

## 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.

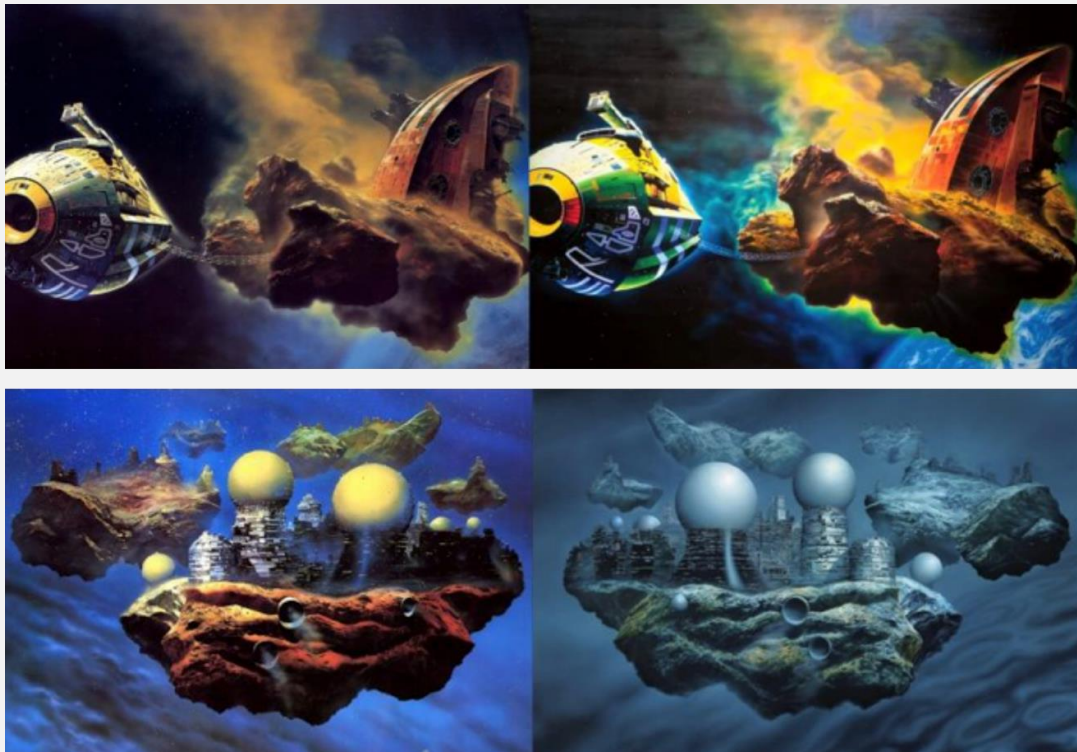
Indeed, appropriation is at the heart of Brown's work. Brown meticulously recreates images 'borrowed' from art and popular culture by transforming the appropriated image, whether changing its colour, position, orientation, mood or size. Brown begins by importing the original image into an image editing 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](http://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](http://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>.