COPYRIGHT AND QUOTATION IN FILM AND TV

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CREATe

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Abstract

This paper explores the application of the exception permitting quotation, first introduced into UK law in 2014, to film and television. It seeks to demonstrate that the concept of quotation is broad and thus that this exception offers much-needed flexibility to film-makers to utilise copyright-protected material without obtaining permission to do so. The paper explains some of the key limitations on the availability of the defence, in particular, the requirement of fair dealing (or use in accordance with fair practice) and sufficient acknowledgment (attribution). The significance of the exception is examined through three examples: *Love is the Devil*, *Titanic* and the art piece *The Clock*.

Introduction

I have been asked to talk about copyright and quotation in relation to film and TV. The presentation will be in three parts. First, I will describe three situations where makers of films have sought to include, or have drawn upon or incorporated existing copyright-protected works in their films. The examples are ones where the inclusion of the material has proved controversial and thus gained some level of public attention. I will use these examples to frame what I am going to say. Second, I will explain a little bit about my interpretation of the law and what the courts, in the EU and UK, have said about freedom to quote. Third, I will return to the three examples to see how the law would apply to them.[3]

[1] Editorial note (Bartolomeo Meletti): CREATe Working Paper 2020/8 – *Copyright and Quotation in Film and TV*, by Professor Lionel Bently – is an edited transcript of the keynote delivered by Bently at Learning on Screen Members' Day: Copyright and Creative Reuse, 8th December 2018, RSA House, London. On 12th February 2020, Bently delivered the CREATe Public Lecture 'Quotation under Copyright Law and the textual paradigm' at the University of Glasgow. A short report on Bently's Public Lecture is available at https://www.create.ac.uk/blog/2020/07/30/report-create-public-lecture-by-professor-lionel-bently-on-copyright-and-quotation-beyond-the-textual-paradigm/ . The CREATe working paper series publishes a variety of formats, including work in progress, pre-prints of accepted articles, literature reviews and edited transcripts of lectures and seminars of wider public interest. The aim is always to make new research accessible, quickly and openly.

[2] Herchel Smith Professor of Intellectual Property, Faculty of Law, University of Cambridge. The following is based on a presentation given at Learning on Screen Members' Day: Copyright and Creative Reuse on 8th December 2018. It has been updated to reflect changes in the law as of 24th April 2020. Both talk and paper drew on Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use: The Right of Quotation* (Cambridge: CUP, 2020, forthcoming). Apart from Tanya, I am indebted to Robert Burrell, Peter Fydler, Emily Hudson, Martin Kretschmer, Bartolomeo Meletti, Claudy Op den Kamp, Richard Paterson and Annabelle Shaw.

[3] The framing examples are illustrated with artworks and film stills with a view to exploring how the quotation exception might apply to art and film. As such, the use of the images in this paper is covered by the quotation exception itself, provided by Section 30(1ZA) of the Copyright, Designs and Patents Act 1988.

(1) Three Examples

The first example concerns a well-known film, *Love Is The Devil: Study for a Portrait of Francis Bacon,* released in 1998. As the title suggests, it is about the British artist Francis Bacon. It was directed by John Maybury and featured Derek Jacobi in a stunning performance as Bacon and Daniel Craig as his lover. The film received very good reviews. Writing in *The Guardian*, Adrian Searle described the film as:

> a devilish brew of naturalism, Baconesque film effects, history and gossip. It is a warped anthropological detour into the fag end of 1950s Soho bohemia, dragged too far into the 1960s but it is also a tragic love story, with astonishing performances and character cameos.[4]

For those who do not recall who Francis Bacon is, here is one example of Francis Bacon's work, that is reasonably typical of his style:[5]

Figure 1 Highlight of *Study for the Nurse in the Film "Battleship Potemkin"* by Eisenstein (Francis Bacon, 1957)[6]

Although the film is a biography of a short period in the life of a very famous artist, *Love Is The Devil* explores Bacon's life but without ever showing any of his artworks. The reason was the directors and producers could not get permission from Francis Bacon's estate.[7] Francis Bacon died in 1992, his estate held all the copyrights and they would not license the use of the images in the film.[8] As Director, John Maybury explained in an interview with Film-maker magazine:

> We came up against resistance from the art establishment in this country. ... the Marlborough Gallery, which was holding the estate of Francis Bacon at the time, ...basically said, "This film is not going to be made." It was extraordinary to have those

[4] Adrian Searle, 'Love Is The Devil: The View from the Art World,' *The Guardian*, 9 November 2012.
[5] Whereas this talk concerns the use of art-works and films in films, this work of Bacon highlights a parallel issue: the use of film in art work. As will be clear, it is quite possible that this, too, might be treated as "quotation."
[6] https://sammlung.staedelmuseum.de/en/work/study-for-the-nurse-in-the-film-battleship-potemkin
[7] Daniel Witkin, 'Fleshed Out,' (July/Aug 2018) 54(4) *Film Comment* 22-23 ("Maybury was barred by Bacon's estate from showing any of the painter's actual work ... In lieu of the paintings themselves, Maybury goes to strenuous lengths to replicate and evoke their style.")
[8] To some critics, this was a positive feature: writing in *Sight and Sound*, Sep 1, 1998, 47, Michael O'Pray says that "The absence of any of the artist's paintings ...helps to deflect it from being about 'Art' and instead makes it into a film about styles of life (something which has always fascinated Maybury)."

> people ganging up against something which at the time was such a small thing. The estate refused to allow any of his paintings to be shown in the film and threatened lawsuits if I [depicted them]. When I sent them my script they claimed to own all of my writing, saying that it was Bacon's, which was kind of flattering but absurd. So, we supplied the art department with polaroids of [Bacon's] images and they made paintings that were just backgrounds from Bacon. In that first scene we used a reference photo from a show he had in Venice. Throughout the film there are just backgrounds that you might see reflected in a mirror or something. I was convinced to make the film look like a Bacon.[9]

The question that I hope to address is: could Maybury have used the images of Bacon paintings lawfully even without the consent of the estate?

The second example concerns a film that is even more famous, released the year before *Love is the Devil*: the blockbuster, and Oscar-winning, *Titanic* from 1997, directed by James Cameron and starring Leonardo DiCaprio (as Jack) and Kate Winslet (as Rose). Although the most memorable parts in the film include the "real party" below deck, the steamy-scene in the car on the cargo area and, of course, the breaking of the boat in two,[10] as ever the interest for copyright-scholars lies elsewhere, in a segment that has sometimes been called the "Something Picasso" scene. Early in the film, as part of the exploration of the unhappy relationship between Rose and her fiancée, Cal (played by Billy Zane), Rose is depicted showing off a collection of artworks that she has purchased in Europe. When she picks up one particular canvas and is asked

Figure 2 The "Something Picasso" scene from *Titanic* (dir. James Cameron, 1997)

who it is by, Rose responds "oh something Picasso". The painting she holds is, evidently, a version of a Picasso picture, *Les Demoiselles d'Avignon*.

[9] 'Forced Perspective' at https://filmmakermagazine.com/archives/issues/fall1998/forced_perspective.php
[10] Matthew Bernstein, "'Floating Triumphantly". The American Critics on Titanic" in Kevin Sandler and Gaylyn Studler (eds), *Titanic: Anatomy of a Blockbuster* (Rutgers University Press, 1999) (analyzing the reviews).

Figure 3 *Les Demoiselles d'Avignon* (Pablo Picasso, 1907)[11]

What is of interest to us is that the picture that she is holding up is not actually *Les Demoiselles d'Avignon*, nor even a reproduction of it. It is rather a picture "inspired by" and recognisable as something that can pass as *Les Demoiselles*.

Cameron did not get a licence and, according to various press reports,[12] the inclusion of the image did, in fact, generate some sort of a dispute as to whether he should have done. Apparently, a collecting organisation, the US Artists Rights Society, sought and apparently was paid some money. The details of that arrangement are unknown, but the issue should be clear: when, if ever, can you use a version of a painting in a film without getting a licence?[13]

The third example is less famous, but more recent. It concerns the work of the artist Christian Marclay, *The Clock* (2010), which debuted at the White Cube Gallery in 2010 but was recently on show at the Tate Modern. For those of you who have not seen it, it is 24-hours long, and it comprises a montage of short snippets from films that they all feature the time, a clock, a watch, something like that. The film is, as I said, 24-hours long, and the collage has been composed in such a way the time on the timepiece in each clip is the time that you are watching it. If you are in the gallery watching the work, and the time is 5:04; all the shots on the screen are of time-pieces with 5:04. It is a pretty amazing work. As Peter Bradshaw said in his review, the idea is "brilliantly simple and completely audacious." The mesmerizing effect, also, is very interesting to experience.[14] As Julie Levinson writes, "viewers experience a temporal whiplash in which we are hurtled back and forth across the decades, centuries, and millennia of the films' collective

[11] https://www.moma.org/collection/works/79766
[12] For example, Patricia Cohen, 'Art is Long; But Copyrights Can Be Even Longer,' *New York Times*, 24 April 2012.
[13] For more examples of paintings in movies, see this site: http://paintingsinmovies.com/m/main
[14] Peter Bradshaw, "'It's Impossible!", *The Guardian*, 10 September 2018; Ari Haque, 'Doing time what I learned from 24 hours watching The Clock,' *The Guardian*, 29 November 2018..

settings, not to mention the eras of the various movies' production and the occasion of our own prior viewing."[15]

Figure 4 Stills from The Clock (dir. Christian Marclay, 2010)

Not surprisingly, the film was an outcome of an enormous research effort and it took three years to compile over ten thousand segments of films featuring clocks and watches. The range of films is enormous.[16] There are some well-known scenes from celebrated films: think, most obviously, *High Noon* (1952, dir. Fred Zinnemann), as well – coincidentally – of *Titanic* (Jack (Leonardo Di Caprio) winning the money so that he can buy tickets to travel, at 11.54 am and 11.55 am, and the boat sinking, at 2.15 am).[17] But there are many less famous films,[18] some colour, some black and white. Some films feature more than once – *Titanic* three times.

There was some discussion about copyright in relation to this artwork. According to the *New Yorker*, this issue did give Marclay pause for thought,[19] but he concluded:

> If you make something good and interesting and not ridiculing someone or being offensive, the creators of the original material will like it.

Elsewhere he recognised that "technically it's illegal". At the same time, he observed that "most people would also consider it fair use".[20] Of course, there is no law of fair use – as such – in the UK (as opposed to, for example, the United States). I hope by the end of this talk we will be able to answer the question whether Marclay needed consent or whether he could claim a defence of fair quotation.

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[15] Julie Levinson, 'Time and Time Again: Temporality, Narrativity, and Spectatorship in Christian Marclay's *The Clock*,' (2015) 54(3) *The Cinema Journal* 87, 93.
[16] For one list, see https://letterboxd.com/thisisdrew/list/the-clock/
[17] For a list by time, see https://theclock.fandom.com/wiki/The_Clock_Wiki Although *Love is the Devil* does feature shots of watches, either Marclay did not find them or he chose not to include them:
[18] For example, there are four shots from the French film, *This Man Must Die* (1969. Dir Claude Chabrol).
[19] Daniel Zalewski, 'The Hours: How Christian Marclay created the ultimate digital mosaic,' at https://www.newyorker.com/magazine/2012/03/12/the-hours-daniel-zalewski See also Claudy Op Den Kamp, *The Greatest Films Never Seen* (Amsterdam University Press, 2018) 122-4 (discussing *The Clock* as part of a broader discussion of the Implications of copyright law for re-use of 'found footage').
[20] 'Artists at Work. Slave to the Rhythm. Christian Marclay on deadline,' *Economist*, 25 August 2010.

(2) Copyright Exceptions in UK Law

In order to determine to what extent these three examples fall within exceptions to copyright infringement under UK law, I now need to explain that law.

The law is embodied in the Copyright, Designs and Patents Act 1988 (as amended, now on numerous occasions, to give effect to incremental – though now substantial – harmonization of copyright within the EU). Chapter III of the Act contains a catalogue of "exceptions" or "limitations" to copyright, that is, situations where a user of a particular work (protected by copyright) does not need to obtain a licence in order to reproduce, communicate to the public, show in public that work.[21] For a long time, these exceptions have been rather narrowly defined, so that while there are rather a lot of them, they are not very flexible. Some of the most relevant ones, for film and television producers, are:

- Fair Dealing for the purposes of criticism or review of a work (or of another work or of a performance of a work); (CDPA, s 30(1))
- Fair Dealing for Reporting Current Events (CDPA, s 30(2)) (relevant for those making newsreels)
- Incidental Inclusion (CDPA, s 31). This covers works that feature somehow in the background of a film and thus are incidentally included. It can be an important exception for film-makers.[22]
- Artistic Works permanently situated in public (CDPA, s 62). If a film-maker is filming in public and there is a work (eg a sculpture or work of architecture) that happens to be in the background, or indeed in the foreground, and that work is permanently situated there, then there may be a defence that permits the film-maker to make and exploit the film without obtaining permission from the copyright holder in the work included therein.

While these four "permitted acts" have been recognised for quite a long time, in October 2014 two new exceptions were added:

- Fair dealing for purposes of parody, pastiche and caricature (CDPA, s 30A);[23]

[21] In the CDPA, these are called "permitted acts." The CJEU has stated that "although Article 5 of Directive 2001/29 is expressly entitled 'Exceptions and limitations', it should be noted that those exceptions or limitations do themselves confer rights on the users of works or of other subject matter": Judgment of 29 July 2019, *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, C-469/17, EU:C:2019:623, [70]; *Spiegel Online GmbH v Volker Beck*, C-516/17, EU:C:2019:625, [54].

[22] Indeed, in *Fraser-Woodward v BBC* [2005] FSR (36) 762, 805, [86], the BBC successfully invoked the incidental inclusion defence in relation to a shot of a newspaper that was taken to highlight the headline but incidentally included a small photograph of Victoria Beckham, Mann J explaining "it is there [in the film] because it happened to be there in the original."

[23] On parody, see Jonathan Griffiths, 'Fair dealing after *Deckmyn* – the United Kingdom's defence for caricature, parody & pastiche' in M Richardson & S Ricketson, *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar, 2017) 64-101. On pastiche, see Emily Hudson, 'The pastiche exception in copyright law: a case of mashed-up drafting?; (2017) Intellectual Property Quarterly 346 (emphasising that the "pastiche" exception introduces significant flexibility into EU and UK law). Note, however, Opinion of Advocate-General Szpunar of 18 December 2018, Case 476/19, *Hütter v Pelham*, EU:C:2018:1002, [AG70], observing that the pastiche exception "presupposes interaction with the work used, or at least with its author, which is lacking in the case of sampling…"

- Fair dealing by way of quotation (CDPA s30 (1ZA)).

I am going to limit my comments to the last of these, fair dealing by way of quotation. This is because it marks rather a shift away from the very narrowly defined exceptions that UK law had operated with until recently. Section 30(1ZA) says:

> Copyright in a work is not infringed by the use of a quotation from the work (whether for criticism or review or otherwise) provided that—
>
> (a) the work has been made available to the public,
>
> (b) the use of the quotation is fair dealing with the work,
>
> (c) the extent of the quotation is no more than is required by the specific purpose for which it is used, and
>
> (d) the quotation is accompanied by a sufficient acknowledgment (unless this would be impossible for reasons of practicality or otherwise).

How much freedom does this new exception provide? In order to understand that I need to take you a little way from British law, because British law, currently anyway, is nested within European law; and European law is nested within a set of international rules and standards that have been adopted. This journey, I hope, will reveal that this quotation exception provides very considerable freedom.

Section 30(1ZA) corresponds to, or implements, Article 5(3)(d) of the European Union's Information Society Directive, Directive 2001/29/EC. Although the language of the two provisions is not identical, it is quite similar. Article 5(3)(d) states that Member States may operate an exception or limitation in relation to the harmonized rights (or reproduction, distribution and communication to the public) permitting:

> (d) **quotations for purposes such as criticism or review,** provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and **that their use is in accordance with fair practice**, and to the extent required by the specific purpose

You will observe

UK CDPA s 30(1ZA)	**EU ISD Art 5(3)(d)**
the use of a quotation from the work (**whether for criticism or review or otherwise**)	quotations for purposes **such as criticism or review**;
the work has been made available to the public	where the work has been **lawfully** made available to the public;

the quotation is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise)	That the source, including the author's name, is indicated unless this turns out to be impossible,
the extent of the quotation is no more than is required by the specific purpose for which it is used	to the extent required by the specific purpose
the use of the quotation is **fair dealing** with the work	use is in accordance with **fair practice**.

So, Article 5(3)(d) contains the same conditions as UK law (though with some textual variations that will not concern us today). The explanation for this correspondence is straightforward. It is because, while a member of the European Union,[24] the UK is constrained by EU law; it has to adopt those requirements.

That said, the European law (like national law) is nested in international law, in particular, in a treaty called the Berne Convention that was at first agreed at the end of the 19th century. The Berne Convention relates to all literary, dramatic, musical, artistic works, and also cinematographic works. As a result, it establishes requirements relating to infringement of copyright in artistic work, but also infringements by use of cinematographic works - films. Article 10 of the Berne Convention is a key provision that in my view has been somewhat neglected. It was introduced in 1967 and became part of the 1971 version of the Berne treaty. It is important because it requires parties to the Berne Convention to have a quotation exception, and it is a quotation exception that is not in terms limited by purpose.

Let's have a quick look at it:

> (1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries
>
> ...
>
> (3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

Note the language of the first four words of Article 10(1): "It shall be permissible ...." This international convention makes clear that the standard it identifies is compulsory, that is the

[24] Of course, the UK left the European Union on 31 January 2020 and will no longer be bound by the substantive law of copyright from 1 January 2021.

laws of signatory countries **must** allow people to make quotations when doing so complies with three conditions: the work must have already been made available to the public, the making of the quotation must be compatible with fair practice, and their extent does not exceed that justified by the purpose in question.

Note, too, that there is nothing in Article 10(1) that limits the types of purpose that the quotation must be for. In fact, the absence of such a limitation implies there is a requirement that a Union country permits quotations from copyright-protected works for any purpose, or irrespective of the purpose. That open-endedness is reflected in the not exhaustive list of purposes mentioned in the Information Society Directive ("such as"), and in turn in the UK law ("or otherwise").

Tanya Aplin, who is a Professor at King's College London, and I, have been writing a book about Article 10 of the Berne Convention.[25] In a nutshell, our argument is that, properly understood, Article 10 of the Berne Convention requires global, mandatory, fair use. It is "global" because the Berne Convention applies to 188 countries.[26] That covers just about all the countries in the world that are likely to be commercially significant. So, in practical terms, Article 10 is a norm of global applicability. It is mandatory, as I have explained, because it requires countries to recognise a quotation exception.[27]

Why is it "fair use"? We say it is fair use because it is extremely broad in principle and not limited by purpose. Why do we think it is extremely broad and not limited by purpose? Firstly, we saw that there was no limitation by purpose in Article 10 itself: it shall be permissible *to make quotations*. It did not say it shall be permissible to make quotations *for* criticism or review, or *only for* criticism or review or *only for criticism or review or analogous purposes*; it said it shall be permissible to make quotations. Full stop.[28]

Moreover, the documents that preceded the adoption of Article 10(1) of Berne (which occurred at Stockholm in 1967),[29] confirm that Members should not confine permissible quotation to certain pre-defined purposes. Indeed, during the processes of developing the Stockholm revision (between 1963 and 1967), there were a number of proposals to limit the right of quotation to specified purposes. Those attempts to confine the scope of the mandatory right were rejected, in particular, because of the dangers that any such list would exclude artistic uses. Essentially the Committee that was drafting the proposal did not think that the Treaty-makers could predict

[25] T Aplin and L Bently, *Global Mandatory Fair Use: The Right of Quotation* (Cambridge: CUP, 2020, forthcoming).
[26] https://www.wipo.int/treaties/en/ActResults.jsp?act_id=26 (visited 21 April 2020)
[27] For more detailed analysis, see T Aplin and L Bently, *Global Mandatory Fair Use: The Right of Quotation* (2020) 29-38.
[28] Ibid, 69-71.
[29] Lawyers call these "travaux préparatoires." Such documents are regularly relied upon as an aid to interpretation, though formally they should only be relevant to confirm the "ordinary meaning" or where the ordinary meaning is "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable": Vienna Convention on the Law of Treaties, Art 32 . We use them largely to confirm the meaning of Article 10(1) Berne.

in advance all the uses for which quotation should be permissible, and so argued that quotation should in principle be allowed for all uses as long as the use, the way that the work was used, was in accordance with fair practice. Effectively, the Treaty-makers determined that the critical limitation on permissible quotation should be the fair practice requirement. Consequently, the starting point for interpreting Article 10(1) is that contracting parties may not limit the exception by type of use. Thus in section 30(1ZA) of the CDPA and Article 5(3)(d) of the EU Directive the reference to criticism or review should be understood as examples pure and simple and not as suggestive of any sort of limitation of the exception to purposes analogous to criticism or review.

The second step in our argument is that the notion of quotation is broad. The meaning of quotation is broad because quotation within the Berne Convention has to have a meaning that reflects the totality of the cultural fields covered by the Berne Convention. The Berne Convention is not just about print publishing, the Berne Convention is about music, it is about drama, it is about art, it is about film.

So to interpret the word "quotation" in Article 10(1), it is necessary to identify a conception of quotation that reflects how that term is understood across the different cultural sectors. It is not enough – in fact, it is wrong – to think of quotation as a print practice and then to define the parameters of the legal concept of quotation in Article 10(1) accordingly. Rather, we must ask, what does it mean to quote from a film, a piece of music or a film? We can find out what quotation means in those context by referring to the work of cultural commentators in those sectors and examining how they use the term "quotation".[30] Ultimately, what counts as quotation for Article 10 has to be identified by reference to how the term is used in a wide range of different cultural contexts.

Let me begin by considering the usage of the term quotation in art commentaries, before moving on to consider how the term "quotation" is used in film scholarship.

The example from art usage concerns what is really often described as the first modernist painting, Édouard Manet's *Le Déjeuner sur l'herbe*. Manet finished this work in 1862 and to my eyes it is a very strange painting:

[30] Courts and tribunals tend to turn to dictionaries, rather than to explore the sorts of material that Aplin and I draw upon. This is probably simply for reasons of procedural economy, but, in our view dictionaries have their own problems. See Aplin and Bently, *Global Mandatory Fair Use* (2020) Ch 5, discussing dictionaries as 84-87.

Figure 5 *Le Déjeuner sur* l'herbe (Édouard Manet, 1862-1863)

It features, as you can see, two Parisian men, deep in conversation, having a picnic in the suburbs of Paris. They are accompanied*, comme d'habitude*, by a naked woman, who they appear to ignore, but who looks towards the viewer. In the background, there is another woman, this time not naked, washing her feet in a pond. At first glance it appears as a picture of people in the countryside, but on closer reflection it is a very odd composition indeed.

However interesting the subject may be, that is not what is interesting about it for us. What is interesting about it for us is that in this painting Manet drew on an old engraving by Raimondi, which was based on a lost Raphael picture. The full engraving is on the left-hand side, and the excerpt that Manet was drawing on is on the right-hand side.

Figure 6 *Judgement of Paris* (Marcantonio Raimondi after Raphael, c. 1515)

That part of the Raphael composition is, I understand, of two water gods and a nymph. Comparing it with Manet's composition, one immediately can see the striking resemblance between the arrangement of these three figures and the three figures in the foreground of *Le Dejeuner*. Manet was clearly drawing on and referencing the expression of the work of Raphael via Raimondi.

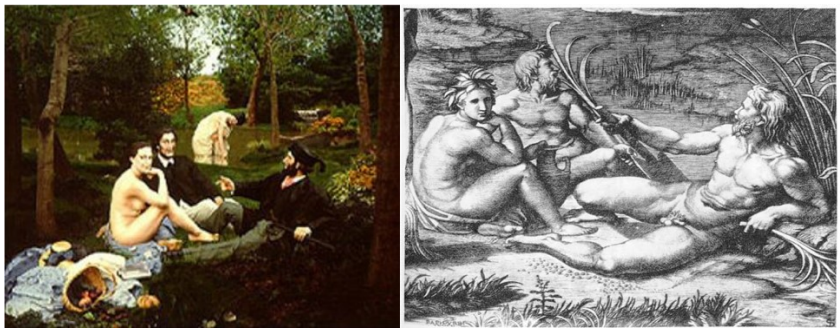

Figure 7

I am not interested in whether Manet's use of the scene from Raphael would be a copyright infringement: it seem improbable that Raphael or Raimondi were ever protected by copyright under French law, and that had they been such protection would have continued to 1862.[31] What I am interested in is whether this sort of use of pre-existing works of others is regarded by commentators today as quotation. And if you look at art-historical commentaries, you find that *it is*. The taking and reuse of arrangements from one work into another is treated in the art historical world as "quotation."

Let me give three examples. First, Michael Fried, a well-known art historian, calls *Déjeuner* "perhaps the most notorious instance of quotation from the Old Masters in Manet's oeuvre."[32] Fried explains "the three foregrounded figures in Manet's painting are a direct quotation from Marcantonio Raimondi's engraving."[33] Second, Beatrice Farwell, another art historian, asks the question: why did Manet need Raphael? And she explains that in using Raphael he was invoking an ideal, and it was this, rather than "weakness of imagination" that lay behind "Manet's **quotations** of the old masters."[34] Thirdly, CUNY Professor of Art History, Carol Armstrong, calls Le Dejeuner a "concentrated exercise in eclectic **quotation**."[35] In fact, art historians are able to identify many other uses of compositional forms derived from elsewhere that they describe as "quotations" both within this single work and also in many of his other works.

The point I am making here is simply this: within art historical commentary this kind of activity – the re-use of compositional form – is referred to as "quotation", and when we define what "quotation" is for the purposes of Article 10(1) of the Berne Convention, it is important to find a

[31] Today, French copyright law does recognize an author's moral rights exist in perpetuity.
[32] Michael Fried, *Manet's Modernism: or, The Face of Painting in the 1860s* (University of Chicago Press 1996), 150.
[33] Ibid, 152.
[34] Beatrice Farwell, *Manet and the Nude: A Study in Iconography in the Second Empire* (Garland 1981) 255.
[35] Carol Armstrong, 'To Paint, To Point, To Pose: Manet's Le dejeuner sur l'herbe' in P H Tucker (ed), *Manet's Le déjeuner sur l'herbe* (Cambridge University Press 1998), ch 4, 90–118, 94.

definition that accommodates this, rather than one defined by reference to what we think of when we consider quotation in the context of printed text.

When we think about the concept of "quotation" of, and in, printed text, we think about blocks of writing that are inset, in quotation marks, left intact,[36] with a footnote and at the bottom a reference to the work. And we usually think of the text surrounding a quotation as being more extensive than the quotation and as referring to and discussing a reference and talking about what is within the quoted text. And there would be a real danger if we took those elements and imagined quotation required all those things, because if we did that the art historical notion of quotation would not fit at all. The Berne Convention is intended to cover all fields, not just print, so the argument is that when we look to other fields, we see that their notion of quotation needs to be a broader notion of quotation.

If we look at film commentaries, we see that the term "quotation" is also used in ways that differ from the way the term is used in the context of printed text.

There are films that draw on paintings for their general arrangements and images, in a similar way to that in which Manet drew on Raimondi and Raphael. An example can be found in the biopic of the barque painter, Caravaggio, directed by Derek Jarman: *Caravaggio* (1986). and there is a scene with the painter Giovanni Baglione, a rival and critic of Caravaggio, sitting in a bath typing. The scene is a clear invocation of, and recognised by commentators as such, of David's *The Death of Marat*.

Figure 8 *Caravaggio* (dir. Derek Jarman, 1986)

[36] Or they are modified, this is signalled by a series of dots ('…') or square brackets, or explanations such as "emphasis added."

Figure 9 *The Death of Marat* (Jacques-Louis David, 1793)

Is this regarded as quotation? It seems so. For example, Ingeborg Hoesterey , formerly a Professor of Comparative Literature and Germanic Studies at Indiana University, in her book on pastiche in literature and the visual and cinematic arts, explores the film as an example of pastiche and refers to this particular scene as "a full-fledged pictorial quotation with high recognition value".[37] No difficulty referring to that sort of thing as quotation.

The term "quotation" is also used by film commentators to describe the placing of artworks in the background of films. A good example is Jean-Luc Godard's art-house classic, *A Bout De Souffle* (*Breathless*) (1960), about Michel Poccard, who steals a car and kills a policeman, and his partner, Patricia Franchini, the latter played by Jean Seberg. In the background of Patricia's apartment are many pictures including some by Picasso. In this scene, Patricia is featured in profile in front of Picasso's *Jacqueline avec des fleurs* (1954):

Figure 10 *À Bout De Souffle* (dir. Jean-Luc Godard, 1960)

[37] Ingeborg Hoesterey, *Pastiche: Cultural Memory in Art, Film, Literature* (Bloomington, Indiana: Indiana UP, 2001) 67.

Would this be described as "quotation"? Mikhail Iampolski, a Professor of Comparative Literature at NYU, describes it as such in his book, *The Memory of Tiresias*. He calls the shots of Picasso's painting "quotations from Picasso," adding that, reaffirming the dialogue, "the quotes here function much like a teacher's comments in red ink."[38] Of course, as James F Austin (a Professor of French cinema at Connecticut College, also interested in the history of pastiche) explains "Godard's work in particular is known for the practice of quoting" not just art works but other films in his works.[39] Indeed, this is how Godard described his own practice. He said:

> You have to put the blame on my taste for quoting, a taste I have always kept. But why blame me for it? In life people quote the things they like. We have a right to quote whatever we like.[40]

The idea that the term "quotation" is used to describe the reuse of compositional forms is also clear in discussion of the use by subsequent film-makers of the scene on the Richelieu steps in Odessa in the film *Battleship Potemkin* by Eisenstein (1925). You will recall that the film concerns a revolt on the battleship and the people in the town of Odessa are genuinely supportive of sailors. The Russian Army attacks the people on the steps. In the chaos, Eisenstein depicts a mother with her child in a pram at the top of the steps. When the mother is shot, the loosened pram begins its descent. The camera follows it as it picks up speed, careering down the steps.

Figure 11 *Battleship Potemkin* (dir. Sergei Eisenstein, 1925)[41]

This scene is replicated by Brian De Palma's in his gangster movie, *The Untouchables* (1987), about the Bureau of Prohibition's efforts to curtail the activities of Al Capone during the prohibition era. The action of interest to us occurs in the grand staircase at Union Station in Chicago, a 1920s entranceway with 32 steps of cream marble and huge Corinthian columns. Here,

[38] Mikhail Iampolski, *The Memory of Tiresias: Intertextuality and Film* (trans. Harsha Ram) (Berkeley: U Cal Press, 1998) 38. At 31, Iampolski observes "Jean-Luc Godard is well known as one of the most intertextually oriented of film directors. Several of his films are practically collages of quotes. Godard reveals his passion for the quotation in his very first film, *Breathless* (*A bout de soufflé*) … *Breathless* is riddled with all sorts of quotes. The source of the widest layer of quotes in the film was American film noir."
[39] *Proust, Pastiche and the Postmodern or Why Style Matters* (Plymouth: Bucknell University Press, 2013) 186.
[40] *Jean-Luc Godard par Jean-Luc Godard*, (Paris: Cahiers du cinema, 1985), 216-8.
[41] Laurence F. Knapp (ed.), *Brian De Palma: Interviews*, (Jackson: Uni. Mississippi Press, 2003) 11.

two members of the Bureau, Eliot Ness (played by Kevin Costner) and George Stone (played by Andy Garcia) wait to confront Al Capone's book-keeper, Walter Payne (acted by Jack Kehoe). A shoot-out ensues between Al Capone's gang and the Bureau. De Palma deploys Eisenstein's device of a mother with a baby in a pram and, when the pram is released, the camera follows it hurtling down the steps. While De Palma uses lots of parallel shots, in *The Untouchables* scene George Stone heroically saves the pram and the baby.

Figure 12 *The Untouchables* (dir. Brian De Palma, 1987)

This re-use of scenic composition is, of course, also described as "quotation." Laurence F. Knapp says: "De Palma quotes openly and unapologetically, from other films." Emanuel Levy says De Palma's "use of film quotation" is here "marked by pastiche", noting something of an interrelationship or overlap between the categories of quotation and pastiche.[42]

If we are looking for a concept of quotation that is not just print/text-based, then cultural commentary on re-use of existing works within film and artworks suggests that a number of typical characteristics of quotations in print are not reflected in these other cultural fields. In particular:

i. in cinema and pictorial art, quotation does not have to be marked off from the material in which it is incorporated. The quotation by Manet of Raimondi or the quotation by De Palma of Eisenstein was recognisable as quotation, but is not in quotation marks.
ii. Moreover, viewed from the pictorial and cinematic fields, the concept of quotation can clearly involve transformation. In fact, all of these examples involve transformation of the work, apart from perhaps the image of Picasso in *Breathless*.
iii. In these fields, quotations can in some circumstances be of the *whole* work, not just a part of it. If the use of a Picasso image within *Breathless* is a quotation, then we can accept that you can quote something by quoting it all.

[42] Emanuel Levy, *Cinema of Outsiders: The Rise of American Independent Film* (New York & London: NYU Press, 1999) 56.

It is our argument that quotation, understood in Article 10 and therefore as should be applied in EU and UK law, is a broad concept that needs to draw on all the cultural fields covered by Berne. This means that quotation is not something that can be defined by necessary or sufficient conditions (or at the very least if those conditions come from the print world). It is preferable to view "quotation" as a much more open-textured concept. For something to be a quotation it must use expressive material and it must be capable of being recognised as derived from an earlier work. Having looked at how the term is used across the cultural fields encompassed by Berne (for example, also in music and architecture), Professor Aplin and I argue that there are no more necessary conditions for something to be quotation. That doesn't mean that every re-use of expressive material is "quotation": plainly, photocopying a book is not, without more, "quotation". Rather, we prefer an alternative approach: whether a particular practice is a quotation depends on all sorts of other factors, *including* the amount re-used (in comparison to source and context), context, purpose of re-use, integrity, distinctness; whether a particular practice counts as "quotation" depends upon the practice has sufficient characteristics to be recognised as a member of the family.

Having set out what Tanya Aplin and I think is the right interpretation of Article 10(1) Berne, it is worth observing that the European Court of Justice has recently adopted a somewhat narrower conception of quotation from the one we propose. In Case 476/19, *Hütter v Pelham*, the CJEU was asked about the concept of quotation in the context of litigation in Germany about "sampling." The sample in question was a couple of seconds from a recording, entitled *Metall auf Metall,* made in the 1970s by the avant-garde German electronica band, Kraftwerk. The sample was reused by the defendant repeatedly in the background of a recording of a pop/rap song called *Nur Mir* and performed by an artist called Sabrina Setlur. The overall style and feel of the two recordings, and indeed their intended audiences, could not be more different.

The members of Kraftwerk were unhappy that the sample was used without their permission and commenced litigation. This case has been a huge legal controversy in Germany: it has been up to the German Supreme Court twice, to the German Constitutional Court once, and finally was referred to the Court of Justice. The Court of Justice was asked whether this reuse of a very small amount of a sound recording in another recording, where it is not distinct from that other recording, is quotation.

My view, as should now be clear, is that this form of "sampling" is quotation for the purposes of Article 10(1) of Berne, and thus Article 5(3)(d) of the Information Society Directive and Section 30(1ZA) of the UK Act. The re-use was of a small amount and it was recontextualized in a larger whole, such that it has sufficient characteristics to be part of the family of practices designated

as quotation. Moreover, as we explain elsewhere, cultural commentators have frequently described sampling as quotation.[43] There might be a question about whether it is in accordance with fair practice or whether there is sufficient attribution, but it is undoubtedly quotation.

The Court of Justice has a slightly different take. It agrees that the quotation defence can apply to musical and cinematographic works as well as visual art.[44] It agrees that a quotation usually involves using an extract from a work, but can involve reproducing the whole work.[45] It also agrees that quotation is permissible for purposes that go beyond criticism or review. The reference to criticism/review is, it said, "merely an illustrative list of such cases."[46] As the Advocate-General said, advising the CJEU in *Pelham*, many quotations, in particular artistic quotations "are not for criticism or review, but pursue other objectives."[47] However, taking inspiration from the print model, the Court in *Pelham* did impose a limitation:

> [71] As regards the usual meaning of the word "quotation" in everyday language, it should be noted that the essential characteristics of a quotation are the use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user, since **the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into "dialogue" with that work**....(emphasis added).[48]

Tanya Aplin and I, perhaps not surprisingly, criticize the limitation of "dialogue" elsewhere in detail.[49] Even if it is right, and the CJEU recognizes it has made a *faux pas*,[50] the case will continue to be binding in the United Kingdom post-Brexit unless the Supreme Court decides otherwise.[51] However, I am not sure that it is a limitation of great importance to film and television makers. The concept of dialogue seems broad: the Court refers to the Opinion of the Advocate-General who stated:

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[43] Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use* (2020) 92-93.

[44] Opinion of Advocate-General Szpunar of 18 December 2018, *Hütter v Pelham*, Case 476/19, EU:C:2018:1002, [AG62] ("in my opinion, there is nothing to indicate that, under EU copyright law, the quotation exception may not concern other categories of works, in particular, musical works"); [68]; Opinion of Advocate-General Szpunar of 10 January 2019, *Spiegel Online GmbH v Volker Beck*, EU:C:2019:16, [AG42] ("may also apply to other categories of work, in particular musical and cinematographic works, as well as works of visual art"); Judgment of 29 July 2019, *Hütter v Pelham*, Case 476/19, EU:C:2019:624, ... See also Judgment of 1 December 2011, *Eva-Maria Painer v Standard VerlagsGmbH and Others*, C-145/10, EU:C:2011:798, [122] (parties assumed, and CJEU proceeded on the basis, that use of photograph might be quotation).

[45] Judgment of 29 July 2019, *Hütter v Pelham*, Case 476/19, EU:C:2019:624, [71]. ("of a work or, more generally, of an extract from a work"); Opinion of Advocate-General Szpunar of 10 January 2019, *Spiegel Online GmbH v Volker Beck*, EU:C:2019:16, [AG45] ("It would therefore seem to be permissible to quote a work in its entirety, provided that this is justified by the purpose behind it.")

[46] Judgment of 29 July 2019, *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, Case 469/17, EU:C:2019:623, [43] ("merely an illustrative list of such cases"); Judgment of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, EU:C:2019:625, [28] (same).

[47] Opinion of Advocate-General Szpunar of 18 December 2018, *Hütter v Pelham*, C-476/19, EU:C:2018:1002, [AG64].

[48] Judgment of 29 July 2019, *Hütter v Pelham*, C-476/19, EU:C:2019:624, [71]; Judgment of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, EU:C:2019:625, [78].

[49] T. Aplin & L. Bently, *Global Mandatory Fair Use* (forthcoming, 2020), pp 132-136, 212.

[50] Advocate-General Szpunar, speaking extra-judicially at a conference in Luxembourg in November 2019 acknowledged that the Court had not been cognizant that a requirement that the use be dialogic had been proposed by Switzerland at the Stockholm Conference and rejected in a vote of the Main Committee. There is thus a possibility it might revisit the requirement.

[51] European Union (Withdrawal) Act 2018 (as amended), s 6 (retained EU case-law, that is case-law decided before IP completion day, is binding on all but the Supreme Court).

> Nevertheless, the wording of the provision in question clearly indicates, in my opinion, that the quotation must enter into some kind of dialogue with the work quoted. **Whether in confrontation, as a tribute to or in any other way,** interaction between the quoting work and the work quoted is necessary.[52] (emphasis added)

While restricting quotation through the notion of dialogue, the Court thus seems to approve a very broad conception of dialogue that includes paying "tribute" and "any other way."[53]

More concerning for film-makers, however, than the requirement of dialogue, is the uncertainty engendered by the decision about how far a quotation can be altered and incorporated within the quoting work. The Advocate-General suggested a rather onerous standard:

> [AG65] The second condition or the lawfulness of a quotation, which arises in one way or another from the first, is the **unaltered and distinguishable character** of the quotation. Accordingly, in the first place, the extract quoted must be incorporated in the quoting work as such or, in any event, without modification (certain amendments being traditionally permitted, particularly translation). In the second place — this is the point directly raised by the question referred — the quotation must be incorporated into the quoting work so that it may be easily distinguished as a foreign element.[54]

This might have mattered in the Kraftwerk case, because the two-second sample was slightly stretched and had been utilised as a building block in the composition of the second recording. The CJEU did not appear to follow the Advocate-General's lead on this point. Instead, it stated:

> [72] In particular, where the creator of a new musical work uses a sound sample taken from a phonogram which is recognisable to the ear in that new work, the use of that sample may, depending on the facts of the case, amount to a "quotation", on the basis of Article 5(3)(d) of Directive 2001/29 read in the light of Article 13 of the Charter, provided that that use has the intention of entering into dialogue with the work from which the sample was taken, within the meaning referred to in paragraph 71 above, and that the conditions set out in Article 5(3)(d) are satisfied.
>
> [73] However, as the Advocate General stated in point 65 of his Opinion, there can be no such dialogue where it is not possible to identify the work concerned by the quotation at issue.
>
> [74] In the light of the foregoing considerations, the answer to the fourth question is that Article 5(3)(d) of Directive 2001/29 must be interpreted as meaning that the concept of 'quotations", referred to in that provision, does not extend to a situation in which it is not possible to identify the work concerned by the quotation in question.[55]

The Court nowhere refers to, and thus seems implicitly to reject, the proposition that a quotation must be *unaltered*. Rather, it seems merely to require that the quoted component is "recognisable to the ear in that new work." In addition, it only requires that such work be identifiable, not "easily distinguishable as a foreign element." Presumably, the test is

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[52] Opinion of Advocate-General Szpunar of 18 December 2018, *Hütter v Pelham*, Case 476/19, EU:C:2018:1002, [AG64].
[53] It might be said that other aspects of the Judgment are more restrictive, the Court at one point appearing to limit dialogue to "illustrating an assertion, … defending an opinion or …allowing an intellectual comparison between that work and the assertions of that user," but had it meant to impose such a restriction, it is difficult to see how it could possibly envision a national court finding use of a sample to be a quotation, something it clearly does contemplate. The better view, then, is that these are three examples of dialogism.
[54] Opinion of Advocate-General Szpunar of 18 December 2018, Case 476/19, *Hütter v Pelham*, EU:C:2018:1002, [AG65].
[55] EU:C:2019:624, [72]-[73].

recognisability to any of the senses and identifiable as material from another source. It is suggested that, for example, the Manet re-use of Raimondi/Raphael would meet the CJEU standard (though it would have failed the Advocate-General's two hurdles).

Given the breadth of quotation that Aplin and I argue for and which dialogue apart, the CJEU has come close to accepting, whether a film or television programme which reuses or builds on existing material is lawful primarily turns on the three other conditions: i) whether the use is proportionate to the purpose; (ii) whether it is in accordance with fair practice; and (iii) whether there is attribution.

The CJEU has indicated that "in the transposition of that provision and its application under national law, the Member States enjoy significant discretion allowing them to strike a balance between the relevant interests."[56] That is, the quotation right has not been fully harmonized and some freedom remains for member states. However, that freedom in transposition and interpretation is constrained by various principles of EU law.[57] Chief amongst these is the duty to balance basic human rights: on the one hand, the so-called right to/of intellectual property (in Article 17 of the EU Charter of Fundamental Rights), which includes copyright;[58] and, on the other, the rights of the person who is using the protected material to express themselves freely (under Article 11 of the Charter) as well as to engage in art and cultural activity (under Article 13).[59] The most obvious vehicle for such balancing is the notion of "fair practice". Indeed, in the leading case on parody (where there is no legislative condition of fair practice), the CJEU introduced a requirement that the application of exception demanded that the court strike a "fair balance" between the interests of the right holder and the freedom of expression of the user.[60]

UK case-law on "fair dealing" is also very vague (and sometimes, too, has invoked the metaphor of balancing).[61] Fairness is said to be a "question of fact and degree" or "degree and impression."[62] Sometimes it has been proposed that the court ask what a fair minded and honest person would think: Would they regard the dealing as fair?[63] Perhaps more usefully, the UK Courts have

[56] Judgment of 29 July 2019, Case 469/17, *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, EU:C:2019:623, [43]; Judgment of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, EU:C:2019:625, [28].
[57] Judgment of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, EU:C:2019:625, [31]-[38].
[58] Charter of Fundamental Rights of the European Union, 2012/C 326/02, Article 17(2) stated baldly: "Intellectual property shall be protected." Importantly, the CJEU has now stated on several occasions that the blunt terms of the provision do not "suggest that that right is inviolable and must for that reason be protected as an absolute right": e.g. Judgment of 24 November 2011, *Scarlet Extended*, C-70/10, EU:C:2011:771, [43].
[59] Charter, Article 13 states "The arts and scientific research shall be free of constraint."
[60] Judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132.
[61] *Newspaper Licensing Agency Ltd v Marks and Spencer plc* [2001] Ch 257, [41] (Peter Gibson LJ) ("It is also not in dispute that the defence of fair dealing is directed, as the judge put it [1999] *RPC 536, 545*, to achieving a proper balance between protection of the rights of a creative author or the wider public interest, of which free speech is a very important ingredient"); *Fraser-Woodward v BBC* [2005] FSR (36) 762, 798, [64] (Mann J) (" the purpose of the section … is to balance the interests of the copyright owner and the critic. It is all a question of balance.")
[62] *Beloff v Pressdram Ltd* [1973] 1 All ER 241, 263 ("fair dealing is a question of fact and of impression") (Ungoed-Thomas J); *Banier v News Group Newspapers* [1997] FSR 812, 815 ("a matter of impression").
[63] *Hyde Park v Yelland* [2001] 1 Ch 143, 159, [38]; [44] (Peter Gibson LJ).

elaborated a series of factors to be considered:[64] the extent of what has being used; its amount and importance; its place in the material that uses it, for example, whether it is a large part or a small part of the use; and whether the user is in commercial competition with, or causes commercial harm to, the claimant. The latter has been said to be "by far the most important factor."[65]

In the context of film, there is one decision of particular note: *Time Warner v Channel 4*.[66] This concerned Stanley Kubrick's movie *A Clockwork Orange*, an adaptation of the Anthony Burgess (1962) novel of the same name. The film depicts a futuristic dystopia in which the lead character, Alex DeLarge (played by Malcolm MacDowell) leads a gang of "droogs" in various acts of rape and "ultra-violence," all executed like a sick-ballet performed to a soundtrack of Rossini and Beethoven. Peter Bradshaw called it "a mixture of Jacobean revenge drama, 18th-century picaresque novel, sci-fi porn and horror comic."[67] The film was released in 1971, but after two years was withdrawn from circulation in the United Kingdom because of some copycat attacks, and only re-released after Kubrick's death in 1999.[68] On one account, Kubrick thought there was some deep-seated failing in the British *persona* that meant that UK citizens were more likely to copy the behaviour portrayed in his films and he thought it best to withdraw it from circulation here. Virtually 20 years later, these circumstances attracted the attention of the press when an audacious manager arranged for the film to be shown at the Scala in King's Cross, leading to proceedings in a Magistrates' Court for copyright infringement.[69]

Following those events, the defendants arranged to broadcast a programme, entitled "Forbidden Fruit," as part of a series of programmes about art, dubbed "Without Walls." The particular programme included a thirty-minute segment about the withdrawal of Kubrick's *A Clockwork Orange* from exhibition to the public in the UK.[70] The programme used twelve clips, each of between ten seconds and two minutes. In aggregate, these clips comprised twelve and a half minutes of footage, that is, more than a third of the 30-minute programme and 8% of the original film. They justified this on the basis that this was a "fair dealing" for purposes of criticism or review.

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[64] Ibid, 158, [37] ("the cases establish, and I believe it right, that it is appropriate to take into account the motives of the alleged infringer, the extent and purpose of the use, and whether that extent was necessary for the purpose".)
[65] Laddie et al, *The Modern Law of Copyright and Designs* (3rd edition, 2000) at para. 20.16, cited with approval by Lord Phillips MR in *Ashdown v Telegraph Group*, [2001] EWCA Civ 1142, [70].
[66] *Time Warner Entertainments Company LP v Channel Four Television Corporation* [2004] EMLR 1.
[67] Peter Bradshaw, 'The Old Ultra-Violence,' *The Guardian*, 3 March 2000.
[68] Peter Bradshaw, 'The Old Ultra-Violence,' *The Guardian*, 3 March 2000 (calling it a "remarkable act of selective self-suppression").
[69] R v Giles, *The Times*, 14 March 1993.
[70] The film was produced by Michael Burke, of the independent production company Fabula Films Ltd, and hosted by journalist and writer, Tony Parsons. Kubrick himself declined to be interviewed.

Following a press screening, Warner Bros were alerted to the existence of the programme. It was unimpressed and, on the day the programme was going to be broadcast, it sought an interim injunction, initially successfully (before Harman J). It argued both that the use was not within the statutory purpose ("criticism or review"),[71] and, even if it was, the use was not fair, for various reasons, including the amount involved. In particular, Warner Bros argued that the standard practice in the industry is to allow maximum one-minute clips from a movie and up to four minutes in total from the movie, and this is way over that. Channel Four appealed, initially that same evening, but proceedings could not be concluded before the programme was to be aired, and so it did not go ahead.

Two weeks later, the Court of Appeal allowed the appeal. The decision contains very little legal analysis of the notion of fairness. The only indication as to the standard was in Lord Justice Neill's judgement and he said: one has to consider "whether the allegedly infringing material may amount to an illegitimate exploitation of the copyright holders' work."[72] Importantly, he said there was "great force in the comment ...that serious criticism of a film *requires that you spend sufficient time showing the film itself*." Moreover, he emphasised that while the clips were being shown, they were accompanied by voice-overs from critics and commentators. The criticism and excerpts were in effect "integrated." He said he had "come to the firm conclusion that this programme does not go beyond the bounds of fair dealing by reason of the length of the excerpts from the film."

Although the judgment was a strong one,[73] in so far as the Court of Appeal indicated that it did not think that there was a seriously arguable case (for Warner) that the use was not fair,[74] in terms of being a guide for future practice of film-makers and television programme producers, this case does need to be treated with lots of care. For example, it would be a huge mistake to think that there is now a standard that anyone can quote 12 minutes or 8% of a Hollywood feature film. The context seems to be crucially important to the conclusion that the use was fair.

Some other indications as to how a court might determine the "fairness" of a use come from other slightly more recent cases. In *Fraser-Woodward v BBC*,[75] the BBC had broadcast a programme, entitled "Tabloid Takes", produced by television production company, Brighter, and featuring Piers Morgan. The 40-minute programme purported to explore the relationship

[71] The argument was that the statute required the criticism/review to be "of the work," and reviewing the reasons for withdrawing the work was not criticism of "the work". The Court of Appeal rejected the argument.
[72] *Time Warner Entertainments Company LP v Channel Four Television Corporation* [2004] EMLR 1, 12.
[73] Being interim proceedings, it might also be possible that the parties and court had less time to prepare their arguments and consider the relevant authorities.
[74] Neill LJ said that "a *prima facie* defence .. has been made out" and that Warner Bros s had failed to demonstrate "with sufficient clarity that there are serious issues to be tried on the fair dealing defence." At 16, Henry LJ agreed that there was no "serious issue to be tried" on the fair dealing defence.
[75] *Fraser-Woodward v BBC* [2005] FSR (36) 762.

between celebrities and the press to cast light on the question of whether the press preys on celebrities and/or whether celebrities manipulate the press for their own (largely commercial) ends. More particularly, it sought to highlight the ways in which celebrities and press photographers were often in co-operative, mutually beneficial relationships. The programme was focussed on the football-music-fashion celebrities, the Beckhams, and included interviews, film and music clips as well as included images of media publications. These included fourteen photographs of the Beckhams which appeared to have been taken in off-guard moments when they were carrying out their day-to-day activities. Thirteen of the photographs were taken by Jason Fraser, a well-known photographer, and the programme intimated that the Beckhams and Fraser were in precisely such a co-operative relationship, with the former trading a degree of control in return for giving Fraser "tip-offs" that in practice guaranteed his exclusive access. Apart from one photograph, which was shown for four seconds, the remainder were visible for at most two or three seconds each. Considering the use to be fair dealing for criticism/review (the "quotation exception" as then not having been implemented in UK law), the BBC had not sought a licence to include these photographs (though it had paid a licence fee of £125 for one photograph that was included in the broadcast).[76]

Fraser-Woodward, which owned the copyright in the fourteen photographs, objected. It was Fraser's general practice not to permit use of his photographs on television. Apparently, he regarded such use as "very damaging to the residual value of his photographs; hence his general practice."[77] It is likely, too, that he resented the criticisms of him implicit in the programme's narrative. In contrast with the Channel Four case, he did not try to stop the airing of the programme, but commenced proceedings soon after, seeking not just damages (which would correspond with a lost licence fee), but additional damages aimed to deter the sort of "flagrant" disregard for Fraser's rights that he alleged the BBC had shown.

The High Court conducted a detailed analysis of the programme and the role and significance of each photograph within it. Noting that one factor in a fairness analysis was often the amount reproduced, Mann J made important observations relating to how this criterion is applied in the context of photographs:

> It makes more sense in relation to extended literary or musical works. If one is critiquing a photograph, or using it for the purpose of criticising another work, then the nature of the medium means that any reference is likely to be by means of an inclusion of most of the work because otherwise the reference will not make much sense.[78]

[76] Whether the BBC had sought a licence was disputed by the parties, Fraser claiming that the BBC had done so, and that Fraser-Woodward had refused to grant it. At 772-3, [7] Mann J concluded that this was not the case, and that Fraser's recollection was false.
[77] *Fraser-Woodward v BBC* [2005] FSR (36) 762, 772, [6]; 796, [61] (reporting Fraser's view that "the more lucrative press market was "hugely diminished" by over exposure to large TV audiences").
[78] Ibid, 793-4, [55].

In the context of film or television, then, a different aspect may into play, namely that "the exposure is not as … continuous or permanent as publication in printed form would be."[79]

When he applied the fairness factors to the facts, Mann J regarded the use by Brighter and the BBC for criticism/review as clearly a use which was fair for that purpose. Key considerations motivating that conclusion seem to have been the importance of showing the newspapers and photographs as evidence in support of the allegation of press-celebrity co-operation; the short time the photographs were on screen; and the absence of any distinct benefit to the BBC purely from showing the photographs;[80] and the unconvincing evidence that television use would inevitably damage the commercial opportunities for exploitation of the photographs. On the latter point, Mann J. recognised that there might be circumstances where television use could be commercially harmful, but was unconvinced that these brief uses even on a channel such as the BBC would.

The place of commercial harm in the appraisal of fairness can be illustrated by a yet more recent UK case, the High Court decision in *Fanatix*.[81] The case related to a platform which allowed users to upload eight-second clips of cricket matches, such as the wickets and the sixes. The English and Welsh Cricket Board objected to the platform, claiming that by communicating these snippets, it would infringe copyright in the films and broadcasts of the matches. The platform relied primarily on the defence of fair dealing for "reporting current events", strangely choosing not to invoke the quotation exception (even though it was by that point part of the UK Copyright, Designs and Patents Act 1988). This was no doubt a consequence of the fact that the platform was seeking to rely on existing agreement by sports broadcasters, the Sports News Access Code of Practice ("SNAC"), that allowed linear television news programmes to show up to 60 seconds of footage in news programmes.[82]

The High Court took the view that the function of the platform could not benefit from the fair dealing exception that had been pleaded because the communication were not made for the purpose of reporting current events primarily because there was no overriding informatory purpose.[83] However, Arnold J also concluded that even if the uses were regarded as for such a purpose, they were not "fair" for that purpose.

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[79] Ibid, 793-4, [55].
[80] Ibid, 796, [59] (Mann J noted that "[t]here is no way in which it can sensibly be said that these photographs were somehow intended as a ratings booster.")
[81] *England & Wales Cricket Board v Tixdaq* [2016] *EWHC* 575 (Ch).
[82] The SNAC had been agreed following *BBC v BSB* [1992] Ch 141, in which the BBC had unsuccessfully sought to invoke copyright to prevent BSB showing clips of the goals from the Cup in 1990, Scott V-C holding that BSB's use of clips in its sports news programme Sportsdesk was fair dealing for reporting current events.
[83] *England & Wales Cricket Board v Tixdaq* [2016] *EWHC* 575 (Ch), [129] ("The clips were not used in order to inform the audience about a current event, but presented for consumption because of their intrinsic interest and value")

Central to the Court's reasoning on fairness was less the effect of the platform on Sky's live coverage of cricket, so much as the ECB's licensing arrangements for short highlights. Importantly, the ECB granted News UK exclusive "audiovisual clip rights" over two years in return for a "significant six figure annual sum."[84] Under the agreement News UK was permitted to stream specified amounts, including six clips per hour, each clip being of average duration of 30 seconds and the total duration of which was not to exceed three minutes per hour. The Judge heard evidence that when the existing agreement lapsed, News UK was unlikely to be interested in continuing such an arrangement were the Fanatix platform still operating. That highlights that even relatively limited commercial effects on the claimant licensing opportunities can be an important factor against a finding of "fairness".

Apart from fairness of use, there is one other requirement that needs to be considered before we return to the three examples set out in the first part of this talk. This is the attribution requirement. For a defence/permitted act/exception to exist, whether for criticism/review, reporting current events or quotation, there must be attribution of the authorship of the material used and, where relevant, its source. This is a requirement within the Berne Convention, Article 10(3) (for quotation),[85] and it is reflected in EU law. In its UK form, it is said that there must be "sufficient acknowledgement" and by sufficient acknowledgement we mean acknowledgement of work, typically by its title, and of the author.[86]

In relation to use of protected work in film and television, the acknowledgment requirement raises issues that are distinct from those in print, where it is usually straightforward to include a footnote, endnote or in-text reference to source. In the *Time Warner v Channel Four* case, of course, the authorship and title of the film were self-evident because the focus of the programme was precisely the author and work that were excerpted. But in other cases, film or television may include large quantities of content, and the best that can be offered is some form of credit in the closing titles. Some other possibilities and issues were raised in the *Fraser-Woodward* case. There the Court observed:

> All that is required is that it is an identification, though I think that I can accept that it probably has to be one that can be readily seen and not require some form of hunting around or detective work in order to ascertain it. It is probably not enough to say that the author can be identified if you look hard enough; the authorship must be more apparent than that. However, at the end of the day it is a question of fact whether there has been an identification.[87]

[84] *England & Wales Cricket Board v Tixdaq* [2016] *EWHC* 575 (Ch), [12].
[85] Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use* (2020) 77-78.
[86] CDPA, s 178 ("sufficient acknowledgement" means an acknowledgement identifying the work in question by its title or other description, and identifying the author unless (a) in the case of a published work, it is published anonymously…")
[87] *Fraser-Woodward v BBC* [2005] FSR (36) 762, 802, [72].

Mann J recognised that where the camera focussed on a photograph and then panned to the credit provided in the newspaper, that was sufficient; as was a voice-over identifying the author of a photograph, even if the photograph appeared somewhat afterwards.[88]

(3) The Three Examples Revisited

With the benefit of that rather lengthy legal exposition – and believe me, there is much more that could be said – it is now time to return to the three examples that I described at the beginning.

Consider, first, *Love Is The Devil*. Could the filmmaker, John Maybury, have used Francis Bacon's paintings despite the refusal of permission by the estate?

The biography of the life of an artist might not be criticism or review of those works themselves, so it might not fall within the criticism or review exception.[89] However, the inclusion of such images could very easily be regarded as "quotation." It is quite conceivable that such a film might be a tribute both to the artist and their works; or involve a comparison or contrast between the artist's life, depicted in the film, and their creative output. Even with (to my mind, unduly narrow) dialogic conception of quotation embraced by the CJEU, I think that the inclusion of such paintings in a biopic easily falls within the defence of quotation.

So the key question then arises about whether the particular use of each painting is proportionate and fair. While the works by Bacon which might have been included are undoubtedly creative works, and even publicly-funded films such as *Love is the Devil* are commercial ventures,[90] it seems to me the use of such works as part of a movie of this type would be fair quotation. This seems especially so in a biographic film about an artist. In particular, there will almost always be a very close nexus between the purpose of the film and the need to use the images. The film will likely be significantly less meaningful without the capacity to use those images. The courts accept that such use can be fair even if it is commercial, although occasionally the judges have said in such a situation there must be some "overriding public advantage" deriving from use.[91] That seems obviously present in a film about Francis Bacon.

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[88] Ibid, 803, [75] ("I do not think that the concept of identification means that there has to be a precisely or virtually contemporaneous act of identification. Once the identification has been provided then it is capable of operating in relation to a later appearance of the copyright material.")

[89] A rather strict view of this requirement was taken in *Ashdown v Telegraph Group Ltd* [2001] Ch 685, 697-8 (Morritt V-C) (differentiating between the purpose of criticising and reviewing the work [a minute of a meeting between the Prime Minister and Ashdown] and criticising or reviewing the actions of the Prime Minister and finding that the newspaper articles did not "come within section 30(1) because the purpose of copying the work was not *its* criticism or review" (emphasis added)); affirmed [2002] Ch 149, 171, [61] ("We endorse this reasoning and conclusion and have nothing to add to it. Section 30(1) can have no application to the facts of this case.")

[90] The budget was £900,000, from the BBC, with £250,000 from the Arts Council. See Adrian Searle, 'Love Is The Devil: The View from the Art World,' *The Guardian*, 9 November 2012 (explaining the conditions for the Arts Council funding).

[91] *Newspaper Licensing Agency Ltd v Marks and Spencer plc* [2001] Ch 257, 280, [77] (per Chadwick LJ) ("it seems to me that a dealing by a person with copyright work for his own commercial advantage—and to the actual or potential commercial disadvantage of the copyright owner—is not to be regarded as a "fair dealing" unless there is some overriding element of public advantage which justifies the subordination of the rights of the copyright owner"). Peter Gibson and Mance LJJ disagreed with Chadwick LJ, but only on the

Moreover, such a film is unlikely to impact on significant forms of exploitation, such as the print market. As in *Fraser-Woodward*, one would expect such a film to dwell only momentarily on the paintings, and that would certainly be something that points towards fairness.

Finally, as with the *A Clockwork Orange* case, one would expect that in a biographical film, the authorship of most of the paintings would be easily inferred, and their titles could be set out, as appropriate, in the credits at the end of the movie.

What about, *Titanic*? Did the producers really need to pay the Artist Rights Society a licence fee, as the press suggested had occurred (albeit after the film was released)?

To begin, we must recall that the character Rose does not hold up a reproduction of the real *Les Demoiselles* painted by Picasso, but rather something a "version" of *Les Demoiselles*. Could this nevertheless count as "quotation"? Certainly, that is the position Tanya Aplin and I have adopted, and we base our conclusion on the use of the term quotation by art critics (as in the example of Manet's *Le Dejeuner*). Whether the CJEU would go this far is, I think, unclear; certainly, Advocate-General Szpunar would not have been willing to do so. But if, as the CJEU implies, all that is required is identifiability, then it is fair to say that the image held up by Rose is "identifiable" as Picasso-inspired.

Would such quotation be fair? Although the Picasso painting is a creative work and (in contrast with Love is the Devil) *Titanic* was a huge commercial venture,[92] to my mind, the answer is yes.[93] The scene is a small part of a much bigger movie and the image is only visible for a few seconds. The choice of Picasso is not arbitrary or gratuitous. Given the character of Rose is an art-dealer, it seems plausible that she would show off pictures of well-known contemporary artists from that period, such as Picasso. It is difficult to see any damage to the economic interests of the Picasso estate. Perhaps the strongest objection is that the painting that she holds up is not in fact a reproduction of a Picasso, and that identifying it as such might damage Picasso's reputation or his moral right of integrity. However, at least from an economic perspective, this should mean its inclusion has even less impact on licensing markets, and thus render more likely still a finding of both proportionality and fairness.

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issue of whether the Defendants reproduced a substantial part: at 271, [43], and 290, [144] Peter Gibson and Mance L LJ clearly also thought a fair dealing defence required some engagement of the "public interest."

[92] The budget was said to be $109 million, but Cameron in fact spent closer to $200 million. Before its release, it was predicted that the film would be a "disaster movie" in a different sense. As it turned out, the box office takings were $1.8 billion. See Kevin Sandler and Gaylyn Studler, Introduction,' in Kevin Sandler and Gaylyn Studler (eds), *Titanic: Anatomy of a Blockbuster* (Rutgers University Press, 1999) 1, 7.

[93] It is not clear whether the sneers of Rose's fiancée, Cal, who says "not those finger-paintings again; they certainly were a waste of money" ..."he won't amount to a thing, trust me" or Rose's response that "they are fascinating; like being inside a dream or something" might support a defence of fair dealing by way of criticism or review. In the UK, it has traditionally been understood that the criticism or review must be of the person doing the dealing, but here it is by some fictional character that is being depicted. Those ambiguities are removed, I think, by the 2014 changes, adding the defence for "quotation" whatever the purpose.

If it were treated as fair, does the use meet the condition of attribution? Recall, in the film Rose is asked "what's the artist's name?" and, unable to recollect the full name of the artist; she responds "something Picasso." In the context of a late Twentieth century film, that would be sufficient to bring recognition of the authorship to the audience. Recalling the words of Mann J, in *Fraser-Woodward*, "anyone paying a moderate amount of attention would be able to identify" the painting as a Picasso.[94] Does it matter that Rose failed to specify his full name? Indeed, Pablo Ruiz Picasso signed most of his paintings just "Picasso."[95]

Of course, there is no attribution of the title, *Les Demoiselles D'Avignon*, so it would be advisable for this to appear in the credits. Three points of uncertainty are perhaps worth drawing out. First, it is not clear how far indication of title is absolutely necessary. The requirement of "an acknowledgement identifying the work in question *by its title or other description*" appears in CDPA s. 178, but not Art 10(3), which simply refers to "mention…of the source," nor Article 5(3)(d) which requires that "the source, including the author's name, is indicated." Given the mandatory quality of Article 10(1) Berne, it is doubtful that any additional specific conditions such as identification "by title" (rather than "source") should be treated as absolute rather than as expressions of the more open-textured notion of "fair practice." That suggests that in a case such as this, omission of the title might not preclude the availability of the defence. Second, the EU provision on quotation requires attribution only where it is "not impossible," and one might wonder whether it might be though "impossible" to refer to a title of a painting in a situation where what was shown was not actually the painting itself but a transformed version. Of course, in certain fields it is common to use the term "after", so that it would certainly not be inappropriate to attribute the picture in that manner: "after Picasso, *Les Demoiselles D'Avignon*." Third, it is not at all clear what the penalty for failure to acknowledge the title might be: it would be disproportionate to enjoin circulation of a film because of such a missing credit,[96] and the damages from such an omission would be trivial.

What about Christian Marclay's *The Clock*? Was he infringing or was this use fair quotation?

This example is particularly interesting because it would hard to claim the dealing was for criticism/review. With the exceptions available in the UK in 2010, one would almost certainly have been driven to the conclusion that no defence was available. Thus, whether an English court

[94] *Fraser-Woodward v BBC* [2005] FSR (36) 762, 802, [73].
[95] Readers might enjoy playing the Tate's "spot the signature" game: https://www.tate.org.uk/art/artists/pablo-picasso-1767/can-you-spot-picassos-signature
[96] Such proportionality of remedy is required under the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004), Art 3(2)("effective, proportionate and dissuasive").

would have been forced to treat the artwork as infringing would have turned on whether the parts reproduced could be said to be substantial.

However, with regard to showings after October 31, 2014, Marclay would have had the potential to invoke the quotation exception (as well, perhaps, as the fair dealing for pastiche).[97] From the perspective that Tanya Aplin and I have developed, Marclay's activities would be quotations: he is re-using small excerpts from large works, the excerpts are recognis*able* (in the weak sense that a specialist is able to recognise that they derive from elsewhere) and Marclay incorporated these in a larger work. The practice has sufficient characteristics to be one we can call quotation.

Whether the Court of Justice, or Advocate-General would share that conclusion is a different matter. To begin, Advocate-General Szpunar seems to demand that the excerpt has been unaltered; it is clear that in *The Clock* the soundtracks accompanying the individual pieces of footage have been altered is a sophisticated editorial process:

> In *The Clock*, music tracks are often separated from their source or overlapped across a succession of unrelated shots. Midmorning, the score from *The 400 Blows* (François Truffaut, 1959) runs across an assortment of scenes, but later, when Antoine Doinel finally reaches the beach, he does so accompanied by a music track from a different movie.[98]

In his article in the New Yorker, Daniel Zalewski gives a number of other examples:

> At 10:30 *P.M.*, Marclay realized, a shot of David Strathairn, delivering the news as Edward R. Murrow in "Good Night, and Good Luck," could slide into Dustin Hoffman, in "Tootsie," watching television. To create continuity, the Murrow dialogue was extended into the "Tootsie" clip, at muffled volume.
>
> ...
>
> Sometimes, as with Dimitri Tiomkin's stirring score for "High Noon," the soundtrack of one movie was laid under dozens of neighboring clips, binding them together. In other cases, a score was shifted in pitch or speed so that it merged with the next. Noise was gradually added to a pristine surround-sound clip, easing the shift into a crackly mono one. Such remastering made it "so that you didn't notice clips were ending, so that you were continually pulled along," Chiappetta said.

A narrow view that "quotation" requires no alteration, as proposed by Advocate-General Szpunar, would make the quotation defence unavailable to Marclay.

In contrast, the CJEU seemed merely to require "recognisability." But in what way, to what extent and by whom the material must be recognisable under the Court's test? Does the test require

[97] Writing on the website of the Institute of Art & Law, Alexander Herman has analysed the application of UK copyright law to *The Clock*. He concludes that it would be quoting, it probably would be fair, but there is no obvious attribution of the films for the authors of the films from which the sections were taken. 'Ticking Away: Christian Marclay's The Clock and Copyright Law,' on https://ial.uk.com/marclay-clock/

[98] Julie Levinson, 'Time and Time Again: Temporality, Narrativity, and Spectatorship in Christian Marclay's *The Clock*,' (2015) 54(3) *The Cinema Journal* 87, 97-8.

that every segment merely be recognised as a work, a test that Marclay would easily satisfy, or must it be recognisable as a particular work? The latter requirement seems to elide recognisability with *attributability*, a standard which seems inconsistent with the statutory regime and the Court's jurisprudence on it.[99] However, it seems implicit in the Court's statement that quotation "does not extend to a situation in which it is not possible to identify the work concerned by the quotation in question." But if the test is attributability, the critical question becomes whom? The writer and film maker Juliet Jacques, observed:

> It's unlikely that any one person will recognize all the source material, but equally unlikely that anyone will recognize none.[100]

As it happens, enthusiasts, collectively, have put together lists of all the films they recognise in *The Clock*; and film critics all cite examples they have noticed in their reviews. Is "recognisability" of this sort what the Court of Justice was referring to? Or was it thinking that the average viewer should be able to identify all the source works? Were it the case, however, *The Clock* would likely fail.

If the test of "recognisability" is that the material used merely be recognised as foreign or alien material, the work of a different author, would *The Clock* also satisfy the requirement of dialogue that the CJEU mentioned in *Huetter v Pelham*? The Court, unfortunately, seems to have had in mind a very different sort of situation, one in which a quoting work incorporates and interacts with the quoted extract whose presence functions to support an intellectual position elaborated in the quoting work, or perhaps of enabling the quoting work to contrast its position with the inferior or mistaken stance expressed in the work quoted. Of course, these are some of the paradigmatic uses of quotation in literature. However, it is not obvious that the uses in *The Clock* fit into this conception. The possibility is improved if the notion of dialogue is broadened so that the dialogue can be between quoted works (rather than between quoting and quoted.). Moreover, as Advocate-General Szpunar seemed to foresee, dialogue could entail other modes of engagement such as "paying tribute" a work.

It is clear from the reviews of *The Clock* that the film generates a dialogue between the thousands of segments and by compiling the fragments raises new questions about time in cinema and time more generally. The Tate's description is typical:

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[99] If the attribution condition can be excused where it is "impossible, for reasons of practicality or otherwise," it would seem absurd to make attributability part of the definition of "quotation" itself. How could it be suggested or assumed, that the photograph of the Natascha K was recognisable, in this sense, if the authorship had not appeared when the photograph was first published: Judgment of 1 December 2011, *Eva-Maria Painer v Standard VerlagsGmbH and Others*, C-145/10, EU:C:2011:798, [148]. The better view must be the recognizability means merely recognizability *as the work of another.*

[100] Juliet Jacques, 'About Time: Christian Marclay's 'The Clock' Receives its Tate Modern Premiere,' 11 September 2018, *Frieze*, at https://frieze.com/article/about-time-christian-marclays-clock-receives-its-tate-modern-premiere

> *The Clock* becomes a homage to cinema that deals with and represents time. It shows dialogue that might seem insignificant, but in this new context emphasises how these characters and the writers of these films are influenced and framed by time.[101]

Jacob Potemski highlighted a different way that the piece operates:

> Functioning as a commentary on the cinema, it seems to say that no matter how hard they try, the movies will never make us oblivious to the present and to all the anxieties that are wrapped up with it. Considered more metaphysically, The Clock seems to argue that real-time is reality itself.[102]

It would seem odd indeed that a creative composition that was so generative of meaning would fail to be recognised as "quotation" because the manner of engagement is not the bilateral one paradigmatic of the literary sphere.

If Tanya Aplin and I are right, and Marclay's practice is properly to be regarded as "quotation," the key questions become whether the uses are proportionate and fair. From what I know and have seen of *The Clock*, I think the answer is clearly that the segments are proportionate to the goal of creating a collage based around images of timepieces, and the uses are "fair." Against a finding of fairness, one might note that the extracts are taken from works which are themselves creative, and that Marclay received considerable funding from The White Cube Gallery to fund the making of the piece, and that the work has itself been sold in a limited edition of six, each for close to $500,000.[103] However, in favour of a finding of fairness is the obvious fact that the use is (as just explained) expressive, artistic and has garnered considerable critical acclaim; the extracts are short, and only a few come from the same film; the works are frequently old; it would have been an extremely time-consuming and difficult endeavour to seek and gain permissions in advance; although the works have been modified, this has only been done to improve the aesthetics of *The Clock*; the work is shown in art galleries,[104] not cinemas, and is not accessible on the Internet; and, perhaps most significantly, the use of extracts in this art piece does not interfere with any of the important modes of commercial exploitation in relation to which the film copyright owners might have planned to rely. In other words, *The Clock* causes no harm, and rather is a significant contribution to artistic culture.[105]

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[101] https://www.tate.org.uk/art/lists/five-ways-christian-marclays-clock-does-more-just-tell-time

[102] 'Christian Marclay's The Clock,' *Cineaction*, (2012), Issue 87, 10-13.

[103] Erika Balsom, 'Around the Clock: Museum and Market, '(Fall, 2013) 54(2) Framework 177, 179 ("making it one of the most expensive pieces of moving image art ever sold, and perhaps the most expensive ever sold on the primary market"). Julie Levinson, 'Time and Time Again: Temporality, Narrativity, and Spectatorship in Christian Marclay's *The Clock*,' (2015) 54(3) *The Cinema Journal* 87, n.1 (stating that *The Clock* sells for approximately $500,000). Writing in the same journal, Eli Horwatt notes that "while the creation of The Clock and much of its critical reception is steeped in the rhetoric of the creative commons, fair use, and sharing, the work itself is one of the most guarded, proprietary, and expensive pieces of media art in history": Eli Howatt, 'On *The Clock* and Christian Marclay's Instrumental Logic of Appropriation,' (Fall 2013) 54(2) *Frameworks* 208, 222.

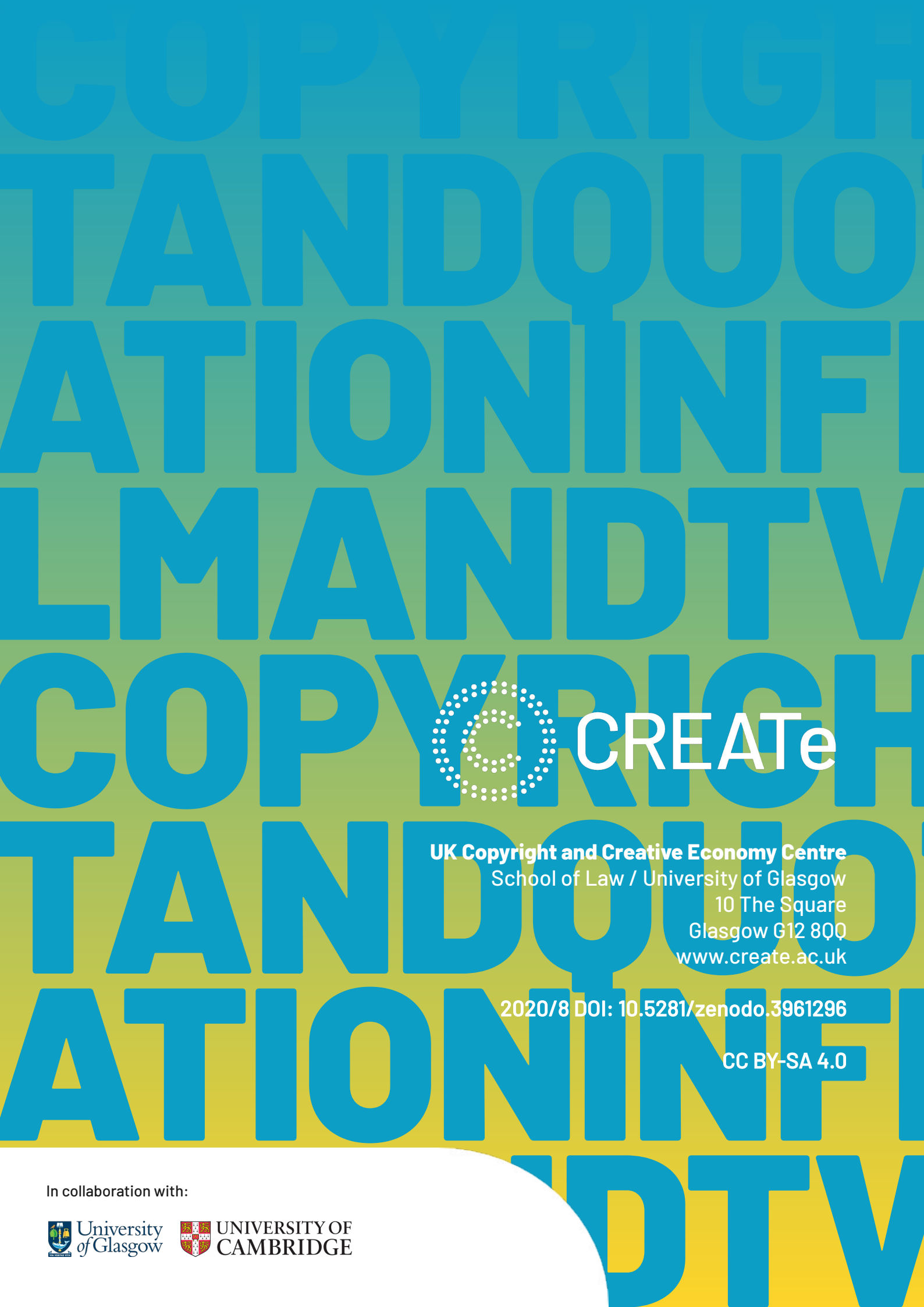
[104] It has been acquired by the Israel Museum (Jerusalem), the Tate (London), the Pompidou Centre (Paris), the Museum of Fine Arts (Boston), the National Gallery of Canada (Toronto), the Museum of Modern Art (New York), the Los Angeles County Museum of Art, and the Kunsthaus Zurich: see Levinson, 'Time and Time Again'.

[105] Eli Howatt, 'On *The Clock,* 'at 208, ("It will be considered a monumental work of art in the twenty-first century due to its scale, labor intensity, and aspirations towards a total reflection of time in narrative cinema").

What about attribution? The film itself, being a twenty-four hour cycle, inevitably has no "credits" as one would expect at the end. To that extent, the form renders attribution impossible – within the artpiece. However, it would be practically possible for Marclay or the Tate to have listed all the films and authors, in the same way that fans have subsequently done. Does the failure to have made accessible such a list in the exhibition room mean there was insufficient attribution? It seems to me that this is indeed a problem for the artist, at list under the present law of fair quotation. However, as mentioned in relation to *Titanic*, it is far from clear to me what the appropriate remedy should be for such a failure. Might a Court grant an injunction prohibiting exhibition of *The Clock unless and until* attribution was provided? In contrast with *Titanic,* where multiple copies would simultaneously be made and released to cinemas across the world (making such an order disproportionate), this does indeed seem likely in the case of *The Clock*. This is because there are a limited number of copies of the piece and providing such a list in the exhibition hall is something that might be readily done. A Court might feel inclined to make such an order, too, given the care that Marclay had himself taken over the selection and arrangement of exhibition spaces (a matter that the producers of a movie for general release are unlikely to control).[106]

It may be because of the attribution requirement that the Tate Gallery justified exhibiting the piece by reference to the pastiche exception,[107] rather than that which permits quotation – as the pastiche exception is not formally encumbered by the need to attribute the works that are pastiched.[108] Or it may be that the Gallery, like Marclay, took a calculated risk that none of the copyright owners would think their interests harmed sufficiently to justify insisting on attribution, engaging expensive lawyers and commencing proceedings. Indeed, given the critical acclaim that *The Clock* ultimately received, the reputational damage attending such insistence would have seemed inadvisable.

[106] For example, he refused The Tate permission to exhibit the piece in The Turbine Hall and he insisted that the seats not be arranged "theatre style" so that visitors could watch as much or as little as they wanted without disturbing other viewers. See Levinson, 106, ("Marclay has specified not just the number of seats but the material conditions for viewing *The Clock*, which include comfortable, widely spaced couches that evoke museum benches more than movie seating.")
[107] Tate Gallery, *Response to IPO Consultation on Impact of Hargreaves Reforms* (2019). Thanks to Bartolomeo Meletti for drawing this to my attention and to Bernard Horrocks for permission to see and cite the response.
[108] CDPA, s 30A ("Fair dealing with a work for the purposes of caricature, parody or pastiche does not infringe copyright in the work"). In the case of successful parody or caricature, the authorship and source must be presumed to be obvious to the audience. It is unclear whether the failure to attribute in cases where authorship and source are not obvious could in practice be regarded a factor that renders such a dealing "unfair."



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