

# 1 Introduction

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1. *The European audiovisual industry in the digital age* Cinema is an important part of European culture. And while there has been considerable debate on the social and cultural impact of television, no one will deny that this medium has shaped our vision of European society.

But the audiovisual industry is also a valuable part of the European economy and an essential support for other industries. In 2011, the core creative industries (film and video, videogames, broadcasting, music, books and press publishing) in the then twenty-seven countries of the European Union generated €558 billion in value added to gross domestic product (GDP), approximately 4.4% of total European GDP.<sup>1</sup> If one takes into consideration the associated supplier and customer industries, the total value added was €860 billion, or 6.9% of total European GDP.<sup>2</sup> Total employment in these industries is approximately 14 million, or 6.5% of the total workforce of the European Union.<sup>3</sup> The economic contribution of these industries in the five largest EU Members (Germany, France, United Kingdom, Italy and Spain) is even more significant.<sup>4</sup>

The sole cinema industry encompasses over 75,000 companies (excluding television production companies) in the European Union.<sup>5</sup> In 2011, it employed more than 373,000 persons and generated

<sup>1</sup> The Economic Contribution of the Creative Industries to EU GDP and Employment, Evolution 2008–2011, TERA Consultants, September 2014.

<sup>2</sup> *Ibid.* <sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* Total creative industries (core, suppliers and customers) represented 9% of jobs in the United Kingdom, 7% in Germany and 6.3% in France (and, respectively, 9%, 6.1% and 7.9% of national GDP).

In the United Kingdom, a 2014 Study of Department for Culture, Media and Sport revealed that in 2012 the UK film, TV, video, radio and photography industries generated 238,000 jobs (more than 13% compared to 2011). A French study ('France: First Panorama of Cultural and Creative Industries', EY, November 2013) estimated the number of direct jobs generated in France by cinema and television industries in 2011 to be 236,000.

<sup>5</sup> An overview of Europe's film industry, EU Parliament Research Service, I Katsarova, December 2014, p. 3.

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€60 billion in revenue.<sup>6</sup> France, Germany, the United Kingdom, Italy and Spain account for around 80% of releases, turnover and workforce.<sup>7</sup> In spite of structural weaknesses<sup>8</sup> and difficulties for European films to reach their potential audience in Europe and in the global market, this industry still produces a large number of films, and their budgets are increasing.<sup>9</sup>

However, the digital revolution of the 1990s has transformed this industry and the way audiovisual contents are distributed and viewed. Physical in-store retail businesses have declined<sup>10</sup> to the benefit of online players (mainly from the United States). New ‘ecosystems’ for media consumption, new business models and audience strategies have emerged.<sup>11</sup> The advent of the Web 2.0 in the last decade, the development of portable players and the seemingly infinite storage capacity of modern storage media have generated new uses for audiovisual works and new expectations from the general public. Changes in behaviour are spectacular. So far cinema attendance has remained stable<sup>12</sup>, but on-demand services develop rapidly.<sup>13</sup> At present, a significant part of the

<sup>6</sup> *Ibid.*    <sup>7</sup> *Ibid.*

<sup>8</sup> As identified by the European Commission on European Film in the digital area, Bridging cultural diversity and competitiveness, COM (2014) 272 final, p. 5: fragmentation of production and financing, limited opportunities and incentives to internationalise projects and to target several markets, focus on production and limited attention to distribution and promotion, shortcomings in entrepreneurial skills and cross-sectorial partnerships.

<sup>9</sup> In the United Kingdom, 182 films were produced in 2013 (i.e., received final certification as British films) for a total budget of £1,353 million (*BFI Statistical Yearbook 2014*), against 116 films and £562.8 million in 1997 (*BFI Film and Television Handbook, 2000*); in 2013, 270 films were produced in France (against 183 in 1998 (Source: CNC statistics)), 236 in Germany and 167 in Italy (Sources: European Audiovisual Observatory and Direzione Generale Cinema).

<sup>10</sup> C. Grece, A. Lange, A. Schneeberger and S. Valais, *The Development of the European Market for On-Demand Audiovisual Services*, European Audiovisual Observatory, March 2015.

<sup>11</sup> See Alejandro Pardo, ‘Hollywood and the digital revolution: new consumers, new markets, new business models’, *Mise au point* [online], 4, 2012.

<sup>12</sup> See European Audiovisual Observatory Yearbook 2012 – Vol. 2, p. 222 (966 million in 2011). Attendance, however, decreased in some Member States like France, Italy, Spain, Portugal, Bulgaria, Slovenia and Slovakia. US productions remain dominant. In 2012, in the European Union, US productions represented 19.84% of theatrical releases and 65.11% of cinema admissions (Source: European Audiovisual Observatory). This situation is mirrored on the other exploitation platform (The European Commission’s Communication of 2014, ‘European film in the digital era’ (COM (2014) 272 final)).

<sup>13</sup> COM (2014) 272 final, p. 4: ‘In 2011, consumer spending on audiovisual content through digital and online platforms and services rose by 20.1% to a total of EUR 1.2 billion, while European consumer spending on DVD fell by 10% for the seventh consecutive year to a total of EUR 9.4 billion. For the foreseeable future, a continuing growth is expected in digital and online forms of delivery for the European video sector. For example, total revenue generated by provision of VoD over proprietary networks (so called walled “garden services”) prevail over distribution on the internet. In Europe such revenues are expected to grow from EUR 850 million in 2011 to EUR 1.5 billion in 2017.

public is most likely to watch films online or to download them.<sup>14</sup>  
 The development of cloud computing will reinforce this trend.

2. *A complex and evolving copyright framework* In this context, the protection of film works and television programmes has been a key issue. The legal activity induced by the necessary adaptation of the copyright framework to this new, evolving environment has been exceptional. At the national level, most developed nations have introduced changes in their copyright laws in order to protect more specifically new audiovisual actors and operators and to cover new uses for audiovisual works. At the European level, the fourteen directives adopted in the field of copyright instituted a high level of protection for performers, film producers and broadcasting organisations. On an international level, the need for a swift and efficient harmonisation of the level of protection for audiovisual works was one of the factors which caused the move from the WIPO in favour of a treatment of copyright through the GATT.<sup>15</sup> This protection at the international level was further reinforced by the WIPO Treaties of 1996, and a new instrument on the protection of audiovisual performance was adopted in 2012. The long-awaited WIPO Treaty on the protection of broadcasting organisations could follow shortly.

However, these at reforms have resulted in a complex legal environment, both at national and at European levels. Many provisions of the EU copyright directives are compromises between different legal traditions, and these left untouched sensitive issues. In regard to films, important differences continue to exist among Member States on fundamental questions covering the whole spectrum of copyright protection and, in particular, authorship, exceptions and contracts. The harmonisation of related rights remains incomplete, and many provisions of the existing directives (especially of the Information Society Directive) have proven difficult to apply.<sup>16</sup>

In addition, new uses and consumer expectations have generated tensions over right clearance and copyright management issues. Over the last

Spending on DVD/BD (Blue Ray Disc) is predicted to decline. Sources: European Audiovisual Observatory, Yearbook 2012; Screen Digest database 2013.<sup>9</sup>

In the United Kingdom, in 2013 the value of on-demand services grew by 37% compared to 2012 and accounted for 8% of total film revenues (*BFI Statistical Yearbook 2014*).

<sup>14</sup> See *A Profile of Current and Future Audiovisual Audience*, Final report to the European Commission, Attentional, Headway International and Harris Interactive, December 2013, pp. 23–25.

<sup>15</sup> See V. Porter, *Beyond the Berne Convention*, John Libbey, 1991, pp. 79–85.

<sup>16</sup> As evidenced by the number of questions referred by national courts to the CJEU.

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five years, the European Commission has produced or commissioned an impressive number of consultations, reports, communications and declarations on these or related issues.<sup>17</sup> However, the few successful European initiatives in this area have a limited impact on audiovisual works.<sup>18</sup>

In the meantime, the Court of Justice of the European Union, faced with difficulties in applying the existing directive and following its internal market agenda, has extended harmonization beyond the text of the directives through systematic interpretation, the discovery of autonomous concepts of EU law or references to broader concepts.<sup>19</sup> Its case law has become a major source of rules in our domain (as could be evidenced by a simple comparison between the two editions of this book) but is increasingly difficult to follow. Moreover, some of its recent decisions are controversial.<sup>20</sup>

3. *The challenge of mass piracy* At the same time, the audiovisual industry is faced with an even more important challenge: piracy has developed on a mass scale through peer-to-peer, streaming and direct download services. The film industry is now, after the music industry, its main victim. Figures are astounding. A 2011 study<sup>21</sup> estimated that 23.76% of traffic over the global Internet<sup>22</sup> was infringing.<sup>23</sup> There is no social consensus

<sup>17</sup> See para. 48.

<sup>18</sup> Initiatives on cross-border licensing have been limited to musical works. The Orphan Works Directive has a very limited scope, and in relation to film its practical utility could be questioned. The scope of the Collective Management Directive is much broader, but its provisions on multi-territorial licensing for online exploitation are restricted to musical works.

<sup>19</sup> It did so in relation to the list of protected works, originality or exclusive rights. It might well do so in the future in relation to contracts or moral rights.

<sup>20</sup> See, e.g., the *Svensson* and *Bestwater* cases on hyperlinking, para. 166.

<sup>21</sup> Envisional, 'Technical Report: An Estimate of Infringing Use of the Internet', 2011 (commissioned by NBC Universal to analyse bandwidth usage across the Internet with the specific aim of assessing how much of that usage infringed upon copyright).

<sup>22</sup> Excluding pornography.

<sup>23</sup> 'BitTorrent traffic is estimated to account for 17.9% of all internet traffic. Nearly two-thirds of this traffic is estimated to be non-pornographic copyrighted content shared illegitimately such as films, television episodes, music, and computer games and software (63.7% of all bittorrent traffic or 11.4% of all internet traffic). Cyberlocker traffic – downloads from sites such as MegaUpload, Rapidshare, or HotFile – is estimated to be 7% of all internet traffic. 73.2% of non-pornographic cyberlocker site traffic is copyrighted content being downloaded illegitimately (5.1% of all internet traffic). Video streaming traffic is the fastest growing area of the internet and is currently believed to account for more than one quarter of all internet traffic. Analysis estimates that while the vast majority of video streaming is legitimate, 5.3% is copyrighted content and streamed illegitimately, that is, 1.4% of all internet traffic. Other peer to peer networks and file sharing arenas were also estimated to contain a significant proportion of infringing content. An examination of eDonkey, Gnutella, Usenet and other similar venues for content distribution found that on average, 86.4% of content was infringing

against piracy. A recent study revealed that among film viewers interviewed, 68% used free downloads, half of them weekly, and 56% free streaming.<sup>24</sup> Although the high cost of cinema or legal platforms is the most commonly given explanation (50% of respondents), ease of access, lack of availability and missed opportunity are also key motivations.<sup>25</sup> The impact of global piracy (all sectors) on job losses in the five main European countries between 2008 and 2011 was estimated as between 204,089 and 1,095,125.<sup>26</sup>

This evolution has forced the industry and legislators to concentrate on enforcement issues and to explore new methods to stop or reduce infringements: actions against intermediaries, new procedures (warning laws, graduated response, etc.).<sup>27</sup> These add a new layer of regulation to an already complex legal environment.

4. *Structure of this book* In what follows, we will attempt to draw a picture of the present scheme of film protection in Europe, at European Union and national levels, with a special emphasis on these developments. After an historical introduction (Chapter 2), this study is divided into nine chapters covering the main aspects of film protection: the definition of the subject-matter of protection (Chapter 3); the question of authorship and initial ownership (Chapter 4); the regime of copyright and author's right contracts (Chapter 5); the exclusive rights granted to film authors (Chapter 6); the limitations of and exemptions from these rights (Chapter 7); the question of moral rights (Chapter 8); the regime of performers' rights (Chapter 9); enforcement (Chapter 10); and the protection of foreign film works (Chapter 11). Appendix 1 is a basic guide to the European Union, intended for readers unaware of the institutional system of the European Union and its law. Appendix 2 lists the principal national copyright legislation of the EU Member States discussed in this book. Appendix 3 lists the EU copyright directives. Appendix 4 details the

and non-pornographic, making up 5.8% of all internet traffic.' Envisional Report, *ibid.*, pp. 2–3.

<sup>24</sup> *A Profile of Current and Future Audiovisual Audience*, Final report to the European Commission, Attentional, Headway International and Harris Interactive, December 2013, p. 26. 'Q125: "Which platform/channel do you use to watch films?" Multiple answers to 13 items incl. "free downloads (MPEG 4, DivX, etc. files stored on PC, local drive, home network or CD-ROMs)" and "free streaming (live film played from a free website, without downloading/storing any file on PC)" (at least once a day, 2–3 times a week, once a week, once or twice a month, less often than once a month or never).'

<sup>25</sup> *Ibid.*, p. 27.

<sup>26</sup> The Economic Contribution of the Creative Industries to EU GDP and Employment, Evolution 2008–2011, TERA Consultants, September 2014, p. 46.

<sup>27</sup> See Chapter 10.

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status of the adherence of the EU Member States to international copyright conventions. Finally, Appendix 5 details the US copyright relations with the EU Member States.

5. *A word on the terminology used in this book (copyright/author's right/related rights)* For convenience the term 'copyright' will be used as a generic term covering both copyright, as this term is understood in Anglo-American legal systems, and author's right (or *droit d'auteur*), as understood in civil law systems. As will be explained, although copyright and *droit d'auteur* refer mostly to the same category of intellectual property rights, both expressions cover different approaches, techniques and solutions. When the distinction becomes necessary, both expressions will be used.

When reference is made to EU Law, the expression 'related right' will be used to describe rights in performances, in sound recordings, in first fixations of films ('film recordings') and in broadcasts. The expression 'neighbouring rights' refers to the terminology used in most Member States of the author's right tradition to describe related rights. One should remember, however, that under UK and Irish copyright, sound recordings, film recordings and broadcasts are protected under a copyright.

Lastly, one should be aware that moral rights are an integral part of the author's right in Member States of the author's right tradition, whereas these form a set of rights distinct from copyright in those of the copyright tradition.

## 2 History of film protection in Europe

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6. *The birth of an industry* Credit for the discovery of animated photography cannot be given to any one person.<sup>1</sup> Following a long line of inventions in the fields of optics and photography,<sup>2</sup> the first motion picture, that is, the first sequence of photographs taken on a film strip in order to give the impression of movement, was probably made in 1888,<sup>3</sup> and several patents on camera and viewing apparatuses were granted in the following years.<sup>4</sup> Edison applied for patents on the photographic camera called the Kinetograph and on a viewing apparatus called the Kinetoscope in April 1891.<sup>5</sup> The first Kinetoscope parlour opened in New York on 16 April 1894.<sup>6</sup> However, the Kinetoscope could only be viewed by one person at a time,<sup>7</sup> and the Kinetograph was itself a rather heavy and clumsy device.<sup>8</sup> Shortly after their release, the French inventors Louis and Auguste Lumière built a handier apparatus which was a combined camera, processor and projector, patented as the *Cinématographe* in March 1895. The invention was shown to an audience on 22 March 1895, and the first ‘theatre’ opened on 28 December 1895 in the basement of the Grand Café in Paris, on the Boulevard des

<sup>1</sup> A reference book on the matter is H. Hecht, *Pre-Cinema History, An Encyclopedia and Annotated Bibliography of the Moving Image Before 1896*, BFI/Bowker Saur, 1993. See also F. A. A. Talbot, *Moving Pictures, How They Are Made and Worked*, London, 1912.

<sup>2</sup> In optics, the illusion of movement had long been shown to public audiences by stroboscopic toys or devices which had been combined with magic lanterns. In photography, scientific interest had developed in the analysis of motion, in the United States with the works of Edward Muybridge, and in France with Etienne-Jules Marey.

<sup>3</sup> In Edison’s laboratory, and maybe earlier by Etienne-Jules Marey. See also the work of W. E. Friese Greene in the United Kingdom.

<sup>4</sup> E.g., in the United States, Louis Aimé Augustin Le Prince obtained a patent for a combination of camera and projector in 1888. In the United Kingdom, in 1889, W. E. Friese Greene applied for a patent on a camera which could not be used as a projector.

<sup>5</sup> The Kinetograph was invented in the autumn of 1890.

<sup>6</sup> Edison did not market his invention himself but instead licensed it. On early film distribution practices, see S. M. Donahue, *American Film Distribution*, UMI Research Press, 1987. A Kinetoscope parlour opened in London in the autumn of 1894.

<sup>7</sup> Apparently, Edison refused to project motion pictures to a public audience, as he thought the effect would be lost.

<sup>8</sup> Although it produced sound films.

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Capucines.<sup>9</sup> Lumière's representatives gave the first public demonstration of the *Cinématographe* in London a few weeks later, on 20 February 1896, at the Marlborough Hall of the Royal Polytechnic Institute on Regent Street. The invention spread rapidly throughout Europe and met with immediate success. Public screening developed rapidly,<sup>10</sup> especially when theatre owners replaced short sketches or documentaries with more elaborate dramas.<sup>11</sup>

**Section I Early stages of copyright protection (1896–1908)**

7. *Questions raised by 'photo-plays' and 'cinematograph films'* The new works, soon to be called photo-plays, cinematograph works or cinematograph films,<sup>12</sup> were universally perceived not as a form of art but, rather, as a form of entertainment or scientific curiosity. But the importance of the industry and the extent of piracy called for a clarification of their legal status. In terms of copyright protection, they raised two series of questions. The first concerned the protection of films against infringement by competitors and unlicensed theatre owners. The second concerned the possibility of infringing pre-existing works, mainly novels or dramas, through cinematography.

Due to a tradition of piecemeal or restrictively drafted legislation, in these early days most copyright laws in Europe were ill-adapted to the new medium (discussed in Part I later). This resulted in very diverse schemes for protection, if any, and created difficulties for the protection of films abroad, at a time when these silent works had a universal and immediate appeal. These difficulties were to be partly solved by the Berlin Conference of the Berne Convention in 1908 (discussed in Part II later).

*Part I National legislation before the Berlin Conference*

8. *Films as series of photographs or dramatic works* Faced with the first claims for protection by the fast-growing industry, lawyers hesitated in their approach to the new works. A first reaction was to consider cinematograph films as mere mechanical apparatuses, not unlike phonogram cylinders, and to exclude them from copyright protection. More

<sup>9</sup> Among the short films shown was 'La sortie des usines Lumières' ('Workers Leaving the Lumière Factory').

<sup>10</sup> E.g., there were around fifty Nickelodeons (theatres dedicated to motion pictures) in New York in 1900, more than 400 by 1908 and 6,000 in 1909 (Donahue, *American Film Distribution*, p. 8).

<sup>11</sup> Like Georges Méliès' 'A Trip to the Moon' in 1902, or E. D. Porter's 'The Great Train Robbery' in 1903. Méliès himself produced more than 400 films between 1895 and 1914.

<sup>12</sup> Hence creating a long-lasting confusion between the work and its physical recording.



satisfactory was the analogy to photographs. The problem was that the copyright status of photographs was still being debated in most countries. In this respect, European countries could be classified into three categories. In several countries, photographs were given the same protection as other copyright works, that is, were protected under a 'full' copyright. This was the case in France and in countries influenced by French law. In other countries, the protection granted to photographs was more limited (at least in duration) than the protection granted to other subject-matter. This was the case in Germany, in countries influenced by German law and, to a lesser extent, in the United Kingdom. In the remaining group, the protection of photographs was uncertain and subject to discussion.<sup>13</sup>

As films evolved from mere pantomimes to more elaborate dramas, more satisfactory analogies were developed to other copyright works, especially dramatic works, which in most countries was to result in protection as literary and artistic works.

These hesitations between protection as a series of photographs and as 'dramatic works' had consequences which remain visible in some aspects of modern copyright protection for film.<sup>14</sup>

9. *Early protection in the United Kingdom* In the United Kingdom, before 1911, the major copyright textbooks are silent on the subject of cinematographic works, and legal literature on the subject is scarce.<sup>15</sup> Before 1911, it was widely acknowledged that since photographs were protected under the Fine Arts Copyright Act 1862,<sup>16</sup> cinematograph films could be protected as a series of photographs.<sup>17</sup> The main problem with this indirect protection was that, under the Fine Arts Copyright Act 1862, in case of transfer of the negative, the copyright was lost unless it was either expressly reserved to the vendor or conveyed to the assignee in a writing signed by the vendor.<sup>18</sup> Also, no action was sustainable, nor any penalty recoverable, in respect of anything done before registration at

<sup>13</sup> At the international level, the copyright protection of photographs would be instituted in 1908 with the Berlin text of the Berne Convention.

<sup>14</sup> E.g., it can explain the adoption of a specific neighbouring right close to the photographic copyright in favour of the film producer in Germany or the protection of non-dramatic films as series of photographs in Italy. See para. 60.

<sup>15</sup> See, however, a short study from W. Carlyle Croasdel, *The Law of Copyright in Relation to Cinematography*, London, Ganes, 1911.

<sup>16</sup> 25 & 26 Vict., c. 68.

<sup>17</sup> *Barker Motion Co. v. Hulton* (1912) 28 TLR 496. In the United States, photographs and negatives were protected under an Act of 3 March 1865 (c. 126, 13 Stat. 540); accordingly, in *Edison v. Lublin*, 122 Fed. 240 (CCA 3d 1903), it was held that films were copyrightable as a series of photographs under s. 5(j) of Title 17 USC.

<sup>18</sup> 1862 Act, s. 1.

Stationers' Hall.<sup>19</sup> The 1862 Act provided for a registration of each photograph taken from a different negative, but at that time, photo-plays were registered only as reels of films. In consequence, some authors doubted that a registration of reels would be sufficient to trigger the protection of the 1862 Act.<sup>20</sup> Finally, there was no performing right or 'right of exhibition' in relation to photographs. Due to transitional arrangements, copyright subsisting in pre-1911 film frames as photographs has now expired.<sup>21</sup>

Protection under the heading of dramatic works was thought even more uncertain because of the ruling in *Tate v. Fullbrook*,<sup>22</sup> in which the Court of Appeal decided that what was protected under the Dramatic Copyright Act of 1833 and the Copyright Act of 1842 had to be 'capable of being printed and published'.<sup>23</sup> However, it is clear that this condition could have been met by the written script. It has been submitted that the ruling did not prevent the final cinematographic work, distinct from the script and fixed in film form only, from being protected under the 1833 Act to the extent it was capable of being so printed and published.<sup>24</sup> But as far as the 1842 Act is concerned, the author of a dramatic work had the copyright in it only if it took the form of a 'book', which excludes fixations in film form only.<sup>25</sup> Therefore, copyright protection was limited to the written script, and the production of such a script was a prerequisite for protection. Under the old law, the author of the dramatic work was the initial owner of the rights subsisting in the works.<sup>26</sup>

The provisions as to commencement and duration of the statutory copyright and 'play-right' in dramatic works are complex and their construction uncertain.<sup>27</sup> In addition to this statutory protection, a perpetual

<sup>19</sup> Section 4. <sup>20</sup> Croasdel, *The Law of Copyright in Relation to Cinematography*, p. 12.

<sup>21</sup> 1956 Act, Sched. 7, para. 2; 1988 Act, Sched. 1, para. 5(1).

<sup>22</sup> [1908] 1 KB 821; 98 LT 706; 77 LJKB 577; 24 TLR 347; 52 SJ 276.

<sup>23</sup> See para. 17.

<sup>24</sup> H. Laddie, P. Prescott and M. Vitoria, *The Modern Law of Copyright*, Butterworths, 1995, para. 5.8: 'there would appear to have been no reason why a sequence of incidents, possessing enough dramatic unity to satisfy the above-quoted test, might not have been protected although fixated in cinematograph form only'. Sterling and Carpenter have also submitted that the celluloid strip might be regarded as a 'print' under *Tate v. Fullbrook*: J. A. L. Sterling and M. C. L. Carpenter, *Copyright Law in the United Kingdom*, Legal Books, London, 1986, para. 283, p. 112.

<sup>25</sup> See Laddie et al., *The Modern Law of Copyright*, para. 4.111 (but compare with *ibid.*, para. 5.8, quoted in n. 24).

<sup>26</sup> This was true even if the work was commissioned, and there was no special provision regarding the dramatic works of employees; see *Shepherd v. Conquest* (1856) 17 CB 427 (compare with s. 18 of the 1842 Act and s. 1 of the 1862 Act). Films published or performed before the 1911 Act are likely to be protected only through their script; in that case the author was the scriptwriter (and maybe the individual producer). On the determination of the author of the film as a dramatic work, see paras. 104 *et seq.*

<sup>27</sup> See Laddie et al., *The Modern Law of Copyright*, para. 4.113 and para. 2.8, n. 3.