

Pure genius or plagiarism?

Slapper, G. (1998) 'Pure genius or plagiarism?', *The Times*, 25 August 1998, p. 36.

The Chancery Division of the High Court is not a place famed for cases involving dance, film, intrigue and beer. A recent case, therefore, involving all these elements, and one deciding an important and previously unresolved point of law, is worthy of some attention.

The decision last month [17 July 1998] was in an action for breach of copyright brought by the commercials director Mehdi Norowzian against Guinness and Arks, the Irish advertising agency. Mr Norowzian alleged that the well-known television advert for Guinness, featuring a man performing a fitful dance while waiting for his pint to settle, was plagiarised from a short film called *Joy* which Norowzian had sent to the agency in 1993.

The Guinness advert, called *Anticipation*, was remarkably similar to *Joy*, so many observers were surprised by the decision of Mr Justice Rattee to dismiss the copyright infringement action. The first time that the agency put the idea for the advert to Guinness, it included a copy of the film *Joy* in its presentation. Mr Norowzian was eventually invited to direct the advert, but declined.

Mr Justice Rattee decided that although *Joy* was a point of reference for *Anticipation*, it was not a copy of it. Critically, however, the judge stated that even if he had thought otherwise on the factual point of infringement, he would have dismissed the action on the basis that *Joy* was not a 'dramatic work', and therefore was outside the protection of the Copyright, Designs and Patents Act 1988. In judgment, he stated that: 'a film can be a recording of a dramatic work, though I do not think that a film itself can be a dramatic work.'

At one time, copyright law was concerned more with the legal control of publishing than with affording protection to creative artists. The modern law developed from a statute in 1709 which dealt with literary works and sought to protect authors from having their works republished without permission, 'to their very great Detriment, and too often, to the Ruin of them and their Families.'

The courts have had to deal with some curious cases over the years. In one case, a film was made of the opening of the Royal Hospital School in Holbrook, Suffolk and shown widely to cinema audiences in a Paramount News edition in 1934. The sound-track included twenty seconds of the school band playing part of the tune 'Colonel Bogey', and the owners of the copyright of the music successfully sued the companies which made and distributed the film. The court confirmed the notion that copyright is a right of property, and neither the intention of the infringer nor the amount of actual damage suffered as a result of the infringement could negate that right.

A film can certainly be protected, under sections 16 and 17 of the 1988 Act, from mechanical copying, as where pirate copies are made for sale

in street markets. A film can also be protected by the legislation where it is a recording of a dramatic work. The central issue in the Guinness case was whether *Joy* was a dramatic work. There are two ways this question can be examined. You can either concentrate on what occurs in front of the cameras, or, alternatively, you can look at the techniques of filming, the lighting, acoustics, editing, and so forth. Mr Justice Rattee focused on what was being filmed and decided, accordingly, that such a frenetic dance was not a drama. The film had been subjected to such severe 'jump-cut' editing, that it would be physically impossible for anyone to perform the dance as seen, and, therefore, it was neither a drama nor a dance.

Mr Justice Rattee stated that in order for films like *Joy* to be protected, there would need to be an extension of the 1988 legislation. That is surely correct. As we move into the next millennium, the artistry and sophistication of professional film-making is, many would argue, just as challenging, creative and technical a business as other art forms like poetry or the short-story. Why should what a former Master of the Rolls, Lord Greene, once referred to as 'the fruit of the brains, skill, imagination, and taste' of particular artists, like those who direct a short film, be less protected than those which write a drama?

The judgment has left advertising agencies in an awkward position, as Stefano Hatfield, editor of *Campaign*, has observed. On the one hand it has left them in a position of relative power when dealing with directors, but, on the other hand, as Mr Hatfield says, 'their position in relation to offering ideas on spec to clients will have been further weakened'. Unlike some other traditional products, copyright law will have to be significantly revised before its powers to satisfy could be described as pure genius.

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