

Too Much Drama Defining Film in UK Copyright Law

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Abstract:

In *Norowzian v Arks Ltd. (No.2)* the Court of Appeal determined that the Copyright, Designs and Patents Act 1988 protects films as dramatic works. What, conceptually and in practice, this means is not clear. This article examines and compares the history of film with the definitions of film in the Berne Convention and UK copyright laws to argue that practical and legal definitions of film were already diverging when the Copyright Act 1911 was enacted. It contends the continuing divergence between film and its legal classification in copyright law develops from the underscoring aesthetic theory on which classifications from the 1911 Act onwards depend. Establishing the classifications in CDPA 1988 on an alternative aesthetic theory could better accommodate filmic expression.

Keywords:

Films; Dramatic Works; Copyright; Film History; Berne Convention

Introduction

‘[T]he whole moving picture play arose from the slavish imitation of the drama and began only slowly to find its own artistic methods.’¹

The question ‘what is film?’ has been asked since the medium’s inception. No definitive answers emerged for two interconnected reasons. Any answer depends on, first, *what* we mean by ‘film’ and, second, *who* asks the question. Is, for instance, film the moving image, the projected moving image, the moving image projected for an audience, or a paying

¹ Hugo Münsterberg, *Hugo Münsterberg on Film: The Photoplay: A Psychological Study and Other Writings* (Allan Langdale [ed] Routledge 2002), 108. This work was published originally in 1916.

audience, the moving-image recording instrument, the moving image as entertainment, the moving image as theatrical entertainment, moving-image narrative storytelling, or the moving image as art form? Film scholars and practitioners often focus on aesthetic value to consider what film *is* and what it *should be*. Legislators, justices, and intellectual property law scholars consider what it is about film that intellectual property law should protect it, seeking a value-neutral conception in order to protect films equally.

Whether the Copyright, Designs and Patents Act 1988 (CDPA 1988) protects films equally, though, is questionable. Section 5B(1) protects film as a ‘recording on any medium from which a moving image may by any means be produced.’ The physical film is simply an object that can be duplicated. To make an unauthorised mechanical copy of a film in copyright, or exhibit it without permission, infringes the copyright owner’s rights.² I see no controversy in this category of protection, so will say no more about it. The problem is with the protection of film content.³ Whether CDPA 1988 protects films as intangible original works was unclear until 2000, when Nourse, Brooke, and Buxton LJ concluded in *Norowzian v Arks (No.2)* that the 1988 Act protects films as dramatic works.⁴ That the content of a film is necessarily dramatic is not obvious, though, and CDPA 1988 does nothing to clarify the issue. Section 3(1)(d) states merely that a “dramatic work” includes a work of dance or mime’, to which Nourse LJ adds ‘the definition is otherwise at large.’⁵ The classification of films as dramatic works first appears in UK copyright law in the Copyright Act 1911, which included in section 35(1) ‘cinematograph production’ in the interpretation of

² Of course, there are uses permitted under fair dealing.

³ For linguistic simplicity I use the term ‘film’ in this paper to refer to film content.

⁴ *Norowzian v Arks Ltd (No.2)* [2000] EMLR 67 (CA (Civ Div)).

⁵ *Ibid* 72.

‘dramatic work.’ Section 48(1) of the Copyright Act 1956 explicitly excluded ‘cinematograph film’ from the category of ‘dramatic work’. CDPA 1988 excludes the 1956 exclusion, which Nourse LJ reasoned reintroduces film into the category of dramatic works. Commentators on the case, independent of their views on the ruling, generally agree that CDPA 1988 stays silent on ‘what aspect of the film director’s art will be protected as a dramatic work’.⁶ The problem, I contend, is not the category’s definition, but the classification itself.

Classifications of original content in copyright law necessarily rely on aesthetic theory. I argue that CDPA 1988 limits what can be considered the expressive content of film because its categories rest on an aesthetic theory insufficiently responsive to the evolution of filmic expression. By exploring key concerns that arise in *Norowzian (No. 2)*; the history of the classification of film content in UK copyright acts, European directives and rulings, and the Berne Convention; and the history of film itself, I maintain that a solution for UK copyright law rests on aligning film *fully* with the open conception of artistic work established in Article 2 of the Berne Convention.

The Norowzian Case and the Problem of Film as a Dramatic Work

Film director Mehdi Norowzian submitted to advertising agency Arks Ltd. a show reel containing his short film *Joy*. In *Joy* a dancer dances in a quirky style against a large tarpaulin backdrop. The film has no moving camera shots, and the camera always points toward the tarpaulin, occasionally reframing. Fast-motion cinematography is used extensively, as are jump cuts. A wide-angle lens distorts the dancer’s dimensions when he is

⁶ Hamish Porter, ‘A “Dramatic Work” Includes ... A Film’ (2000) 11(3) Entertainment Law Review 50, 53.

in close-up. Norowzian synchronised these elements with an acoustic guitar music track. The film explores the experience of the emotion of joy. Arks showed the film to their client, Guinness Ltd. Guinness liked *Joy* and requested Norowzian make a similar film to advertise their beer. Norowzian declined. Arks hired another director, showed him *Joy*, and commissioned him to make an advertisement in the same style. The result was *Anticipation*, a short narrative film depicting a dancer ordering and then anticipating his pint of Guinness as it settles. Nobody involved contested that *Anticipation* was modelled on *Joy*. In the Court of Chancery, Rattee J did not find infringement, since *Joy* was neither mechanically copied nor, he maintained, did it contain a dramatic work that could be copied.⁷ He held that a necessary quality of a dramatic work was that it could be performed independently. The editing in *Joy* precluded independent performance of the dance, so the dance could not be a dramatic work. Even if the dances in the independent takes could be performed, CDPA 1988 protects only the work as a whole. He concluded that *Joy* was therefore not a recording of a dramatic work and that, under CDPA 1988, a film could not *be* a dramatic work, arguing ‘It is not, in my judgement, open to me to try and fill the resulting lacuna by giving a forced construction to the definition of the term “dramatic work” as used in the Act.’⁸

Norowzian appealed. The Court of Appeal upheld Rattee J’s ruling that *Joy* was not a recording of a dramatic work, but disagreed with his ruling that under CDPA 1988 films could not be dramatic works. Nourse LJ noted that Rattee J based his view on section 48(1) of the 1956 Act, which explicitly excluded films from the category of dramatic works. CDPA 1988 makes no explicit exclusion. Nourse LJ reasoned, ‘is it unsafe to base any construction of the material provisions of the 1988 Act on those of the 1956 Act. Indeed, it might be said

⁷ *Norowzian v Arks Ltd and Others (No.2)* [1999] EMLR 67 (ChD).

⁸ *Ibid* 79.

that Parliament's omission to repeat the exclusion of films from the definition of dramatic work points rather towards their inclusion.⁹ The Court of Appeal accepted that *Joy* constitutes a dramatic work. Undoubtedly *Anticipation* resembles *Joy* and borrows its style and techniques, but, declared Nourse LJ, 'no copyright subsists in mere style or technique.'¹⁰ The Court concluded that *Anticipation* did not copy *Joy* as a dramatic work, nor did it include a significant part of it. It clarified that films are protected as dramatic works, but, asks Michelle James, 'against what?'¹¹

The roots of an answer are in the 1911 Act. This act was drafted to comply with the 1908 Berlin Act of the Berne Convention, and addresses film in two key sections.¹² Section 1(2)(d) of the 1911 Act protects the physical medium of 'cinematograph film[s]', and other recording media, as the means by which literary, dramatic, and musical works may be recorded and 'mechanically performed or delivered.' Section 35(1) protects film under two interpretations. The category of photographs includes works produced 'by any process analogous to photography', which films are. The definition of artistic work includes photography, so it therefore includes film, albeit as film frames rather than as projected.¹³ This section also restricts the contents of cinematographic productions to the interpretation of dramatic works, 'where the arrangement or acting form or the combination of incidents

⁹ *Norowzian (No.2)* (n 4) 73. Poorna Mysoor suggests the 1988 Act may include the 1956 Act, citing the long title of the 1988 Act: 'An Act to restate the law of copyright, with amendments [...]'. Poorna Mysoor, 'Does UK Really Have a "Closed" List of Works Protected by Copyright?' (2019) 41(8) *European Intellectual Property Review* 474, 476.

¹⁰ *Ibid* 74.

¹¹ Michelle James, 'Some Joy at Last for Cinematographers' (2000) 22(3) *European Intellectual Property Review* 131, 133.

¹² Hereafter I refer to this as the Berlin Act.

¹³ Pascal Kamina, *Film Copyright in the European Union* (Cambridge University Press 2002) 22-3.

represented give the work an original character.’ This text derives almost verbatim from Article 14 of the Berlin Act 1908. Both acts characterise films as means to record, disseminate, and exhibit dramatic works, not as dramatic works themselves. As early as 1910, concerns with the wording in the Berlin Act emerged. Conference members at the *First International Congress of Cinematography*, held in Brussels, objected to film’s originality being restricted to acting, staging, and incidents in Article 14, for the reason that the personal and original character of a film is not necessarily determined by qualities it shares with stage performances.¹⁴

The Copyright Act 1956 established a lacuna between the 1911 and 1988 Acts. Section 48(1) of the 1956 Act stated that a dramatic work ‘does not include a cinematographic film, as distinct from a scenario or script for a cinematographic film.’ *The Whitford Report* (1977) notes that the 1956 Act divided works into two classes: ‘those historically protected as literary, dramatic, musical or artistic works, falling into Part I, and the more recent types of works – sound recordings, cinematographic films and broadcasts together with published editions of works, a sort of hybrid – falling into Part II.’¹⁵ Part I works were original compositions, but Part II works had no originality criterion. Yet, the report continues, this distinction is not clear in practice. ‘It has been not unreasonably pointed out that, for example, at least some cinematographic films, on any system of rating, should be judged as being in a class above, say, a price list, which is classified as a literary work

¹⁴ *Annuaire du Commerce et de L’industrie Photographiques & Cinématographiques pour la France et L’étranger: Deuxième Partie – ‘Cinéma’ Annuaire de la Projection Fixe et Animée* (1911), 16.

¹⁵ Dept. of Trade, *Report of the Committee to Consider the Law on Copyright and Designs* (Cmnd 6732, 1977) para 30. I refer to this work throughout as *The Whitford Report*.

protected in Part I.’¹⁶ Films can be more than fixations of antecedent works, they can be original works.

By limiting film to Part II works in the 1956 Act, legislators aimed to eliminate the restricted classification of film in the 1911 Act. The 1952 *Gregory Report*, which informed the 1956 Act and responded to the 1948 Brussels Act of the Berne Convention, notes that

The Copyright Act of 1911 in Section 35 (1) includes ‘any cinematographic production’ in its definition of a ‘dramatic work’ but apparently only ‘where the arrangement or acting form or the combination of incidents represented give the work an original character’. The difficulty of deciding what constitutes originality in such cases must be manifest; on any definition some types of film, e.g., newsreels, would seem to be deprived of copyright protection, though there seems to be no equitable reason why they should be.¹⁷

The Gregory Report recommended removing film from Part I works, reasoning that films and gramophone records align ‘more closely to industrial products than to original literary or musical works’.¹⁸ ‘At the best, the record or film has called forth in its production a measure of artistic skill, but there is always a great measure of what is only technical and industrial in its manufacture’.¹⁹ It proposed protecting film only as the material artefact, and assigning ownership to the entrepreneur, or producer, following The Cinematograph Films Acts of

¹⁶ *Ibid.*

¹⁷ Board of Trade, *Report of the Copyright Committee* (Cmd 8662, 1952) para 100. I refer to this work throughout as *The Gregory Report*.

¹⁸ *Ibid* para 88.

¹⁹ *Ibid* para 86.

1938 and 1948.²⁰ Separable works, such as scripts and musical scores, could find protection as literary or musical works elsewhere in the act.²¹

With the re-inclusion of film into dramatic works in the 1988 Act, Nourse LJ proposed a definition of the category that diverged from the problematic 1911 definition. He replaced ‘acting, scenic arrangements, and combination of incidents’ with ‘*action and performance*’. His definition, ‘substantially a distilled synthesis of those which have gone before, would be this: a dramatic work is a work of action, with or without words or music, which is capable of being performed before an audience.’ He claims this is the term’s ‘natural and ordinary meaning’, and that film is capable of performance.²² Section 19(2)(b) of CDPA 1988 defines performance as ‘any mode of visual or acoustic presentation, including by means of a sound recording, film, or broadcast of the work.’²³ Commenting on this, Pascal Kamina contends that defining dramatic works as *capable of performance* introduces two problems. First, the definition of ‘performance’ is imprecise. Most copyright works could be performed as the term is defined in the Act. Second, if *being capable of performance* is a property of dramatic works, and if dramatic works require performance by acting or dancing, then the definition is too narrow. It excludes works like animations. Kamina proposes an alternative definition: ‘The key words are *action* and *movement* [; ...] *a dramatic work is a work created in order to be communicated in motion, that is, through a sequence of actions,*

²⁰ Ibid para 103.

²¹ Ibid para 97.

²² *Norowzian (No.2)* (n 4) 73.

²³ Broadcast was added as a result of The Copyright and Related Rights Regulations 2003. The definition of performance in section 35(1)(c) of the 1911 Act limits performance to ‘any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument.’

*movements, irrespective of the technique by which this movement is retrieved or expressed, this communication in movement being the “performance”.*²⁴ Kamina concludes *‘the final cinematic work is not the mere performance of the script, but its visual translation, interpretation, that is, a new derivative work.’*²⁵ This definition distinguishes between a film as a recording of a dramatic work and a film as a dramatic work. But what is this ‘new derivative work’? Film is not just a means to ‘retrieve or express’ movement, it is itself the constructed artefact of which all of its formal properties are available to compose an expression. A film may not necessarily be a derivative work nor rely on ‘action and movement’ for its expressive content. Such redefinitions as those by Nourse LJ and Kamina alter the terms of the debate without resolving the problem.

Buxton LJ’s comments in *Norowzian (No.2)* are helpful. He agrees with Nourse LJ that CDPA 1988 protects films as dramatic works, but follows different reasoning.²⁶ Echoing *The Gregory Report*, he contends that classifying films as dramatic works risks excluding works that should be protected, yet he accepts this classification pragmatically.

[I]f the 1988 Act is to be interpreted consistently with this country’s international obligations under the [Berne] Convention, the cinematographic works referred to in the convention have all to be included within the Act’s category of dramatic works: even in cases where the natural meaning of ‘dramatic work’ does not or might not embrace the particular film in question.²⁷

²⁴ Pascal Kamina, ‘Authorship of Films and Implementation of the Term Directive: The Dramatic Tale of Two Copyrights’ (1994) 16(8) *European Intellectual Property Review* 319, 320. Italics in original.

²⁵ *Ibid* 320-1. Italics in original.

²⁶ The third judge, Brooke LJ, commented only that he agreed with Nourse and Buxton LJ.

²⁷ *Norowzian (No.2)* (n4) 75.

Nourse LJ, Buxton LJ, and Rattee J disagree about whether the meaning of ‘dramatic work’, as it applies to films in CDPA 1988, is ‘natural and ordinary’ or ‘forced’. This is hardly surprising. *The Whitford Report* warned about the precision of language in Copyright Acts, which legislators appear not to have heeded.

[T]he general words of description in the Copyright Act should relate more closely to the way in which those words are commonly used. As we have already mentioned in the Introduction, it is plainly not understood by a good many people that many of the words used in the Copyright Act have a meaning, arising from definition and interpretation, rather different from that which would probably be given to them by most people. This sort of misdescription can lead to misconception as to the scope and extent of copyright protection.²⁸

A layperson would likely see as ‘natural and ordinary’ *narrative feature films* as dramas or dramatic works. This understanding differs from Nourse LJ’s ‘*action and performance*’ and Buxton LJ’s universal protection required by Berne. But whether one pursues a lay or legal understanding of film as a dramatic work, the classification leads to ambiguity.

The CJEU and the Autonomous Concept of Original Works

Recent European copyright directives and case law establish a supranational autonomous concept of a work across EU member states, which appears to challenge the closed list of classifications of works in UK copyright law. Central to this issue are the Information Society Directive²⁹ and the *Infopaq* case.³⁰ In *Infopaq*, the CJEU ruled that Article 2 of Infosoc harmonised across the EU ‘an autonomous and uniform interpretation’ of

²⁸ Cmnd 6732 para 36.

²⁹ European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (Infosoc)

³⁰ Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-06569.

original, protected works as those that ‘are the expression of the intellectual creation of their author’.³¹ Paul Torremans, amongst others, argues that this ruling alters the notion of originality in UK law, from a work originating in its author to being ‘the author’s own intellectual creation.’³² This has two notable consequences. First, any work that meets this definition of originality must be protected, regardless whether it fits within a category specified in CDPA 1988.³³ Second, the threshold of originality changes from skill and labour to an expression of the author’s intellectual creation. An author must exercise ‘free and creative choice’ when creating a work for it to be protected.³⁴

Prior to *Infopaq* a work was protected in the UK only if it fell within a protected category. Some scholars, notably Poorna Mysoor, Andreas Rahmatian, and Torremans, offer good reasons to be sceptical that recent rulings by the CJEU introduce a fundamental change to UK copyright law.³⁵ Mysoor contends that categories of works in CDPA 1988 already have a degree of openness. Categories defined by the term ‘means’ are closed, while those defined by ‘includes’ are open. Rahmatian suggests any change to UK law is likely to be minimal, as ‘[T]he classic originality definition of UK copyright law of [...] “skill, labour, and judgement”’ implies already the creative choices required for a work to be an author’s

³¹ Ibid para 27, and ruling para 1.

³² Paul Torremans, ‘The Role of the CJEU’s Autonomous Concepts as a Harmonising Element of Copyright Law in the United Kingdom’ [2019] 4 IPQ 265, 272.

³³ Eleonora Rosati, ‘Towards an EU-Wide Copyright? (Judicial) Pride and (Legislative) Prejudice’ [2013] 1 IPQ 47, 59.

³⁴ Torremans (n 32) 281.

³⁵ Andreas Rahmatian, ‘Originality in UK Copyright Law: The Old “Skill and Labour” Doctrine Under Pressure’ [2013] 44(1) IIC 4; Torremans (n 32); Mysoor (n 9).

intellectual creation.³⁶ Rosati notes the CJEU, in *Infopaq*, determined that Article 2 of the 1971 Paris Act of the Berne Convention (as amended in 1979) governed the meaning of the term ‘work’ in *Infosoc*. Article 2 specifies that ‘every production in the literary, scientific and artistic domain’ falls within the scope of the Convention, and therefore attracts protection, although, as Rosati clarifies, the Convention does not define the originality threshold.³⁷ UK courts already interpret the definitions of protected categories in CDPA 1988 liberally and, Torremans notes, are ‘rather close indeed to the approach set out by the Court of Justice of the European Union’.³⁸ With regards to film, this is evident already with *Norowzian (No.2)*. Buxton LJ insisted that film content must fall within the scope of Article 2 of Berne and relied on the category of dramatic work to do so, even if this required stretching the definition beyond its ‘natural meaning’.

As a result of *Norowzian (No. 2)*, CDPA 1988 therefore *appears* to protect all original films in the UK because by fiat they fall within a protected category. However, classifying films as dramatic works, whatever definition of the category one adopts, limits which qualities justify protection, regardless whether those qualities form any given work’s expressive content. This classification is too narrow to account for the possibilities for expression in film.

The Berlin Act, the Gorell Committee, the First International Congress of Cinematography, and the Copyright Act 1911

³⁶ Rahmatian [2013] (n 35) 30.

³⁷ Rosati (n 33) 56.

³⁸ Torremans (n 32) 283.

This problem with CDPA 1988 begins with the 1908 Berlin Act. The Berlin Act introduced protection to ‘cinematograph productions’ in Article 14:

Authors of literary, scientific or artistic works shall have the exclusive right of authorising the reproduction and public representation of their works by cinematography.

Cinematograph productions shall be protected as literary or artistic works if, by the arrangement of the acting form or the combinations of the incidents represented, the author has given the work a personal and original character.

Without prejudice to the rights of the author of the original work, the reproduction by cinematography of a literary, scientific, or artistic work shall be protected as an original work.

The above provisions apply to reproduction or production effected by any other process analogous to cinematography.

To consider the implications of the Berlin Act for UK copyright law, the UK Parliament convened the Gorell Committee, which produced *The Report of the Committee on the Law of Copyright* (1909).³⁹ The Committee accepted Article 14 and recommended the appropriate changes be made to UK copyright law.⁴⁰ The resulting 1911 Act includes films under ‘dramatic works’, which the Berlin Act lists in Article 2 in the open definition of ‘literary and artistic works’. Although discussing phonograph recordings, committee member Mr. H. Granville Barker contended that the Berlin Act used the word ‘literary’ to refer to both ‘literary and dramatic works,’ and that this was understood in English copyright law.⁴¹ They were, he contended, the same sorts of things, except that literary works contain words that are

³⁹ Law of Copyright Committee, *Report of the Committee on the Law of Copyright* (Cd. 4976, 1909). I refer to this work throughout as *The Gorell Report*.

⁴⁰ *Ibid* 27.

⁴¹ Harley Granville Barker (his surname is sometimes hyphenated) was an English actor, theatre director, and author.

published, dramatic works contain actions that are performed, and publishing and performance differ fundamentally.⁴² What may at the time seem to have been an innocent word choice begins to illuminate the historical perception of film as a recording medium.

Commercial filmmaking in the UK was only about 15 years old when the 1911 Act was enacted. During this period film content varied remarkably, but films shared a common property: filmmakers recorded, whether actual events or scenes performed for the camera. By 1908 fictional content was increasingly popular, but these films were still typically scenes performed for a camera, whether adapted from existing works or produced solely for film. Experimentation with the medium's formal properties for narrative and expressive purposes was nascent. To borrow Kendall Walton's term, the medium was *transparent*; audiences saw the drama *through* the cinematographic images.⁴³ The *Dramatic Literary Property Act (1833)* established protection of dramatic works in the UK. The 1911 Act extended infringement to the recording of others' dramatic works, and included in the category of dramatic works scenes composed to be recorded on film.

By 1910 the nascent developments in the expressive capacities of film started to stretch the conception of film written into the Berlin Act and the 1911 Act. While film was still used to record antecedent dramas, filmmakers increasingly conceived and produced works that integrated film form and dramatic content.⁴⁴ André Gaudreault elucidates this shift in

⁴² Law of Copyright Committee, *Minutes of Evidence Taken Before the Law of Copyright Committee* (Cd. 5051, 1910) paras 627-632. Subsequently I will refer to this as *Minutes*.

⁴³ Kendall Walton, 'Transparent Pictures: On the Nature of Photographic Realism' (1984) 11(2) *Critical Inquiry* 246. Walton argues transparency is an ontological property of photographic media. Without addressing his ontological argument, I agree this property is at least historically contingent.

⁴⁴ I refer here to narrative films. I discuss non-narrative films below.

film, and its implications for audience address. Film is not a singular cultural practice emerging from the technology exhibited in the 1890s and developing into *the movies*, he argues, but two distinct cultural formations. Early commercial film to around 1915, a period he calls ‘kinematography,’ was principally a recording medium integrated into other contemporaneous cultural practices, including photography, fairground attractions, and the range of stage entertainments.⁴⁵ By 1915 this intermedial basis of film had largely transformed into an institutional system of commercial narrative films, characterised by internally coherent stories, narrative points of view, and continuity editing.

The Gorell Committee *Minutes* evidences film’s (kinematography’s) outward integration with other cultural practices. Neither the Committee nor its body of witnesses included film experts. Instead, witnesses from the established arts intended to protect works of literature, theatre, *and music* from filmic reproduction without permission. Mr. Pierre Gabriel Sarpy, a representative in Great Britain for the Société des Auteurs Compositeurs et Editeurs de Musique in France, and who also represented Italian, Spanish, and Austrian authors and composers, highlighted, in his evidence of 25 May 1909, film’s capacity to infringe performances by ‘living pictures.’ In a memorandum provided to the committee he stated: ‘Dramatic rights are invaded by moving pictures which convey the scenic representation. Sometimes whole performances are given which mechanically reproduce stage pictures and the singers and performers by gramophone.’⁴⁶ Sarpy may be referring to

⁴⁵ André Gaudreault, *Film and Attraction: From Kinematography to Cinema* (University of Illinois Press 2011) 64-7. Gaudreault uses the term “kine-attractography” to highlight that this was a period of cinematographic attractions, rather than narrative coherence. I instead use the term “kinematography,” the term he opted for in the title of his book, for its relative simplicity.

⁴⁶ *Minutes* (n 42) para 955. The *Minutes* reproduce Mr. Sarpy’s Memorandum in full on pages 210-213.

Tonbilder films, produced by Deutsche Bioscope around 1907-1909, although such sound films were also produced in France, the US, and the UK.⁴⁷ The prevalence of these niche films was not the issue. Rather, the Gorell Committee debated film's *capacity* to infringe the rights in antecedent works, emphasising its understanding of film as a copying technology rather than a medium for crafting original works.⁴⁸ The Committee recognised Sarpy's concern, but felt that no special measures beyond those in the Berlin Act were required. Discussing the Dramatic Sub-Committee's conclusions, the Committee reported that 'the reproduction by cinematography of [...] dramatic pieces should be under the exclusive control of the dramatists as in clause [Article] 14 is provided [*sic*].' It accepts also that Article 13 grants dramatic authors 'exclusive control' to 'dramatic performances reproduced by phonograph'.⁴⁹ Neither the Berlin Act nor *The Gorell Report* considers the expressive qualities of film. That which is seen *through* the film attracts protection as a dramatic work.

⁴⁷ Some Tonbilder films have been restored. These restorations were projected at the 2014 and 2015 editions of The Pordenone Silent Film Festival. At the 2018 Festival the French film *Les Rameaux. Hosannah! (de Faure)* (1908) was presented with its original soundtrack. Programme notes for these films are on the Festival's website: http://www.cinetecadelfriuli.org/gcm/ed_precedenti/ed_prec2011-2020.html. The BFI possesses a copy of *Kitty Mahone* (1900), sung by Lil Hawthorne <https://player.bfi.org.uk/free/film/watch-kitty-mahone-1900-online>). See also the discussion held during Mr. John Drummond Robertson's evidence in the *Minutes* (n 42) paras 1286 -1291.

⁴⁸ Dotted throughout the *Minutes* are concerns about reproduction technologies. For instance, Mr. William Heinemann, who spoke on behalf of the Publishers' Association of Great Britain and Ireland, recommended the wording 'mechanical and other means' rather than "'mechanical instruments.'" This would probably protect copyright matter against future and still undeveloped forms of reproduction in which mechanism is not employed (such, for instance, as is photographic sun-printing) and would prevent the grave injustice done to copyright owners during recent years through the free use of copyright matter by such instruments as gramophones, phonographs, cinematographs, &c.' *Minutes* (n 42) 192.

⁴⁹ *Minutes* (n 42) 187.

As the 1911 Act progressed through the legislature, changes in film culture were becoming evident. The divergent focus of two international film conferences held one year apart illustrates this nascent shift. The *International Congress of Film Manufacturers* (*Congrès international des Editeurs de Films*), held in Paris in 1909 and chaired by George Méliès, focused on trade, treating film principally as a commodity. The conference established the International Editors of Film (IEF), a collection of mainly European film producers, which aimed to end the sale of film in much of Europe, instead promoting leasing with a price per foot of fourpence. It also restricted the duration films could be in circulation and prohibited renters and exhibitors from obtaining non-IEF films. UK renters and exhibitors fought against this protectionism, inviting American producers to distribute films in the UK.⁵⁰

The Brussels Congress differed. Held in September 1910, the *First International Congress of Cinematography* (*Premier Congrès Internationale de Cinématographie*) debated film's capacity to document and to educate, and chastised film companies for shirking this responsibility for commercial interests. Mr. Charles Havermans, a lawyer at the Brussels Court of Appeal, presented a lengthy paper on Article 14 of the Berlin Act. He argued that film was a young, misunderstood medium, both culturally and within the law, and elaborated two established viewpoints.⁵¹ The first characterised film as a mechanical medium, with 'The sun, the camera, and chemistry [as] the agents of cinematographic works.' Film, being mechanically produced and reproducible, like any form of mass manufacture, constitutes 'an

⁵⁰ Jon Burrows, 'When Britain Tried to Join Europe: The Significance of the 1909 Paris Congress for the British Film Industry' (2006) 4(1) *Early Popular Visual Culture* 1, 5-10.

⁵¹ These views correspond closely with Part I and Part II categories in *The Whitford Report* years later.

industry, a mechanical and especially commercial profession'.⁵² The second rejects reducing film to its component technologies. Like other artworks, films originate in the minds of those who make them. This applies to dramatic scenes, but extends well beyond. 'When it comes to landscapes, travelogues, even current events, is it not necessary that the operator put down his camera and choose the vista, take in the effect of light, evaluate the scenery and choose the framing? In short, does he not give the work he will produce his direction and personality?'⁵³ Havermans also highlighted editing, scriptwriting, and acting as tasks dependent upon the thoughts of human agents. He made no grand claims for the quality of films. Rather, he noted analogies with works such as statuettes and newspaper illustrations. 'Even if a work is modest, it is nonetheless art, even if we need the aid of an instrument to create and experience that work. Cinema is no different.'⁵⁴ Having highlighted the necessity of agency, he addressed the second paragraph of Article 14:

undoubtedly influenced by the views of the opponents of cinematographic art [...] the drafters of the Berlin Convention felt obliged to insert in the text certain deplorable restrictions. Instead of asserting frankly 'cinematographic productions are protected as literary and artistic works' and stopping there, they added the words: 'If by the staging devices or the combinations of incidents represented, the author will have given the work a personal and original character.'⁵⁵

⁵² Charles Havermans speech is reproduced in *Annuaire du Commerce et de L'industrie Photographiques & Cinématographiques pour la France et L'étranger: Deuxième Partie – 'Cinéma' Annuaire de la Projection Fixe et Animée (1911) 7-14, 8*. Quotations from this work are the author's translations, with assistance from Thom Currie.

⁵³ *Ibid* 9.

⁵⁴ *Ibid* 10.

⁵⁵ *Ibid* 11.

Something is a work of art only if it ‘presents a personal and original character,’ but, he claimed, locating originality in films cannot be restricted to ‘staging devices or the combination of incidents.’ The conditional ‘if’ in the last sentence means ‘the question of artistic value will be left to the discretion of the magistrates, which is a formidable danger we have always attempted to eliminate.’ Article 14 also sets a different threshold for ‘personal and original character’ between dramatic films and ‘the reproduction by cinematography of a literary, scientific or artistic work.’ The former requires a discernible original quality evident in acting, staging, and incidents, while the latter, lacking this form of originality, is likely to have protection refused.⁵⁶

Havermans lamented the poor understanding of film in the law. ‘Cinematography is an art of which the secrets are still greatly unknown, which leads to the misconceptions that we have encountered in certain judicial decisions.’⁵⁷ It is bad enough judges needed to make aesthetic judgements; it is worse they did not recognise, or could not consider, a film’s expressive qualities beyond those taken from stage performances. Havermans did not stop there. Article 14 was all the more problematic because Article 3 of the Berlin Act resolved the question whether photography was mere mechanical reproduction or capable of a ‘personal or original character’ by protecting fully ‘photographic works and [...] works produced by a process analogous to photography.’⁵⁸ He questioned why the Berlin Act did not treat film similarly. To achieve this parity, he proposed to the Congress a motion requesting the Berne Convention omit from paragraph two of Article 14 all words following

⁵⁶ Ibid.

⁵⁷ Ibid 12. Havermans refers to the case concerning the film *The Apparition of the Virgin to Bernadette*, heard at the Court of Appeal of Pau, 18 November 1904.

⁵⁸ Ibid 13.

‘protected as literary or artistic works.’ This was agreed under Motion 19.⁵⁹ The wording of Berne finally reflected the Congress’ motion in the Brussels Act 1948.⁶⁰

In 1911, Haverman’s comments the previous year were timely. What we now understand as cinema was emerging. Previously, Gaudreault explains, films were fundamentally different. Edison and the Lumières, amongst others, invented apparatuses, not cultural practices.

[T]he kinematograph was seen by its first users as a simple ‘reproduction’ device, one capable not of producing things, but of reproducing them as they are, as products of pre-existing cultural series. The kinematograph was used to record vaudeville numbers, magic acts, everyday scenes, living portraits, stage acts, fairy plays, and the like.⁶¹

It is a mistake, he argues, to view kinematography as experimentation leading teleologically to cinema’s *natural* narrative state. Doing so misconstrues the medium’s first twenty years, undervalues the ways in which practitioners integrated the technology with extant culture, and mistakes subsequent contingent narrative form and institutional practices for the medium’s essential properties. Méliès used the camera to enhance the fairy theatre, the Lumières to advance their photography. Neither produced cinema because it did not yet exist.⁶²

⁵⁹ Ibid 16.

⁶⁰ I do not claim the Congress’ motion caused the amendment to Article 14 in the Brussels Act 1948.

⁶¹ Gaudreault (n 45) 84. Kinematographers did not merely record. They explored the capacities of the medium and developed numerous techniques such as stop motion animation and superimposition. However, they deployed these techniques to produce films that referred externally to established cultural practices rather than internally to autonomous narratives.

⁶² Gaudreault (n 45) 42-3.

The shift towards institutional cinema, Gaudreault contends, began around 1907-8. Film industry trade journals appeared, such as *Moving Picture World* in the US, *Bioscope* in the UK, and *Ciné-Journal* in France. Previously films were discussed mainly in photography and stage entertainment trade journals. Film distribution moved from purchasing to rentals, which helped to increase film manufacturers' control over the industry. Additionally, 'various national and international umbrella organizations were founded, such as the Motion Picture Patents Company in the United States and the *Congrès international des producteurs de films* in France, thereby facilitating consistency and standardisation.'⁶³ This period also saw the emergence of early theoretical writings on film. In France writers and filmmakers contemplated the possibilities of film. In 'The Birth of the Sixth Art' (1911) Ricciotto Canudo argued that film was a synthesis of all the established arts. He did not describe an artistic cinema, but proposed one: 'It will be a superb conciliation of the Rhythms of Space (the Plastic Arts) and the Rhythms of Time (Music and Poetry)'⁶⁴ – '*the plastic Art in motion*'.⁶⁵ Abel Gance stated a year later 'The Cinema? No, as my friend Canudo says, it is a sixth art that has yet to advance beyond its first stammerings.'⁶⁶ Richard Abel notes that most of those writing about film in France in the years approaching 1910 'shared the view that the cinema was still a new form of theater' and that 'the dramatist or scenario writer was the real author of the film.'⁶⁷ Following this period, filmmakers and early theorists explored the

⁶³ Ibid 83-4.

⁶⁴ Ricciotto Canudo, 'The Birth of the Sixth Art' in Richard Abel (ed), *French Film Theory and Criticism: A History/Anthology 1907-1939*, vol 1 (Princeton University Press 1988) 58, 59.

⁶⁵ Ibid 65.

⁶⁶ Abel Gance, 'A Sixth Art' in Richard Abel (ed), *French Film Theory and Criticism: A History/Anthology 1907-1939*, vol 1 (Princeton University Press 1988) 66, 66.

⁶⁷ Richard Abel, 'Before the Canon' in Richard Abel (ed), *French Film Theory and Criticism: A History/Anthology 1907-1939*, vol 1 (Princeton University Press 1988) 5, 19.

medium's expressive qualities made possible by its material form. For instance, painter Léopold Survage 'used the analogy between the rhythm of sound in music and the rhythm of form and colour possible in a succession of images to envisage a new kind of cinema that would be neither narrative nor documentary.'⁶⁸ These explorations of film form demonstrated meaning was not *solely* in underscoring dramatic or recorded content. In 1912 the pseudonymous Yhcam published a series of articles in *Cine-Journal*, arguing for fundamental distinctions between theatre and film. Divergence benefitted both.⁶⁹

These debates were not limited to France. In the United States, Hugo Münsterberg explored in *The Photoplay: A Psychological Study* (1916) the divergence of film and theatre, and the aesthetic and psychological principles of the photoplay. Anton Kaes, Nicholas Baer and Michael Cowan's anthology of early German film theory presents further examples.⁷⁰ In these essays common themes emerge, such as divergent and shared properties between literature, theatre, and film; the importance of motion and action in film; the expressive capacities of film independent of its ability to record; the optical possibilities resulting from the variety of lenses available; variable frame rates; and camera movement. Writing in *Die Zukunft* in 1911, Eduard Bäumer contemplates 'Why couldn't the cinematograph be employed even for the highest theoretical knowledge of nature, or for philosophy?'⁷¹ He also

⁶⁸ Ibid 22.

⁶⁹ Yhcam, 'Cinematography' in Richard Abel (ed), *French Film Theory and Criticism: A History/Anthology 1907-1939*, vol 1 (Princeton University Press 1988) 67.

⁷⁰ Anton Kaes, Nicholas Baer, and Michael Cowan (eds), *The Promise of Cinema: German Film Theory 1907-1933* (University of California Press 2016)

⁷¹ Eduard Bäumer, 'Cinematograph and Epistemology' in Anton Kaes, Nicholas Baer, and Michael Cowan (eds), *The Promise of Cinema: German Film Theory 1907-1933* (University of California Press 2016) 78, 79.

positioned film within the history and philosophy of optics and vision, alongside the microscope and telescope. ‘The moving picture camera, too, can help us to expand our sensory experience to perceive movements that would otherwise remain imperceptible.’⁷² The importance of gesture and expression, isolated by the closeup and camera movement, and the epic scale of landscape recur throughout these writings, distinguishing between acting and setting in film and in theatre. The integration of acting, gesture, motion, action, setting, cinematography, and editing in film generates a coherent mode of address foreign to the theatre. In 1914 Kurt Pinthus argued film

is less the stage play than the novel that the photoplay resembles. While in the drama the characters are bound to the stage, in the cinema, as in the novel, the viewer can move with the actors and, in constant motion independent of spatial limitations, see the actions carried out. [...]

The cinema embarked upon the wrong path, and its decline began at the moment when it forgot its true nature, lost its independence, and set about filming established literary works instead of learning to invent its own plays (not stage plays) keyed to its unique capacities.⁷³

Pinthus characterised film as a medium with poetic potential. Its ability to combine locations, movement, and what he called ‘the trick’, or novel collections of events, ‘stimulate[s] the desire for experience, the desire to comprehend the fate of humanity and all earthly events – a desire that exists, repressed, in all human beings.’⁷⁴

⁷² Ibid 80.

⁷³ Kurt Pinthus, ‘The Photoplay: A Serious Introduction for Those Who Think Ahead and Reflect’ in Anton Kaes, Nicholas Baer, and Michael Cowan (eds), *The Promise of Cinema: German Film Theory 1907-1933* (University of California Press 2016) 199, 200-1.

⁷⁴ Ibid 203.

These and other writings from between about 1908 – 1915 highlight two main concerns. First, they identify a significant shift in mode of address in film, from what Gaudreault calls ‘monstrative attraction’ to ‘narrative integration’.⁷⁵ Film narration developed as a structured position in the story for the viewer. Tom Gunning calls this the ‘narrator system, [... which] appeared within an international change in narrative form [...] during the years 1908-13.’⁷⁶ Münsterberg elaborated this mode of address as the control of the viewer’s involuntary attention, which is largely absent in theatre.⁷⁷ Second, theorists explored film’s modernist credentials, particularly its engagement with space and time within industrial society. Filmmakers depicted speed, thrills, and novelties within narrative films to construct cinematic *experiences* as much as dramatic narratives.⁷⁸

The Berlin Act, the *Report of the Committee of the Law of Copyright* and its accompanying *Minutes*, and the 1911 Act all conceive of film as a medium to record and reproduce, which up to that point film generally had been. They address the underscoring dramatic work, not the film itself. Should this matter for CDPA 1988, since its understanding of dramatic work need not be taken from the 1911 Act? Yes. Recent definitions of film as a dramatic work have not escaped Havermans’ complaint. Havermans’ proposed a genuinely open definition of film content to replace a definition that limits which elements of a film can be considered to be expressive. Yet, approximately a century later, Buxton LJ’s pragmatic interpretation of CDPA 1988 in the context of Berne establishes mainly nominal, not

⁷⁵ Gaudreault (n 45) 52-55.

⁷⁶ Tom Gunning, *D.W. Griffith and the Origins of American Narrative Film: The Early Years at Biograph* (University of Illinois Press 1991) 25.

⁷⁷ Münsterberg (n 1).

⁷⁸ See for instance Ben Singer, *Melodrama and Modernity: Early Sensational Cinema and Its Contexts* (Columbia University Press 2001).

substantive, protection. Article 14^{bis} of the current form of the Berne Convention no longer specifies the means by which a cinematographic work achieves originality. CDPA 1988, though, does not obviously follow Article 14^{bis} fully, since protection applies only to the aspects of a cinematographic work that meet some understanding of dramatic content, even if that content does not constitute its expressive content.

Aesthetics

Buxton LJ's comments in *Norowzian (No.2)* exemplify this problem. He reasons that the film 'as a whole' needs to be considered, yet he focuses on the acting and combinations of incidents.

The theme and originality of *Joy* was, as Mr. Norowzian's evidence stressed, a representation in stylised form of a young man hesitating with tension when coming amongst a group of unknown people but gradually gaining confidence. That essence and originality of *Joy* is however, not reproduced at all in *Anticipation*. The drinker is not hesitant, but impatient. The only tension from which he suffers is not that of introspection, but of separation from his drink: as the advertiser of the drink no doubt wished to convey.⁷⁹

This account of these two films strips them of much of their expressive content. One could take Buxton LJ's description of *Joy* and produce a play, novel, or dance routine which reproduces it. Yet such a work would be so unlike *Joy* it would seem much further from infringement than *Anticipation*. Editing, lens choice, framing, frame rates, mise-en-scène, and colour are as integral to *Joy* as the dance. The simple story represented by the dance cannot be singled out as the film's original content with the remaining elements relegated to style

⁷⁹ *Norowzian (No.2)* (n 4) 77.

and technique. Collectively, these elements form the work's expression. Acting (including mime or dance), an arrangement of incidents, or action are neither necessary for, nor definitive of, films. In films in which these are present, they can be little more than incidental.⁸⁰

Filmic and dramatic content differ significantly. A dramatic work is typically complete at the point of composition, often but not necessarily in written form. Two companies performing the same play perform the same dramatic work, even if the performances diverge significantly. Films differ. Two films can be made from the same independent screenplay but remain discrete works. A film is not its script, nor is it a mere performance of it, but the completed work. It shares properties such as framing, composition, colour, and perspective with painting and photography; rhythm with music; narrative and narration with literature; and temporality, kinesis, and performance styles with dramatic works. Nourse LJ's assertion that a film is a dramatic work because it is a 'work of action [...] capable of being performed before an audience' does not clarify matters. To say a film is 'performed' departs from the word's natural meaning. Performance results from the actions of an agent. Noël Carroll explains that the projection of a film is a mechanical task, not a performance, whereas the performance of a theatrical work is an interpretation.⁸¹ Every film projection reproduces the same work, but every theatrical performance uniquely interprets an

⁸⁰ *Koyaanisqatsi* (1982), for instance, has no significant combination of incidents or action. It expresses its theme of industrial society's dehumanisation through graphic, often metaphorical means, utilising devices such as long lenses and fast motion cinematography.

⁸¹ There are exceptions. For instance, Ken Jacobs uses analytical film projectors to perform live projections. However, even in such cases Jacobs does not perform films, but projects films in performances. Similarly, early kinematographic projectionists performed *with* films, juxtaposing films, slides, and other media, sometimes to produce thematic shows. Even here film is an element of a performance, not itself performed.

antecedent work. The performance of a theatrical work is itself a work of art; the projection of a film is not, even if the film itself may be.⁸² Additionally, section 180(2) of CDPA 1988 lists those activities that constitute performance, but does not obviously include film projection. It specifies that performance is ‘a live performance given by one or more individuals.’ Recordings in relation to performances refer only to recordings of the live performances or re-recordings of recordings of the live performances. CDPA 1988 does not state how a film could *be* a performance that could be infringed. Furthermore, film actors do not perform films but perform for individual shots. These shots are composed by the cinematographer’s aesthetic choices and then subjected to post-production processes. Actors’ performances in narrative films are as fragmented as the dance in *Joy*, and for the same reason.

The notion that a film is a ‘work of action’ also does not fare well. Action implies movement occurring over time. There are at least three types of movement in film, all of which are complicated by the ways in which films can utilise time. First, films record and show profilmic objects in motion relative to the camera. Even a simple film such as the Lumière’s *Repas de bébé* (1895) shows the actions of a domestic scene and the gentle movement of leaves. Such films are effectively moving photographs. Additionally, profilmic movement can be reversed. Second, the camera moves relative to the profilmic objects in such techniques as the track, pan, and tilt. The static shot, as the unrealised possibility of camera movement, is part of this category. Third, a zoom is produced by changing the focal length within the lens during a shot. This alters the perceived distance and scale of planes in the image. As any motion occurs within time, any understanding of action must also account

⁸² Noël Carroll, ‘Defining the Moving Image’ in Noël Carroll and Jinhee Choi (eds) *Philosophy of Film and Motion Pictures* (Blackwell Publishing 2006) 113, 128.

for time. Any distance, including no distance, an object, camera, or lens covers over a set time constitutes an action. Even a film of a photograph, taken from a fixed camera, is a work of action because it has duration. It is not a mere copy of the photograph because it determines a temporal and optical viewing experience of the photograph, as if to say ‘consider this photograph under these conditions.’ Frame rates allow the representation of time in all three forms of movement to be altered. Recording at a greater frame rate than the playback rate (overcranking) produces slow motion, while recording at a slower frame rate (undercranking) produces fast motion.⁸³ Films also can have implied action. An edit between two actions, such as getting into a car in one shot, and out at a different location in the next, implies but does not show the intermediate action of travel. Additionally, films can represent simultaneous action in two or more locations, even though they present the shots of these locations sequentially. Thus, does ‘work of action’ refer to sensory perception or cognitive apprehension? Lastly, moving images are not on screen, but in the minds of viewers. The motion in filmic images is perceptual, not actual.⁸⁴ The intermittent action of the projector exploits our perceptual capacities. Strictly speaking, the only action in a film projection exists in the projector and in the minds of the viewers. Given the complexities of motion in time in film, what constitutes a ‘work of action’ in film?

Determining the original contents of films rests, not with the definition of films as dramatic works, but with the aesthetic philosophy on which the classification rests.⁸⁵ Holmes J, in *Bleinstein v. Donaldson Lithographing Co.* (1903), warned against ‘persons trained only

⁸³ Both *Joy* and *Anticipation* use undercranking.

⁸⁴ For more on the cinematic apparatus and perception, see Münsterberg (n 1).

⁸⁵ Although I will use the term ‘artworks’ I do not imply works need to be works of art, only that are the kind of works protected by Article 2 of Berne.

to the law' judging the worth of works because they lack expert knowledge in the arts. If artworks 'command the interest of any public, they have commercial value [...] and the taste of any public is not to be treated with contempt.'⁸⁶ In principle, legislators, like justices, intend aesthetic neutrality. In practice, they struggle to achieve aesthetic neutrality because aesthetic judgements, and therefore aesthetic theory, are unavoidable. By engaging in aesthetic judgements, Holmes J argued, those trained in the law risk conservative assessments of works based on their understandings of historical practices rather than evolving conventions. By restricting the legal understanding of film to dramatic content in 1911 and 1988, UK legislators also, even if inadvertently, classified film conservatively.

Filmmakers communicate as much through pictorial and sonic composition and editing as acting, character, and combination of incidents. The meaning of a film such as *The Outlaw and His Wife* (1918) owes as much to Julius Jaenzon's cinematography, which relies on allusions to Northern Romantic landscape painting, as it does to Jóhann Sigurjónsson's play, Victor Sjöström's and Edith Erastoff's acting, Sjöström's direction, and Sjöström's and Sam Ask's script. Reducing the image composition to mere style and ignoring its allusions strips the work of much of its expressive content. Similarly, Eisenstein's brutal critique of Kerensky's provisional government in *October* (1927) exists in the edits and framings. Many shots in the sequence appear arbitrary and have no dramatic purpose. They are intelligible only to those aware that Eisenstein produced metaphors through edits. Stan Brakhage treats the surface of film stock in part as a painter treats a canvas. It is a surface on which images can be recorded, but equally it can be painted on, scratched and items can be affixed to it. So-called professional production standards, such as sharp focus and correct exposure, are for

⁸⁶ *Bleistein v Donaldson Lithographing Co.* 188 US 239 (1903) 251-2.

Brakhage not natural, but industrial impositions. His works frequently meditate on a variety of philosophical and mythological topics through formal experimentation.

However natural the classifications of literary, dramatic, musical, and artistic (LDMA) works may seem in CDPA 1988, they sit on aesthetic theory. Justine Pila argues that the definitions of LDMA works in CDPA 1988 ‘correspond to the formalist theory of art.’⁸⁷ This is not quite correct. Morris Weitz characterises formalism succinctly. Referring to the theories of Clive Bell and Roger Fry, he explains ‘The nature of art, what it *really* is, [...] is a unique combination of certain elements (the specifiable plastic ones) in their relations.’ For instance, the defining property of painting ‘is significant form, i.e., certain combinations of lines, colors, shapes, volumes – everything on the canvas except the representational elements.’⁸⁸ But LDMA categories derive principally from presumed function rather than form. The category of literary works requires words and other symbols, whether written, spoken, or sung, to be comprehended as things like stories, theories, or instructions, but excludes as dramatic works written works produced for performance, such as stage plays, even though they are also read and studied like works of literature. The category of artistic works includes a range of media but is limited to two- and three-dimensional static works to be presented for contemplation and aesthetic appreciation. Stasis, though, is a property of form, not itself a formal element. Moreover, this category co-opts the term ‘artistic’, which conventionally applies across all LDMA media. Lastly, the ambiguous definition of dramatic works and the tautological definition of musical works offer no clear means by which expression can be located in form, only function.

⁸⁷ Justine Pila, ‘Copyright and Its Categories of Original Works’ (2010) 30(2) Oxford Journal of Legal Studies 229, 231.

⁸⁸ Morris Weitz, ‘The Role of Theory in Aesthetics’ (1956) 15(1) The Journal of Aesthetics and Art Criticism 27, 28.

Monroe C. Beardsley's functionalist theory better explains film's inclusion in dramatic works, if not the formations of all LDMA categories.⁸⁹ Artworks, he contends, are defined by purpose: to appeal to aesthetic interests and provide aesthetic experiences. 'Such objects may be expected to have a distinctive function in the culture of the society, to be closely connected with certain institutions and roles, to deserve particular attention from sociological and anthropological students of the society, and so on.'⁹⁰ This theory explains the classification of film in the 1911 Act: as a means to record dramas and other attractions, and as a form of photography, albeit one used to produce filmstrips that are projected to produce moving images. These are the main cultural practices within which film appeared, and therefore which framed its aesthetic interests and experiences. In contrast to formalism, where value is determined intrinsically from the form, functionalism locates purpose extrinsically in the historically developed uses of media. Since photography adopted the picture-making practices of painting, and early films developed the recording capability of photography, functionalism explains why photography and film can sit alongside painting as artistic works in the 1911 Act. This attention to purpose also establishes functionalism's value neutrality. The theory encompasses works from popular arts to the high arts. The status a work achieves has no bearing on whether it serves its function.⁹¹

⁸⁹ To the best of my knowledge Stephen Davies terms Beardsley's theory functionalist. See Stephen Davies, *Definitions of Art* (Cornell University Press 1991).

⁹⁰ Monroe C. Beardsley, *The Aesthetic Point of View: Selected Essays* (Michael J. Wreen and Donald M. Callen [eds] Cornell University Press 1982) 302-3.

⁹¹ Monroe C. Beardsley, 'An Aesthetic Definition of Art' in Peter Lamarque and Stein Haugom Olsen (eds) *Aesthetics and the Philosophy – The Analytic Tradition: An Anthology* (Blackwell Publishing 2010) 55, 62.

But functionalism has an important limitation. Beardsley argues that for something to be an artwork it must be produced intentionally to appeal to aesthetic interests and experiences. Some works, though, are presented as artworks but lack the appropriate intentions. Beardsley distinguishes between ‘producing art and kidding art,’ the latter he contends produces no art at all. The paradigm case of kidding art is Duchamp’s *Fountain*. First, the intention behind its manufacture differs from its intended meaning as an artwork. The object Duchamp repurposed was produced solely as sanitaryware. Second, Duchamp did not appeal to aesthetic interests and experiences through the work. He aimed only to comment on art and the artworld. Commentaries, Beardsley insists, are not artworks. An artist declaring something to be an artwork does not make it so.⁹² Stephen Davies argues this conclusion undermines the functionalist’s account. Denying *Fountain* art status dismisses both the extent to which artists, art historians and art critics have accepted it as a seminal work of modern art, and the influence it has had on art production. By limiting the boundaries of art, rather than addressing that which is accepted to be art, the functionalist ‘cuts across the prevailing practice in a way that would appear to be legislative rather than descriptive.’⁹³ Beardsley provides a conservative account that aims to meet the demands of established aesthetic interests and experiences, but his theory struggles with non-standard, evolutionary, and especially revolutionary, artworks.

The 1911 Act provided historically contingent functional classifications for film, but filmmakers’ intentions and practices, and therefore films themselves, were changing. By 1915 this change was largely complete. Gaudreault calls the result ‘institutional cinema.’

⁹² Ibid 57-60.

⁹³ Davies (n 89) 74.

The institutionalization of a medium is the product of a slow process. It is an evolutionary and diachronic process that supposes the regulation, regularization, and consolidation of the relationship between those who work in it (stability); the choice of practices that are proper to the medium in question, thereby distinguishing it from other media (specificity); and the setting up of discourses and mechanisms that sanction those relationships and practices (legitimacy).⁹⁴

Narrative fiction constitutes the main form of institutional cinema. Film shifted from the recording of performances and attractions to an integrated, autonomous form with narrative structures much closer to literature than stage plays. Cinematography and editing in particular developed alongside acting methods to establish narrative point of view, temporal leaps, representations of memories and other mental states, and juxtapositions to establish meanings independent of image content. Narrative still served many of the functions of dramas, but the means by which these aesthetic interests were satisfied differed. Analogously, one could illustrate this shift with two paintings: one a painting of a beautiful flower, the other a beautiful painting of a flower. In the former the object reproduced is the object of aesthetic interest, in the latter it is the material representation. Institutional films have dramatic content, but only as an element of the broader possibilities for filmic expression that developed from extensive formal experimentation with the medium.

Narrative film appeals to the aesthetic interest in story. Both literature and dramatic theatre share this function. But cinematic experimentation and the application of film to other arts expanded the medium's aesthetic capacities well beyond literature and theatre. For instance, Walther Ruttmann, in his essay 'Painting with Time,' argues that

increasingly pressed toward the observation of temporal phenomena in intellectual matters, the gaze no longer has any use for static, reductive, and

⁹⁴ Gaudreault (n 45) 83.

timeless schemas in painting. It is no longer possible to experience the action of a painting, reduced to a single moment or symbolized through a ‘pregnant moment’ as genuine life.

Ruttman subsequently developed motion painting in his *Lichtspiel Opus* film series, beginning in 1921. He contended that such works exist between painting and music, and that ‘The technology for displaying the new art is cinematography.’⁹⁵ Norman McLaren also made numerous films through painting. The clear strips of film on which he and his collaborators painted are surfaces no different than any other surface a painter could use.⁹⁶ Such works are clearly paintings, but by being copied to positive film stock they become animated motion via projection. One could examine independently the painted 35mm stock that McLaren and Evelyn Lambert created for *Begone Dull Care* (1949) and the processed film capable of projection.⁹⁷ The filmmakers, though, did not produce a static work, however interesting it may be to view the filmstrip directly. The work is the projected film, and nothing else. It is an abstract painting in motion, which, McLaren notes, expresses his feelings about the Oscar Peterson Trio soundtrack.⁹⁸ Such films are works of action and movement and can be communicated to an audience, but they do not address the aesthetic interest in and experience of dramatic works. These non-figurative, non-narrative abstract films sit comfortably within the modernist artworld traditions from which they emerge. They

⁹⁵ Walter Ruttmann, ‘Painting with Time’ in Anton Kaes, Nicholas Baer, and Michael Cowan (eds), *The Promise of Cinema: German Film Theory 1907-1933* (University of California Press 2016) 450, 451.

⁹⁶ McLaren painted directly on film, rather than produce and photograph paintings.

⁹⁷ This film can be viewed online at the National Film Board of Canada website:
https://www.nfb.ca/film/begone_dull_care/

⁹⁸ Norman McLaren, *On the Creative Process* (Donald McWilliams [ed] National Film Board of Canada 1991) 38.

have little, if any, dramatic content, however defined, to infringe. Certainly one can manufacture an account of such a work's 'dramatic' content, but doing so misses its point. It is like judging a hammer on how well it functions as a door stop. CDPA 1988 effectively excludes protection of such works prescriptively by assigning them to a category that cannot accommodate their purposes and modes of expression. Yet as UK copyright law protects all films as dramatic works, it *appears* to conform with Berne and Infosoc. The fault lies in assuming moving image technologies have necessarily and predominantly a dramatic capacity and function.

A more responsive theory of art on which to base evaluations of the expressive qualities of works is needed. Davies defends procedural theories of art over functional theories, the former best characterised by the institutional theory of art.

[T]he defender of the institutional view of the definition of art holds that, whether or not it meets the point of art in general, a piece is or is not an artwork in accordance with its having that status conferred upon it by someone with the authority to do that conferring. Whereas a proponent of the functional view of the definition of art holds that only a piece that could serve the point of art could become a work of art, whatever procedures were followed and whatever the artistic authority of the person following them.⁹⁹

Like the functional theory the institutional theory offers no means to evaluate the merit of a work. Rather, it explains how something qualifies as an artwork.¹⁰⁰ Artworks, Davies contends, are social practices within social institutions. Artists express themselves by

⁹⁹ Davies (n 89) 39.

¹⁰⁰ Ibid 114.

utilising, and challenging, conventions recognised as belonging to a sphere of artworks.¹⁰¹ Originality in art therefore necessarily builds on established conventions. Davies' criterion that a work's status is 'conferred ... by someone with the authority to do that conferring' requires simply that those sufficiently knowledgeable of a sphere of artworks recognise a work as belonging to that sphere. George Dickie, a key proponent of the institutional theory, argues the theory accounts well for evolution in cultural practices. He postulates a tripart relation which constitutes an artworld. First, 'an artist is a person who participates with understanding in the making of a work of art.' Second, 'a work of art is an artefact of a kind created to be presented to an artworld public.' Third, 'a public is a set of persons the members of which are prepared in some degree to understand an object which is presented to them.' This public has '(1) a general idea of art and (2) a minimal understanding of the medium or media of a particular art form.'¹⁰² Moreover, artworlds evolve because they incorporate social negotiations between those who produce and engage with artworks. Davies explains that classifications can be both procedural and functional, but radical uses of conventions can cause works to diverge from established functions while still adhering to recognisable procedures. As radicality subsides, new functional understandings emerge.

Conclusion

¹⁰¹ Ibid 214. John Searle demonstrates that institutional theories are not limited to artworks, but describe the broader spheres of convention in social interaction. See his book *The Construction of Social Reality* (Penguin, 1995).

¹⁰² George Dickie, 'The Institutional Theory of Art' in Noël Carroll (ed) *Theories of Art Today* (University of Wisconsin Press 2000) 93, 98-100.

The 1911 Act prescriptively classified film consistently with functionalism. By protecting the dramatic works in films, it adhered to the purpose to which many films had been put, although subsequently this function and emerging cinematic practices diverged. The re-inclusion of films into the category of dramatic works in CDPA 1988 was, as Buxton LJ indicated, fundamentally pragmatic: as a means to meet obligations to the Berne Convention. Little sense, though, has been made of the contention that films can *be* dramatic works, either now or prior to 1911. However, the 1911 inclusion of film in the category of artistic works, in virtue of film being a photographic technology, suggests a solution. It will be recalled that section 35 of the 1911 Act included photographs as artistic works, alongside ‘works of painting, drawing, sculpture, and artistic craftsmanship’, and that the definition of photograph included ‘works produced by any process analogous to photography’.¹⁰³ CDPA 1988 could realign films with the category of artistic works by removing in the latter exclusions which limit consideration of that which constitutes a film’s expressive content. This proposal follows Havermans’ request that Berne remove the restriction in Article 14 of the Berlin Act, which limited any film’s ‘personal and original character’ to ‘the arrangement of the acting form or the combination of the incidents represented’, in order to incorporate film into Article 2 fully as a form of ‘literary and artistic work’, which it did in the Brussels Act 1948.¹⁰⁴ Article 2 is conceptually procedural, establishing an open list that accommodates evolution in conventions, forms, and technologies. Havermans intended Berne should protect whatever film was or should become. Determinations of what makes works part of a

¹⁰³ I elaborate on this issue above in the third paragraph of the section ‘The Norowzian Case and the Problem of Film as a Dramatic Work’.

¹⁰⁴ I elaborate on this concern in *ibid* and again in my discussion of Havermans’ paper presented at the Brussels Congress.

classification belong to the expertise in an historically dynamic artworld, not the functional codification of legislation.

Infosoc takes its definition of the term ‘work’ from Article 2 of Berne. *Norowzian (No. 2)*, which predates Infosoc, clarified that CDPA 1988 in principle protects all films in accordance with the Berne Convention, but symptomatically highlights the incompatibility between the open definition of protected works in Article 2 of Berne and the persistently prescriptive definition of film content in CDPA 1988. The scope Buxton LJ had, to analyse that which the law protects in *Joy*, enabled him to single out only a limited aspect of the work’s expressive content, despite his intention to interpret CDPA 1988 consistently with the Berne Convention. As long as UK copyright law protects film content in virtue of it being a form of dramatic work, the protection of film content will not in practice be universal. The expressive qualities that can be considered are determined by an obsolete conceptualisation, even though the underscoring definition has evolved, not a work’s intentional expressive content. Buxton LJ’s comments in *Norowzian (No. 2)* already demonstrate a willingness to open the understanding of films in UK copyright law fully to the intentions of Article 2 of Berne. The nudge of Infosoc and *Infopaq* may be just what CDPA 1988 needs to complete this journey.