

## 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](http://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>