

Intellectual Property Law (6th edn)

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p.62 **3. Subject Matter**

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#### Abstract

This chapter is concerned with the subject matter, or types of creation, protected by copyright law as stipulated by the Copyright, Designs and Patents Act 1988. Eight categories of work are examined: literary works, dramatic works, musical works, artistic works, films, sound recordings, broadcasts, and published editions (or typographical works). The chapter considers the definitions of these categories of work in the case law and through the jurisprudence of the European Court of Justice. It discusses whether the list of works must be treated as an exhaustive list.

**Keywords:** copyright subject matter, literary works, databases, computer programs, dramatic works, musical works, artistic works, works of artistic craftsmanship, films, sound recordings

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## 1 Introduction

This chapter examines the subject matter protected by copyright law.<sup>1</sup> In formal terms, the Copyright, Designs and Patents Act 1988 (CDPA 1988) provides a detailed and exhaustive list of the types of creation protected by copyright law. In order for a creation to be protected by copyright, the Act stipulates that it must fall within one of the following eight categories of work: (i) literary works; (ii) dramatic works; (iii) musical works; (iv) artistic works; (v) films; (vi) sound recordings; (vii) broadcasts; and (viii) published editions (or typographical works). The definitions of these categories of work are elaborated in greater detail in the case law.

Before looking at the categories of subject matter in more detail, it is necessary to make three preliminary points. First, it should also be noted that the legal categories do not necessarily correspond to the objects commonly associated with copyright law. Instead, individual tangible objects may embody a number of different copyright works. For example, a book or newspaper might contain a literary work, an artistic work, and a typographical arrangement;<sup>2</sup> an artistic work may embody literary as well as visual components; a song may consist of literary and musical works (the lyrics being a literary work); and a CD might contain a sound recording, a musical work, and a literary work. While the legal categories do not necessarily correspond to the objects protected by copyright, in most cases there have been few problems in matching a particular creative act to one of the protected categories.

Second, all types of subject matter that are protected by British copyright law are called ‘works’. This is in marked contrast to the position in civil law systems, such as in France, which distinguish between ‘author’s rights’ (or *droits d’auteur*) and ‘neighbouring rights’ or entrepreneurial works (*droits voisins*). Author’s rights typically cover literary, dramatic, musical, and artistic work, whereas neighbouring rights are afforded to sound recordings, broadcasts, and performers.<sup>3</sup> This distinction is also reflected in the international conventions, with the 1886 Berne Convention protecting ‘author’s rights’ and the 1961 Rome Convention protecting ‘neighbouring rights’. Under EU law, ‘neighbouring rights’ are usually classed as ‘related rights’. As we will see, the distinction (never fully abandoned in the details of UK law), has started to take on renewed importance, as the Court of Justice develops principles that are applicable to author’s rights.

The third and most problematic issue is whether the list of eight works is to be regarded as an exhaustive list. Until recently, the list was understood to be closed. This meant that there was little opportunity for the courts to recognize new forms of subject matter, other than through the creative interpretation of the existing categories. Thus some ‘works’ that would be protected in countries operating a non-exhaustive system have been regarded as unprotected under the 1988 Act.<sup>4</sup> This was graphically illustrated in the case of *Creation Records*.<sup>5</sup> Here, as preparation in the production of the cover for Oasis’s album *Be Here Now* (see Fig. 3.1), Noel Gallagher arranged for a series of objects (a Rolls Royce, a motor bike, a clock) to be placed around a swimming pool. This collection of ‘artistically’ distributed objects was then photographed by the claimant and the photograph used as the album cover. However, a photographer from the defendant newspaper was present and also took a photograph of the scene. When the newspaper published this photograph and offered to sell posters of the scene, the record company sought an interim injunction alleging infringement of its

copyright. The claim based on copyright failed because the scene did not fall within the meaning of any of the (then) nine (now eight) categories of protected work; in particular, it was neither an artistic work nor a dramatic work.<sup>6</sup>



**Fig. 3.1** The album cover of Oasis's *Be Here Now*

Source: Big Brother Recordings

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However, the assumption that the list is closed is under challenge.<sup>7</sup> The source of the change is the interpretation of the various EU directives by the Court of Justice. Although the Directives say very little about what constitutes a 'work',<sup>8</sup> as the Directives (most obviously, Article 2 of the Information Society Directive) employ that term, the Court has taken the view that 'work' is an autonomous concept of EU law.<sup>9</sup> Drawing on the terms used to define when works are 'original' in three directives, as well as other sources in international copyright law,<sup>10</sup> the Court has defined a work as having three components (though it insists on referring to these as two): first, it must be a result of 'intellectual creation'; second, it must be an 'expression of such creation'; and third, the subject matter should be identifiable with clarity and precision.<sup>11</sup>

The first requirement, that 'there exist an original subject matter, in the sense of being the author's own intellectual creation', imports into the notion of a 'work' the criterion of 'originality'. On this basis, the Court has reasoned that a football match is not a work (a conclusion that seems sensible, even if the reasoning is not convincing).<sup>12</sup> We treat the requirement of originality in detail in Chapter 4.

In relation to the second requirement, that the intellectual creation manifest itself as ‘expression’, the criterion appears, importantly, to exclude ‘ideas’. Indeed, the Court has referred explicitly to the provisions in TRIPS and the WCT excluding from copyright ‘ideas, procedures, methods of operation or mathematical concepts as such’. In *Cofemel*, the Advocate-General indicated that this limitation would exclude from copyright certain clothing designs, at least when identified in abstract terms, such as the ‘specific composition based on shapes, colours, words and numbers’, the ‘combination of colours’, the ‘placement of the pocket on the stomach’ or even ‘the way the jeans are made by assembling the three pieces’.<sup>13</sup> In *Levola Hengelo*, Advocate-General Wathelet also indicated he thought a recipe as such (as opposed to its expressed eg written form) would be excluded from copyright protection on the basis that it was a mere idea.<sup>14</sup>

- p. 65 ↵ The third requirement, that of identifiability of the subject matter, was elaborated in *Levola Hengelo BV v. Smilde Foods BV*,<sup>15</sup> in which the Court of Justice was asked whether EU copyright law required the protection of the original taste of a spreadable cream cheese mixed with herbs (known in the Netherlands as ‘Heksenkaas’ or ‘Heks’nkaas’, meaning witches’ cheese). Sensibly holding that member states should not protect taste by copyright, the Court focused on the requirement of identifiability, which it derived from case law relating to registered trade marks.<sup>16</sup> The condition reflects the need for third parties to be able ‘to identify, clearly and precisely, what is the subject matter of protection which third parties, especially competitors, enjoy’.<sup>17</sup> Furthermore, requirements of legal certainty demand that the subject matter be objectively identifiable, and thus exclude any element of subjectivity. Because a taste is perceived by the consumer of the cheese, and that experience is necessarily subjective, it could not satisfy this requirement of a ‘work’.<sup>18</sup> The same conclusion would seem to follow for other aspirant subject matters, such as the smell of a perfume, which would thus remain outside copyright.<sup>19</sup> Conventional works, such as ‘a literary, pictorial, cinematographic or musical work’,<sup>20</sup> as well as less obvious subject matter, such as a foldable bicycle, readily satisfy the standard.<sup>21</sup>

If a subject matter satisfies the three elements, the CJEU has indicated it must be protected. In *Cofemel*, the Court stated: ‘Where a subject matter has the characteristics described ..., and therefore constitutes a work, it must, as such, qualify for copyright protection, in accordance with Directive 2001/29.’<sup>22</sup> Other criteria are therefore inappropriate. In *Cofemel*, the Court specifically excluded from consideration the use of ‘aesthetic criteria’,<sup>23</sup> but the clear implication is that there is no room for any additional criteria (such as that a work falls within particular defined categories, e.g. those in the CDPA). In cases that preceded the elaboration of the three elements of a work, the CJEU has said that a ‘graphic user interface’ and a videogame (which contained a computer program, as well as visual and sonic material) should be protected.<sup>24</sup> As we elaborate further in p. 66 Chapter 29, ↵ the breadth of the category of ‘work’ also extends to material that also might fall within the domain of design law.<sup>25</sup>

The approach taken by the CJEU to the concept of the protected work has not gone uncriticized.<sup>26</sup> At the heart of the critiques lies the fact that the CJEU elides the concept of the work with that of its originality, ‘arguably inverting and confusing the appropriate chronology of enquiry (work first, originality second)’.<sup>27</sup> The elision is particularly problematic because it deprives copyright law of any principle to limit its ‘domain’. For example, in *SAS Institute v. World Programming*,<sup>28</sup> Arnold J insisted that while a ‘scientific theory’ might be an intellectual creation, it would not in itself be a work; likewise a computer ‘language’, being ‘a system of rules for the generation and recognition of meaningful statements’, may be an intellectual creation, but is not a

work.<sup>29</sup> However, CJEU case law subsequent to that decision (which seems to have rejected the proposition that copyright is limited to ‘literary and artistic works’, the terms of the Berne Convention)<sup>30</sup> must cast doubt on whether any such distinction exists in EU law.<sup>31</sup> As Professor Hugenholtz has previously argued (in relation to similar jurisprudence of the Dutch Supreme Court), the danger of ‘reducing the subject matter test to mere originality and personal stamp’, is that it might lead to ‘infinite expansion of the concept of the work of authorship. Anything touched by human hand, including for instance sports performances, would be deemed a work.’<sup>32</sup>

From the perspective of UK law, three consequences of this emerging CJEU jurisprudence should be observed.<sup>33</sup>

First, existing British case law that purports to define the limits of the different categories of protected works will need to be revisited. Following general principles of European law, and even after Brexit,<sup>34</sup> the terms of the UK statute must now be read (as far as possible) to reflect the EU principle that anything that constitutes an ‘identifiable expression of intellectual creation’ should be protected. Whatever a literal reading of any of the categories might now be, henceforth they should be offered a broad reading so as to ensure protection of anything that constitutes the expression of an intellectual creation. ↗ Following this approach, in one pre-Brexit case, the Court interpreted the category of ‘work of artistic craftsmanship’ broadly in the light of the CJEU jurisprudence.<sup>35</sup>

Second, if it is not possible to interpret the statutory language to include subject matter, the principle of supremacy (still relevant under section 5(2) of the EU(W)A) may require the court to disapply the statute. That is, as Professor Rosati said, ‘exhaustive lists of protectable subject matter (as is the case of, e.g. the United Kingdom) are really incompatible with EU law.’<sup>36</sup> At least one English court has recognized this, stating that the fact that a work does not fall within the definitions adopted for the existing categories does not necessarily mean that such a work is not protected.<sup>37</sup> As a result, the supposed benefits of having an exhaustive list of copyright works have necessarily vanished.

Third, the approach of the Court of Justice raises doubts about the significance of the various categories of work.<sup>38</sup> Hitherto, UK law has used the categories to provide for different conditions and consequences (e.g. in defining when a work must be recorded in material form in order to be protected or what counts as a reproduction). Questions have thus been asked as to whether the same creative effort can be protected under more than one category.<sup>39</sup> At least where rights (and exceptions thereto) are harmonized, such differentiation may no longer be appropriate or meaningful. The way in which a work is initially perceived or understood should be irrelevant as to the scope of protection of ‘authorial works’. Nevertheless, the categories can continue to play a role in three situations: where they reflect European differentiations between author’s rights and related rights (sound recordings, broadcasts, fixations, of films); where they reflect European differentiations within author’s rights (as with computer programs, databases, photographs, cinematographic/audiovisual works, artistic works, works of applied art, and buildings);<sup>40</sup> where they determine matters that had not been harmonized (most obviously questions of ownership of copyright and moral rights).

With these general points in mind, we now turn to look at the eight types of work referred to expressly in the CDPA.

## **2 Literary Works**

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Literary works have been protected from unauthorized reproduction since at least 1710.<sup>41</sup> Literary works are defined in section 3(1) of the CDPA 1988 to mean:

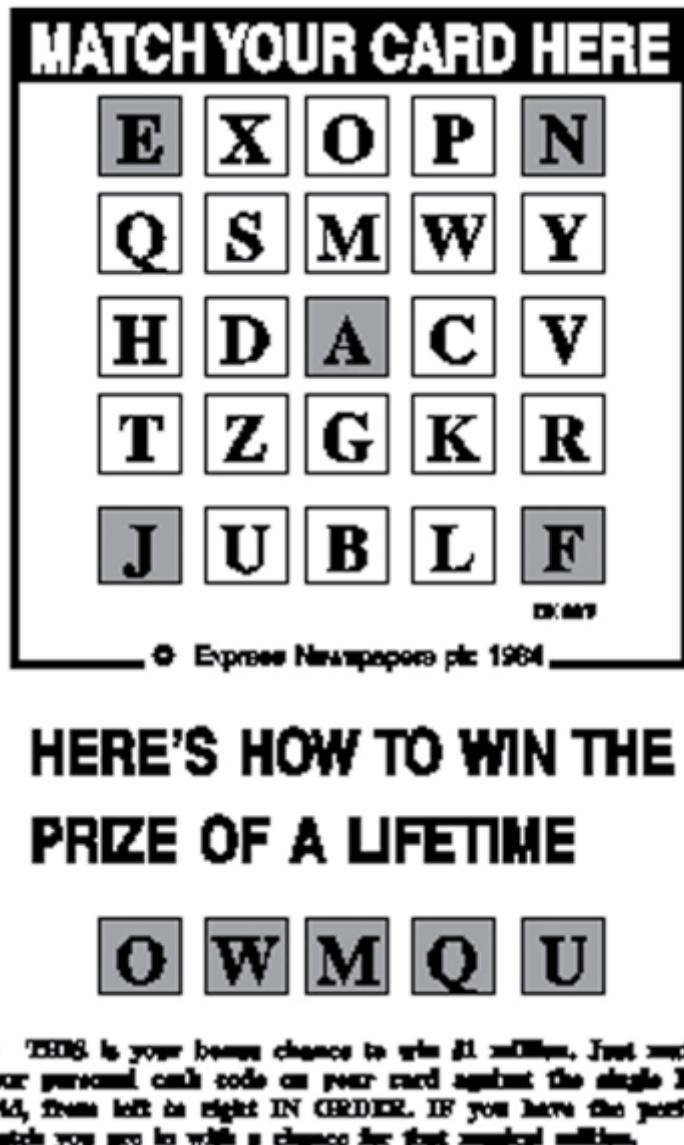
any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes (a) a table or compilation (other than a database), (b) a computer program, (c) preparatory design material for a computer program, and (d) a database.

Literary works are also a category of authorial works expressly referred to in the Software Directive.<sup>42</sup>

It is important to note that literary works are not limited to works of literature, but include all works expressed in print or writing (other than dramatic or musical works).<sup>43</sup> ‘Writing’ includes symbols and numerals. A literary work will be protected irrespective of the quality or style of the creation in question: copyright law does not pass judgment on the standard of the work. As a result, the types of thing that will be protected as a literary work include novels, poems, and song lyrics, as well as advertising slogans, railway timetables, and examination papers.<sup>44</sup> The fact that literary works include works that are spoken means that spontaneous conversations, interviews, and the like may also be protected (although, as we shall see, copyright does not subsist in a spoken work unless it is recorded).

Where problems have arisen in deciding what is meant by a literary work, the courts have tended to rely on the test in *Hollinrake v. Truswell*<sup>45</sup> that, to qualify as a ‘book’ under the Literary Copyright Act 1842, the creation must afford ‘either information and instruction, or pleasure, in the form of literary enjoyment’.

Most of the cases in which the meaning of literary work has arisen have been concerned with works that afford ‘information’ or ‘instruction’. These cases have made it clear that, for a work to provide information or instruction, it must be capable of conveying an intelligible meaning.<sup>46</sup> This is a low threshold. For example, in one case, it was accepted that sequences of letters set out in grids published in a newspaper provided ‘information’ as to whether a reader had won or lost a bingo game and, as such, were literary works (see Fig. 3.2).<sup>47</sup> In order for a work to ‘convey an intelligible meaning’, it is not necessary that the work be understood by the general public; it is sufficient that the work is understood by a limited group with special knowledge. Thus a telegraphic code has been held to be a literary work, even though the words of the code were meaningless in themselves.<sup>48</sup> It has also been held that ciphers, mathematical tables, systems of shorthand, and Braille catalogues convey meaning, and as such qualify as literary works.<sup>49</sup> One of the few situations in which works have been held not to provide information or instruction is where the work is meaningless or gibberish.<sup>50</sup> Another situation in which a work fails to provide information is where it is an invented name. For example, it was held that the word ‘EXXON’, which had been created to act as a company name, conveyed no information and hence was not protected as a literary work (although, as we will see, there may have been other grounds for this decision).<sup>51</sup>



**Fig. 3.2** The grids in *Express Newspapers v. Liverpool Daily Post*

Source: Express Newspapers

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The test of 'literary work' provided in *Hollinrake v. Truswell* suggests that the term also includes works that 'provide pleasure in the form of literary enjoyment'. The requirement of 'literary enjoyment' seems to suggest a qualitative test: if so, it would run counter to the widely accepted principle (and EU law) that the quality of the literary work is not to be taken into account when deciding whether a work should be protected.

With these general points in mind, we now turn to look in more detail at the types of thing that are protected as literary works. After looking at names and invented words (which are not protected), we turn to look at titles, tables and compilations, computer programs, preparatory material for computer programs, and databases.

## **2.1 Names and Invented Words**

Despite the fact that names and titles are expressions in writing or print (and are often traded for substantial amounts of money), the United Kingdom (like most countries) refuses to protect them as literary works.<sup>52</sup> Thus invented words such as EXXON, which had been invented by Esso Petroleum as a trade name, have been held not to be protected by copyright as literary works.<sup>53</sup> This is because although such names are in writing, they do not afford ‘information, instruction or pleasure of a literary kind’.<sup>54</sup> The Court of Appeal Justice, likewise, has stated that words ‘considered in isolation, are not as such an intellectual creation of the author who employs them’.<sup>55</sup>

p. 70 There are a number of policy reasons why names may be excluded from protection as literary works by copyright law. Perhaps the main reason for not protecting names and titles relates to the general inconvenience that would arise if someone were able to control the way in which certain words and phrases were used. It would be inconvenient—indeed absurd—if business commentators and political activists could not refer (e.g. in broadcasts, newspapers, or campaign literature) to the oil conglomerate by using the term EXXON without gaining permission in advance. Another reason for refusing protection to names and titles as literary works under copyright law is that it is unnecessary to do so, given that they are adequately protected by passing off, trade mark law,<sup>56</sup> and artistic copyright.<sup>57</sup>

## **2.2 Titles and Headlines**

A similar approach used to be taken to titles. Thus courts have refused protection to the name of game shows such as *Opportunity Knocks*<sup>58</sup> or song titles such as ‘The Man Who Broke the Bank at Monte Carlo’.<sup>59</sup> In the latter case, the Privy Council indicated that it did not regard a title as ‘substantial enough’ to warrant protection in its own right.<sup>60</sup> This approach leaves room for the possibility that some creative titles might still qualify for copyright protection.<sup>61</sup> 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,<sup>62</sup> 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**

p. 71 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.<sup>63</sup> This position is now well entrenched in European and international intellectual property law.<sup>64</sup> In line with these trends, the 1988 Act protects computer programs as literary works.<sup>65</sup> While the Act does not define what is meant by a ‘computer program’,<sup>66</sup> it is clear that it

includes source code,<sup>67</sup> 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).<sup>68</sup>

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’.<sup>69</sup> Because the key characteristic of a program is that it enables the reproduction of the computer program itself, so that the computer can perform its task, it does not include a GUI.<sup>70</sup> 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.<sup>71</sup>

## 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.<sup>72</sup>

## p. 72 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.<sup>73</sup>

The Court of Justice explained some aspects of the definition of a database in *Fixtures Marketing v. Organismos Prognostikon Agonon Podosfairou AE (OPAP)*.<sup>74</sup> The case concerned a claim that English football fixtures were databases (and protected by database right).<sup>75</sup> 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’.<sup>76</sup> 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’,<sup>77</sup> and the Court intimated that this was true of individual fixtures, each of which had ‘autonomous informative value’ by providing ‘interested third parties with relevant information’.<sup>78</sup> 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.<sup>79</sup> 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,<sup>80</sup> and each can be read separately.<sup>81</sup> 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’).<sup>82</sup> Importantly, the Court pointed out that the ‘unit’ of data which is collected in a database could comprise combinations of information (e.g. 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.<sup>83</sup> 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’,<sup>84</sup> the Court considered this from the perspective of ‘each third party interested by the extracted material’ (rather than the ‘typical user’).<sup>85</sup> 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.<sup>86</sup>

A database does not include a computer program used in the making or operation of databases accessible by electronic means.<sup>87</sup> 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.<sup>88</sup> Given that a database is defined, seemingly without 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,<sup>89</sup> this conclusion now seems unavoidable.

**3 Dramatic Works**

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The CDPA 1988 does not define what a ‘dramatic work’ is, except to state that it includes a work of dance or mime.<sup>90</sup> However, it is relatively clear that dramatic work includes the scenario or script for films,<sup>91</sup> plays (written for the theatre, cinema, television, or radio),<sup>92</sup> and choreographic works.<sup>93</sup>

For a creation to qualify as a ‘dramatic work’, it must be a ‘work of action’ that is ‘capable of being performed’.<sup>94</sup> 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,<sup>95</sup> although these might be protected as artistic works.<sup>96</sup> It has been said that a film will usually be a dramatic work where there is ‘cinematographic work’ on the film.<sup>97</sup> In some limited circumstances, a work of action might include sports, such as gymnastics or synchronized swimming.<sup>98</sup>

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,<sup>99</sup> 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 New Zealand broadcast a television talent quest that was similar to *Opportunity Knocks* in that the title and catchphrases were the same. It also used a clapometer, as well as the idea of using sponsors to introduce contestants.<sup>100</sup> Green’s action for copyright infringement against the Broadcasting Corporation of New Zealand failed, primarily because he was unable to show that the programme was a dramatic work. In part, this was because, when looked at as a whole, the show lacked the specificity or detail for it to be performed. In particular, the Privy Council said that the scripts provided only a general idea or concept of a talent quest, which was not capable of being protected. The Privy Council also held that the features of the programme that were repeated in each show (namely, the format or style of the show) were not dramatic works. The reason for this was that a dramatic work must have sufficient unity for it to be capable of being performed.<sup>101</sup> On the facts, it was held that the particular features that were repeated from show to show (the format) were unrelated to each other except as accessories to be used in the presentation of some other dramatic performance.<sup>102</sup>

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The requirement of ‘unity’ means that interactive video games are not ‘dramatic works’, since the sequence of images will not be the same from one play to another. Thus, in *Nova Productions v. Mazooma Games*,<sup>103</sup> Kitchin J held that a computer game simulating billiards involved artistic works and literary works, but not a dramatic work. Moreover, it has been held these requirements precluded the protection of an elaborated idea of having a group of musicians, dressed in formal attire, playing music not written for the ukulele on that instrument, could not be considered a dramatic ‘work’. The Judge explained that the supposed ‘work’ lacked certainty, for example, as to the number of musicians, the precise nature of their formal attire, the particular music played, etc. Moreover, the ‘work’ lacked the necessary ‘unity’, because, if protected, a vast array of alternative performances would infringe.<sup>104</sup>

The failure of the Privy Council to protect television formats in the *Hughie Green* case prompted a number of (unsuccessful) attempts to have formats recognized by British law.<sup>105</sup> The proponents of format rights appealed to the usual moral and economic arguments to support their cases. In particular, it was argued that formats require creative input similar to that involved in existing copyright works. It was also argued that failure to protect formats is not only unjust, but also fails to provide sufficient incentives to television producers. Those opposed to format rights noted the problems of defining what a format is, the anti-competitive effects, and the costs of such rights, as well as the potential for nuisance litigation.<sup>106</sup> The opponents of format rights favour leaving the developers of formats to the remedies offered by passing off<sup>107</sup> and breach of confidence.<sup>108</sup>

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While formats are not protected to the extent that some would like, the need for *sui generis* format protection is less pressing as a result of the Court of Appeal decision in *Norowzian v. Arks*.<sup>109</sup> This is because, in this case, the Court liberally interpreted the requirement that a dramatic work must be ‘capable of being performed’ to include performances by artificial means, such as the playing of a film.<sup>110</sup> Consequently, a cartoon may be a dramatic work. In this decision, the Court of Appeal was called upon to decide whether a Guinness advertisement (which featured an actor dancing while a pint of Guinness was being poured) had infringed copyright in an earlier film, *Joy* (which the advertisement copied). To answer this question, it was necessary to determine whether *Joy* was a dramatic work.<sup>111</sup> One of the notable features of *Joy* was that it utilized a particular editing technique known as ‘jump-cutting’ (that is, cutting segments out of the film to produce a series of artificial effects). One of the consequences of this was that the finished film contained a series of movements that could not be performed by an actor.<sup>112</sup> At first instance, it was held that because the (artificial) dance shown on the edited film could not be performed, the film did not embody a dramatic work. (If the film had shown all of the movements of the actor, it would have been protected.) However, on appeal, it was held that the film itself was a dramatic work. The Court said that, because it was possible for the film to be played, it was therefore ‘capable of being performed’.

One might wonder whether, in the light of European developments, the question of the protection of formats needs to be revisited. If a format comprises more than ‘ideas’ and amounts to an ‘intellectual creation’, existing Court of Justice case law suggests that it should receive protection from various acts, including reproduction. The language of dramatic work is open-textured and certainly can be interpreted more broadly than occurred in the *Hughie Green* case. Assuming that, post-Brexit, English courts continue to follow the CJEU jurisprudence on the copyright ‘work’, the *Green* case is increasingly likely to be seen as denying copyright to formats only where they fail to meet certain standards of identifiability in a precise and objective manner.<sup>113</sup> In *Banner Universal*,<sup>114</sup> Snowden J took the view that it was ‘at least arguable’ that the format of a television game show or quiz could be a dramatic work. Without seeking to establish ‘precise conditions’, the Court indicated that there must be clearly identified features which, together, distinguish the format from other shows; and those distinguishing features must be ‘a coherent framework that can be repeatedly applied’.<sup>115</sup>

## 4 Musical Works

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The CDPA 1988 also protects musical works. A ‘musical work’ is defined to mean ‘a work consisting of music exclusive of any words or action intended to be sung, spoken or performed with the music’.<sup>116</sup> Thus the words and the music of songs are treated as the subject matter of distinct copyrights. A song therefore consists of both a musical work and a literary work: the tune and lyrics, respectively.

The meaning of ‘music’ was discussed in *Sawkins v. Hyperion Records*.<sup>117</sup> This case concerned the efforts of Sawkins in producing what are termed ‘performing editions’ of four of the works of the seventeenth-century composer Michel-Richard de Lalande. Sawkins’ efforts included ‘figuring of the bass’, adding ‘ornamentation’, and performance directions. Hyperion, which made recordings of performances of the works of Lalande by musicians using Sawkins’ scores, denied that, by so doing, it infringed copyright, arguing that Sawkins’ contribution had not created an original musical work. One question was whether

Sawkins' contributions could count as contributions to the music in circumstances under which they did not involve alteration of the notes or melody. The Court of Appeal held that they could. Mummery LJ explained that the:

essence of music is combining sounds for listening to. Music is not the same as mere noise. The sound of music is intended to produce effects of some kind on the listener's emotions and intellect. The sounds may be produced by an organised performance on instruments played from a musical score, though that is not essential for the existence of the music or of copyright in it.<sup>118</sup>

The defendant's argument mistakenly assumed that the *actual notes* were the only matter covered by musical copyright; according to the Court of Appeal, other elements that contributed to *the sound* as performed, such as tempo and performance practice indicators, were equally music.

Although the Court of Appeal explicitly excluded 'noise' from the scope of 'music', it said nothing about the controversial question of whether 'silence' can be music.<sup>119</sup> According to newspaper reports, a dispute over just such a work of 'silence' resulted in a settlement—and a six-figure payment for the rights to use the work! The work in question was by the avant-garde composer John Cage, who, in the 1950s, wrote a piece entitled '4' 33', a work of silence. Apparently, the basis for the claim was that classical–pop fusion group The Planets included 60 seconds of silence on its recording. A member of the group claimed that this was an improvement on Cage's effort—because they had achieved in 60 seconds what he accomplished in 273! The payment to Cage's publisher suggests, however, that the legal advisers to The Planets (and the group's record company) feared that a court would treat Cage's work as protected.<sup>120</sup>

## 5 Artistic Works

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The fourth category of works protected by copyright is artistic works.<sup>121</sup> Section 3(1) of the CDPA 1988 contains a detailed list of the types of subject matter that are protectable as 'artistic works'. These are divided into the following three categories:

- (i) irrespective of artistic quality, a graphic work (including a painting, drawing, diagram, map, chart or plan, engraving, etching, lithograph, woodcut, or similar work), a photograph (excluding a film), a sculpture, or a collage;
- (ii) ↳ a work of architecture, being a building or fixed structure or a model thereof; or
- (iii) a work of artistic craftsmanship.<sup>122</sup>

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### 5.1 Graphic Works, Photographs, Sculptures, and Collages

The first subcategory of artistic works, set out in section 4(1)(a), includes graphic works, photographs, sculptures, and collages. It is important to note that the material contained in section 4(1)(a) is protected irrespective of artistic quality. This ensures that, once a creation falls within a particular category of works, copyright protection is not contingent on the work reaching a certain aesthetic standard. As a result, the task of having to decide what is good or bad art and all of the associated problems are thus avoided.<sup>123</sup> More

controversially, the decision that copyright law should not concern itself with the artistic quality of these types of work has been used to expand the *types* of subject matter (as distinct from the *quality* of subject matter) protected as artistic works. While few would have problems with Marcel Duchamp's 'readymades' (e.g. his famous urinal) being protected as an artistic work, more problems arise when objects exclusively used for industrial purposes to achieve commercial ends are protected as artistic works. For a period of time, a fear of making aesthetic judgements (when combined with a degree of formalism) led the courts to provide such protection. In recent years, however, the courts have been more willing to use a general sense of what is meant by 'art' to limit the scope of protectable works.

#### 5.1.1 Paintings

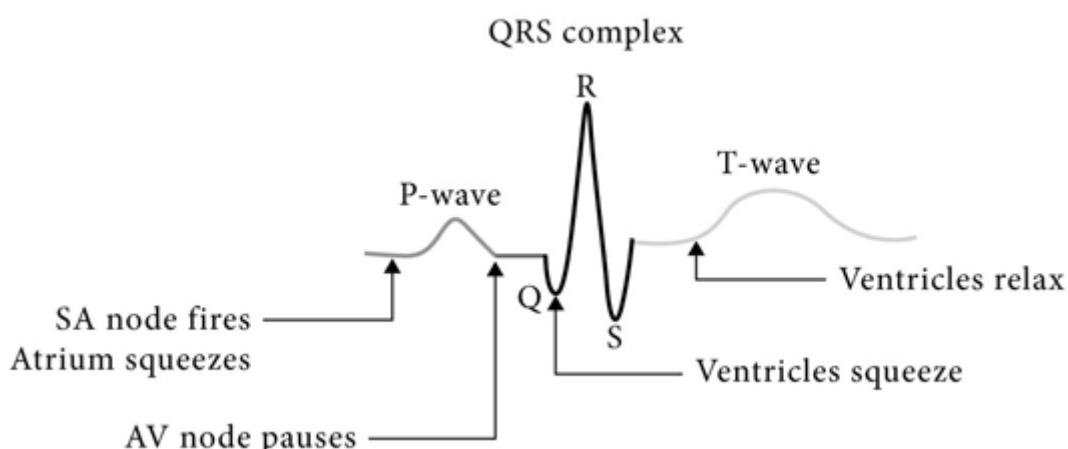
Graphic works are specifically defined in section 4(1)(a) to include 'paintings'. For the most part, there have been few problems in determining whether something is a 'painting' and thus whether it qualifies as an artistic work. One of the few situations in which this was not the case was *Merchandising Corp. v. Harpbond*,<sup>124</sup> in which it was argued that the facial make-up of the pop star Adam Ant was a painting and thus protected by copyright. The Court of Appeal rejected this submission, Lawton LJ remarking that it was fantastic to suggest that make-up on anyone's face could possibly be a painting. He held that a painting required a surface and that Adam Ant's face did not qualify as such, noting that '[a] painting is not an *idea*: it is an object; and paint without a surface is not a painting' (see Fig. 3.3).<sup>125</sup>



**Fig. 3.3** The defendant's poster in *Merchandising Corp. v. Harpbond* (created by Mr Langford)

Source: *Merchandising Corporation of America v. Harpbond* [1983] 3 FSR 32

The reasoning of Lawton LJ seems odd, for it is difficult to see why Adam Ant's face is less of a surface than a piece of canvas. The decision could, however, be justified on the ground that a painting must be intended to be permanent. If so, a tattoo would be protected, but dramatic or cosmetic make-up would not.<sup>126</sup> Equally, since the make-up in question consisted of two broad red lines round a light-blue line running from nose to jaw, it is arguable that the work did not satisfy the criteria of originality. Alternatively, the decision could be seen as a case of merger of idea and expression (for which no protection ↗ is granted).<sup>127</sup> In light of European developments,<sup>128</sup> it is suggested that the courts should revisit the unconvincing reasoning in the Adam Ant case. If a work made out of face paint or a tattoo constitutes its author's own intellectual creation, then, under European law, it should be protected.<sup>129</sup> The most obvious way to do so under British law is to treat such works as paintings.



**Fig. 3.4** Wave diagram in *Technomed v. Bluecrest Health Screening*

Source: Courtesy of Technomed Ltd

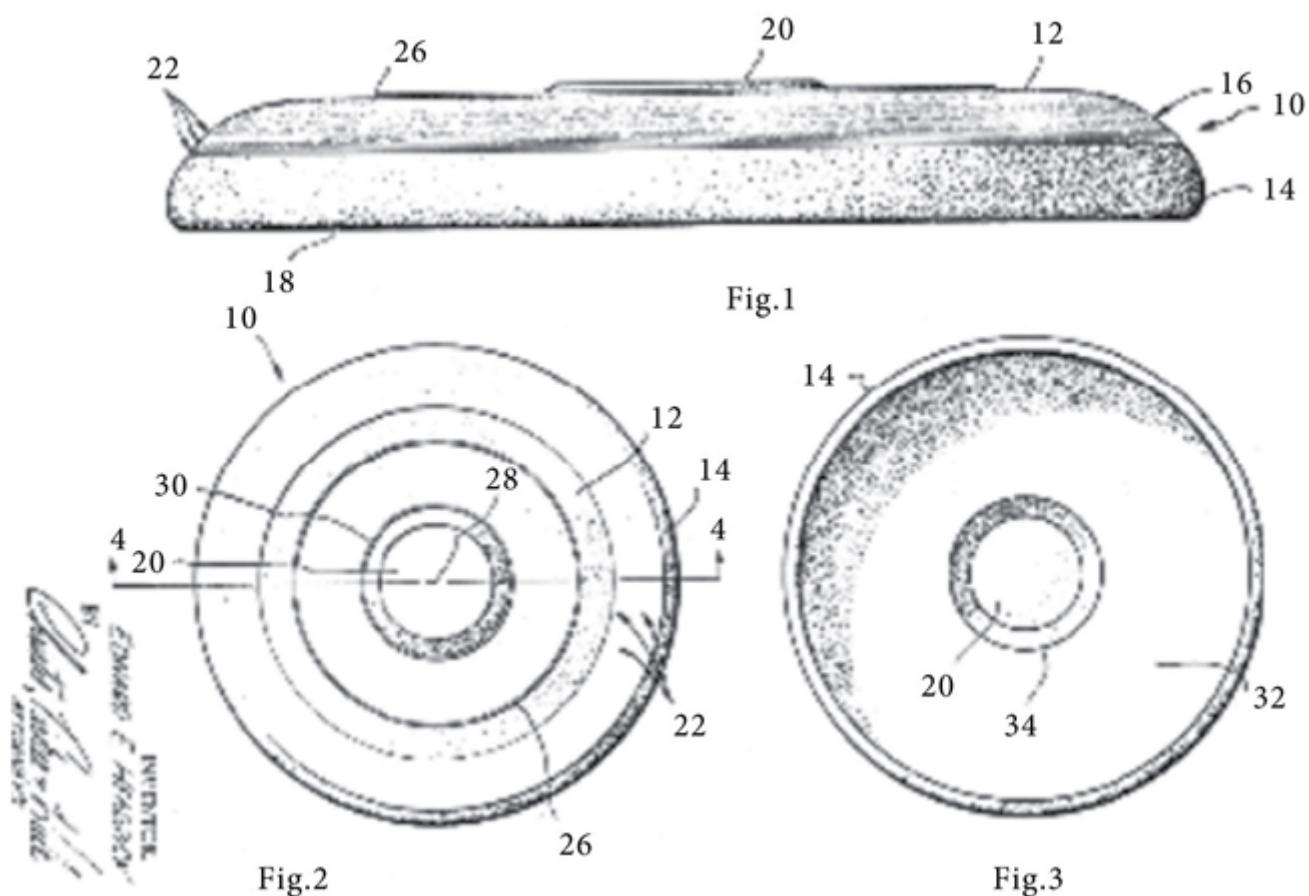
### 5.1.2 Drawings and Diagrams

The next type of subject protected as an artistic work under section 4(1)(a) is 'drawings'. In addition to sketches of people and landscapes that we expect to be classified as drawings, protection has been granted to the drawing of a hand on a 'how to vote' card,<sup>130</sup> typeface design,<sup>131</sup> architects' plans (as distinct from actual buildings), and sketches for dress designs.<sup>132</sup> Because protection is granted 'irrespective of artistic quality', copyright in drawings has been widely used to protect industrial designs.<sup>133</sup> Thus drawings of exhaust pipes, boxes for storing kiwi fruit, and the like have been protected.<sup>134</sup> Importantly, such protection has frequently prevented the copying of the (three-dimensional) designed artefact itself. As we will see later, section 51 of the CDPA 1988 has reduced the significance of copyright in drawings for three-dimensional designs, other than in designs for artistic works.<sup>135</sup>

↗ Section 4 of the CDPA 1988 also defines graphic work as including 'diagrams'. In *Technomed v. Bluecrest Health Screening*,<sup>136</sup> the High Court held that a simple line diagram, called the 'wave diagram', was an artistic work (and protected as original); see Fig. 3.4.

### 5.1.3 Engravings

Engravings were first protected by copyright in 1735. For the most part, the way in which the law has developed since then has provided few surprises, protection being granted to etchings, aquatints, woodcuts, lithographs, and the like. In the last 40 years, however, a range of somewhat surprising objects have been protected as engravings. For example, in *Wham-O Manufacturing v. Lincoln Industries*,<sup>137</sup> the New Zealand Court of Appeal held that both the mould from which a frisbee was pressed and the frisbee itself were protected, because the mould was made by cutting onto a surface and so was an engraving, and the frisbee itself was a print from the engraving (see Fig. 3.5).



**Fig. 3.5** Headrick's flying saucer

Source: *Wham-O Manufacturing v. Lincoln Industries* [1982] RPC 281, 296

In *Hi-Tech Autoparts v. Towergate Two*,<sup>138</sup> Judge Christopher Floyd QC held that copies of the claimant's rubber floor mats for cars could not be sold by the defendant on the grounds that the moulds used in the production of the mats, and the mats themselves, were 'engravings'. The moulds had been made by cutting a series of concentric circles, to a depth of 1/16th of an inch and a bevel angle of 45°, into flat plates. In so holding, the Judge placed particular emphasis on the fact that the statute requires engravings to be protected 'irrespective of their artistic quality'.

### **5.1.4 Photographs**

Although photographs were protected by copyright shortly after photography was invented in the 1840s,<sup>139</sup> copyright law has never been completely comfortable with photographs, primarily because they seem to be ill-suited to the paradigm of the ‘original’ and the ‘copy’.<sup>140</sup> Photographs are defined in the 1988 Act as ‘a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film’.<sup>141</sup> The definition is broad enough to include digital photographs (where there is no film). Individual frames from a film are not treated as photographs.<sup>142</sup>

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### **5.1.5 Other graphic works**

The examples elaborated of ‘graphic works’ are non-exhaustive, so non-itemized works may also be protected as artistic works. In *Abraham Moon & Sons v. Thornber*, the Patents County Court (now the IPEC)—held that the instructions for generating fabric designs were graphic works, because they had visual significance for experts.<sup>143</sup> Moreover the subcategory ‘graphic work’ has also been held to protect computer screen icons and graphic user interfaces.<sup>144</sup> However, the dynamic effect created by a series of drawings is not protected as an artistic work;<sup>145</sup> nor is a wave design for knitted jumpers (Fig. 3.7).<sup>146</sup>

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### **5.1.6 Sculpture**

The protection of ‘sculpture’ by copyright has required the courts to make some difficult determinations. Most notoriously, in *Wham-O Manufacturing v. Lincoln*, the New Zealand Court of Appeal held that the wooden model that was used as a mould to make the frisbees was ‘a sculpture’,<sup>147</sup> in *Lucasfilm v. Ainsworth*, however, Mann J ‘respectfully disagreed’ with that conclusion.<sup>148</sup> The UK courts have adopted a more restrictive interpretation of the term ‘sculpture’.

*Lucasfilm v. Ainsworth*, which concerned the question of whether a plastic version of a ‘stormtrooper’ helmet was a ‘sculpture’, went to the Supreme Court, which approved the approach taken by Mann J and his conclusion that the helmet was not a ‘sculpture’ (see Fig. 3.6).<sup>149</sup> While acknowledging that the assessment of whether an object was a sculpture was one in which ‘subjective considerations are likely to intrude’, Mann J identified a number of guidelines.<sup>150</sup> His articulation of the guidance is worth consulting directly, but here we will note only the emphasis that the legal meaning should not stray too far from the ‘normal’ understanding of what was a sculpture. Thus Mann J noted that while something could be a ‘sculpture’ even though one would not expect to find it in an art gallery, ‘some regard’ has to be had to the normal use of the word ‘sculpture’ and care should be taken to avoid straying too far from what would normally be regarded as such. At the same time, it was stated that no judgement is to be made about artistic worth. Mann J’s guidelines go on to focus on the structural nature, mode of fabrication, and—probably most importantly—the purpose of the object. As to its nature, Mann J is clear that while it is a necessary requirement that a sculpture be a ‘three-dimensional representation of a concept’, not every three-dimensional construction would be a sculpture. Likewise, the process of fabrication, such as whether the representation is carved and the material

p. 83 used (for example, wood or stone), might be another relevant factor—although not a determinative one: not everything carved in wood is a sculpture.<sup>151</sup> Ultimately, the determinative factor seems to be the purpose of the process. A purely functional item, not intended to be at all decorative, would not be a sculpture. It is:

of the essence of a sculpture that it should have, as part of its purpose, a visual appeal in the sense that it might be enjoyed for that purpose alone, whether or not it might have another purpose as well. The purpose is that of the creator ... An artist (in the realm of the visual arts) creates something because it has visual appeal which he wishes to be enjoyed as such. He may fail, but that does not matter (no judgments are to be made about artistic merit). It is the underlying purpose that is important.<sup>152</sup>



**Fig. 3.6** Stormtrooper helmet design

Source: Lucasfilm v. Ainsworth [2009] FSR (2) 103

The fact that the object has some other use does not necessarily disqualify it from being a sculpture, but it still has to have the intrinsic quality of being intended to be enjoyed as a visual thing.

Applying these guidelines to the material before him, Mann J held that none of the articles were sculpture. His reasons are surprising, so are probably worth quoting in full:

The purpose of the helmet was that it was to be worn as an item of costume in a film, to identify a character, but in addition to portray something about that character—its allegiance, force, menace, purpose and, to some extent, probably its anonymity. It was a mixture of costume and prop. But its primary function is utilitarian. While it was intended to express something, that was for utilitarian purposes. While it has an interest as an object, and while it was intended to express an idea, it was not conceived, or created, with the intention that it should do so other than as part of character portrayal in the film ... Not everything which has design appeal is necessarily a sculpture. I think that the ordinary perception of what is a sculpture would be over-stretched by including this helmet within it ... It is not that it lacks artistic merit; it lacks artistic purpose.<sup>153</sup>

This seems to give undue emphasis to one conception of the purpose of the costumes and mistakenly to undervalue the importance of appearance in the designs. His explanation for holding that the toys were not sculptures was equally surprising:

These are, as already described, articulated models which are sold as toys and which are intended for the purposes of play. Play is their primary, if not sole, purpose. While their appearance is obviously highly important (if they did not look like the original, the child would not be so interested) they are not made for the purposes of their visual appearance as such. While there is no accounting for taste, it is highly unlikely that they would be placed on display and periodically admired as such. The child is intended to use them in a (literally) hands-on way, in a form of delegated role play, and that is doubtless how they are actually used. That means, in my view, they are not sculptures.<sup>154</sup>

Nevertheless, the Court of Appeal and Supreme Court affirmed the decision. In a speech composed jointly by Lords Walker and Collins, the Supreme Court agreed that the term 'sculpture' should be given its ordinary meaning,<sup>155</sup> and approved Laddie J's definition in *Metix v. Maughan* that 'sculpture' refers to a 'three-dimensional work made by an artist's hand'.<sup>156</sup> The Court said that Mann J's multifactor approach was consistent with that test. The Court went on to note that there were good policy reasons for differentiating between copyright and designs law, so that the definition of sculpture should not be permitted to 'creep outwards'.<sup>157</sup> Because the question was one of fact, on which the Judge had heard evidence, the assessment was one that a higher court should respect. In the view of the Supreme Court, the assessment by Mann J that the helmet was utilitarian in the sense that it was an element in the process of producing the film was not 'obviously untenable'.<sup>158</sup> Consequently, the first-instance decision was affirmed.

While the legal understanding of 'sculpture' is by no means confined to the works of those who exhibit in art galleries, not all three-dimensional works exhibited in art galleries and attributed to artists will necessarily qualify as sculptures. In *Creation Records* (the Oasis record cover case—see Fig. 3.1), Lloyd J held that the collection of a series of objects around a swimming pool was not itself a sculpture.<sup>159</sup> He explained that he could not see how:

the process of assembling these disparate objects together with the members of the group can be regarded as having anything in common with sculpture ... No element in the composition has been carved, modelled or made in any of the other ways in which sculpture is made ...<sup>160</sup>

This conclusion leaves unclear the position in relation to so-called *objets trouvés* and other situations in which artists ‘create’ artistic works from found material, famous examples being Duchamp’s urinal, Carl André’s bricks, Damien Hirst’s shark, or Tracy Emin’s bed. Although it seems that these are unlikely to fall within Laddie J’s definition of sculpture as a three-dimensional work *made by an artist’s hand*, Mann J’s multifactor test, which stresses the ‘purpose’ of the object, seems better able to accommodate such practices.<sup>161</sup>

All of this concern with what counts as a ‘sculpture’ may, however, be of limited significance in terms of determining whether a work is protected.<sup>162</sup> Given the Court of Justice case law (outlined earlier), it seems that the key question is less whether the object is a ‘sculpture’ than it is whether it is an ‘expression of intellectual creation’. In reaching that conclusion, the question of the quality or purpose of the work is irrelevant except insofar as they limit the potential creative choices of the creator. Moreover, the fact that there is another regime that protects three-dimensional artefacts—namely, the law of designs, which was considered relevant by the Supreme Court—is also irrelevant. If the question were to arise today of whether a stormtrooper helmet is a work protected by copyright, there is a strong possibility that a different answer would be reached.<sup>163</sup>

p. 85    **5.2 Works of Architecture**

The second subcategory of artistic works listed in section 4(1)(b) of the CDPA 1988 is ‘works of architecture’. A ‘work of architecture’ is defined as a building or a model for a building.<sup>164</sup> In turn, a ‘building’ is defined as including ‘any fixed structure, and a part of a building or fixed structure’. It should be noted that copyright also exists in the architect’s plans as drawings.

One question that has arisen is whether buildings include things such as greenhouses, portable cabins, and swimming pools that are built off-site. The main obstacle to protection is that a building is defined as a *fixed* structure.<sup>165</sup> While this was apparently intended to prevent ships from being protected as works of architecture, the status of articles that are not fixed when they are created, but which are intended to be subsequently fixed or permanently placed, is unclear. In an Australian case, the Supreme Court of the Northern Territory held that a plug and mould used for manufacture of pre-cast fibreglass swimming pools were protected by copyright.<sup>166</sup> Explaining that there was no single test for what is a building, Mildren J said that a number of factors needed to be considered, including the size of the structure, its proposed use, whether it is fixed or portable, and its degree of permanence. As a result, he concluded that while neither the plug nor the mould was a building, the pools were. This was despite the fact that the pools were manufactured off-site and were capable of being removed.

In contrast to other types of artistic work, there is no requirement that architectural works should be protected ‘irrespective of artistic quality’. This might imply that, when deciding whether subject matter qualifies as an architectural work, we should consider whether the work is a work of architecture, and if so, whether it is sufficiently artistic. However, the legislative history points to a contrary conclusion: a requirement of ‘artistic quality’ existed under the 1911 Act but was removed in 1956. Therefore it seems that the legislature intended there to be no need for a work of architecture to be ‘artistic’ for it to be protected. This would be in line with the current trend of jurisprudence from the Court of Justice.

## 5.3 Works of Artistic Craftsmanship

The final category of artistic works listed in section 4(1)(c) of the CDPA 1988 is ‘works of artistic craftsmanship’. The legislative origins of this category of work, which first appeared in the Copyright Act 1911, are obscure.<sup>167</sup> Works of artistic craftsmanship cover creations such as handcrafted jewellery, tiles, pots, stained-glass windows, wrought-iron gates, hand-knitted jumpers, and crocheted doilies. In order for a work to fall within this category, it is necessary to show that the work is ‘artistic’ and that it is a work of ‘craftsmanship’. We will deal with each in turn.

### 5.3.1 Requirement of ‘artistic quality’

A work will qualify as a work of artistic craftsmanship only if it is ‘artistic’—that is, if it has an element of real artistic or aesthetic quality.<sup>168</sup> This approach is unusual in copyright law because it requires the courts to consider whether the work satisfies the ↗ qualitative threshold of being artistic. The question of what is meant by a work of *artistic* craftsmanship was discussed by the House of Lords in *Hensher v. Restawile Upholstery*.<sup>169</sup> Because the defendants conceded that the claimant’s prototype of a mass-market upholstered chair was a work of craftsmanship, the only question to be determined was whether the chair was a work of *artistic* craftsmanship. While all of their Lordships agreed that the chair was not artistic, they differed in their explanations as to why.

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- Lord Reid said that an object could be said to be artistic if a person gets ‘pleasure or satisfaction ... from contemplating it’.<sup>170</sup> As a result, his Lordship said that the test to decide whether a work was artistic was whether ‘any substantial section of the public genuinely admires and values a thing for its appearance and gets pleasure or satisfaction, whether emotional or intellectual, from looking at it’.<sup>171</sup> Lord Reid noted that ‘looking nice appears to me to fall short of having artistic appeal’.<sup>172</sup> While the author’s intention that the resulting product is artistic might be important, Lord Reid indicated it was neither ‘necessary [n]or conclusive’. Since there was no evidence that anyone regarded the furniture in issue as artistic, Lord Reid concluded that the prototype was not protected by copyright.
- Lord Morris said that, in this context, the word ‘artistic’ required no interpretation. However, he acknowledged that, because the question of whether a particular artefact was artistic was a matter of personal judgement, courts might be faced with differences of opinion. Because of this, Lord Morris said that a court should look to see if there was a general consensus of opinion ‘among those whose views command respect’.<sup>173</sup> The views of the artist and the person acquiring the object might act as pointers as to whether something is artistic. However, the question was ultimately one for the courts, guided by evidence (particularly of specialists). Since the most favourable thing that had been said about the prototype chair was that it was distinctive, Lord Morris was content to conclude that it was not artistic.
- Lord Kilbrandon said that the question of whether something was a work of art depended on whether it had come into existence as the product of an author who was consciously concerned to produce a work of art.<sup>174</sup> For Lord Kilbrandon, this must be judged from the work itself and the circumstances of its creation. A work did not become a work of art as a result of the opinions of critics or the public at large. As a consequence, expert evidence was irrelevant. Instead, it was for the Judge to determine whether the

author had the ‘desire to produce a thing of beauty which would have an artistic justification for its own existence’.<sup>175</sup> Since, in the case in hand, the objective was to produce a commercially successful chair, it was not a work of artistic craftsmanship.

- In deciding whether a craftwork was artistic, Viscount Dilhorne explained that this was really a question of fact for the court to answer. As such, he declined to elaborate much further on the meaning of artistic.<sup>176</sup> He did say, however, that a work would not be artistic merely because there was originality of design, but that it could be artistic even if it were functional. While Viscount Dilhorne said that expert evidence and public opinion would be relevant,<sup>177</sup> in the end it seems that he preferred to act on his own intuition as to what was a ‘work of art’. However, since no witness had described the chair as a work of art, he said that this was not even a borderline case: the prototype was not protected by copyright.<sup>178</sup>
- Lord Simon took a rather different approach from his colleagues, insofar as he emphasized that it was the craftsmanship rather than the work that must be artistic. Lord Simon also said that the fact that the work ‘appeals to the eye of the beholder, giving him visual pleasure’ was irrelevant.<sup>179</sup> Examples of ‘artistic craftsmen’ included hand-painters of tiles, and makers of stained-glass windows and wrought-iron gates, but not ‘plumbers’. Lord Simon said that many craftsmen fell into an intermediate category, some of their products being the result of artistic craftsmanship, while others were the product of craftsmanship. In making the decision as to whether a particular object was created by a person who was an ‘artist craftsman’, Lord Simon took the view that ‘the most cogent evidence is likely to be either from those who are themselves acknowledged artistic-craftsmen or from those who are concerned with the training of artist-craftsmen—in other words, expert evidence’.<sup>180</sup> Lord Simon added, however, that the crucial question was ‘the intent of the creator and its result’.<sup>181</sup> Like the other Law Lords, he found the application of his test to the facts relatively easy: none of the experts had regarded the settee as exhibiting anything more than originality of design and appeal to the eye. The settee was an ordinary piece of furniture and not an example of artistic craftsmanship.

Given the ‘different and apparently irreconcilable’ tests employed in *Hensher*, it is not surprising to find that there has been little consistency in subsequent case law as to the approach to be taken when assessing ‘artistry’.

In *Merlet v. Mothercare*,<sup>182</sup> in which a baby’s cape made by Madame Merlet was held not to be a work of artistic craftsmanship, Walton J concluded that, in the first instance, the question is whether the artist-craftsman intended to create a work of art.<sup>183</sup> If the intention was present and the creator had not ‘manifestly failed’ in this regard, then the work was a work of art. Because Madame Merlet had not set out to create a work of art, but instead had utilitarian considerations in mind (she hoped that the cape would shield her son from the rigours of the climate when visiting her mother in the Scottish Highlands), Walton J concluded that the baby cape was not a work of artistic craftsmanship. In contrast, in *Vermaat v. Boncrest*,<sup>184</sup> Evans-Lombe J adopted a different test, requiring not merely intention but actual evidence of creativity. The case concerned whether the design of a patchwork bedspread was a work of artistic craftsmanship. Evans-Lombe J held that the finished work must have some artistic quality, in the sense of being produced by someone with creative ability and having aesthetic appeal.<sup>185</sup> Applying that test of artistry to the facts, the Judge held that though the designs were ‘pleasing to the eye’, they did not exhibit the necessary requirement of creativity.

Yet more confusion has been created by the rather incoherent judgment of Rimer J in *Guild v. Eskandar*.<sup>186</sup> In this case, the question was whether the claimant's wide, square-shaped designs for a cardigan and sweater were works of artistic craftsmanship. Initially, Rimer J purported to follow *Merlet* and found that there was no evidence that the claimant regarded herself as an artist or intended to create a work of art; she chose the design because it appealed to her and she therefore believed that it would appeal to others. If he had been rigorously following *Merlet*, that should have put an end to the investigation; instead, Rimer J went on to consider whether the garment 'can fairly be regarded as satisfying the aesthetic emotions of a substantial section of the public'.<sup>187</sup> The Judge took account of the conflicting expert evidence, but ultimately concluded that the garments were not works of art. This was in spite of the fact they had been displayed in the Victoria & Albert Museum, Rimer J explaining that they were exhibited as examples of developments in fashion rather than because anyone regards them as works of art.<sup>188</sup>

More recently, and in marked contrast to the conclusion in the previous cases, in *Response Clothing*,<sup>189</sup> HHJ Hacon held that a 'wave design' for knitted fabric was a work of artistic craftsmanship (see Fig. 3.7). Interestingly, the Court thought that the House of Lords in *Hensher* would not have regarded the fabric as a work of artistic craftsmanship,<sup>190</sup> but because the Judge took the view that there was no 'ratio' from the case, he was not bound to reach the same conclusion. Instead, the Judge preferred the test of 'work of artistic craftsmanship' adopted by Tipping J in the New Zealand decision, *Bonz v. Cooke*.<sup>191</sup> According to this test, 'it must be possible fairly to say that the author was both a craftsman and an artist. A craftsman is a person who makes something in a skilful way and takes justified pride in their workmanship. An artist is a person with creative ability who produces something which has aesthetic appeal'.<sup>192</sup> That aesthetic appeal can be of a nature which causes a work to appeal to potential customers.<sup>193</sup> On the facts, the wave pattern fabric was created by a 'craftsman' and was 'artistic', because it had aesthetic appeal (as evidenced, the Judge indicated, by the fact it was a commercial success).<sup>194</sup>



**Fig. 3.7** Wave design

Source: Courtesy of Response Clothing Ltd

- p. 89 ↵ Clearly, these first instance decisions have done little to clarify when a work of craftsmanship is to be treated as artistic. Further guidance from a higher court would be welcome indeed.

#### 5.3.2 Requirement of ‘craftsmanship’

As well as showing that the work is artistic, it is also necessary to show that it is a work of ‘craftsmanship’. In *Hensher v. Restawile*, Lord Simon defined a work of craftsmanship as presupposing ‘special training, skill and knowledge’ for its production.<sup>195</sup> He also said that it implied ‘a manifestation of pride in sound workmanship’. A rather different definition was provided by Lord Reid, who referred to a work of craftsmanship as ‘a durable, useful handmade object’.<sup>196</sup> Lord Reid seemed to suggest that if the defendant had not conceded that the prototype was a work of craftsmanship, he would not have been inclined to that view. This was because the prototype, which was a flimsy, temporary, knock-up that had subsequently been destroyed, was better described as a ‘step in a commercial operation’ with no value of its own rather than as a work of craftsmanship.<sup>197</sup> While wooden rods (used to teach addition and subtraction to children) have been held not to be products of craftsmanship,<sup>198</sup> knitting and tapestry-making have been held to be a craft,<sup>199</sup> and the baby’s cape in *Merlet v. Mothercare* was said to be ‘very much on the borderline’.<sup>200</sup>

One problem with the courts’ failure to provide a helpful definition of craftsmanship is that it is unclear whether the work needs to be handmade to be protected. In *Hensher v. Restawile*, Lord Reid and Viscount Dilhorne suggested that craftsmanship implied that the work was handmade.<sup>201</sup> In contrast, Lord Simon said that ‘craftsmanship’ could not be limited to handicrafts, nor was the word ‘artistic’ incompatible with machine production.<sup>202</sup> The approach of Lord Simon was followed by the Federal Court of Australia in *Coogi Australia v. Hysport International*.<sup>203</sup> In that case, Drummond J held that the stitch structure of a fabric made up of different yarns (used to make jumpers), which was constructed in such a way as to produce a mixture of textured surfaces (some flat, some rolled, some protruding), was a work of artistic craftsmanship.

Drummond J said that the way in which the designer had used the stitch structures and colour to produce an unusual textured and multicoloured fabric meant that the design was artistic. This was so even though the design was mass-produced and had been formulated on a computer, rather than using traditional craft techniques. As regards the issue of mass-production, Drummond J reviewed the authorities and found that he preferred Lord Simon’s approach in *Hensher v. Restawile*. To hold otherwise, he said, would be to import a Luddite philosophy into copyright legislation, which was enacted against a background of modern industrial organization and was intended to regulate rights of value to persons in the area of activity.<sup>204</sup> The decision in *Response Clothing* takes a similar line in holding, first, that it ↵ is possible for an author to make a work of artistic craftsmanship with a machine;<sup>205</sup> and, further, that a work is not precluded from being a work of artistic craftsmanship simply because multiple copies are subsequently made and marketed.<sup>206</sup> Thus the wave design for a fabric (Fig. 3.7) was held to be a work of artistic craftsmanship.<sup>207</sup>

Another aspect of the notion of artistic craftsmanship that has proved to be problematic is whether both attributes—artistry and craftsmanship—need to be supplied by the same person. In *Burke v. Spicer’s Dress Designs*,<sup>208</sup> Clauson J suggested as much when he said that a woman’s dress was not a work of artistic

craftsmanship because the artistic element (the sketch of the dress) did not originate from the person who made the dress (the dressmaker).<sup>209</sup> However, in *Bonz Group v. Cooke*,<sup>210</sup> the New Zealand High Court held that hand-knitted woollen sweaters depicting dancing lambs and golfing kiwis were a work of artistic craftsmanship, the hand-knitters being craftspeople and the designer an artist. Tipping J concluded that it was not essential that the same person both conceive and execute the work.<sup>211</sup> The hand-knitters had made a work in a skilful way, taking justified pride in their workmanship and the designer had, with creative ability, produced a work with aesthetic appeal.

#### 5.3.3 Australian escape route

It is clear that the English courts have struggled with the interpretation of the notion of artistic craftsmanship. An indication as to how the problems can be avoided has been provided by the unanimous decision of Australia's highest court, the High Court, in *Burge v. Swarbrick*.<sup>212</sup> The question in that case was whether Swarbrick's design for a yacht, the JS9000 (see Fig. 3.8)—in particular, the hull and deck mouldings—were works of artistic craftsmanship.



**Fig. 3.8** JS9000 yacht

Source: Mr John Swarbrick

While refusing to provide 'any exhaustive and fully predictive identification of what can and cannot amount to a "work of artistic craftsmanship"', the High Court concluded that the key factor that separates protected works of artistic craftsmanship from mere industrial designs is the significance of functional constraints.<sup>213</sup> With works of artistic craftsmanship, there is considerable 'freedom of design choice' and thus scope for 'real or substantial artistic effort'. The intention of the designer could cast some light on this and, in his evidence, Swarbrick had acknowledged that he sought to produce a 'well mannered, easily balanced boat that was fast'. However, in most cases, the crucial evidence would be the views of experts, and here this confirmed that speed was the overriding consideration ↗ in the design of 'sports boats'.<sup>214</sup> Designing the JS9000

therefore involved the application of principles of mathematics, physics, and engineering, rather than making something visually or aesthetically appealing. Thus, the plug and mouldings were not works of artistic craftsmanship.

Although the decision in *Burge v. Swarbrick* is based on legislation that now differs substantially from that operating in the United Kingdom, there is much to be said for the clarity that it brings to the notion of a work of artistic craftsmanship. (Moreover, it would align the test of artistic craftsmanship somewhat with the CJEU analysis of originality, which we discuss in Chapter 4.) Had the ‘design freedom’ test been applied in *Guild v. Eskander* or *Vermaat v. Boncrest*, one could imagine that a different result might well have been reached: both look like cases in which the creator possessed and utilized the freedom available in creating the design of clothes and bedspreads. Of course, other cases, such as *Hensher* itself or *Merlet v. Mothercare*, would require the courts to face up to the difficult question as to how much design freedom would suffice to render a work one of artistic craftsmanship. The High Court was willing to say only that this was a question of ‘fact and degree’.

#### 5.3.4 European escape route

An alternative way out of the problem of defining works of artistic craftsmanship—at least for the purposes of subject matter—is to question what role quality determinations can have in a harmonized system of EU copyright law. It is not simply that the EU law requires the United Kingdom to protect expressions that constitute intellectual creations, but also that it appears to prohibit any use of qualitative criteria.<sup>215</sup> Drawing on the condition elaborated in *Levola Hengelo* that the expression must be identifiable with clarity and precision, in *Cofemel*—a case concerning clothes designs—the Court indicated that ‘the required precision and objectivity is not attained where an identification is essentially based on the sensations, which are intrinsically subjective, of an individual who perceives ↗ the subject matter at issue’.<sup>216</sup> While one might question whether the Court’s reasoning has not confused the *Levola* requirement that the subject matter be identifiable (with clarity and precision), with the distinct requirement that the assessment of its protectability (originality or otherwise) ought not to be subjective,<sup>217</sup> the important conclusion is that aesthetic appreciation has no part to play in determining whether a work is to be protected.<sup>218</sup> This precludes the maintenance of some of the interpretations of ‘work of artistic craftsmanship’ offered by their Lordships in *Hensher*.<sup>219</sup> Perhaps, the word ‘artistic’ in ‘artistic craftsmanship’ could be understood as having the same meaning as it has for ‘artistic works’ in copyright law generally (that is, referring to something that is perceived visually). Applying such a criterion, if a work of craftsmanship is original, in the sense described in Chapter 4 (that is, the result of creative, as opposed to functionally constrained, choices), then it should be protectable.

The English courts have now acknowledged the tension between the concept of a work of artistic craftsmanship and EU law but have not gone so far (yet) as to embrace the logical conclusions. In *Response Clothing*,<sup>220</sup> HHJ Hacon took an intermediate position: preferring an interpretation of ‘work of artistic craftsmanship’ that meant the work in issue was protectable under UK law (as EU law required). While HHJ Hacon recognized the importance of interpreting the category to give effect to EU law,<sup>221</sup> he suggested that

the test in *Bonz* did so ‘up to a point’.<sup>222</sup> However, it was not necessary to reach a decision in the case that the Court go further than *Bonz* in order to give effect to EU law.<sup>223</sup> In due course, other courts may feel obliged to go further.

## 6 Films

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Copyright law has struggled to find a convenient way to treat ‘films’ or ‘motion pictures’. One reason for this is that such productions can be the product both of significant investment and creativity (particularly the creative vision of the director). Another reason is that films are often the result of a large number of inputs—screenplays, music, set-design, costumes, performance (and direction), cinematography, and so forth. A third is that some of these contributions can receive separate protection, but the film as a whole may be more than ‘the sum of its parts’.<sup>224</sup>

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Under the CDPA 1988, UK law recognizes a distinct category of work, ‘film’. This term is defined as a recording on any medium from which a moving image may be produced by any means.<sup>225</sup> This broad definition encompasses celluloid films and video recordings or disks, as long as they produce ‘moving images’. Multimedia products may sometimes be protected as films.<sup>226</sup>

In contrast, the EU’s Term and Related Rights Directives distinguish between two distinct subject matters of protection for motion pictures: on the one hand, ‘cinematographic and audiovisual works’; and on the other, related rights in fixations of moving images, so-called ‘films’, or ‘videograms’.<sup>227</sup> The former are conceived as authorial works (like literary or artistic works) and thus would be subject to a requirement of originality, and protection lasts for 70 years from the death of the principal director or author of the screenplay, dialogue, or music.<sup>228</sup> Rights in fixations, in contrast, vest in the ‘producer’ and last for 50 years.<sup>229</sup>

Unfortunately, although the United Kingdom has attempted to implement those Directives, no corresponding adjustment has been made to the structure of UK law. As a result, the 1988 Act continues expressly to acknowledge only one copyright work, a ‘film’, which appears primarily as a ‘related right’ (although modified, as to authorship and term, to comply with the Directives).<sup>230</sup> However, the courts have gone some way to alleviating the legislative deficit by recognizing that original ‘cinematographic works’ under the Berne Convention are also ‘dramatic works’ under UK copyright law.<sup>231</sup> Nevertheless, in various respects, the UK approach can be said to fail to have implemented the various directives.<sup>232</sup>

The soundtrack accompanying a film is treated as part of the film. As we will see, there is no reason why such a soundtrack would not also qualify as a sound recording. This leads to a potential problem of overlap. Section 5B(3)(a) and (b) of the CDPA 1988 clarifies the position by stating that references to the showing of a film include playing the film soundtrack to accompany the film, and references to playing a sound recording do not include playing the film soundtrack to accompany the film. Consequently, if a cinema were to wish to show a film that included a soundtrack, the cinema would need to obtain rights clearances only from the owner of copyright in the film.<sup>233</sup> In contrast, where the soundtrack is played without the moving images, for example on a jukebox in a pub, it is necessary to obtain the consent only of the right holder in the sound recording of the soundtrack.<sup>234</sup>

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## **7 Sound Recordings**

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Under the CDPA 1988, section 5A(1), sound recordings are defined to mean either:

- (a) a recording of sounds, from which the sounds may be reproduced, or
- (b) a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced,

regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced.

The definition thus covers vinyl records, tapes, compact discs, digital audiotapes, and mp3s, which embody recordings. The definition also seems to encompass digital instructions embodied in electronic form that produce sounds. In a different legal context (that of licensing places of entertainment), it has been held that ‘recorded sounds’ can include CD-ROM embodiments of Musical Interface Digital Interface (MIDI) instructions (rather than data in wave form) that cause a sound module or synthesizer to generate sounds.<sup>235</sup>

As the definition of sound recording requires that there be ‘sounds’, it appears to exclude a single sound from protection (even though a considerable amount of production work may go into its recording). Interesting questions have also arisen as to how the limits of a sound recording are to be determined. We review these issues when we look at copyright infringement.<sup>236</sup> Because sound recordings exist irrespective of the medium on which the sounds are recorded, a soundtrack of a film is a sound recording. However, the soundtrack of a film will also be treated as part of the film insofar as the soundtrack ‘accompanies’ the film.<sup>237</sup> The effect of this is that the public showing of a film and its soundtrack requires the consent of only the owner of copyright in the film.<sup>238</sup> In contrast, where the soundtrack is played without the moving images,<sup>239</sup> this would require the consent of only the holder of rights in the sound recording.

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## **8 Broadcasts**

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Broadcasts, whether of sounds or images, were first included as copyright works in the Copyright Act 1956. Subsequently, they were deemed to be suitable subject matter for protection by neighbouring rights at the 1961 Rome Convention.<sup>240</sup> The decision to extend copyright protection to broadcasts marked an important change in copyright law. In contrast with art, literature, films, and recordings, a broadcast is essentially the provision of a service that involves a communication; it is not the creation of a thing, but an action. This is because broadcasts are not fixed or embodied (although they can be); rather, they are ephemeral acts of communication. This means that a broadcast does not protect any fixed entity per se. Instead, it is the signals that are transmitted which are protected. In a sense, copyright law recognizes the value in the act of communication itself as distinct from the content of what is being communicated.<sup>241</sup>

A ‘broadcast’ is defined as:

an electronic transmission of visual images, sounds, or other information which—

- (a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them, or
- (b) is transmitted at a time determined solely by the person making the transmission for presentation to members of the public ...<sup>242</sup>

This definition merely requires that the transmission be ‘electronic’,<sup>243</sup> being indifferent otherwise as to the means of transmission, the route taken, or the form of the signals.<sup>244</sup> The definition therefore covers transmissions both by wire (‘cable television’) and wireless (such as ‘free-to-air’ broadcasts), terrestrial and satellite transmission, and analogue and digital broadcasts. By referring to the transmission of ‘visual images, sound, or other information’, the definition is also broad enough to cover systems that transmit different forms of content, such as radio, television, and other broadcasts (e.g. teletext). It also takes into account the forms of broadcasting that may be directly received by individuals or may be received by subscribers who obtain a decoder.<sup>245</sup>

While the basic definition of ‘broadcast’ is deliberately broad, two alternative criteria provide important limits: to constitute a broadcast, the transmission must be ‘for simultaneous reception by members of the public’ (and capable of being lawfully received) or be made ‘at a time determined solely by the person making the transmission for presentation to members of the public’. Moreover, section 6(1A) excludes from broadcasts ‘any Internet transmission’, although with three (not insubstantial) exceptions.

The limitation of broadcasts to transmissions *for simultaneous reception ‘by members of the public’* excludes from protection transmissions between individuals, such as telephone calls, faxes, or emails, as well as transmissions on private networks (such as company ‘intranets’): these are not for reception by members of the public. The requirement that the transmission be ‘capable of lawful reception’ reinforces the exclusion of private communications from the definition of broadcast, because the interception of such a transmission would be illegal under the Regulation of Investigatory Powers Act 2000.<sup>246</sup> The requirement for ‘simultaneous reception’, too, excludes transmissions for which the individual recipient decides the time of the transmission, as with on-demand services, or interactive database services (such as *Lexis Library* or *Westlaw*). The alternative criterion—that the transmission be at a time determined solely by the person making the transmission ‘for presentation to members of the public’—is designed to cover transmission for playing or showing, such as when a football game is beamed back to the away team’s stadium.<sup>247</sup> It also covers what is frequently referred to as ‘narrow-casting’, such as transmission to shops for presentation to the public.

The scope of the definition of broadcast is confined further by excluding ‘any Internet transmission’, but this exclusion is subject to three exceptions of its own. No definition is provided for an ‘Internet transmission’, but the better view is that the Internet is not confined to the ‘world wide web’. Emails to news groups therefore are generally excluded from protection as ‘broadcasts’ (although they might be protected as literary or artistic works).<sup>248</sup>

As an exclusion from broadcasts of ‘any Internet transmission’ would be unfathomably broad, the Act seeks to keep broadcast protection for ‘Internet transmissions of a conventional broadcast character’ by means of three exceptions to the exclusion. First, section 6(1A)(a) clarifies that the exclusion of ‘Internet transmissions’ does not encompass ‘a transmission taking place simultaneously on the Internet and by other means’. This means that websites that transmit sounds and images simultaneously with broadcasts—all of the BBC radio stations, for example, are accessible from the BBC’s website—remain protected broadcasts.

A second provision in section 6(1A)(b) allows for broadcasts to include an Internet transmission that is a ‘concurrent transmission of a live event’. The term ‘concurrent’ implies that the Internet transmission must occur at the same time as the ‘live event’, so would seem to cover Internet transmission of a cricket match or sounds of a pop concert. The provision refers to transmission of a live event and so would not treat as a broadcast a transmission of *commentary* on a live event. Newsgroup emails of progress at the latest international copyright convention would not be a broadcast therefore, nor would the commentary on a football match (unless the commentary itself were to be treated as an event). Whether the courts will interpret ‘live event’ to cover transmissions of the *Big Brother* house (even where these were not being broadcast on television) remains to be seen; an approach that refuses to discriminate will end up treating all live web-cam feeds into websites as broadcasts.

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↳ A third exception in section 6(1A)(c) indicates that an Internet transmission is not excluded from the definition of broadcast if it is ‘a transmission of recorded moving images or sounds forming part of a programme service offered by the person responsible for making the transmission, being a service in which programmes are transmitted at scheduled times determined by that person’. This means that a person who wishes to set up a conventional style of broadcast service, solely utilizing the Internet to distribute the programme service, does gain protection for the broadcasts.

## 9 Published Editions

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The final category of works that are protected by copyright is ‘typographical arrangements of published editions’. This category of works was first introduced in the United Kingdom in 1956 and remains largely a peculiarity of the British, and British-influenced, copyright systems (having no corresponding international regime).<sup>249</sup> A ‘published edition’ means ‘a published edition of the whole or any part of one or more literary, dramatic or musical works’.<sup>250</sup> In *Newspaper Licensing Agency v. Marks & Spencer*, Lord Hoffmann stated that ‘the “edition” is the product, generally between covers, which the publisher offers to the public’.<sup>251</sup> In this context, the copyright in the published edition protects the typographical arrangement—that is, the overall appearance of the page or pages. This protects the publisher’s skill and investment in typesetting, as well as the processes of design and selection that are reflected in the appearance of the text.<sup>252</sup> There is no requirement that the published edition must be a previously unpublished work. It therefore covers modern editions of works in the public domain (such as the complete works of Shakespeare) and prohibits the reproduction of the layout (but not the work itself). It should be noted that the concept of reproduction of a typographical arrangement is extremely narrow, being restricted to facsimile reprography. Consequently, the reproduction of the material contained in a published work will not infringe this limited copyright where a different layout is employed.

## Notes

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<sup>1</sup> J. McCutcheon, ‘*Levola Hengelo BV v. Smilde Foods BV: The Hard Work of Defining a Copyright Work*’ [2019] 82 *MLR* 936 refers to the copyright work as ‘the fundamental cornerstone of the copyright system’ but a ‘curiously under-examined phenomenon’.

<sup>2</sup> *Newspaper Licensing Agency v. Marks and Spencer* [2003] 1 AC 551, 557, [4].

<sup>3</sup> The division of subject matter into ‘authorial’ and ‘entrepreneurial’ works is based upon a belief that copyright for authors is the pure form and should not be conflated or equated with rights given in return for investment. See Chapter 2, section 3, p. 38.

<sup>4</sup> E. Bonadio and N. Lucchi (eds), *Non-Conventional Copyright* (2018).

<sup>5</sup> *Creation Records v. News Group* [1997] *EMLR* 444.

<sup>6</sup> Interim relief, however, was granted on the basis of breach of confidence: see Chapters 44–46.

<sup>7</sup> For discussion of the merits (and disadvantages) of a closed list, see T. Aplin, ‘Subject Matter’, in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright* (2009), 49–76.

<sup>8</sup> *Cofemel—Sociedade de Vestuário SA v. G-Star Raw CV*, Case C-683/17, EU:C:2019:363, [AG 23] (AG Szpunar) (noting that no provision of the Info. Soc. Directive defines the concept of ‘work’ and observing that ‘it is likely that ... the excessive disparities between the copyright regimes of the Member States precluded a unanimously accepted definition from being established.’).

<sup>9</sup> *Levola Hengelo BV v. Smilde Foods BV*, Case C-310/17, EU:C:2018:899, [33]; *Cofemel—Sociedade de Vestuário SA v. G-Star Raw CV*, Case C-683/17, EU:C:2019:721, [29]. For analyses of earlier case law foreshadowing these cases, see M. van Eechoud, ‘Along the Road to Uniformity: Diverse Readings of the Court of Justice Judgments on Copyright Work’ (2012) 1 *JIPITEC* 60; C. Handig, ‘The “Sweat of the Brow” is not Enough! More than a Blueprint of the European Copyright Term “Work”’ [2013] *EIPR* 334; C. Handig, ‘Infopaq: Is the Term “Work” in the CDPA in Line with the European Directive?’ [2010] *EIPR* 53.

<sup>10</sup> *Levola Hengelo*, EU:C:2018:899, [38]–[39] (referring to Berne, Art. 2, the WCT, Art. 2, and TRIPS, Art. 9(2)).

<sup>11</sup> *Levola Hengelo BV v. Smilde Foods BV*, Case C-310/17, EU:C:2018:899, [36], [37], [40]; *Cofemel*, [29], [32]; *SI, Brompton Bicycle v. Chedech/Get2Get*, Case C-833/18, EU:C:2020:461, [22], [25]. See also *Funke Medien NRW GmbH v. Republic of Germany*, Case C-469/17, EU:C:2019:623, [19]–[20]; *Shazam Productions v. Only Fools The Dining Experience* [2022] *EWHC* 1379 (IPEC), [94]–[97].

<sup>12</sup> *Football Association Premier League v. QC Leisure*, Case C-403/08 and *Karen Murphy v. Media Protection Services*, Case C-429/08 [2011] *ECR I-9083* (Grand Chamber), [97]. For a critique of the reasoning, see L. Bently, ‘The Football Game as a Copyright Work’, in M. van Eechoud et al. (eds), *Intellectual Property and Sport* (2021), 305. A preferable reason might have been that a football match is not a production in the literary, scientific, or artistic domain (as specified in Berne). Certainly, there is no utilitarian justification in terms of incentives for protecting football matches, or parts of them.

<sup>13</sup> *Cofemel—Sociedade de Vestuário SA v. G-Star Raw CV*, Case C-683/17, EU:C:2019:363, [AG 60].

<sup>14</sup> *Levola Hengelo*, Case C-310/17, EU:C:2018:618, [AG55] (AG Wathelet).

<sup>15</sup> *Levola Hengelo*, Case C-310/17, EU:C:2018:899; *Cofemel*, [29], [32] ('a subject matter that is identifiable with sufficient precision and objectivity'); *Shazam Productions v. Only Fools The Dining Experience* [2022] EWHC 1379 (IPEC), [94]–[97].

<sup>16</sup> For this case law, see Chapter 35, section 2.1.3. The *Sieckmann* case, *Sieckmann v. Deutsches Patent-und Markenamt*, Case C-273/00 [2002] ECR I-11737, is cited by AG Wathelet at EU:C:2018:618, [AG56]. For a defence of this requirement, see J. McCutcheon, 'Levola Hengelo BV v. Smilde Foods BV: The Hard Work of Defining a Copyright Work' (2019) 82 *MLR* 936 (arguing that the ability to be identified with clarity and precision is a prerequisite of all property rights).

<sup>17</sup> *Levola Hengelo*, EU:C:2018:899, [41]; *Cofemel*, EU:C:2019:363, [33].

<sup>18</sup> *Levola Hengelo*, EU:C:2018:899, [42]. The Court explained that taste depended 'inter alia, on factors particular to the person tasting the product concerned, such as age, food preferences and consumption habits, as well as on the environment or context in which the product is consumed'.

<sup>19</sup> Some European countries have even protected perfumes by copyright: *Lancôme Parfums v. Kecofa* [2006] *ECDR* (26) 363 (Dutch Supreme Court) (comment H. Cohen Jehoram [2006] *EIPR* 629); cf. *Bsiri-Barbir v. Haarmann & Reimer* [2006] *ECDR* (28) 380 (French *Cour de Cassation*). See C. Seville, 'Copyright in Perfume: Smelling a Rat' (2007) 66 *CLJ* 49.

<sup>20</sup> *Levola Hengolo*, EU:C:2018:899, [42].

<sup>21</sup> *Brompton*, EU:C:2020:461, [28].

<sup>22</sup> *Cofemel—Sociedade de Vestuário SA v. G-Star Raw CV*, Case C-683/17, EU:C:2019:721, [35].

<sup>23</sup> *Ibid.*, [53]–[56].

<sup>24</sup> *Bezpečnostní softwarová asociace* [2010] ECR I-13971, [45]–[46]; *Nintendo v. PC Box*, Case C-355/12, EU:C:2014:25, [23] ('In so far as the parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, *together with the entire work*, by copyright in the context of the system established by Directive 2001/29') (emphasis added). For an analysis of videogames, see Y. H. Lee, 'Play Again? Revisiting the Case for Copyright Protection of Gameplay in Videogames' [2012] *EIPR* 865. For further thoughts on videogames, see Daithí Mac Síthigh, 'The Game's the Thing', in M. Richardson and S. Ricketson, *Intellectual Property in Media and Entertainment* (2017), ch. 13.

<sup>25</sup> *Flos v. Semararo Case e Famiglia*, Case C-168/09 [2011] ECR I-181, [34].

<sup>26</sup> Another criticism is that the CJEU exceeded its competence in treating these matters as harmonized (a criticism that seems particularly pertinent in relation to designs, given Designs Dir., art. 17). On this, see Chapter 29.

<sup>27</sup> J. McCutcheon, 'Levola Hengelo BV v. Smilde Foods BV: The Hard Work of Defining a Copyright Work' (2019) 82 *MLR* 936; J. Pila, 'The Authorial Works Protectable by Copyright', in E. Rosati, *The Routledge Handbook of EU Copyright Law* (2021), 63, 71 (the question of whether there is a work and whether it is original are 'analytically separate'). See further *Levola Hengelo*, EU:C:2018:618, [AG46] (AG Wathelet) (emphasizing the importance of keeping concepts of 'originality' and 'work' distinct).

<sup>28</sup> [2013] EWHC 69 (Ch), [2013] *RPC* (17) 421.

<sup>29</sup> *Ibid.*, [33].

<sup>30</sup> Berne Convention, Art. 2(1) ('literary and artistic works' shall include 'every production in the literary, scientific and artistic domain'); Term Dir., Art. 1.1 (specifying the term of protection for 'rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention'). Some authors still insist on this requirement: J. Pila, 'The Authorial Works Protectable by Copyright', in E. Rosati (ed.), *The Routledge Handbook of EU Copyright Law* (2021), 63, 65–6.

<sup>31</sup> Perhaps such subject matter is excluded on the basis that it would count as 'ideas', broadly understood as 'procedures' and 'methods of operation'.

<sup>32</sup> P. B. Hugenholtz, 'Works of Literature, Science and Art', in P.B. Hugenholtz et al. (eds), *100 Years of Dutch Copyright Law: Auteurswet, 1912–2012* (2012), ch. 2, 53.

<sup>33</sup> But see Chapter 1, section 5.1.3, pp. 24–6. It might be possible to argue that some of the CJEU case law on works does not relate to retained EU law, or that it went beyond the competences of the CJEU.

<sup>34</sup> EU(W)A 2018, s. 6, discussed in Chapter 1, section 5.1.3, pp. 24–6.

<sup>35</sup> *Response Clothing Ltd v. The Edinburgh Woollen Mill Ltd* [2020] EWHC 148 (IPEC), [2020] FSR (25) 635, [63] (interpreting work of artistic craftsmanship in accordance with New Zealand precedent rather than the *Hensher v. Restawile* case, so as to give effect to EU law 'up to a point').

<sup>36</sup> E. Rosati, 'CJEU Rules That Copyright Protection for Designs Only Requires Sufficient Originality' (2019) 14 *JIPPL* 931, 932.

<sup>37</sup> *SAS Institute v. World Programming* [2013] EWHC 69 (Ch), [2013] RPC (17) 421, [27]. Cf. *Response Clothing Ltd v. The Edinburgh Woollen Mill Ltd* [2020] EWHC 148 (IPEC), [2020] FSR (25) 635, [27] (HHJ Hacon describing a 'tension' between EU law and the approach taken in the UK 'for 300 years'). For consideration of how far magic tricks might be protected, see A. Struthers, 'Copyright Protection for Magic Tricks: A Danger Lurking in the Shadows?' [2017] *EIPR* 136, esp. 141.

<sup>38</sup> That said, European copyright law does not avoid categories completely. First, the directives require distinct regimes of protection for 'computer programs' and 'databases' (with different rules on ownership, exceptions, secondary infringement, and 'para-copyright' for 'computer programs'). Second, computer programs must be protected as 'literary works': Software Dir., Art. 1(1). Special rules also apply in relation to authorship of 'cinematographic works' under Term Dir., Art. 2(1), and the term of copyright for 'musical compositions with lyrics' under Dir. 2011/77/EU. See Yin Harn Lee, 'The Persistence of the Text' [2018] *IPQ* 22 and 107, 135.

<sup>39</sup> Compare *Electronic Technique v. Critchley* [1997] FSR 401 (arguing against protection as both literary and artistic work) with *Anacon Corp. v. Environmental Research Technology* [1994] FSR 659 (Jacob J suggesting that a circuit diagram is both a literary and artistic work) and *Sandman v. Panasonic UK* [1998] FSR 651 (Pumfrey J indicating that a poem could be both).

<sup>40</sup> See e.g. Software Dir. (special rules for computer programs); Database Dir. (special rules for databases); Term Dir., Arts 2, 6 (special rules for photographs, cinematographic, and audiovisual works); Rel. Rights Dir., Art. 3(2) (exclusion of 'buildings' and 'applied art'); Info. Soc. Dir., Art. 5(3)(j) (permissible exception for 'artistic work') and 5(3)(m) (permissible exception for 'building').

<sup>41</sup> The Statute of Anne 1710 and the Literary Copyright Act 1842 used the term 'book'. However, since 1911, the statutes have referred to literary works.

<sup>42</sup> Software Dir., Art. 1(1) (referring to Berne). See also Term Dir., Art. 1(1).

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<sup>43</sup> *University of London Press v. University Tutorial Press* [1916] 2 Ch 601.

<sup>44</sup> Ibid.

<sup>45</sup> (1894) 3 Ch 420, 428 (Davey LJ).

<sup>46</sup> Ibid., 521.

<sup>47</sup> *Express Newspapers v. Liverpool Daily Post* [1985] 3 All ER 680.

<sup>48</sup> *D. P. Anderson v. Lieber Code Company* [1917] 2 KB 469.

<sup>49</sup> *Apple Computer v. Computer Edge* [1984] FSR 481 (FCA), 521.

<sup>50</sup> Ibid., 495 ('meaningless rubbish would plainly be excluded').

<sup>51</sup> *Exxon Corp. v. Exxon Insurance* [1982] RPC 69, 90.

<sup>52</sup> See R. Stone, 'Copyright Protection for Titles, Character Names and Catch-phrases in the Film and Television Industry' [1996] Ent L Rev 178, [1997] Ent L Rev 34. See also *Shazam Productions v. Only Fools The Dining Experience* [2022] EWHC 1379 (IPEC) (recognizing the character of 'Del Boy' to be a protected literary work).

<sup>53</sup> *Exxon Corp. v. Exxon Insurance* [1982] RPC 69.

<sup>54</sup> Ibid.

<sup>55</sup> *Infopaq International v. Danske Dagblades Forening*, Case C-5/08 [2009] ECR I-6569, [45].

<sup>56</sup> The corollary of this is that while a person is usually free (as far as copyright is concerned) to appropriate names and short titles, care must be taken to ensure that the use of such a title cannot be seen as passing off or a trade mark infringement: see Chapters 32–34.

<sup>57</sup> 'Karo Step' Trade Mark [1977] RPC 255 (a pictorial mark may be an artistic work); *Hutchinson Personal Communications v. Hook Advertising* [1996] FSR 549; *News Group v. Mirror Group* [1989] FSR 126.

<sup>58</sup> *Green v. Broadcasting Corp. of New Zealand* [1989] RPC 469 (CANZ), 472, 475, 490.

<sup>59</sup> *Francis Day and Hunter v. 20th Century Fox* [1940] AC 112 (copyright in the song 'The Man Who Broke the Bank at Monte Carlo' was not infringed by the performance of a motion picture of the same title). See also *Dick v. Yates* [1881] Ch 6 (no copyright in 'Splendid Misery').

<sup>60</sup> *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').

<sup>61</sup> 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).

<sup>62</sup> CDPA 1988, s. 3(1)(d).

<sup>63</sup> *Gates v. Swift* [1982] RPC 339; *Sega Enterprises v. Richards* [1983] FSR 73; *Thrustcode v. WW Computing* [1983] FSR 502.

<sup>64</sup> Software Dir., Art. 1(1); TRIPS, Art. 10(1); WCT, Art. 4.

<sup>65</sup> 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.

<sup>66</sup> 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).

<sup>67</sup> *Ibcos Computers v. Barclays Mercantile Highland Finance* [1994] FSR 275.

<sup>68</sup> Software Dir., Recital 7.

<sup>69</sup> *Bezpečnostní softwarová asociace*, Case C-393/09 [2010] ECR I-13971, [28]–[42] (emphasis added). See also *SAS Institute v. World Programming*, Case C-406/10, EU:C:2012:259 (Grand Chamber), [35]–[37].

<sup>70</sup> *Bezpečnostní softwarová asociace* [2010] ECR I-13971, [38].

<sup>71</sup> 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.

<sup>72</sup> Software Regs, reg. 3; *Bezpečnostní softwarová asociace* [2010] ECR I-1397, [36]–[37]. For commentary, see S. Chalton, ‘Implementation of the Software Directive in the UK’ [1993] EIPR 138, 140.

<sup>73</sup> Cf. *Football Association Premier League v. Panini UK* [2003] EWCA Civ 995, [2004] FSR 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).

<sup>74</sup> Case C-444/02 [2004] ECR I-10549.

<sup>75</sup> On this right, see Chapter 13, section 3, pp. 380–9.

<sup>76</sup> *Fixtures Marketing v. OPAP*, Case C-444/02 [2004] ECR I-10549, [20]. See also *Ryanair*, Case C-30/14, EU:C:2015:10, [33]; *Freistaat Bayern*, Case C-490/14, EU:C:2015:735, [12].

<sup>77</sup> *Fixtures Marketing v. OPAP*, Case C-444/02 [2004] ECR I-10549, [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.

<sup>78</sup> *Fixtures Marketing v. OPAP*, Case C-444/02 [2004] ECR I-10549, [33].

<sup>79</sup> Ibid., [30].

<sup>80</sup> Cf. *Software Solutions Ltd v. 365 Health & Wellbeing Ltd* [2021] EWHC 237 (IPEC), [136] (‘XML schema’ which structured the elements, attributes, and data which are validly contained in the various XML files in the claimant’s software application was not itself a database because the elements could not be separated without losing the informative value of the rules as a whole).

<sup>81</sup> Information displayed on a ‘pdf’ might be ‘individually accessible’: *Technomed v. Bluecrest Health Screening* [2017] EWHC 2142 (Ch), [2018] FSR (8) 187 (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,

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*Freistaat Bayern*, Case C-490/14, EU:C:2015:735, [15] (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).

<sup>82</sup> *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.

<sup>83</sup> Ibid., [21].

<sup>84</sup> Ibid., [24].

<sup>85</sup> Ibid., [27].

<sup>86</sup> Ibid., [28].

<sup>87</sup> Database Dir., Art. 1(3).

<sup>88</sup> 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.

<sup>89</sup> See *Football Association Premier League v. Panini UK* [2003] EWCA Civ 995, [2004] FSR 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.

<sup>90</sup> CDPA 1988, s. 3(1). Note that the categories of ‘dramatic’ and ‘literary’ works are mutually exclusive: a literary work is one ‘other than a dramatic or musical work’: *Banner Universal Motion Pictures Ltd v. Endemol Shine Group* [2017] EWHC 2600 (Ch), [2018] ECC (4) 55, [25].

<sup>91</sup> *Martin v. Kogan* [2019] EWCA Civ 1645, [2020] FSR (3) 46, [66] (as its primary purpose lies in being performed); *Shazam Productions v. Only Fools The Dining Experience* [2022] EWHC 1379 (IPEC), [121] (character not a dramatic work).

<sup>92</sup> *Green v. Broadcasting Corp. of New Zealand* [1989] RPC 469, 493.

<sup>93</sup> 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 (CA) (dance recorded on film held unprotected because the film had been drastically edited and so was no longer a recording of the dance).

<sup>94</sup> *Norowzian v. Arks (No. 2)* [2000] EMLR 67 (CA), 73.

<sup>95</sup> *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).

<sup>96</sup> *Shelley Films v. Rex Features* [1994] EMLR 134; cf. *Creation Records* [1997] EMLR 444.

<sup>97</sup> *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. 14bis, 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.

<sup>98</sup> 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.

<sup>99</sup> *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).

<sup>100</sup> *Ibid.* [1989] *RPC* 469, 478, 480, 493.

<sup>101</sup> Cf. *Ladbroke v. William Hill* [1964] *1 WLR* 273 (copyright held to exist in pools coupons even though the matches changed each week).

<sup>102</sup> *Green v. Broadcasting Corp. of New Zealand* [1989] *RPC* 469, 477, on appeal [1988] *2 NZLR* 490 (CANZ), 497; cf. *Television New Zealand v. Newsmonitor Services* [1994] *2 NZLR* 91 (High Court of Auckland) (television news programme made up of unscripted and unchoreographed interviews and discussions was not a dramatic work).

<sup>103</sup> [2006] *EWHC* 24 (Ch); [2006] *RPC* (14) 379, [116]–[119].

<sup>104</sup> *The Ukulele Orchestra of Great Britain v. Clausen* [2015] *EWHC* 1772 (IPEC); [104] (HHJ Hacon).

<sup>105</sup> See ‘Programme Formats: A Further Consultative Document’ [1996] *Ent L Rev* 216; R. McD. Bridge and S. Lane, ‘Programme Formats: The Write-In Vote’ [1996] *Ent L Rev* 212; U. Klement, ‘Protecting Television Show Formats under Copyright Law: New Developments in Common Law and Civil Law Countries’ [2007] *EIPR* 52; M. Kretschmer and S. Singh, ‘Exploiting *Idols*: A Case Study of International TV Formats Trading in the Absence of Intellectual Property Protection’, available online at [https://cemp.ac.uk/tvformats/Downloads/Exploiting\\_Idols.pdf](https://cemp.ac.uk/tvformats/Downloads/Exploiting_Idols.pdf); K. Bowrey and M. Handler, ‘Instituting Copyright’, in K. Bowrey and M. Handler (eds), *Law and Creativity in the Age of the Entertainment Franchise* (2014), 140.

<sup>106</sup> Mr Mellor, Standing Committee F, IV Hansard, 8 March 1990, cols 1293–4.

<sup>107</sup> *Green v. Broadcasting Corp. of New Zealand* [1989] *RPC* 469, 474, 480–1, 488–9 (passing off claim failed because the British show had never been broadcast in New Zealand, so there was no goodwill).

<sup>108</sup> Lord Sanderson of Bowden, 521 Hansard (HL), 26 July 1990, cols 1718–19. See Chapter 44, section 4, p. 1248, and Chapter 46, section 2.2.1, p. 1279.

<sup>109</sup> *Norowzian v. Arks (No. 2)* [2000] *EMLR* 67, 73.

<sup>110</sup> *Ibid.*

<sup>111</sup> Note that the argument on appeal was not that there was copyright in the dance as a dramatic work (recorded on film), but that the film was not merely a ‘record’ of a dramatic work, but was itself a dramatic work: *ibid.*

<sup>112</sup> That is, the finished film owed as much to the editing technique as to the dance that was filmed.

<sup>113</sup> *Meakin v. BBC* [2010] *EWHC* 2065 (Ch) (Arnold J), [30] (distinguishing *Green* and finding it arguable that the format could benefit from copyright); *The Ukulele Orchestra of Great Britain v. Clausen* [2015] *EWHC* 1772 (IPEC), [104] (HHJ Hacon) (not impossible to claim copyright in a TV format); L. Golding, ‘Opportunity Knocks for Dramatic Copyright in Television Formats’, in M. Richardson and S. Ricketson, *Intellectual Property in Media and Entertainment* (2017), ch. 14, 380 (proposition that TV formats are unprotected ‘seems incorrect now as a general statement’).

<sup>114</sup> *Banner Universal Motion Pictures v. Friday TV AB* [2017] *EWHC* 2600 (Ch), [2018] *ECDR* (2) 45.

<sup>115</sup> *Ibid.*, [44]. The Court gave summary judgment to the defendant, finding that the claimed ‘format’ for a television show ‘Minute Winner’ comprised features that were ‘commonplace and indistinguishable’ from other game shows [46], and, moreover, (at [52]) that the defendant’s show ‘Minute to Win It’ was ‘different in every material respect’.

<sup>116</sup> CDPA 1988, s. 3(1). Sheet music was held to be covered by the term ‘book’ in the Statute of Anne: see *Bach v. Longman* (1777) 2 Cowp 623, 98 ER 1274.

<sup>117</sup> *Sawkins v. Hyperion Records* [2005] EWCA Civ 565, [2005] 1 WLR 3281.

<sup>118</sup> *Ibid.*, 3295, [53].

<sup>119</sup> C. L. Saw, ‘Protecting the Sound of Silence in 4’ 33” [2005] EIPR 467; Copinger (18th edn, 2021) [3–126] (‘it is doubtful that a passage of silence by itself is capable of being a musical work, even if claimed by the author or critics to be such’).

<sup>120</sup> *The Independent*, 22 June 2002.

<sup>121</sup> See S. Stokes, *Art and Copyright* (3rd edn, 2021); A. Barron, ‘Copyright, Art and Objecthood’, in D. McClean and K. Schubert (eds), *Dear Images: Art, Copyright and Culture* (2002), 277 (‘copyright law’s conception of the artistic work now faces a crisis of credibility’).

<sup>122</sup> CDPA 1988, s. 4(1).

<sup>123</sup> In *Burge v. Swarbrick* [2007] HCA 17, (2007) 232 CLR 336, [63], the Australian High Court referred to ‘the supposed terrors for judicial assessment of matters involving aesthetics’.

<sup>124</sup> [1983] FSR 32.

<sup>125</sup> *Ibid.*, 46.

<sup>126</sup> *J. & S. Davis (Holdings) v. Wright Health Group* [1988] RPC 403 may lend support to such a view; cf. *Metix v. Maughan* [1997] FSR 718, 721. For discussion in the US context, see A. Perzanowski, ‘Owning the Body: Creative Norms in the Tattoo Industry’, in K. Darling and A. Perzanowski (eds), *Creativity Without Law: Challenging the Assumptions of Intellectual Property* (2017), ch 4.

<sup>127</sup> E. Derclaye, ‘Debunking Some of UK Copyright Law’s Longstanding Myths and Misunderstandings’ [2013] IPQ 1; cf. *Ibcos Computers v. Barclays Mercantile Highland Finance* [1994] FSR 275.

<sup>128</sup> See earlier, section 1, pp. 64–7.

<sup>129</sup> For a comparison of the German and US positions, see T. Dreier, ‘Tattoos: Control and Ownership of Body Art? Some Cultural Historical, Aesthetical and Legal Reflections’, in M. van Eechoud, et al. (eds), *Intellectual Property and Sport* (2021), 63–74.

<sup>130</sup> *Kenrick v. Lawrence* (1890) 25 QBD 99.

<sup>131</sup> *Stephenson Blake & Co. v. Grant, Legros & Co.* (1916) 33 RPC 406.

<sup>132</sup> *Bernstein v. Murray* [1981] RPC 303.

<sup>133</sup> D. Booton, ‘Framing Pictures: Defining Art in UK Copyright Law’ [2003] IPQ 38 (arguing that circuit diagrams, architects’ plans, and engineering drawings are not artistic, but literary).

<sup>134</sup> *British Leyland v. Armstrong* [1986] RPC 279; *Plix Products v. Frank Winstone* [1986] FSR 92 (NZ).

<sup>135</sup> See Chapter 29, section 3, pp. 818–21.

<sup>136</sup> [2017] EWHC 2142 (Ch), [2018] FSR (8) 187, [133] (D Stone).

<sup>137</sup> [1985] *RPC* 127. See also *James Arnold v. Miafern* [1980] *RPC* 397 (articles made from a block and also the block itself); *Martin v. Polyplas* [1969] *NZLR* 1046 (coin is an engraving).

<sup>138</sup> *Hi-Tech Autoparts v. Towergate Two* [2002] *FSR* (15) 254 (plates); *Hi-Tech Autoparts v. Towergate Two (No. 2)* [2002] *FSR* (16) 270 (mats).

<sup>139</sup> Fine Art Copyright Act 1862.

<sup>140</sup> K. Bowrey, ‘Copyright, Photography and Computer Works: The Fiction of an Original Expression’ (1995) 18 *UNSWLJ* 278.

<sup>141</sup> CDPA 1988, s. 4(2). Whether something is a photograph may also be important because of CDPA 1988, ss 30(2) and 62.

<sup>142</sup> *Spelling Goldberg Productions v. BPC Publishing* [1981] *RPC* 283, 288, 297, 298, 300 (single frames from *Starsky and Hutch* were not photographs, but part of a film under CA 1956). See P. Kamina, *Film Copyright in the European Union* (2nd edn, 2016), 92–4.

<sup>143</sup> [2012] *EWPCC* 37, [2013] *FSR* (17) 312, [100]–[107] (leaving undecided whether the fabric designs themselves were graphic works). In *Islestarr Holdings v. Aldi Stores* [2019] *EWHC* 1473 (Ch), [2020] *ECDR* (20) 495 a design embossed in powder was assumed to be a graphic work, debate centring around whether it was adequately ‘recorded’. For the latter requirement, see Chapter 4, section 2, pp. 98–100.

<sup>144</sup> *Navitaire v. EasyJet Airline Co. & Bulletproof Technologies* [2005] *EWCHC* 282 (Ch), [2006] *RPC* (2) 111, [98]; *Nova Productions v. Mazooma Games* [2006] *EWCHC* 24 (Ch), [2006] *RPC* (14) 379, [100].

<sup>145</sup> *Nova Productions v. Mazooma Games* [2007] *EWCA Civ* 219, [2006] *RPC* (14) 379, [16].

<sup>146</sup> *Response Clothing Ltd v. The Edinburgh Woollen Mill Ltd* [2020] *EWHC* 148 (IPEC), [2020] *FSR* (25) 635, [16] (HHJ Hacon) (‘All the examples of a graphic work set out in the subsection are created by the author making marks on a substrate to generate an image. I do not think that the definition of a graphic work can be stretched to include a fabric, whether made on a loom or a knitting machine.’).

<sup>147</sup> *Wham-O v. Lincoln Industries* [1985] *RPC* 127, 157. See also *Breville Europe v. Thorn EMI* [1995] *FSR* 77, 94 (Falconer J) (scallop-shaped moulds that were used in toasted-sandwich makers were sculptures).

<sup>148</sup> [2008] *EWCHC* 1878 (Ch), [2009] *FSR* (2) 103, [118].

<sup>149</sup> [2011] *UKSC* 39, [2012] *1 AC* 208, [37], [48].

<sup>150</sup> [2008] *EWCHC* 1878 (Ch), [2009] *FSR* (2), [118]; [2009] *EWCA Civ* 1328, [2010] *Ch* 503, [54], [71].

<sup>151</sup> *Lucasfilm v. Ainsworth* [2008] *EWCHC* 1878 (Ch), [2009] *FSR* (2) 103, [118].

<sup>152</sup> *Ibid.*, [118], point (vi).

<sup>153</sup> *Ibid.*, [121].

<sup>154</sup> *Ibid.*, [123].

<sup>155</sup> [2011] *UKSC* 39, [2012] *1 AC* 208, [29].

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<sup>156</sup> *Metix v. Maughan* [1997] FSR 718, 722 (moulds for making functional cartridges in the shape of double-barrelled syringes are not sculptures). The Supreme Court said that this definition had ‘not attracted adverse comment from any quarter’: [2011] UKSC 39, [34]. It seems that the Court overlooked *Hi-Tech Autoparts v. Towergate Two* [2002] FSR (15) 254, [48].

<sup>157</sup> [2011] UKSC 39, [2012] 1 AC 208, [48].

<sup>158</sup> Ibid., [44], [46].

<sup>159</sup> *Creation Records v. News Group* [1997] EMLR 444.

<sup>160</sup> Ibid., 449.

<sup>161</sup> In *Creation Records*, Lloyd J distinguished Gallagher’s assemblage from Carl André’s bricks by reference to the ‘ephemerality of the former’. In *Lucasfilm v. Ainsworth* [2008] EWHC 1878 (Ch), [2009] FSR (2) 103, [118], Mann J agreed that André’s bricks would be a sculpture, emphasizing that it was its ‘artistic purpose’ that was key.

<sup>162</sup> However, at least for the moment, it retains significance particularly when examining whether the defence provided by CDPA 1988, s. 51, is in play. See further Chapter 29, section 3.1.2 *ff*, pp. 819–20.

<sup>163</sup> E. Rosati, ‘CJEU Rules That Copyright Protection for Designs Only Requires Sufficient Originality’ (2019) 14 *JIPLP* 931, 932 (CJEU decision in *Cofemel* made authority of *Lucasfilm* ‘even more questionable’).

<sup>164</sup> CDPA 1988, s. 4(1)(b). Copyright protection for works of architecture was first introduced under the 1911 Act to give effect to the Berlin Revision of the Berne Convention.

<sup>165</sup> CDPA 1988, s. 4(2) (but note that the provision says ‘building’ *includes* ‘any fixed structure’).

<sup>166</sup> *Darwin Fibreglass v. Kruhse Enterprises* (1998) 41 IPR 649.

<sup>167</sup> *George Hensher v. Restawile Upholstery (Lancs)* [1976] AC 64 (Lord Simon).

<sup>168</sup> *Cuisenaire v. Reed* [1963] VR 719, 730; *Hensher v. Restawile Upholstery (Lancs)* [1976] AC 64, 77, 78, 81, 85, 86, 96; *Merlet v. Mothercare plc* [1986] RPC 115; *Bonz Group v. Cooke* [1994] 3 NZLR 216, 222.

<sup>169</sup> *George Hensher v. Restawile Upholstery (Lancs)* [1976] AC 64.

<sup>170</sup> Ibid., 78E.

<sup>171</sup> Ibid., 78G.

<sup>172</sup> Ibid., 79C–D.

<sup>173</sup> Ibid., 81D.

<sup>174</sup> Ibid., 96G.

<sup>175</sup> Ibid., 98C.

<sup>176</sup> Ibid., 86G–87A.

<sup>177</sup> Ibid., 87C–D.

<sup>178</sup> Ibid., 87E–F.

<sup>179</sup> Ibid., 93C.

<sup>180</sup> Ibid., 94H.

### 3. Subject Matter

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<sup>181</sup> Ibid., 95B–C.

<sup>182</sup> *Merlet v. Mothercare* [1986] *RPC* 115. The Court of Appeal (at 129 *ff*) considered only issues relating to infringement of copyright in Mme Merlet's drawings.

<sup>183</sup> Ibid., 125–6, citing Viscount Dilhorne, Lord Simon, and Lord Kilbrandon.

<sup>184</sup> [2001] *FSR* (5) 49.

<sup>185</sup> Relying on *Bonz Group v. Cooke* [1994] 3 *NZLR* 216.

<sup>186</sup> *Guild v. Eskandar* [2001] *FSR* (38) 645.

<sup>187</sup> Ibid., 700.

<sup>188</sup> Note also *Lucasfilm v. Ainsworth* [2008] *EWHC* 1878 (Ch), [2009] *FSR* (2) 103 (Mann J holding that the stormtrooper helmets in *Star Wars IV* were not works of 'artistic craftsmanship' because '[t]heir purpose was not to appeal to the aesthetic at all. It was to give a particular impression in a film'; not discussed on appeal).

<sup>189</sup> *Response Clothing Ltd v. The Edinburgh Woollen Mill Ltd* [2020] *EWHC* 148 (IPEC), [2020] *FSR* (25) 635.

<sup>190</sup> Ibid., [42], [54].

<sup>191</sup> *Bonz Group (Pty) Ltd v. Cooke* [1994] 3 *NZLR* 216.

<sup>192</sup> The test had previously been referred to by Evans-Lombe J in *Vermaat v. Boncrest* [2001] *FSR* (5) 49 and Mann J in *Lucasfilm v. Ainsworth* [2008] *EWHC* 1878 (Ch), [2009] *FSR* (2) 103, [131]. But do the rules of precedent not require that the test proposed at the very least justify the result in decisions of superior courts? If so, would the test in *Bonz* have led to the result in *Hensher*, that the three-piece suite was not protected?

<sup>193</sup> Ibid., [40], [64].

<sup>194</sup> *Response Clothing* [2020] *EWHC* 148 (IPEC), [38] ('the Wave Fabric was a commercial success, so customers must have found it aesthetically pleasing', thus effectively, if dubiously, dissolving the requirement of 'artistry' into one of sales).

<sup>195</sup> *George Hensher v. Restawile Upholstery (Lancs)* [1976] *AC* 64, 91.

<sup>196</sup> Ibid., 77.

<sup>197</sup> Ibid., 77.

<sup>198</sup> *Cuisenaire v. Reed* [1963] *VR* 719 (Supreme Court of Victoria); *Komesaroff v. Mickle* [1988] *RPC* 204 (Supreme Court of Victoria), 210.

<sup>199</sup> *Bonz Group v. Cooke* [1994] 3 *NZLR* 216 (High Court of New Zealand), a case approved by the High Court of England and Wales in *Vermaat* [2001] *FSR* (5) 49.

<sup>200</sup> [1986] *RPC* 115, 122.

<sup>201</sup> *George Hensher v. Restawile Upholstery (Lancs)* [1976] *AC* 64, 77 (Lord Reid), 84 (Viscount Dilhorne) (made by hand and not mass-produced).

<sup>202</sup> Ibid., 90.

<sup>203</sup> (1998) 157 *ALR* 247 (FCA). See also *Burge v. Swarbrick* [2007] *HCA* 17, (2007) 232 *CLR* 336, [60] (noting that something such as a 'plug' for a mass-produced boat could be a work of artistic craftsmanship).

<sup>204</sup> *Coogi Australia v. Hysport International* (1999) 157 ALR 247, 258–9.

<sup>205</sup> *Response Clothing* [2020] EWHC 148 (IPEC), [64].

<sup>206</sup> *Ibid.*, [64].

<sup>207</sup> Cf. *Guild v. Eskander* [2001] FSR (38) 645, 700 (the fact that a design is created without using traditional ‘craftsmanship techniques’, or is intended to be mass-produced, may be a factor), not considered on appeal at [2002] EWCA Civ 316, [2003] FSR (3) 23.

<sup>208</sup> [1936] 1 Ch 400, 408.

<sup>209</sup> This approach is consistent with the views of Lord Simon in *George Hensher v. Restawile Upholstery (Lancs)* [1976] AC 64 to the effect that a work of artistic craftsmanship is the work of a person who is an ‘artist-craftsman’.

<sup>210</sup> *Bonz Group v. Cooke* [1994] 3 NZLR 216 (High Court of New Zealand). See also *Spyrou v. Radley* [1975] FSR 455; *Bernstein v. Sydney Murray* [1981] RPC 303; *Merlet v. Mothercare* [1986] RPC 115, 123–4.

<sup>211</sup> *Bonz Group v. Cooke* [1994] 3 NZLR 216 (High Court of New Zealand), 224; *Vermaat v. Boncrest* [2001] FSR 49.

<sup>212</sup> [2007] HCA 17, (2007) 232 CLR 336.

<sup>213</sup> *Ibid.*, [82]–[84].

<sup>214</sup> See *ibid.*, [63]–[65], noting the problems with such evidence, in particular that ‘few alleged authors of works of artistic craftsmanship [will] be heard readily to admit the absence of any aesthetic element in their endeavours’.

<sup>215</sup> S. Van Gompel and E. Lavik, ‘Quality, Merit, Aesthetics and Purpose: An Inquiry into EU Copyright Law’s Eschewal of other Criteria than Originality’ (2013) 236 RIDA 100.

<sup>216</sup> *Cofemel—Sociedade de Vestuário SA v. G-Star Raw CV*, Case C-683/17, EU:C:2019:721, [34].

<sup>217</sup> Cf. *Levola Hengelo*, EU:C:2018:618, [AG58, n. 31] (where AG Wathelet indicates it is the subject matter that must be identifiable objectively, rather than originality, which he observed ‘is an exercise open to differing opinions and involves a degree of subjectivity’); K. Güven, ‘Eliminating “Aesthetics” from Copyright Law: The Aftermath of *Cofemel*’ [2021] GRUR Int 1, 9–10 (explaining that while in *Levola* the question was whether the subject matter is identifiable, in *Cofemel* it became whether the originality could be assessed with sufficient precision and objectivity).

<sup>218</sup> A more plausible way to reach the same conclusion might have been to refer to various provisions in directives prohibiting the use of such criteria: Software Dir., Recital 8 (stating that originality is the only criterion for protection and that ‘no tests as to the qualitative or aesthetic merits of the program should be applied’); Term Dir., Recital 16 (‘no other criteria such as merit or purpose’ should be used when assessing the originality of photographs); Database Dir., Recital 16 (that ‘no aesthetic or qualitative criteria’ may be used when determining the eligibility of a database for copyright). Assuming, as the Court of Justice has been willing to do in *Infopaq*, that the logic expressed in these directives applies to all ‘works’, then no qualitative criteria could be applied when deciding on the eligibility of ‘works of artistic craftsmanship’ for protection.

<sup>219</sup> E. Rosati, ‘CJEU Rules That Copyright Protection for Designs Only Requires Sufficient Originality’ (2019) 14 JIPLP 931, 932 (‘the category of works of artistic craftsmanship needs to be seriously re-considered’).

<sup>220</sup> *Response Clothing Ltd v. The Edinburgh Woollen Mill Ltd* [2020] EWHC 148 (IPEC), [2020] FSR (25) 635.

<sup>221</sup> *Ibid.*, [59]–[61].

<sup>222</sup> Ibid., [63].

<sup>223</sup> Ibid., [63].

<sup>224</sup> E. Derclaye, ‘Debunking Some of UK Copyright Law’s Longstanding Myths and Misunderstandings’ [2013] *IPQ* 1 (highlighting the problems involved in using the term ‘film’ both colloquially and in its legal sense).

<sup>225</sup> CDPA 1988, s. 5B(1); cf. CA 1956, s. 13(10), and *Spelling Goldberg v. BPC Publishing* [1981] *RPC* 283 (stating that film has three characteristics: a sequence of images, recorded on material, capable of being shown as a moving picture).

<sup>226</sup> Aplin, ch. 3; T. Aplin, ‘Not in Our Galaxy: Why Film Won’t Rescue Multimedia’ [1999] *EIPR* 633; Stamatoudi, ch. 6, esp. 126–51. Despite these criticisms, the biggest problem with relying on film copyright to protect multimedia works derives from the narrow scope of protection given by film copyright.

<sup>227</sup> Term Dir., Art. 3(3), defining film, as ‘a cinematographic or audiovisual work or *moving images, whether or not accompanied by sound*’ (emphasis added).

<sup>228</sup> Term Dir., Art. 2. See Chapter 7, section 3, p. 204.

<sup>229</sup> Rel. Rights Dir., Arts 3(1)(d), 9(1)(c), Info. Soc. Dir., Arts 2(d), 3(2)(c) (conferring rights of rental, distribution, reproduction and making available on the producer); Term Dir., Art. 3(3).

<sup>230</sup> CDPA 1988, s. 13B(9). For an argument that this fails to implement the directives, see P. Kamina, ‘British Film Copyright and the Incorrect Implementation of the EC Copyright Directives’ [1998] *Ent L Rev* 109.

<sup>231</sup> *Norowzian v. Arks (No. 2)* [2000] *EMLR* 67. For criticism, see T. Rivers, ‘*Norowzian Revisited*’ [2000] *EIPR* 389.

<sup>232</sup> P. Kamina, *Film Copyright in the European Union* (2nd edn, 2016), 134–5.

<sup>233</sup> *Atresmedia Corporación de Medios de Comunicación S.A. v. Asociación de Gestión de Derechos Intelectuales (AGEDI)*, Case C-147/19, EU:C:2020:935, [2020] *ECDR* 21, [41], [47]. See also P. Kamina, ‘The Protection of Film Soundtracks under British Copyright after the Copyright Regulations 1995 and 1996’ [1998] *Ent L Rev* 153.

<sup>234</sup> CDPA 1988, s. 5B(2)–(3).

<sup>235</sup> *Sean Toye v. London Borough of Southwark* (2002) 166 *JP* 389.

<sup>236</sup> See Chapter 8, esp. section 2.3.3, pp. 227–30.

<sup>237</sup> Term Dir., Art. 3.

<sup>238</sup> CDPA 1988, s. 5B(3)(a). *Atresmedia Corporación de Medios de Comunicación S.A. v. Asociación de Gestión de Derechos Intelectuales (AGEDI)*, Case C-147/19, EU:C:2020:935, [41], [47] (holding that the broadcasting of audiovisual works containing previously published phonograms within them does not implicate the rights of performers or phonogram producers because ‘an audiovisual recording containing the fixation of an audiovisual work cannot be classified as a “phonogram” for the purposes of Rel. Rights. Dir., Art. 8(2)'). However, in situations where a recording is incorporated with a ‘film fixation’ rather than an ‘audiovisual or cinematographic work’, Art. 2(b) of the WPPT implies that the rights in the phonogram can still be invoked: *ibid.*, [39]–[40].

<sup>239</sup> CDPA 1988, s. 5B(3)(b).

<sup>240</sup> Rome, Arts 3(f), 6, 13, 14, 16(1)(b); TRIPS, Art. 14(3).

<sup>241</sup> On the question of what amounts to a ‘work’ in this context, see the Australian High Court decision in *TCN Channel Nine v. Network Ten* [2004] HCA 14, (2004) 218 CLR 273 in which the majority held that, in the case of a broadcast, the work is the individual programme transmitted.

<sup>242</sup> CDPA 1988, s. 6(1) (as amended).

<sup>243</sup> Defined in CDPA 1988, s. 178, as ‘actuated by electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical energy’.

<sup>244</sup> The IPO refers to this as a ‘technologically neutral definition’: *Consultation on UK Implementation of Directive 2001/29/EC on Copyright and Related Rights in the Information Society: An Analysis of Responses and Government Conclusions* (2003), [3.6].

<sup>245</sup> That is, any encrypted broadcast, whether terrestrial or by satellite relay, is ‘lawfully’ received if decoding equipment has been made available through the person transmitting it in encrypted form: CDPA 1988, s. 6(2).

<sup>246</sup> Rather surprisingly, this might mean that foreign encrypted broadcasts, such as satellite broadcasts, for which there is no authorized distribution of decoders in the UK are unprotected because they are not capable of lawful reception in the UK. This would be a breach of Rome, Art. 6(1)(b), and is best avoided by treating the definition as covering broadcasts that are capable of lawful reception in the country at which the signals are primarily targeted.

<sup>247</sup> Copyright Directorate, *Consultation on UK Implementation of Directive 2001/29/EC*, [3.9] (explaining requirement that timing be determined by the person making the transmission as designed to exclude on-demand services from the definition of broadcast).

<sup>248</sup> Ibid., [3.10] (explaining the exclusion as a response to concerns that websites would be protected and that exceptions, such as research and private study, at the time limited to use of works of specified types, would therefore be unavailable). In this respect, the decision in *Shetland Times v. Dr Jonathan Wills* [1997] FSR 604 that a website is protected (then, as items included in a cable programme service) is no longer good law.

<sup>249</sup> CA 1956, s. 15. See *Report of the Copyright Committee* (Cmd. 8662, Oct. 1952), [306]–[310].

<sup>250</sup> CDPA 1988, s. 8(1).

<sup>251</sup> *Newspaper Licensing Agency v. Marks and Spencer* [2003] 1 AC 551, 558 (Lord Hoffmann) (holding that the whole newspaper was the ‘edition’).

<sup>252</sup> Ibid., [23]: ‘It is not the choice of a particular typeface, the precise number or width of the columns, the breadth of margins and the relationship of headlines and strap-lines to the other text, the number of articles on a page and the distribution of photographs and advertisements but the combination of all of these into pages which give the newspaper as a whole its distinctive appearance ... The particular fonts, columns, margins and so forth are only, so to speak, the typographical vocabulary in which the arrangement is expressed.’

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