

# The Legal Situation in the UK

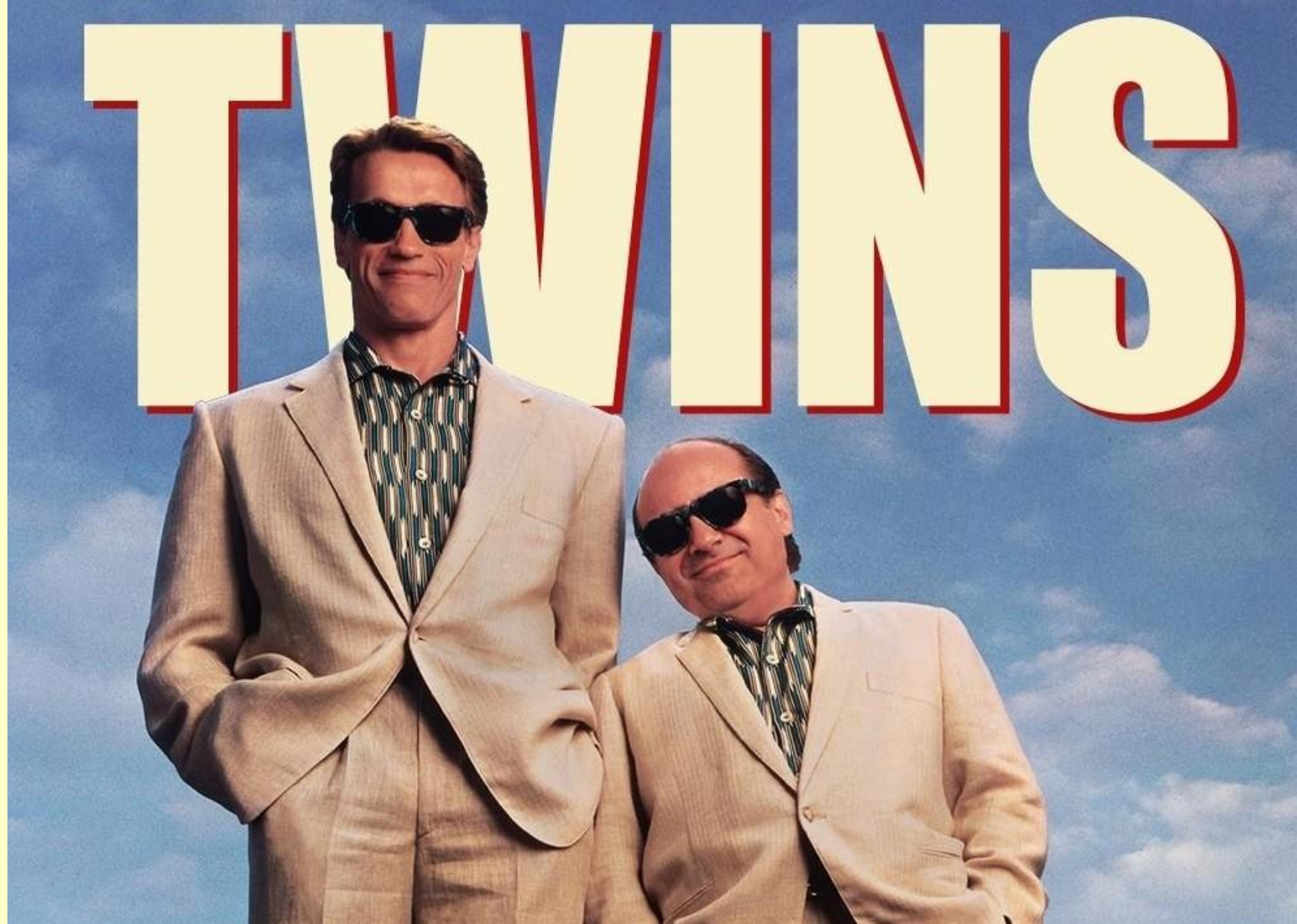
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***The different notions of 'copyright-protected work' in Europe***

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Are there still  
different  
'situations'  
across the  
EU?



Ought there be?

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UK law



# s.1(1) Copyright Designs Patents Act 1988 (CDPA)

Copyright is a property right which subsists in accordance with this Part in the following descriptions of work—

- (a) original literary, dramatic, musical or artistic works,
- (b) sound recordings, films or broadcasts, and
- (c) the typographical arrangement of published editions.

# So?

- Closed subject-matter categorisation
- Originality only for literary, dramatic, musical or artistic works?
  - Flint and Others: (b) and (c) incorporate original works by their very nature



# A transition phase?

- *Copinger and Skones James on Copyright: “A ‘work’ is a thing which satisfies the statutory description of a literary, dramatic, etc., work.”*
  - > A work is a work
- *Cornish, Llewelyn & Aplin: “[N]ot only must creative intellectual activity produce the right kind of work, but the input must satisfy a certain minimum standard of effort ... EU intervention has harmonised originality ... and the precise impact on the UK approach is still uncertain.”*
  - > We don't know whether originality standard has changed

# Traditional understanding of 'work'





# What can (could) fall within ‘descriptions of work’?

- Why does it matter? Because infringement when an unlicensed act takes place in relation to the “*work as a whole or a substantial part of it*” (s.16(3))
- A pigeon-hole approach
  - 8 categories
  - Wherever possible, separate elements in a composite creation have distinct copyrights, *eg* words and music of a song
  - Rights attaching to each type of work may differ, *eg* right of adaptation
    - May get problematic: holistic approach or separate works?
      - Laddie: better just one category by reference to main attributes (*cf* CJEU in Case C-355/12 *Nintendo*)
      - Jacob: better to separate into constituents

# Be here now: the case of unconventional works

- Assembly of a scene neither an artistic (sculpture, collage, work of artistic craftsmanship) nor a dramatic work: *Creation Records* (1997)
- Stormtrooper helmet not a sculpture: *Lucasfilm* (2011)





# Traditional understanding of originality



# What can (could) be considered 'original'?

*"[T]he [1911 Copyright] Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author."*

*Per Peterson J, University of London Press (1916)*

- What is worth copying is worth protecting
- Sufficient skill, labour and (=or) effort
- A few actions (*eg* work written when drunk ... But why?) failed on grounds of insufficient originality



# Originality as substantiality?

- Substantial taking (s.16(3))
- Yet, *“the question whether the defendant has copied a substantial part depends much more on the quality rather than the quantity of what he has taken”* (Per Lord Reid, *William Hill* (1964))
  - *Allen v Bloomsbury Publishing and Murray* (2010)
- A matter of degree (*Macmillan v Cooper* (1923))



Coping with (post-)*Infopaq* string of cases



# ‘Work’ and subject-matter categorisation

- CJEU-style requiem: copyright only in subject-matter which is original in the sense that it is its author’s own intellectual creation
  - Case C-5/08 *Infopaq*, [35]
  - Case C-393/09 *BSA*, [45]-[46]
  - Joined Cases C-403/08 and C-429/08 *FAPL*, [97]
  - Case C-145/10 *Painer*, [87]

# A requiem also played in UK courts?

*“The [InfoSoc] Directive envisages the protection of all intellectual creations by the same reproduction right and distinctions between literary and artistic works are no longer justified.”*

*Per Judge Birss QC, Abraham Moon (2012)*

-> No longer different rights attached to different works?

*“In the light of a number of recent judgments of the CJEU, it may be arguable that it is not a fatal objection to a claim that copyright subsists in a particular work that the work is not one of the kinds of work listed in section 1(1)(a) [CDPA] and defined elsewhere in that Act.”*

*Per Arnold J, SAS v WPL (2013)*

-> Towards open-ended subject-matter categorisation?



# Originality

- “[T]he test of quality has been re-stated but for present purposes not significantly altered by Infopaq ... [yet] the full implications of the decision have not yet been worked out ”

*Per Proudman J, NLA v Meltwater (2010)*

- “[C]opyright may subsist in a photograph if it is the author's own ‘intellectual creation’”

*Per Judge Birss QC, Temple Island v New English Teas (2012)*

- “For an artistic work to be original it must have been produced as the result of independent skill and labour by the artist ... It is only where there is copying of the originality of the artist that there can be infringement.”

*Per District Judge Clarke, Taylor v Maguire (2013)*

Result:





# Conclusion

- Is UK law (still) compliant with EU law?  
The case of subject-matter categorisation
- Are different notions of 'work' still permissible under EU law?
- Can this just imply changing respective roles of descriptions of work and originality?



**Thanks for your attention!**



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# The 2009 decision in Case C-5/08 *Infopaq*

- Authors have the exclusive right to authorise or prohibit reproduction, in whole or in part, of their ‘works’
- Pursuant to Article 2 Berne protection of certain subject matter presupposes that this amounts to being an ‘intellectual creation’
- Originality standard set out for computer programs, databases and photographs, applies to any other subject matter (InfoSoc Directive same rationale)
- Copyright in the various parts of a work, provided that they contain elements which are the expression of the intellectual creation of the author of the work (choice, sequence, combination)