

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.

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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/cjg-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>