

CASE FILE #28: THE MUSICIAN AND THE MACHINE

LEARNING AIMS

- Understand the difference between music and a sound recording
- Be able to explain how copyright law treats music and sound recordings differently

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- How does copyright law define a musical work?
- What is a sound recording?
- How long does copyright last for musical works and sound recordings?
- Not all sound recordings will qualify for copyright protection. Why not?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

HOW DOES COPYRIGHT LAW DEFINE A MUSICAL WORK?

- See **TEXT BOX #2**
- The law defines a musical work as 'a work consisting of music.'
This is a rather circular definition but generally we know music when we hear it, and when we see it written down.
- But music is more than just notes on a page. Copyright will also protect all of the musical phrasing and instructions that accompany those notes.

WHAT IS A SOUND RECORDING?

- See **TEXT BOX #3 and #4**
- The law provides a very broad definition of sound recording. Essentially, if you can record sounds by any means or in any format that allows you to replay those sounds, that will count as a sound recording. It will be protected by copyright.
- Sound recordings can be made on vinyl records, tapes, compact discs, digital audio tapes and any other media. They can even be made on large steel disks (a polyphon).

HOW LONG DOES COPYRIGHT LAST FOR MUSICAL WORKS AND SOUND RECORDINGS PROTECTED?

- See **TEXT BOX #5 and #6**

- The length of copyright protection is different for each type of work.
- The basic rule for musical works is that they are protected for the life of the author plus 70 years after he or she dies.

However, there are also special rules about co-authored musical works discussed in TEXT BOX #5 that you may want to consider or discuss with the students.

- The basic rule for a sound recording is slightly more complicated.

A recording will be protected for 50 years from the end of the year in which the recording is made. But, if the recording is made available to the public during that initial 50-year period, then the work will be protected for 70 years from the year in which it is made available.

For example, the *Rolling Stones* make a sound recording in 1970 that is never released. It will be protected for at least 50 years, that is until 2020.

However, suppose they decide to release the track as part of a new Greatest Hits album in 2015. As the track was made available to the public before the first 50-year period expired (before 2020), it will benefit from an extended protection of 70 years from 2015, that is, until 2085.

NOT ALL SOUND RECORDINGS WILL QUALIFY FOR COPYRIGHT PROTECTION. WHY NOT?

- See **TEXT BOX #7**
- The law requires that different types of work meet certain criteria before they enjoy copyright protection
- For sound recordings, this means they must not be copied from a previous sound recording.

If copyright was granted to a new sound recording of an existing recording, then potentially the original recording could be protected indefinitely. All the copyright owner would have to do is re-record the original recording.

So, the rule that a recording must not be copied from a previous recording ensures that copyright in the original recording will come to an end at some point, and the work will enter the public domain.

- The criteria for protection for a musical work is different. The work is required to be original (rather than simply not copied). We discuss the concept of originality in [Case File #14](#).
- Why does the law apply different criteria to sound recordings and musical works?

There is a perceived difference between literary, dramatic, musical and artistic works and films on the one hand, and sound recordings, broadcasts and the protection of typographical arrangements on the other. (See [Case File #23](#) on the eight categories of work protected by copyright law.)

The former works are considered authorial creations, works that require creativity and inspiration to produce. They are protected for longer (the life of the author plus 70 years), and so the more demanding criterion of originality is required.

Sound recordings and broadcasts are perceived to be more technical or entrepreneurial in nature. They depend on the existence of authorial works, such as songs or scripts. As such, they receive a shorter term of protection, and the criterion for protection is less (not copied).

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1. INTRODUCTION

In *The Missing Note*, a digital file contains a recording of the soundtrack to the film *The Forger's Apprentice*, but with one note missing. The missing note is the key to a cipher that holds the answer to the whereabouts of the anarchist group.

In [Case File #23](#) we considered the different types of work that can be protected by copyright in the UK. In this Case File #28, we consider how copyright protects music and sound recordings – two different categories of copyright work.

2. WHAT IS MUSIC?

Music embodied in print form (that is, sheet music) has been protected by copyright since the late eighteenth century. Consider the sheet music for the song *Too-ra-loo-ra-loo-ral*, written in 1914 by the Irish-American composer James Royce Shannon (1881-1946). As Shannon died more than 70 years ago, the work is no longer in copyright. However, it provides a useful illustration of what *would be protected* as a musical work under the Copyright Designs and Patents Act 1988 (the CDPA).

First, it is worth noting that, for copyright purposes, the lyrics accompanying the song are not a part of the musical work: the CDPA defines a musical work as 'a work consisting of music, *exclusive of any words or action intended to be sung, spoken or performed with the music*' (s.3(1)). Instead, the lyrics would be protected as a literary work, separate from the musical work. (In this case, however, both music and lyrics were written by Shannon.)

Dedicated to, written for and sung by
Chauncey Olcott
 Too-ra-loo-ra-loo-ral
THAT'S AN IRISH LULLABY

Lyric and Music
 By J. R. SHANNON

Moderately

mp

With expression

O - ver in Ki - lar - ney, — Man - y years a - go, — Me
 Oft in dreams I wan - der — To that cot a - gain, — I

mp in sustained style

Mith - er sang a song to me In tones so sweet and low; Just a
 feel her arms a hug - gin' me As when she held me then. And I

♯287
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The notes on the score – the melody and the accompanying baseline and harmonies – are obviously part of the musical work. But, music is more than just notes on a page. Other elements that contribute to the sound of the music as it is performed can also be protected by copyright, such as the tempo (*Moderately*), instructions concerning the relationship between notes (such as musical phrasing or an arpeggiated chord), dynamics (*mf* or *mp*), or other directions for performance (*With expression*). Like stage directions accompanying a play, all of these various elements contribute to the musical work and as such may be protected by copyright.

3. WHAT IS A SOUND RECORDING?

Sound recordings were first protected in the UK under the Copyright Act 1911. Interestingly, at that time, they were protected *as if they were musical works*. Today, the situation is different: musical works and sound recordings are two different types of copyright work.

Under the CDPA a sound recording is defined as: '(a) a recording of sounds, from which the sounds may be reproduced, or (b) a recording of the whole or part of a literary, dramatic or musical work, from which the sounds reproducing the work or part may be produced, [and] regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced' (s.5A(1)). This is a very broad definition. As a result, the Act provides protection for vinyl records, tapes, compact discs, digital audio tapes and any other media used to embody recordings.

4. CURIOSITY: POLYPHON FANTASY

Labyrinth (1986) is an adventure fantasy film directed by Jim Henson and executive-produced by George Lucas. It stars the late David Bowie as Jarthe, the Goblin King. Bowie recorded five songs for the film, including *As the World Falls Down* which was also produced in a Polyphon format: that is, the music was cut onto a 19⁵/₈-inch high-nickelled steel disc to be played on a mechanical music box. Only two copies were ever made: one for the recording of the film score, and one for Bowie's personal use.

The Polyphon steel disc format constitutes a sound recording for the purposes of the CDPA. The same would be true of a pin roll from a music box or a length of punched tape to be used in a barrel organ or a pianola.



A Polyphon 11-inch disc musical box, made in Leipzig (www.mechanicalmusic.co.uk/disc-players/)



David Bowie, *As the World Falls Down*, on a 19⁵/₈-inch Polyphon disc

5. SONGS AND OTHER CO-AUTHORED MUSICAL WORKS: COPYRIGHT DURATION

Copyright in literary, dramatic, musical and artistic works expires 70 years from the end of the year in which the author died (s.12(2)). If a literary, dramatic, musical or artistic work is jointly authored, the 70-year term is calculated from the end of the year in which the longest surviving joint author died.

However, special rules about calculating duration of copyright in songs and other similar musical compositions were introduced in 2013. The CDPA was amended to say that when the author of a musical work and the author of a literary work collaborate to create works intended 'to be used together', the resulting works are treated as a 'work of co-authorship.' The concept of a work of co-authorship is similar to but distinct from the concept of a work of joint authorship. (You can read more about works of joint authorship in [Case File #22](#).)

This change had an important impact on how duration is calculated for these types of work. Previously, duration of copyright in the music and the lyrics of a song would have been calculated independently of each other: that is, copyright in the music would come to an end 70 years following the death of the composer, whereas copyright in the lyrics would end 70 years after the death of the lyricist. Now, however, duration of copyright in a song that has been co-authored will last for 70 years from the end of the year in which the longest surviving co-author died.

This change has also resulted in work that was already in the public domain benefitting from a *revived copyright*.

Consider, for example, the songbook of George and Ira Gershwin. George composed music, and Ira was the lyricist. George died in 1937; Ira survived until 1983. In the UK, before the changes introduced in 2013, copyright in George's music had expired on 31 December 2007. Now, copyright in George's music has been revived and will expire 70 years from the end of the year in which Ira died: that is, on 31 December 2053.

6. SOUND RECORDINGS: COPYRIGHT DURATION

The rules on the copyright term in sound recordings have changed a number of times in recent years – in 1995, in 2001, and then again in 2013 – which can make calculating duration of protection more complicated than it should be. In general, though, copyright in a sound recording will last for 50 years from the end of the year in which the recording is made, or if published, played in public or communicated to the public during that period, 70 years after the end of the year in which the work is first published, played in public or communicated to the public (CDPA, s.13A(2)).

You can read more about the duration of protection in sound recordings [here](#).

7. FOR DISCUSSION: WHEN NOT COPIED IS GOOD ENOUGH

Not every literary, dramatic, musical or artistic work will qualify for copyright protection. There is a minimum criterion set out in the CDPA which requires that all literary, dramatic, musical and artistic works should be *original* before they will be protected by copyright (s.1(1)). You can read more about the concept of originality in copyright law in [Case File #14](#).

However, sound recordings do not need to be original; the CDPA only requires that a sound recording is *not copied* from a previous sound recording (s.5A(2)). This is a much

easier criterion to satisfy than originality. Imagine, for example, a band has written a new song they want to record. In the studio they make various recordings, or 'takes,' each of which is essentially the same as the last. Even though each take is almost identical to every other take, they are all protected by copyright as individual sound recordings. None of them have been copied from a previous recording: each one is a new protected recording, even though they may not be original.

Why do you think the CDPA applies different criteria for protection to music and to sound recordings? Why must a musical work be original, whereas a non-original sound recording will be protected so long as it has not been copied from a previous sound recording?

8. USEFUL REFERENCES

The Copyright, Designs and Patents Act 1988 is available here: <http://www.legislation.gov.uk/ukpga/1988/48/contents>

For further information on copyright duration in the UK, see *Copyright Bite #1 – Copyright Duration*: <http://copyrightuser.org/copyright-bites/1-copyright-duration/>

See also: *Copyright and Digital Cultural Heritage: Duration of Copyright*: <https://copyrightcortex.org/copyright-101/chapter-6>

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