in its own right.[39] This approach leaves room for the possibility that some creative titles might still qualify for copyright protection.[40] The standard of 'originality' is reviewed in Chapter 4.

2.3 TABLES AND COMPILATIONS (OTHER THAN DATABASES)

Section 3(1)(a) of the CDPA 1988 specifically states that literary work includes 'tables or compilations (other than a database)'. Implementing the EU Database Directive, 'databases' are a separate type of literary work,[41] subject to a distinct requirement of originality. As we will see, a database is defined in very wide terms. As a result, there is little that will fall within the category of 'tables and compilations'.

2.4 COMPUTER PROGRAMS

After considerable debate at both national and international levels over whether computer programs should be regulated by copyright law, patent law, or by a *sui generis* regime, it was decided in the 1980s that computer programs ought to be protected as literary works.[42] This position is now well entrenched in European and international intellectual property law.[43] In line with these trends, the 1988 Act protects computer programs as literary works.[44] While the Act does not define what is meant by a 'computer program',[45] it is clear that it includes source code,[46] assembly code, and object code. It is also clear that 'computer program' is not synonymous with software. On this basis, the definition of computer program includes instructions permanently wired into an integrated circuit (that is, firmware).[47]

In a decision in which it held that a 'graphic user interface' (GUI) is not a computer program (although it may be some other type of work), the Court of Justice has articulated the defining characteristics of a computer program. The 'object of the protection', the Court of Justice said, 'is the expression in any form of a computer program *which permits reproduction in different computer languages*, such as the source code and the object code.'[48] Because the key characteristic of a program is that it enables the reproduction of

[39] *Rose v. Information Services* [1987] *FSR* 254 (Hoffmann J) (there was too slight a degree of skill and labour in *The Lawyer's Diary*). In *Sinanide v. La Maison Kosmeo* (1928) 139 *LTR* 365 (CA), protection was refused to the advertising slogan 'Youthful appearances are social necessities, not luxuries' by reference to the principle *de minimis non curat lex* ('the law does not concern itself with trifles').

[40] In *Francis Day and Hunter v. 20th Century Fox* [1940] *AC* 112, the Privy Council indicated that if a title were extensive and important enough, it might be possible to protect it. For cases of protection, see *Lamb v. Evans* [1893] 1 *Ch* 218 (headings in trade directory protected) and *Shetland Times v. Dr Jonathan Wills* [1997] *FSR* 604 (arguable that newspaper headline of eight or so words—'Bid to save centre after council funding cock-up'—was protected because it was designedly put together for the purpose of imparting information).

[41] CDPA 1988, s. 3(1)(d).

[42] *Gates v. Swift* [1982] *RPC* 339; *Sega Enterprises v. Richards* [1983] *FSR* 73; *Thrustcode v. WW Computing* [1983] *FSR* 502.

[43] Software Dir.; TRIPS, Art. 10(1); WCT, Art. 4.

[44] CDPA 1988, s. 3(1)(b). The Copyright (Computer Software) Act 1985 had declared only that computer programs were to be *considered* as literary works.

[45] But cf. the WIPO *Model Provisions on Protection of Computer Software* (1978); Green Paper, *Copyright and the Challenge of Technology* (June 1988), COM(88) 172 final, 170; Copyright Act 1976, 17 *USC* §101 (all offering definitions).

[46] *Ibcos Computers v. Barclays Mercantile Highland Finance* [1994] *FSR* 275.

[47] Software Dir., Recital 7.

[48] *Bezpečnostní softwarová asociace*, Case C-393/09 [2010] *ECR* I-13971 (ECJ), [28]–[42] (emphasis added). See also *SAS Institute v. World Programming*, Case C-406/10 [2012] 3 *CMLR* (4) 55 (ECJ, Grand Chamber), [35]–[37].

the computer program itself, so that the computer can perform its task, it does not include a GUI.[49] This is because a GUI merely enables communication between the computer program and the user, and so does not enable the reproduction of the computer program. The Court said that a GUI 'merely constitutes one element of that program' by means of which users make use of the features of that program.[50]

2.5 PREPARATORY DESIGN MATERIAL FOR COMPUTER PROGRAMS

To bring British law into conformity with the Software Directive, preparatory design material for computer programs is now included within the general definition of literary works. It has been suggested that this is an inappropriate way of implementing the Directive and that preparatory design material should be treated as part of a computer program.[51]

2.6 DATABASES

As we mentioned earlier, in order to comply with the Database Directive, the definition of literary works was amended from 1 January 1998 to introduce 'databases' as a distinct class of literary works. Section 3(1)(d) of the CDPA 1988, corresponding to Article 1(2) of the Directive, defines a database very broadly as 'a collection of independent works, data or other materials which (a) are arranged in a systematic or methodical way, and (b) are individually accessible by electronic or other means'. It seems that the definition is broad enough to cover most, if not all, of the material previously protected as tables and compilations.[52]

The Court of Justice explained some aspects of the definition of a database in *Fixtures Marketing v. Organismos Prognostikon Agonon Podosfairou AE (OPAP)*.[53] The case concerned a claim that English football fixtures were databases (and protected by database right).[54] The defendant organization, which used the fixtures in its betting games, asserted that the fixtures lists were not 'databases'. The Court of Justice considered that the notion of 'database' was intended to have 'a wide scope, unencumbered by considerations of a formal, technical or material nature'.[55] Consequently, there was no reason why a collection of sporting information should not be a 'database'. As regards the prerequisite of 'independence', the Court said that this required the constituent material to be 'separable from one another without their informative ... or other value being affected',[56] and the

[49] Case C-393/09, [38].

[50] Interpreted literally, one might form the view that the Court was saying that a GUI is 'part' of a program. But if that were the case, it would be protected, and clearly the Court thought that it was not protected under the Software Directive.

[51] Software Regs, reg. 3; *Bezpečnostní softwarová asociace*, Case C-393/09 [2010] *ECR* I-13971 (ECJ), [36]–[37]. For commentary, see S. Chalton, 'Implementation of the Software Directive in the UK' [1993] *EIPR* 138, 140.

[52] *Cf. Football Association Premier League v. Panini UK* [2004] *FSR* (1) 1, [25], [29] (suggesting that an album for stickers of football players—the stickers being artistic works—is a compilation, but it is probably a database).

[53] Case C-444/02 [2005] 1 *CMLR* (16) 367.

[54] On this right, see Chapter 13.

[55] *Fixtures Marketing v. OPAP*, Case C-444/02 [2005] 1 *CMLR* (16) 367, [20]. See also *Ryanair*, C-30/14, EU:C:2015:10, [33]; *Freistaat Bayern*, Case C-490/14, EU:C:2015:735, [12], (ECJ, Second Chamber).

[56] *Fixtures Marketing v. OPAP*, Case C-444/02 [2005] 1 *CMLR* (16) 367, [29]. See also E. Derclaye, 'Do Sections 3 and 3A of the CDPA Violate the Database Directive? A Closer Look at the Definition of a Database in the UK and its Compatibility with European Law' [2002] *EIPR* 466, 469 ('"independent" means that an element makes sense by itself'); Davison, 72.

Court intimated that this was true of individual fixtures, each of which had 'autonomous informative value' by providing 'interested third parties with relevant information'.[57] The Court also commented on the requirement that the materials be arranged in a 'systematic or methodical' manner so as to be individually accessible, and stated that this required either that there be technical means for searching or other means, such as an index, table of contents, plan, or classification, to allow retrieval.[58] The fixture lists, being organized chronologically and, within the chronology, alphabetically, constituted just such an arrangement.

Applying these definitions, the poems in a book of poems by the same poet would most likely be regarded as 'independent' and 'individually accessible', and thus would constitute a database. Each poem has value on its own, and each can be read separately.[59] While one might have questioned whether the data on a map would be considered to be 'independent', because the meaning and value of the information typically depends on its relationship to other information on the map, the CJEU has now confirmed that it usually will be (and thus that in most, if not all cases, a map is a 'database').[60] Importantly, the Court pointed out that the 'unit' of data which is collected in a database could comprise combinations of information (for example, an item, such as a church, and its geographic location), so that it was irrelevant that the item, taken by itself, would have no value.[61] However, the Court went on to offer a different way of determining whether data was 'independent.' While one might have assumed that the question was whether each datum was 'independent' before its collection into a 'database,' the Court instead considered the question 'ex post', asking whether the information would continue to have some value if extracted from the collection. Observing that mere diminution in the value was not such as to lead to a conclusion that each item did not have 'autonomous informative value',[62] the Court considered this from the perspective of 'each third party interested by the extracted material' (rather than the 'typical user').[63] As long as extracted information could be of some value to some third parties, the Court concluded, it could be regarded as 'independent' for the purposes of the definition.[64]

A database does not include a computer program used in the making or operation of databases accessible by electronic means.[65] It should be noted that a computer program might itself be or include a compilation of information and hence be a database as well. Insofar as a computer program incorporates parts that fall within the definition of a database, it seems that these components may be independently protected as databases (whether under copyright or the *sui generis* database right).

One question that has arisen in this context is the extent to which a multimedia work as a whole (as distinct from the sound, pictures, text, and moving images of which it is made up) can be protected as a database.[66] Given that a database is defined, seemingly without

[57] *Fixtures Marketing v. OPAP*, Case C-444/02, [2005] 1 *CMLR* (16) 367, [33]. [58] Ibid., [30].

[59] Information displayed on a 'pdf' might be 'individually accessible': *Technomed v. Bluecrest Health Screening* [2017] *EWHC* 2142 (Ch) (Judge D Stone), [69] ('the contents of the pdf can be accessed, either through electronic conversion, through digital character recognition, or old-fashioned reading or re-typing.') See, to the same effect, *Freistaat Bayern*, Case C-490/14, EU:C:2015:735, [15] (ECJ, Second Chamber) (analogue nature of maps, which required they be subject to process of OCR before each element could be searched electronically, did not mean those elements were not individually accessible).

[60] *Freistaat Bayern v. Verlag Esterbauer GmbH*, Case C-490/14, EU:C:2015:735, [29]. The conclusion is likely more important for database right, as most maps are unlikely to be original.

[61] Ibid., [21]. [62] Ibid., [24]. [63] Ibid., [27]. [64] Ibid., [28].

[65] Database Dir., Art. 1(3).

restriction to the type of material, as a collection of 'works data or other materials', there seems no reason why a multimedia work should not be a database. While it may seem odd that a compilation of artistic works or sound recordings is protected as a literary work,[67] this conclusion now seems unavoidable.

3 DRAMATIC WORKS

The CDPA 1988 does not define what a 'dramatic work' is, except to state that it includes a work of dance or mime.[68] However, it is relatively clear that dramatic work includes the scenario or script for films, plays (written for the theatre, cinema, television, or radio),[69] and choreographic works.[70]

For a creation to qualify as a 'dramatic work', it must be a 'work of action' that is 'capable of being performed'.[71] While the courts have not yet fully explored what is meant by a 'work of action', it is clear that it does not include static objects, sets, scenery, or costumes,[72] although these might be protected as artistic works.[73] It has been said that a film will usually be a dramatic work where there is 'cinematographic work' on the film.[74] In some limited circumstances, a work of action might include sports, such as gymnastics or synchronized swimming.[75]

The requirement that, to be a dramatic work, the subject matter must be 'capable of being performed' initially operated in a restrictive manner. In the *Hughie Green* case,[76] Green was the originator and producer of a talent show called *Opportunity Knocks*—a programme that followed a particular format: certain catchphrases were used; sponsors introduced contestants; and a 'clapometer' was used to measure audience reaction. Beyond this, the content of the show varied from show to show. The Broadcasting Corporation of

[66] See Stamatoudi, ch. 5.; Aplin, ch. 3; S. Beutler, 'The Protection of Multimedia Products through the European Community's Directive on the Legal Protection of Databases' [1997] *Ent L Rev* 317.

[67] See *Football Association Premier League v. Panini UK* [2004] *FSR* (1) 1, [32] (Mummery LJ) (giving examples of compilations made up of artistic works). One effect could be that a compilation of sound recordings would achieve much longer protection under copyright as a database than as a single sound recording.

[68] CDPA 1988, s. 3(1).

[69] *Green v. Broadcasting Corp. of New Zealand* [1989] *RPC* 469, 493.

[70] The fixation of such a work can be in writing 'or otherwise' and may accordingly be, for instance, on film. Where a dramatic work is recorded on a film, the film must contain the whole of the dramatic work in an unmodified state: *Norowzian v. Arks (No. 2)* [2000] *EMLR* 67 (dance recorded on film held unprotected because the film had been drastically edited and so was no longer a recording of the dance).

[71] *Norowzian v. Arks (No. 2)* [2000] *EMLR* 67 (CA), 73.

[72] *Creation Records* [1997] *EMLR* 444 (finding no arguable case that a photo shoot is dramatic work, since scene was inherently static, having no movement, story, or action).

[73] *Shelley Films v. Rex Features* [1994] *EMLR* 134; cf. *Creation Records* [1997] *EMLR* 444.

[74] *Norowzian v. Arks (No. 2)* [2000] *EMLR* 67. In the view of Buxton LJ, such a construction went some way towards ensuring compliance with Berne, Art. 14*bis*, which specifies that a cinematographic work must be protected 'as an original work' and that the owner of copyright therein 'shall enjoy the same rights as the author of an original work'. Nourse LJ said that he reached his conclusion without reference to the Convention.

[75] Although a film of a sporting event may be a work of action, it is probably not an 'original' dramatic work, being a mere recording of actions.

[76] *Green v. Broadcasting Corp. of New Zealand* [1989] *RPC* 469 (CANZ), 477 (scripts could not constitute dramatic works because they could not be acted or performed, which is the essence of drama); on appeal [1989] 2 *All ER* 1056 (Privy Council).