released her famous country version of the song in 1974 as a single. The song reached number one on the Billboard Hot

Country Songs chart twice: first in June 1974, and then in October 1982, when Parton re-recorded the song for the film *The Best Little Whorehouse in Texas*. When the 1974 recording of the song was reaching number one on the country charts, Elvis Presley indicated that he wanted to cover the song. However, since Elvis' managers requested the assignment of part of her publishing rights in the song, Parton refused. In 1992, Whitney Houston recorded her version of the song for the film *The Bodyguard*. *The Bodyguard* remains the best-selling soundtrack album of all time, selling over 42 million copies worldwide. In 1995, Parton recorded a third version of her song with Vince Gill as a duet.

How many copyright works can you identify in this story? Why do you think Dolly Parton gave permission to Whitney Houston and not to Elvis Presley to cover her song?

5. USEFUL REFERENCES

The Copyright, Designs and Patents Act 1988 is available here: <http://www.legislation.gov.uk/ukpga/1988/48/contents>

For an innovative and accessible resource on music copyright, see *Going for a Song*: <https://www.copyrightuser.org/create/creative-process/going-for-a-song/>

For further information on copyright duration in the UK, see *Copyright Bite #1 – Copyright Duration*: <https://www.copyrightuser.org/copyright-bites/1-copyright-duration/>

See also: *Copyright and Digital Cultural Heritage: Duration of Copyright*: <https://copyrightcortex.org/copyright-101/chapter-6>

CASE FILE #30: THE CREATIVE COPY

LEARNING AIMS

- Understand that creativity often involves copying (and that is okay)
- Be able to discuss how copyright law allows copying for a variety of reasons

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- Why was the composer Nino Rota not nominated for an Oscar in 1972?
- How does copyright law treat artists differently from other creators?
- Does our use of the theme tune from the film *The Godfather* infringe copyright?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHY WAS THE COMPOSER NINO ROTA NOT NOMINATED FOR AN OSCAR IN 1972?

- See **TEXT BOX #2 and #3**
- It was discovered that he had plagiarised his own earlier composition from the 1958 film *Fortunella*. Because of this, the Academy said his score for the 1972 film *The Godfather* was not 'original' and so could not be nominated for the category of 'Best Dramatic Score'.
- It is unclear whether he was aware of his self-plagiarism, or whether he had done so unconsciously. But he is not the only author or creator who re-uses his own earlier work. This happens quite often.

HOW DOES COPYRIGHT LAW TREAT ARTISTS DIFFERENTLY FROM OTHER CREATORS?

- See **TEXT BOX #4**
- The law recognises that artists often revisit and repeat themes and elements from their earlier work when creating new paintings or a new body of work.
- For this reason, the law provides a specific exception for artists to reuse aspects of their earlier work.

DOES OUR USE OF THE THEME TUNE FROM THE FILM THE GODFATHER INFRINGE COPYRIGHT?

- See **TEXT BOX #2**

- **NO.** (At least we are 99% sure that it doesn't – which is about as good as it gets, when trying to answer copyright questions.)
- Copyright law provides various exceptions that allow you to make use of someone else's work without having to ask for permission. These include:
 - Quoting from a work
 - Criticising or reviewing a work
 - Creating a parody of a work

So long as you are copying someone's work for one of these purposes, and your use of their work is fair, then it is entirely lawful to do so.

- Arguably, our use of the theme tune could be understood as simple quotation.

Or, it could be a form of criticism and review. That is, we are using Nino Rota's theme tune to explore the concept of self-plagiarism and creativity. Perhaps we are critiquing the idea that all creativity is entirely original in the sense that it is not influenced by existing work, whether your own or someone else's. Is anything truly original in this sense?

Or, our use of the theme tune could be regarded as a form of parody. We might be reusing his work to gently poke fun at Rota and the whole Oscar debacle of 1972.

- Might any other exceptions apply?
- If the students explore the [Exceptions](#) page of Copyrightuser.org they might be directed to the material on exception for [Education](#).

One important exception for education allows the use of any type of work for the purpose of 'illustration for instruction'. This allows teachers and educators to make use of someone's work to give or receive instruction. Moreover, the instruction does not have to take place within an educational institution.

We believe that The Game is On! resource falls within this exception. That is, our use of someone's work might be parodic, or critical, or quotation ... but it is also for the purpose of illustrating for instruction.

SUGGESTED ACTIVITY

Organise a mock trial.

The creators of *The Game is On!* are on trial for copyright infringement. The descendants of Nino Rota are suing for damages. They are accusing *The Game is On!* team of infringing Rota's copyright in the main melody from *The Godfather*.

Split the class into four groups. Two groups are lawyers for Nino Rota's descendants. Two groups are lawyers for *The Game is On!* team. Give them time to prepare the arguments for and against the allegation of copyright infringement. You might direct the groups to think about:

- How much of the original musical work has been copied? Is it too much? Too little?
Guidance: even if the melody is short, they have probably copied too much – after all, even this snippet of melody is very famous, and very recognisable.
- Does it make any difference that the melody has been altered?

Guidance: no; it doesn't make any difference if they have changed and altered the work in a significant way; all that matters is whether they have copied without permission, and, if they have, then in theory, they should be liable for infringement.

- If they have copied too much without permission, can they rely on any of the exceptions to copyright?

Guidance : this is where the argument for the defence is probably strongest. The exceptions discussed above are likely to be very relevant, especially the exception for quotation, as well as criticism and review, parody and so on. But all these exceptions also depend on the use being fair. Is the use fair? This is likely to produce some interesting debates.

Once the groups have had time to discuss their arguments, they should appoint someone to present those arguments before the court.

For the mock trial itself, pick two teams to present. Each team should appoint someone to present their team's argument before the court.

In addition, appoint one student from each of the other two groups to act as judges. Working together, they can ask questions during and after each of the presentations to the court, asking for further clarification of arguments, trying to explore any potential weaknesses in reasoning, and so on.

All the remaining students are appointed to the jury. Once both arguments have been presented, and the judges have concluded their questions, the jury vote either in favour of Nino Rota's descendants, or in favour of *The Game is On!* team.

If more than two-thirds of the jury vote in favour of Nino Rota's descendants, then *The Game is On!* team have been found guilty of copyright infringement!

CASE FILE #30: THE CREATIVE COPY

1. INTRODUCTION

In *The Missing Note*, a digital file contains a recording of the soundtrack to the film *The Forger's Apprentice*, but with one note missing. The missing note is the key to a cipher that holds the answer to the whereabouts of the anarchist group.

The melody in question is taken from the film score of *The Godfather*, written by the Italian composer Nino Rota, and it was subject of some controversy when the film was first released. In [Case File #18](#) we considered the similarities and differences between plagiarism and copyright infringement. In this Case File #30, we consider the concept of self-plagiarism and how it relates to creativity and copyright.

2. COPYING AND CREATING

Many of the Case Files created for this resource explore when it is appropriate and lawful to borrow from and make use of the work of others. But, what about when creators borrow from themselves?

The author and playwright Luigi Pirandello is a good example of a creator who often reused and recycled his own earlier work. Indeed, in many respects, the practice of self-plagiarism lay at the heart of Pirandello's writing and method.

For example, Pirandello's novel, *Her Husband* [*Suo Marito*], first published in 1911, considers what it means to create original work, and what it means to be an author. The novel's central character is Silvia Roncella, a writer who is unconcerned with the commercialisation of her work. Indeed, she often insists on giving her work away for free, which frustrates her husband's attempts to benefit financially from her writing.

However, in the novel, the works that are attributed to Silvia are actually recycled re-presentations of some of Pirandello's earlier texts. That is, Pirandello presents Silvia as the author of Pirandello's own earlier work. The boundaries between quotation and original text are blurred in the novel in a way that encapsulates the extent to which Pirandello deliberately conflated copying and creation throughout his literary career. This was just one of the reasons that we wanted to borrow from Pirandello's work when creating episode 2 of *The Game is On! The Adventure of the Six Detectives*.

Moreover, like Pirandello, and many others, we have also borrowed from our own earlier work in creating *The Game is On!* series. In this episode, for example, we reuse scenes and material from the first two episodes (can you spot them?). And, we'll reuse material from this episode in the next two that follow (we don't believe in spoilers, so you'll have to wait and see).

3. AND THE OSCAR DOESN'T GO TO ...

In 1972, Nino Rota's score for the *The Godfather*, directed by Francis Ford Coppola, was nominated for an Oscar for Best Original Dramatic Score. However, the nomination was subsequently withdrawn by the Academy on the grounds

that Rota – when writing the Love Theme for the film – had reused music from a score that he had written for the 1958 Italian film comedy *Fortunella*. The Academy argued that as Rota had reused his own music from an earlier film, the score to *The Godfather* could not be considered 'original'.

With *The Godfather* out of the running, the Oscar for Best Dramatic Score that year was awarded to the film *Limelight*, written, produced and directed by Charlie Chaplin in 1952. Chaplin also co-authored the score with Raymond Rasch and Larry Russell. Although *Limelight* had first been released twenty years earlier, it had not been screened in Los Angeles until 1972; as such, it was eligible for nomination.

Whereas today the soundtrack to *Limelight* is not particularly well known, Rota's Love Theme from *The Godfather* has become one of cinema's most famous and recognisable pieces of music. And yet, Rota had indeed reused his tune from *Fortunella*, albeit played in a very different way. In *Fortunella* the tune is played as a fast march: it is upbeat, raucous, and full of energy. In *The Godfather*, the orchestration, tempo and mood are completely changed: the melodic line may be the same, but the effect – what the music evokes – is entirely different.

Rota's act of self-plagiarism, whether conscious or unconscious, had other knock-on effects. Dino De Laurentiis, who produced *Fortunella*, subsequently reissued the *Fortunella* soundtrack featuring the ironic claim that it was 'The Godmother of the Godfather'. De Laurentiis was seeking to capitalise on the scandal of plagiarism surrounding Rota's Love Theme.

As it happens, two years later, Nino Rota and Carmine Coppola were awarded the Oscar for Best Dramatic Score for *The Godfather II*. Naturally, the film score for the *Godfather II* reused and recycled much of Rota's original score for *The Godfather*.

4. CREATE, AND REPEAT

Artists often incorporate motifs and elements of their earlier work when creating new works. However, if they have sold the copyright in those earlier works to someone else, they run the risk of infringing copyright when creating their new work. For this reason, the CDPA provides a specific exception allowing artists to reuse aspects of their earlier works. Section 64 states that where the author of an artistic work is not the copyright owner of that work, she does not infringe the copyright by copying the work in making another artistic work, provided she does not repeat or imitate the main design of the earlier work.

Consider, for example, an artist commissioned to paint a group portrait of seven or eight individuals. Later, the artist might reuse the sketches she made for the group painting to produce individual portraits. This type of use would fall within the scope of s.64: the artist would not infringe the copyright in the earlier painting as she is not repeating or imitating the main design of that earlier work.

Why do you think the CDPA specifically provides an exception for artists to reuse their earlier work, but not for authors or composers?

5. FOR DISCUSSION: TOO FAR? OR FAIR ENOUGH?

The melody at the heart of the mystery in *The Missing Note* is based on the Love Theme from *The Godfather*, by Nino Rota. Our version is an adaptation of Rota's melody, by the Italian composers Pietro Bartolotti and Filippo Terni, under the supervision of Adriano Cirillo. Cirillo was taught by Nino Rota. The notes are the same, but the timing, phrasing and effect is different.

But, have we infringed the copyright in the original melody? Or, does our reuse of the melody fall within one of the exceptions to copyright? Perhaps it qualifies as quotation (see [Case File #25](#)), criticism or review (see [Case File #6](#)), or even parody (see [Case File #5](#))? Perhaps it falls within a different exception entirely? You can find more information about different types of copyright exception on the [Exceptions](#) page of copyrightuser.org. Is there another exception that might apply in this case?



Main melody from the Love Theme, by Rota



Adaptation, by Bartolotti, Terni and Cirillo

6. USEFUL REFERENCES

The Copyright, Designs and Patents Act 1988 is available here: <http://www.legislation.gov.uk/ukpga/1988/48/contents>

There are various websites that provide information and guidance about plagiarism and how to avoid it! Many of these websites have been developed by Universities seeking to educate their students about this increasingly important issue. One particularly helpful resource is 'What Constitutes Plagiarism' within the Harvard Guide to Using Sources: <http://usingsources.fas.harvard.edu/what-constitutes-plagiarism>

Other resources have been developed by commercial companies that specialise in developing tools and strategies to help students and educators understand and detect plagiarism within an educational context. For example, see: <http://www.plagiarism.org/>

CASE FILE #31: FROM ARCADES TO APPS

LEARNING AIMS

- Understand the rich audio and video dimensions of computer games today – what this enables, and why that might matter in copyright law
- Evaluate approaches to games as copyright-protected works

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- How can a game be used to create a 'new' work?
- Is it useful to think of games as an art form?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

HOW CAN A GAME BE USED TO CREATE A 'NEW' WORK?

- See **TEXT BOX #3**
- Students are asked here to think about the 'machinima' (ma-shin-a-ma) phenomenon.

It's very common for games to have functions allowing the player to 'build' something – customising a character, putting together a structure, or a broader set of actions, gestures, movements. Even where this isn't possible, game footage can often be exported and then edited in other ways (such as inserting a different soundtrack or combining game footage with other material). (Your students may have examples of their own to discuss).

As an end product, Machinima can look quite like a film clip, but may have been created with nothing other than a computer game and a lot of time ... no camera, no studio, no film school.

- This is a good example of a new or emerging form of creativity – and one not necessarily expected by those who develop the original game!

A point to consider though is that, as with many exciting methods for creative production today, there is the risk that it rubs up against the rights of others, or at least seems legally 'risky'.

A major hurdle for those interested in machinima is whether they are infringing the exclusive rights of the original game developer. As noted in **TEXT BOX #3** and the further resources, some (though not all) will take a more generous approach – perhaps recognising that machinima does not compete commercially with the game itself, and might even serve to promote the game to a wider audience.

IS IT USEFUL TO THINK OF GAMES AS AN ART FORM?

- See **TEXT BOX #2 and #4**
- **There is no right or wrong answer** to this question, **it is a matter of opinion.**
- The idea of protecting software under copyright law is somewhat unusual; the 'creative' dimension in writing software code is less obvious. But it is now well established that software is protected. This was achieved, as set out in **TEXT BOX #2**, by amending copyright law to state that a program is a type of literary work.
- Game development today can be a highly creative activity. A modern game can include hours of original or licensed music, innumerable works of visual art, a complex 'plot', and much more.

Many successful games are made by large teams, where computer programmers are working alongside graphic designers, sound engineers, scriptwriters, animators, voice artists, and others. In that respect, the making of a game may look more like the production of a film than the preparation of new word processing software.

- The law defines the authors of a film as the producer and the director. This makes it relatively easy to understand who owns what rights in the film.

But we don't have the same clearly defined rules on authorship for games. For this reason, there is lots of potential for complexity when trying to work out who owns what rights in relation to a game. For example, a game can involve multiple creators who all may or may not own some of the rights in the game, depending on what type of contract they have signed, whether they are working on a freelance basis, and so on.

Do the students think that games production should be treated in the same way as film production? That is, should there be an equivalent of a producer and a director?

SUGGESTED ACTIVITIES

Consider introducing the students to a machinima video – there are some links below. Contrast this (and indeed modern high-definition console gaming) with a 'simpler' game (a classic e.g. [Pac-Man](#) or an app-based game from the present day volunteered by a student).

Ask the students to discuss points of similarity and difference between the two.

Two obvious points to make are as follows: (a) that games have always involved some measure of music and visual art, but (b) the processing power of today's hardware is such that the look and feel of a game is now very close to film and television (not least because film and TV increasingly use similar techniques e.g. computer-generated imagery).

CASE FILE #31: THE ARCADE AND THE APP

1. INTRODUCTION

In *The Unreliable Narrator*, our characters find themselves wandering through the history of a very 20th century art form – the (video – or computer) game. In this Case File #31 we consider the implications of intellectual property protection for the gaming sector, including the different aspects of copyright that may be present in a game.

2. WHAT IS SOFTWARE?

Computer games contain a rich set of potential subjects for intellectual property protection. Even the most elementary game will require the presence of some sort of instructions to the computer hardware. This 'software', written in a programming language, can be represented in letters and numbers and printed on paper, though some software would require thousands if not millions of pages and make little sense to those not skilled in the language. Computer hardware has improved over the last few decades, though; today's games can incorporate a significant amount of photo, video, and audio material, and even games that seem 'simple' (like an app played while waiting for a bus) can involve a complex set of instructions.

Although it was initially unclear how to treat software in the world of copyright, it became clear that classifying it as a type of literary work was the preferred approach. Software itself has been protected in copyright law for some time. When the UK revised its copyright law in 1988, it included 'a computer program' within the definition of literary work (s 3(1)(b)), confirming and clarifying a change to copyright law first made in 1985. In 1991, the EU (or the European Economic Community, as it then was) adopted a Software Directive, and in 1994, the new international agreement on world trade in services included new provisions on copyright law; both instruments also classified computer programs as a type of literary work.

That doesn't mean that computer code will be a particularly good bedtime story, but it does mean, as with other literary works, the author of the work will have certain exclusive rights under copyright law. When dealing with software, these rights are about the copying of the code itself, such as making an unauthorised copy of a file or disk or incorporating the code into another game.

A game, however, will normally consist of other elements alongside the computer program itself. Images, sounds, and the like, may be protected (assuming they meet the normal criteria for originality and the like). On the other hand, as explored in [Case File #32](#), certain features within a game (especially the 'mechanics' through which the player interacts with the system) may fall outside of copyright protection entirely. In any event, one of the tasks for a game developer (just like we saw in [Case File #29](#)) will be obtaining licenses for other works incorporated into their game (e.g., if they are not writing their own music, creating their own artwork, and so on). And, an unauthorised copy of a game may also be an unauthorised copy of, for instance, a [theme tune](#) contained within it.

3. GAMES AND BEYOND

As sometimes arises in the context of buyers exercising consumer rights or even tax breaks for developers, it can be quite difficult to work out when a game is 'finished,' or what is or is not the game as far as the developer's contribution is concerned. Games, like software more generally, may need to be fixed ('patched') through an update, especially where a problem with the code is identified after it has been first released. Many games are now accompanied by downloadable content ('DLC'), unlocking features or adding a new level. Some games offer great opportunities for players to create new content using the software – customised characters, new gaming experiences, and more.

A particularly interesting issue has been the phenomenon of [machinima](#), that is, the generation of new creative content using a game. Examples including making audiovisual material while playing a game and exporting it to be viewed elsewhere, or combining game footage with additional material (e.g. an additional soundtrack).

[Hugh Hancock](#) pioneered machinima, working in Scotland with creative and technical collaborators and, through the company he co-founded, [Strange Company](#), produced a feature-length film, [Bloodspell](#), in 2008. Strange Company's [machinima.com](#) website grew into a broader hub for game-related content, was taken over by its staff and eventually [sold to Warner](#), recently relaunched as a 'premier provider of digital content at the intersection of gamer entertainment and culture'.

During his career, Hancock often spoke at conferences on law and technology about the challenges of intellectual property law for his work. In this [2015 video](#), he talks about the particular barriers faced by machinima creators as compared with, for instance, a filmmaker working with a camera on a street or in a studio. On another [occasion](#), in 2013, he told stories about why it matters that the world's first copyright act, the 1710 Statute of Anne, didn't contemplate World of Warcraft.

Legal academic [Greg Lastowka](#) has written about machinima in chapter 9 of his 2010 book [Virtual Justice](#), highlighting how some game developers encouraged or [tolerated](#) the creation of machinima, but did so against a backdrop of a copyright law ill-equipped to handle this novel situation.

4. FOR DISCUSSION: THE ART OF GAMES

If copyright is about creativity, how creative is game development? Opinions vary; one early court throws some judicial shade by describing arcade game players as '[fairly indiscriminating insofar as their concern about more subtle differences in artistic expression](#)' and so not particularly engaged with artistic creativity on the part of the developer. More recently, the Court of Justice of the EU explained (in the *Nintendo v PC Box* case, which was about modifying computer hardware so as to allow for the playing of a wider range of games than those authorised by the manufacturer) that modern games '[constitute complex matter comprising not only a computer program but also graphic and sound](#)

elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption’.

Does it help to think of games as an art form? Does this affect how you think about copyright in the context of games?

5. USEFUL REFERENCES

WIPO, ‘The Legal Status of Video Games: Comparative Analysis in National Approaches’ (2013)

Atari v North American Philips 672 F 2d 607 (1982) (unfortunately, this case is not readily available online)

Nintendo v PC Box (2014) (CJEU) Case C-355/12 is available here: <http://curia.europa.eu/juris/liste.jsf?num=C-355/12>

G Lastowka, *Virtual justice: the new laws of virtual worlds* (Yale University Press 2010) <https://archive.org/details/virtualjustice>

D Mac Síthigh, ‘The game’s the thing: properties, priorities and perceptions in the video games industries’ in M Richardson and S Ricketson (eds), *Research handbook on intellectual property in media and entertainment* (Edward Elgar 2017)

L Frølund, ‘Machinima as creative practice’ (*Audiovisual Thinking* #7) <https://www.audiovisualthinking.org/videos/issue-7-machinema/>

H Hancock, ‘A Virtual Filmmaking Primer’ (24 January 2014) <https://www.antipope.org/charlie/blog-static/2014/01/resource-post-virtual-filmmaking.html#more>

Learn how to write your own game in this free [FutureLearn course from the University of Reading](#)

CASE FILE #32: THE (UN)POPULAR CLONE

LEARNING AIMS

- Understand copying (as in developer B allegedly copying the work of developer A) in the context of games
- Discuss how the law ought to be enforced

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- How can one game be said to be a copy of another?
- Who should be responsible for dealing with 'cloned' games?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

HOW CAN ONE GAME BE SAID TO BE A COPY OF ANOTHER?

- See **TEXT BOX #2 and #3**
- Some of the biggest copyright cases concerning computer games have been disputes between game developers. In the materials, we see disputes between the famous original game of *Tetris* and a deliberately similar, more recent game; we also meet the *Nova* case, where two developers of arcade games went up against each other in a set of lengthy court cases in England.
- These cases aren't hugely surprising. A 'similar' game can draw upon the market for a particular type of game – and a player, having completed or at least got the most out of the first game, could be interested in a different approach. And some gamers (perhaps including your students) will have clear preferences as to genre – 'I like action games but not puzzle games', for instance.
- The creators of the 'earlier' game will argue that the 'later' game is drawing upon their work – even if (as is typical) there is no direct copying of the computer code itself. They will argue that the way that gameplay is represented (through on-screen displays, the rules of the game, particular types of image) is original to them and that the 'later' game developer needed their authorisation to make what is, in legal terms, an infringing copy.
- But the 'later' creators will point to the very general nature of some of the alleged similarities, arguing that what is said to be copied was never protected by copyright law in the first place. They will worry that if they need permission to make their game, it will be too easy for the 'earlier' creators to corner the market and simply say no (or demand an unreasonable price) – even though what the 'earlier' creators did in the first place may be limited in terms of originality.
- The law tries to strike a balance between these positions. While warning (as in *Nova*) that copyright law can go too far, there is the possibility of showing, in suitable

cases, that despite the lack of evidence of copying of code, a later game is an infringing copy of the earlier game. Courts will look in detail at, for instance, how much has been 'taken' from the earlier game and how much of that material was itself original.

WHO SHOULD BE RESPONSIBLE FOR DEALING WITH 'CLONED' GAMES?

- See **TEXT BOX #4**
- **There is no right or wrong answer** to this question, **it is a matter of opinion.** There is no specific legal duty in place.
- This text box prompts students to think about enforcement.

'Cloning' of games is seen as a particularly extreme example of the phenomenon discussed in this case file (though note that it can be tempting for a developer to shout cloning, as it's not a legal term but it a very negative one).

In its proper sense, we are talking about a new game that is developed quickly and with little originality to exploit the interest in a particular game. This is often seen in app stores and the like – taking advantage of a sudden wave of players searching for a game and perhaps going to the 'cloned' version if it comes up earlier in search results or is cheaper.

- In general, copyright law is up to the owner to enforce. In theory, where cloning arises, the original developer can go to court seeking to prevent the cloner from publishing the game, and/or seeking an appropriate legal remedy for the harm caused.
- In practice, this can be of limited value. Cloned versions can pop up quickly and gather substantial revenue. The nature of legal processes, especially across national borders, can be too cumbersome to satisfy the original developer. Players, too, can be led astray by poor quality clones (especially where combined with, for instance, the gathering of personal data).
- One possible way to enforce the law is to make the app store take on a greater role.

Many games are now sold through these stores, so it seems an obvious place to screen out the worst of clones – and to do so quickly and cheaply. And a cloned game that can't be downloaded by players isn't really doing much harm.

But this approach can be challenged on the grounds that it gives power to the store operator (such as Apple, for iPhone games) and that the operator may not be in as good of a position as a judge to decide whether copyright law has been infringed or not. (This is not just an issue for games clones – increasingly, the responsibility for enforcing copyright law seems to be shifting to platforms like YouTube or Facebook, for better or for worse).

SUGGESTED ACTIVITIES

As an activity, ask students to come up with their own 'clone' of a popular game, and debate whether this would be lawful or unlawful. Use this to explore the consequences of overprotection (no scope for new games) vs underprotection (unfair competition with no real creativity).

CASE FILE #32: THE (UN)POPULAR CLONE

1. INTRODUCTION

Sherlock and John see a number of images and animations that may look familiar to a gamer, during *The Unreliable Narrator*. For example, what are those skulls falling in intriguing patterns? In this Case File #32, we consider a famous dispute about a game similar to one of the world's most played games – *Tetris* – and think about the consequences of under- and over-protection in copyright law.

2. TETRIS

When Sherlock and John meet Mr. Hush and Agnes, something like *Tetris* plays out around them, although instead of the 'tetromino' familiar to anyone who had a [Game Boy in the 1990s](#) we see skulls instead. But what is the legal status of a game that 'looks' or 'feels' like *Tetris*? This issue [came before the US courts in 2012](#), where the *Tetris* rightsholders succeeded in persuading a judge that a new game, *Mino*, infringed their rights. (We also learn from reading the case that the makers of *Mino* happily admitted that they had set out to do something that was *Tetris*-like, having taken legal advice that it would be possible to do so without infringing copyright law). The judge pointed out that *Tetris* was a 'purely fanciful' game (not an existing game, like golf, which was being represented on screen in a way that players would already visualise), and that *Mino*'s developers could have chosen different shapes and the like.

Disputes between game developers are not new. The most detailed exploration of this question in the UK arose out of something that Sherlock and John encounter early in this episode: the 'arcade' game. [Nova Productions](#) and Mazooma Games were two companies working in this sector when Nova went to court in the mid-00s arguing that some of Mazooma's games infringed on its copyright. But Mazooma succeeded – in the [High Court of England and Wales](#) and then in the [Court of Appeal](#) – primarily on the grounds that it had not copied the computer code that drove Nova's games. Indeed, one judge at the Court of Appeal – Lord Justice Jacobs – warned that copyright should not go so far as to 'become an instrument of oppression rather than the incentive for creation which it is intended to be'.

The distinction between ideas, genres, graphics, and the like, is often controversial. In episode 5 we see the centaurs throwing paperballs-cum-fireballs at the unfortunates below; this might look particularly like *Super Mario Bros*, though gamers have long had to dodge unwelcome gifts from above, whether [Donkey Kong's](#) barrels or even the bullets in [Space Invaders](#). In 2018, the [wildly popular Fortnite](#) was to be the subject of a [copyright action in South Korea](#), though the case, which was brought by rival *PlayerUnknown's Battlegrounds* (PUBG) was [withdrawn at an early stage](#). (Both games have versions with 'battle royale' modes, inspired by the [film](#) of that name; the conceptual similarities between *Battle Royale* and *The Hunger Games* have been [much discussed](#)).

3. PROTECTING GAMEPLAY

Indeed, the *Tetris* case also reminded us how the key cases on software and copyright in the US are also from the 1980s heyday of the video game arcade, turning on allegations that the big games of the day - such as *Asteroids* and *Pac-Man* - had been unlawfully copied by others. Some proved infringement while others didn't; where infringement wasn't found, it was often because the elements alleged to have been copied were too general in nature (tables of highest scores, various ways of representing the use of buttons and joysticks on screen).

A similar caution is evident in the 2004 English case of *Navitaire v EasyJet*, where new software (for managing air reservations) was designed to perform similar functions to a more established package, though the designers of the new software had no access to the code of the original; it was found lawful, as what was 'taken' was not a 'substantial part' of the original. The *Navitaire* case was discussed in detail in the *Nova* case.

But what of the situation where, as seems particularly commonplace in new game markets such as app stores, a successful game is quickly and (it seems) quite cheaply imitated? Does copyright have a role to play here? It has been argued that copyright law should change so that 'gameplay' is protected. Meanwhile, however, other court decisions in the EU have emphasised the limits to protecting 'functional' aspects of computer use through copyright law – such as an on-screen interface. Some old debates about IP law and computers – including whether copyright, or patent, or something that is distinctive to information technology, is the most appropriate form of protection – seem as relevant as ever.

4. FOR DISCUSSION: IS THE ANSWER IN THE BIG APPLE?

If there is a situation where a game has been 'cloned', how can that be addressed? Or, to put it another way, should platforms have any responsibility for checking the lawfulness of software distributed through that platform? In the situation of one of the most rapidly copied games – *Flappy Bird* – it was reported that, at its height, a new clone was uploaded to the Apple app store [about twice an hour](#), and that making a new version would take [about three hours](#). Apple are said to be taking [more action against clones](#) these days. Is this effective? Is it the right thing to do? Or should we leave it to the courts to determine what is and isn't copying in these circumstances? Overenforcement can leave other developers in a position where they [can't reach their key audience](#), but others call for Apple to play [more of a policing role](#).

5. USEFUL REFERENCES

Box Brown, [Tetris: the games people play](#) (2016)

T Phillips "'Don't clone my indie game, bro': Informal cultures of videogame regulation in the independent sector' (2015) 24 Cultural Trends 143

Y H Lee, 'Play Again? Revisiting the Case for Copyright Protection of Gameplay in Videogames' (2012) 34 European Intellectual Property Review 865-874.

Tetris v Xio Interactive (2012) 863 F Supp 2d 394 is available here:

https://scholar.google.co.uk/scholar_case?case=18064882260025243346

Nova Productions v Mazooma Games [2007] EWCA Civ 219 is available here:

<http://www.bailii.org/ew/cases/EWCA/Civ/2007/219.html>

Navataire v Easyjet [2004] EWHC 1725 (Ch) is available here:

<https://www.bailii.org/ew/cases/EWHC/Ch/2004/1725.html>

CASE FILE #33: THE (IN)COMPLETE MESSAGE

LEARNING AIMS

- Understand that not all copying is wrong
- Understand that copying, when creating new work, can be lawful and creative
- Understand that theft and copyright infringement are not the same thing

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- What is the difference between theft and copyright infringement?
- In creating *The Game is On!* have we copied other people's works creatively and lawfully?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

WHAT IS THE DIFFERENCE BETWEEN THEFT AND COPYRIGHT INFRINGEMENT?

- See **TEXT BOX #2 and #3**
- Theft involves dishonestly taking someone's property and permanently depriving them of it
- Copyright infringement occurs when you copy someone else's work for certain purposes without their permission.

Copyright infringement might be economically harmful, but it does not deprive anyone of their property, permanently or otherwise. The copyright owner can still make use of their property.

Also, copyright infringement can happen by mistake, or innocently. Even if you don't know you are doing something wrong you can still be infringing copyright.

IN CREATING *THE GAME IS ON!* HAVE WE COPIED OTHER PEOPLE'S WORKS CREATIVELY AND LAWFULLY?

- See **TEXT BOX #4 and #5**
- The first question is easy to answer (we think): we have been extremely creative with other people's works in developing and producing *The Game is On!*

Sometimes our use is obvious. Sometimes our use is not so obvious.

Perhaps make the **ANNOTATIONS** to each episode (or some of them) available to the students to let them explore the various ways in which we have copied, creatively.

- **Have we copied lawfully?**
- **YES.** We have copied in various ways that are entirely lawful. For example, we have copied:
 - **Ideas;** ideas are not protected by copyright.
 - Standard **Themes and Tropes** that recur again and again in literature and film; like ideas, these are not protected by copyright.
 - **Facts and Information;** these are not protected by copyright.
 - From works that are in the **Public Domain;** that is, copyright has expired in these works, and so they are free for anyone to use.
 - **Insubstantial Parts** of works; insubstantial copying is allowed under the law.
- In addition, wherever we have copied something more than an insubstantial part of someone's copyright work, we have relied on various exceptions to copyright. These exceptions allow us to make use of other people's work, so long as our use is fair.

We have relied on exceptions for the following purposes:

- Parody
- Quotation
- Criticism and Review
- Illustration for Instruction

ADDITIONAL MATERIAL

In considering and discussing the second KEY QUESTION you may want to refer to the ANNOTATIONS accompanying the films to illustrate these different types of lawful use. With that in mind, we provide some examples drawing on the ANNOTATIONS.

- **Ideas;** ideas are not protected by copyright

See 4.16: In episode 4, the idea of using a melody as the basis of the cipher was influenced by Alfred Hitchcock's film *The Lady Vanishes*. Miss Froy (the lady who vanishes), is an undercover British agent who must deliver a message to the Foreign Office in London. The key to the message is a folk tune that Miss Froy teaches to her travelling companions, Iris Henderson and Gilbert Redman.
- Standard **Themes and Tropes** that recur again and again in literature and film; like ideas, these are not protected by copyright.

See 2.26: In episode 2, each of the six characters that Mary is thinking about creating – the six detectives – are easily recognisable tropes frequently used in the genre of detective fiction. Recognisable types of literary detective cannot be protected by copyright.
- **Facts and Information;** these are not protected by copyright.

See 6.27: Arthur, the photographer is obsessed with the occult, and with capturing fairies on film. This aspect of the episode 6 was based on the well-known fact that

Sir Arthur Conan Doyle believed fairies and tried to persuade the public about their existence.

- From works that are in the **Public Domain**; that is, copyright has expired in these works, and so they are free for anyone to use.

See 5.8: In episode 5, our map of the game that Sherlock and John must play is based on two illustrations of the different levels of Hell, from Dante's Inferno, one of which is by Sandro Botticelli (1445-1510). These works are in the public domain.

- **Insubstantial Parts** of works; insubstantial copying is allowed under the law.

See 1.32: There are lots of examples of insubstantial copying throughout the films, but one of the most insubstantial concerns the use of one word from an episode of the BBC series Sherlock. That word is: 'Bored!'

- **Exception for Parody**

See 1.24: In episode 1, we create a parody of the famous movie poster for Jaws (1975), while at the same time incorporating elements from works in the public domain by Carlo Chiostri.

- **Exception for Quotation**

See 3.22: We make use of extensive quotation throughout the films, copying very short bits of dialogue from other films, from television, and from literature. Sometimes we paraphrase or adapt the quotes slightly, to suit our context. In episode 3, much of the dialogue of the person interviewing Sherlock and John is quoting similar dialogue from the film Blade Runner (1982)

- **Exception for Criticism and Review**

See 1.1: The opening scene of the entire series is an image of a red double-decker bus crossing Westminster Bridge. In doing so, we recreate an image that was the focus of copyright litigation in 2012, resulting in a decision that many researchers and academics considered problematic. Within the film, our use of this image carries with it an implicit critique of the court's decision, discussed further in Case File #1.

- **Exception for Illustration for Instruction**

See Episodes 1-6: We like to think that however and whenever we have copied other people's work throughout the making of The Game Is On!, ultimately, it has all been for the purpose of 'illustration for instruction'. The point of developing this resource has been to help educate and instruct students about copyright law.

SUGGESTED ACTIVITY

Pick one film and its accompanying set of annotations (or, alternatively, give different groups a different film to consider and discuss).

Working in groups, ask the students to identify examples of copying, and to explain why the copying is lawful. For example, the copying might involve ideas, or facts and information. Alternatively, the copying might involve quotation or parody.

Are there any instances of copying that the group cannot agree on? Do the students think there are any examples of copying that might be unlawful? Ask them to explain why.

CASE FILE #33: THE (IN)COMPLETE MESSAGE

1. INTRODUCTION

There are many different copyright education resources available online and elsewhere. Often, they are developed for schools in partnership with organisations that represent authors and artists, as well as the publishing, music, film and other creative industries. But, in our experience, this often means these resources offer a very particular kind of story about copyright, its purpose and its possibilities.

In this Case File #33, we consider two ways in which some traditional copyright educational materials can present a slightly skewed or incomplete view of the copyright world. Then, we invite you to consider the many and varied ways in which we have copied copiously from other people's ideas and works to create the entire series of *The Game is On!*

2. YOU SAY EDUCATION? I SAY MISINFORMATION. LET'S CLEAR THE WHOLE THING UP

Copyright infringement is wrong.

And, theft is wrong.

They are both wrong, but they are not the same thing. Far from it.

Why then do some copyright educational materials tell you that copyright infringement and theft are essentially the same thing?

For example, one copyright education resource repeatedly talks about 'copyright theft' (rather than copyright infringement), contains a lesson plan concerning 'the theft of creative ideas,' and stresses that 'it's wrong to steal an idea,' just as 'it's wrong to steal a pen, a mobile phone or a car'. You may also have seen adverts in the cinema or online delivering a similar message: you wouldn't steal a handbag or a car, so why would you infringe copyright?

Classically defined, theft occurs when one person dishonestly takes property belonging to another with the intention of permanently depriving the other person of that property.

In other words, theft typically involves things – such as a pen or a mobile phone or money – that can only be used by one person at one time. If you steal my car, you are depriving me of its use. If the car is never recovered, I have been deprived of its use permanently. Also, theft only occurs when someone is acting dishonestly. That is, they must intend to steal. If you take my pen by mistake there is no theft because there is no intention to steal.

Copyright infringement is unlawful, but it is not theft. Rather, it involves *copying someone else's work without permission*. Moreover, not all copying without permission is unlawful, as we shall see in the next section.

For now, however, think about J.K. Rowling's first book, *Harry Potter and the Philosopher's Stone*. Since it was first published in 1997, it has sold over 120 million copies worldwide, in over 80 languages. That is, the story has been printed and reprinted, bought and sold, on paper and in digital form, over 120

million times. Roughly speaking, that's about one copy for every 60 people that are alive on the planet. The phenomenal success that Rowling has enjoyed is quite amazing.

Now, suppose that I copy and paste passages from *The Philosopher's Stone* into a blog or a website that I maintain because I'm a Harry Potter fan. In doing this, I am copying parts of Rowling's copyright-protected text. My copying may or may not be unlawful, depending on the circumstances, e.g., how much I have copied, the reason and purpose for my copying, whether my actions can be considered fair, and so on.

But, whatever else I am doing, I am not stealing. There is no theft.

Of course, copyright infringement can sometimes cause economic harm. Imagine, for example, an eccentric billionaire decides to print one million copies of *The Philosopher's Stone*, in Spanish, to give away for free to children in Colombia, Ecuador, Venezuela and Peru. And, she does it without Rowling's permission. Clearly, this amounts to copyright infringement and this unlawful action will cause Rowling economic harm by harming her opportunity to sell copies of her work throughout the north of South America. But again, this is not theft.

So, to recap:

Theft is wrong.

Copyright infringement is wrong.

But, copyright infringement is not theft. And, don't let anybody tell you that it is.

3. HEADS OR HEADS? A STORY HALF-TOLD

The second way in which some copyright education resources sometimes fall short, is that they have a tendency only to tell you half of the copyright story. That is, they tend to focus almost entirely on what you *can't do* with someone else's copyright work. But, rarely do they tell you what you *can do* with another person's work without the need for permission or paying any kind of fee.

You should never forget that there are *always* two sides to the copyright coin.

The law tells us that there are certain things that we cannot do without copyright permission. But equally, the law expressly tells us that there are lots of ways in which we can make use of another person's work, without the need for their permission, whether it is for certain creative, informative, educational or other purposes. In the next section, we consider the various ways in which use without permission is entirely lawful.

So, to recap:

Sometimes how you make use of someone's work will require permission; at other times, it won't.

Whereas some resources tend to prefer a coin with two HEADS, in this resource we show you both sides of the coin, HEADS *and* TAILS.

4. THE STORY OF THE STORY OF *THE GAME IS ON!*

When developing *The Game is On!* we set out to make a research-led, open access, web-based resource that provides users with an opportunity to explore, discuss and debate key principles and ideas underpinning copyright law, creativity, and the limits of lawfully appropriating and reusing other people's work. But, *The Game is On!* does more than just try to explain and help users navigate these issues.

Rather, we want to *demonstrate* how copyright enables creative possibilities. In adopting appropriation as a creative technique, each of our films speak to the positive, expressive power of the copyright regime by embracing and evidencing the creative reuse of public domain and copyright materials.

In short, we have copied. Lots. And, lawfully.

Across all six films, in just over 20 minutes, we believe we have copied, borrowed from and been influenced by other people's ideas and copyright works around 500 times (or, on average, approximately twice every five seconds). The works we have borrowed from take many different forms: novels and short stories, paintings, film posters and photographs, melodies and musical scores, television and film, costume and set designs, history, science and academia, real-world copyright litigation, and much, much more.

Sometimes we make use of numerous sources in developing a single image, design or idea for one of our films. Sometimes we make use of the same work multiple times, in different ways, throughout the films. Sometimes we simply take inspiration or borrow ideas, neither of which are protected by copyright. Sometimes we borrow from works in the [public domain](#), works that can be freely copied because copyright has expired.

However, in general, we borrow from works that are still in copyright. And, importantly, not once did we ask for permission.

This isn't because we're rude people (we're not).

And it isn't because we don't respect the authors who created the works, or because we think copyright isn't a good thing. We do. And, it is.

Rather, we don't ask for permission because we don't need to ask for permission. We haven't asked for permission because the copyright regime tells us we can make use of other people's work in all sorts of ways. In making *The Game is On!* we've made use of others people's work [for criticism and review, for quotation](#), for [parody and pastiche](#), and for [educational purposes](#). Similarly, we've made use of insubstantial parts of copyright works, and of information, biographical and otherwise, as well as commonplace tropes, themes and ideas from well-known films, stories and more.

In other words: we have done what creators typically do. We have allowed ourselves to be influenced by the world around us. We've taken things that already exist in the world and we've struck them together, hoping for a creative spark, conjuring fire, and spinning unlikely threads of gold.

In creating, we have copied. And that's not a bad thing. It's not a bad thing at all.

Moreover, we have decided to lay bare the story of our copying, so far as we know it and have been able to document it.

Accompanying this Case File are six documents, each of which annotate an episode of *The Game is On!* In each document, we identify and explain the many and varied sources that have influenced the writing, design, animation and scoring of each film. We do not claim that our annotations are necessarily exhaustive or complete. We accept that there may well be influences we have forgotten or overlooked. Similarly, there may well be material that we have copied or borrowed from unconsciously. If you can identify any copying that we have not listed in each of these documents, it would be great to hear from you. Otherwise, we leave it for you to explore these annotations at your own leisure.

5. FOR DISCUSSION

From a copyright perspective, we believe all of the copying that takes place in *The Game is On!* is lawful. Do you agree?

The Game is On!

a web series produced by



for



with the support of

