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# Copyright Protection for Magic Tricks: A danger lurking in the shadows?

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## Abstract

The historical lack of interaction between IP regulation and the magic profession has entered a new chapter following the ground-breaking judgment in the US case of *Teller v Dogge*. Whilst there has been much commentary about the decision in the US, it has received little attention in the UK. This article therefore explores UK copyright protection for magic tricks and investigates the important question of how magic *should* be protected.

## Introduction

In the enigmatic world of magicians and grand illusions, looting of secrets is – and has historically been – rampant. During the “Golden Age” of magic,<sup>1</sup> the techniques adopted to steal tricks were more brazen (and arguably, through a nostalgic gaze, rather more charming), with magicians attending the performances of their rivals and sneaking backstage to discern the secrets behind their most impressive tricks. Until recently, magicians and IP lawyers alike considered that little could be done to prevent the pilfering of magic secrets. Well, little that could be done through the machinery of the law certainly. Magicians, therefore, rarely turned to IP law for protection and the profession has been said to operate in a so-called IP “negative space”.<sup>2</sup>

The term “negative space” is used to describe industries, such as magic, high fashion and *haute cuisine*, where the use of informal norms and sanctions is more prevalent, and usually more effective, than legal IP protections. Internal regulation amongst magicians seeks to create something of a “sharing economy”, where the degree of sharing of ideas is maximised within the community and the risk of IP exposure to the outside world minimised.<sup>3</sup> Indeed, there are a number of respected organisations in the profession – including Hollywood’s Magic Castle and London’s Magic Circle – that impose strict penalties, including professional blacklisting, on any performer deemed to have breached professional etiquette.<sup>4</sup> A tradition also exists where secrets are shared amongst magicians, but credit must be given to the inventor, thus providing a strong incentive for creativity as a means of building up a respected professional reputation.<sup>5</sup> Magic

norms are thus enforced largely through social pressure, and this has generally been effective at deterring most magicians from nefarious activity.

This interaction, or lack thereof, between IP regulation and the magic profession has entered a new chapter, however, following a ground-breaking judgment in March 2014.<sup>6</sup> The US District Court<sup>7</sup> in Nevada ruled that the copyright in one of Teller's – identifiable to many as the professionally mute half of American magic duo Penn & Teller – most famous and beloved illusions, *Shadows*, had been breached by another magician.<sup>8</sup> In the trick, Teller snips the leaves from the shadow of a rose projected onto a screen and the corresponding real petals from the flower casting the shadow fall to the floor. The magician registered a copyright for *Shadows* in the US in 1983 as a “dramatic pantomime” – representing something of a (deliberate?) amalgamation of the copyrightable categories of “dramatic works” and “pantomimes” – advising playfully that “this gothic pantomime has been performed by its creator over 1,100 times since 1976. It's about time he registered a copyright, don't you think?” Teller did not, therefore, register *Shadows* as a magic trick – which, due to the idea-expression dichotomy and the lack of protection available in the US for procedures and processes,<sup>9</sup> is generally considered to be non-copyrightable in itself<sup>10</sup> – but rather as a piece of performance art.

The magician later discovered that Dutch entertainer, Gerard Dogge,<sup>11</sup> had posted a copycat illusion on YouTube entitled “The Rose and Her Shadow” and was offering to sell the secret of the trick for \$3050. The caption underneath his video acknowledged that he had “seen the great Penn & Teller performing a similar trick, and now I'm very happy to share my version in a different and more impossible way for you”.<sup>12</sup> Teller issued a takedown notice for the video and offered Dogge money to cease performing the trick and selling its secret. Negotiations broke down, however, resulting in Teller filing a lawsuit for copyright infringement.<sup>13</sup> He requested an injunction to prohibit Dogge from performing and revealing the trick, and sought damages.

In a judgment that undoubtedly came as a surprise to both magicians and IP lawyers alike, US District Judge James Mahan found in favour of Teller. What made the decision particularly important and newsworthy was that successfully suing a magician for copying a magic trick was a feat that had no existing precedent,<sup>14</sup> with magicians having tried, and failed, to argue IP infringements in a handful of high-profile cases.<sup>15</sup> In *Glazer v Hoffman*,<sup>16</sup> for example, a magician was able to copyright the opening monologue to his signature trick in order to prevent a rival copying this aspect of his act, but the court considered the substance of the trick itself to be non-

copyrightable.<sup>17</sup> And in *Rice v Fox Broadcasting*,<sup>18</sup> the court upheld a number of defences put forward by FOX network in support of its argument that its infamous series of TV specials<sup>19</sup> – in which the secrets behind a number of famous illusions were exposed by a masked magician – was not similar enough to the plaintiff’s preceding work to infringe copyright.

Much has been written by US commentators on the ground-breaking *Teller v Dogge* case,<sup>20</sup> yet it has attracted relatively little attention on this side of the Atlantic. This article, therefore, explores the potential implications of the case for UK copyright law. It analyses the basis on which the US judgment was made, and considers whether it is likely that UK copyright law would be similarly construed. As a number of the world’s most prominent magicians hail from UK shores, this is a potentially significant issue. With this in mind, the next section explores the legal basis upon which *Teller v Dogge* was decided. This is followed by analysis of relevant aspects of UK copyright law, with consideration as to whether Teller’s case may have been similarly decided by British courts. In light of this analysis, the final section proceeds to explore the important question of how magic *should* be protected. In doing so, it considers the arguments for and against stronger copyright protection in this enigmatic profession, and offers a warning about the potentially detrimental and stifling effects that may result from the greater intrusion of formal copyright laws into the IP negative space currently occupied by the magic profession.

### **US Copyright and the *Teller v Dogge* Decision**

Arguably the most fundamental principle of copyright law, both in the US and UK, is that it protects the expression of an idea and not the idea itself, and thus:

At some level of abstraction, works may be viewed as embodying only similar “ideas”. Such a level of similarity would not be an infringement. Where to draw that line varies from case to case and courts have not been able to articulate some fine line as to what level of abstraction is permitted.<sup>21</sup>

Importantly, under US copyright law, protection does not extend to procedures, processes, systems, methods of operation, concepts, principles or discoveries,<sup>22</sup> and therefore in the realm of magic, the general position is that “methods of achieving illusions” are not copyrightable.<sup>23</sup>

Copyrightable categories under the US Copyright Act of 1976 (1976 Act) that may be relevant to the magic profession include dramatic works,<sup>24</sup> choreographic works,<sup>25</sup> and pantomimes,<sup>26</sup> with only the presentation and stylistic elements of such works protectable. They thus attract protection in the same way as other works in these categories that do not contain magic tricks:

[A] magic performance should be treated as any other type of performance work. If it contains a plot...and at least one “character”, with or without dialogue, it could be a “dramatic work”. If it has no plot or characters, but includes successions of rhythmic bodily movements organized into a “coherent whole”, often accompanied by music, it can qualify as a “choreographic work”. If it contains no such movement, but acts out “situations, characters or some other events with gestures and body movements”, it could be protectable as “pantomime”.<sup>27</sup>

The “pantomime” category seems particularly relevant. The pantomimes involved in magic tricks are copyrightable, despite the technical elements of illusions not attracting protection. Though not defined in the 1976 Act, the Copyright Office describes pantomimes as “the art of imitating or acting out situations, characters, or some other events with gestures or body movement”,<sup>28</sup> and they must contain a “significant amount of copyrightable matter in the form of specific gestures”.<sup>29</sup> Unlike the law prior to 1976,<sup>30</sup> choreography and pantomimes do not need to qualify as “dramatic works” in order to be copyrightable. In other words, they need not “tell a story”.<sup>31</sup>

To qualify for copyright protection, an original work must be “fixed” in a “tangible medium of expression”,<sup>32</sup> through, for example, recording a performance or providing a written description of how a magic trick is performed. Upon being so fixed, copyright law then protects that particular presentation of the illusion. The result of this, however, is that live magic performances do not attract copyright, unless they are simultaneously recorded.

Plaintiffs in US copyright infringement cases must show ownership of a valid copyright and that the defendant has copied their protected original work.<sup>33</sup> To demonstrate the latter, they must prove “that the works are substantially similar and that the defendant had access to...[the] protected work”.<sup>34</sup> Defendants can, however, rely upon a number of recognised defences. They can use the “merger doctrine” to argue that the supposedly infringing choreography was *the only* way of performing the trick: in other words, “if an idea is capable of being expressed in only one

way, the expression “merges” with the idea itself and is not subject to copyright protection”.<sup>35</sup> Or they can rely upon the *scènes à faire* principle, which allows performers to use material that is inherent to a particular genre, and therefore cannot attract protection.<sup>36</sup> In the realm of magic, Jenny Small uses the example of pulling a rabbit out of a hat.<sup>37</sup> A magician’s stereotypical attire of coattails and a cape, as well as the use of the classic white-tipped wand, would also fall into this category.<sup>38</sup> In these cases, plaintiffs are protected only against essentially identical copying.<sup>39</sup> Finally, the defendant can draw upon the “independent creation” defence to argue that she created the work without copying the plaintiff, or the “fair use” doctrine covering reasonable use for *inter alia* criticism, comment and research.<sup>40</sup> Claiming for copyright infringement thus “imposes a fairly high burden on the plaintiff who must demonstrate copying through substantial similarity and access whilst also negating any defenses put forward by the defendant”.<sup>41</sup>

Because Teller’s copyright registration for *Shadows* covered only the “dramatic pantomime” involved in its performance, the lawsuit was not *formally* concerned with revelations about the trick’s inner workings. The word “formally” is key here, however, for Teller was arguably using copyright protection in the performance of the illusion as a means of preventing its secret from being exposed. Such use of copyright law for ostensibly protecting the “non-protectable” raises important questions regarding how the law should operate in this area to balance the interests of magicians and the public. This is a key issue that will be returned to later in the article.

The lawsuit therefore addressed only the question of whether Dogge had unjustifiably copied Teller’s choreography. Teller has been hugely successful in enchanting audiences with his showmanship, with his deliberate professional silence ensuring that they remain captivated by his actions. Acknowledging that US copyright law protects pantomimes, Judge Mahan found in Teller’s favour. Whilst Dogge sought to challenge the validity of the registration of *Shadows* as a pantomime, the judge waived his objection, advising that:

While Dogge is correct that magic tricks are not copyrightable, this does not mean that *Shadows* is not subject to copyright protection. Indeed, federal law directly holds ‘dramatic works’ as well as ‘pantomimes’ are subject to copyright protection...The mere fact that a dramatic work or pantomime includes a magic trick, or even that a particular illusion is its central feature does not render it devoid of copyright protection.<sup>42</sup>

In deciding the case, Judge Mahan appeared to treat *Shadows* more as a dramatic work than a pantomime,<sup>43</sup> through “contrasting the elements typically used in cases involving literary works, screenplays and plays in his ‘substantial similarity’ analysis”.<sup>44</sup> With the Ninth Circuit<sup>45</sup> holding that “the court must first identify the similar elements in the works in question before the works can be considered and compared as a whole”,<sup>46</sup> it will generally consider similarities in “the plot, themes, dialogue, mood, setting, pace, characters and sequence of events”.<sup>47</sup> In recognition of the distinction in copyright between ideas and expression, the “substantial similarity” test in the Ninth Circuit involves an extrinsic and intrinsic element.<sup>48</sup> The former is “an objective analysis of concrete expressive elements” of the works being compared, involving consideration of whether the protectable elements are substantially similar.<sup>49</sup> The latter seeks to determine whether an ordinary observer would deem the works to have a similar feel and concept.<sup>50</sup>

Judge Mahan considered the extrinsic test to be met through observing that “the events and dramatic progression of these two works are nearly identical”.<sup>51</sup> And whilst Dogge sought to argue that because his method of performing the trick differed from Teller’s, the intrinsic element of the test ought to fail,<sup>52</sup> Mahan disagreed, stating that:

By arguing that the secret to his illusion is different than Teller’s, Dogge implicitly argues about aspects of the performance that are not perceivable by the audience. In discerning substantial similarity, the court compares only the observable elements of the works in question. Therefore, whether Dogge uses Teller’s method, a technique known only by various holy men of the Himalayas, or even real magic is irrelevant, as the performances appear identical to an ordinary observer.<sup>53</sup>

Following the judgment, Jared R. Sherlock observed that “Teller’s successful protection of his performance’s copyright, while preserving the illusion’s secret, marks an important shift in copyright’s ability to provide theft protection for magicians”.<sup>54</sup> Owing to the particular facts of the case,<sup>55</sup> Teller had successfully prevented another magician from revealing the procedure, process or system behind his signature illusion by drawing upon a formal legal regime that expressly excludes copyright protection for procedures, processes and systems.<sup>56</sup> Some might argue that this is a magical feat in itself. What seems undeniable, however, is that the decision raises important questions for magicians and IP lawyers in the UK: would the case have been decided differently by our courts, and if not, would this represent a positive or negative

development in the regulation of this idiosyncratic profession? Each of these questions will be addressed in turn.

### **How Might *Teller v Dogge* Have Been Decided in the UK?**

There has been much commentary in the US, both academic and populist, not only about *Teller v Dogge*, but about IP protection and the magic profession generally.<sup>57</sup> In the UK, however, few are talking about this issue, yet our shores have been, and continue to be, home to some of the most famous names in magic. P.T. Selbit (credited with being the first magician to saw a woman in half), the famous Maskelyne family of magicians, Tommy Cooper and, more recently, Derren Brown and Dynamo all have a place in the UK's rich history of professional magic. It is important to consider, therefore, how UK copyright law might respond to a case comparable to *Teller's*: how well protected are our professional magicians from illusion theft, and is the protection they currently receive likely to be the most appropriate for their needs?

UK copyright law is affected to a great extent by the copyright and related rights conventions.<sup>58</sup> As a signatory to the Berne Convention for the Protection of Literary and Artistic Works 1886, for example, the UK had to implement its requirements into national law, and as a member of the World Trade Organisation, it furthermore had to incorporate the basic copyright framework under the TRIPS Agreement.<sup>59</sup> The UK Copyright, Designs and Patents Act 1988 (CDPA) protects a number of categories of original works, including literary, dramatic, musical, and artistic works,<sup>60</sup> with the law covering works that represent “the author's own expression of the underlying idea”.<sup>61</sup> To attract copyright protection, authors must invest a minimum amount of “skill, judgement and labour” in their creations to meet the “originality” criteria.<sup>62</sup>

Following the decision of the European Court of Justice in the *Infopaq* case, however, the standard for originality has ostensibly been harmonised with civilian EU jurisdictions and must now meet the threshold of representing “the author's own intellectual creation”.<sup>63</sup> Whilst commentators have questioned the extent to which this will impact upon UK case law<sup>64</sup> – and this is particularly so given the UK's decision to leave the EU – the subsequent *Meltwater* judgement followed *Infopaq*,<sup>65</sup> indicating that the decision is currently exerting a degree of influence over UK copyright law. In order to qualify for copyright protection in the UK, therefore, works must now ostensibly meet the standard of representing “the author's own intellectual creation”, or, in other words, reflect authors' “creative choices”.<sup>66</sup> In comparison



with the existing UK test requiring “a minimum amount of skill, judgement and labour”, this test sets a higher creative threshold and is likely to exclude more functional works that currently attract protection under UK law.<sup>67</sup> Works must additionally be recorded, in writing or otherwise,<sup>68</sup> to attract protection.

In keeping with US copyright law, magic tricks are not expressly protected under the CDPA. However, and again as per the American position, certain categories under the Act may cover illusions, or at least specific aspects of magic performances, with the most relevant category likely to be dramatic works. These are not defined in the CDPA, other than to clarify that they include works “of dance or mime”,<sup>69</sup> but according to Pascal Kamina, the category denotes works “created in order to be communicated in motion, that is, through a sequence of actions, movements, irrespective of the technique by which this movement is retrieved or expressed”.<sup>70</sup>

Paul Torremans suggests that the obvious example of a dramatic work is a synopsis or script for a play or film,<sup>71</sup> and therefore a scripted presentation of a magic trick would attract protection under this category. And Lionel Bently and Brad Sherman clarify that the script for a choreographic work would also constitute a dramatic work. Teller’s written script for *Shadows* would thus have attracted copyright protection in the UK. Torremans further highlights that following the Court of Appeal’s classification of a dramatic work as “any work of action, with or without words or music, that is capable of being performed before an audience”,<sup>72</sup> cinematographic or audio-visual works would also qualify. These dramatic works are distinct from their underlying scripts, due to additional elements such as music and dance, and thus become “more than a performance of the script”.<sup>73</sup> A recorded version of a magic performance would thus attract copyright protection as a separate, derivative dramatic work.<sup>74</sup>

The CDPA does not expressly offer protection for pantomimes. Based on the US interpretation of this term as “the art of imitating or acting out situations, characters, or some other events with gestures or body movement”,<sup>75</sup> however, it seems likely that they would fall within the remit of dramatic works in the UK. Whilst the absence of explicit reference to pantomimes could imply that protection for such works may be weaker in the UK than the US, Bently and Sherman acknowledge that “in most cases there have been few problems in matching a particular creative act to one of the protected categories”.<sup>76</sup> Furthermore, the recent harmonising European case law requiring protection for authors’ own “intellectual creations” is likely to ensure that

protection is available for all works that meet this criteria, irrespective of whether or not they fall neatly within an existing CDPA category.<sup>77</sup>

It seems reasonable to suggest, therefore, that although magic tricks are not protected as a separate CDPA category, in a case of infringement such as that of *Teller v Dogge*, it is unlikely that the UK courts would reject the case on the basis of it failing to slot into an existing defined category. As with the US position, however, UK copyright law would not protect the secrets behind magic tricks, irrespective of the category into which they might be deemed to fall. Owing to the idea-expression dichotomy,<sup>78</sup> the law would only *formally* protect the particular presentation of the trick described in the script, recorded, or otherwise fixed. The word “formally” is again used here to emphasise the official basis upon which a case would be brought and decided. Whilst this is comparable to the legal position in the US, it was suggested above and will be discussed in more detail below, that in some cases magicians may be able to utilise these formal legal channels to prevent exposure of the secrets underlying their illusions.

In contrast to the US, copyright law in the UK recognises and protects the moral rights of authors. According to Torremans, moral rights “give minimum long-lasting rights against manifestly unfair use of the work to the author-creator, while allowing maximum flexibility for the entrepreneur” who subsequently seeks to exploit the work.<sup>79</sup> Four moral rights are included within the CPDA,<sup>80</sup> and in the context of copyright for magic tricks, the two most relevant of these are rights: (i) to be identified as the author of a work (paternity right);<sup>81</sup> and (ii) to object to derogatory treatment of the work (integrity right).<sup>82</sup> Paternity rights for dramatic works provide authors with the right to be identified when the work is “published commercially, performed in public, or broadcast”.<sup>83</sup> This puts on a formal legal footing in the UK that which is governed through gentleman’s agreement by the magic profession in the US.<sup>84</sup>

Pursuing a copyright infringement claim in the UK requires a causal link between the original and supposedly infringing works. There will be no infringement if the later work has been created independently or if a common source has been relied upon in producing both. The owner of the copyright in the original work must prove that any similarity between the works is “explained by this causal connection”,<sup>85</sup> and the defendant must have copied either the whole work or a substantial part of it.

This “substantiality” requires a qualitative rather than quantitative assessment, and is therefore determined on a case-by-case basis.<sup>86</sup> Judges tend to interpret the term “substantial” broadly – generally taking a *de minimis* approach<sup>87</sup> – and attach particular weight to copying of the most important elements of the original work.<sup>88</sup> In *Newspaper Licensing Agency v Marks & Spencer*,<sup>89</sup> Lord Hoffman suggested that the quality one is looking for must be determined with reference to the reason why the work was granted copyright protection in the first place.<sup>90</sup> As with the US law, the defendant can rely upon a number of defences, including *inter alia*: that copying is for educational purposes or private use; or that copying for research, criticism, review and so on constitutes fair dealing.<sup>91</sup>

What, then, would be the likely outcome of a UK case comparable to *Teller v Dogge*? Both Teller’s script and his recorded presentations of *Shadows* would undoubtedly have attracted copyright protection as dramatic works.<sup>92</sup> Thus, in copying and reproducing Teller’s illusion, and performing or communicating this to the public,<sup>93</sup> it is probable that the courts would have reached a similar conclusion to the US District Court and found Dogge guilty of copyright infringement. This is particularly likely given that the UK test for infringement is that the defendant copied the whole or a substantial part of the original work. As identified above, Judge Mahan considered the events and dramatic progression of the works in *Teller v Dogge* to be nearly identical,<sup>94</sup> thus Dogge had clearly copied a “substantial” part of *Shadows*.

Furthermore, had the case been decided in the UK, it may have had an additional dimension concerning Teller’s morals rights. It is debatable whether the UK courts would have considered Dogge’s reference to Penn & Teller’s performance of the trick to be sufficient for crediting Teller with creating *Shadows*, and thus he may have had a claim regarding his paternity right.<sup>95</sup> And it seems reasonable to suggest that he may also have been able to object to Dogge’s video on the basis of infringement of his integrity right. As a substantial part of *Shadows* had been copied, Teller could feasibly have argued that Dogge had subjected the illusion to derogatory treatment through the changes made to its performance.<sup>96</sup> Here, the element of Dogge’s video in which he offered to sell the trick’s secret would be likely to support a finding of derogatory treatment, for this exposure inherently devalues *Shadows*. Other elements of the video may also have infringed Teller’s integrity right, however. Whilst Dogge’s version is no longer online, Teller’s performance of the trick is a masterful and captivating piece of performance art and, though Dogge had attempted to emulate the look and feel of the original performance, components were altered that may have amounted to derogatory treatment.<sup>97</sup>

Whilst an exploration of the relevant law in the US and UK suggests that the case of *Teller v Dogge* would likely be decided similarly in both countries, it is important to bear in mind the aforementioned caveat: in neither jurisdiction would the case be decided based on the mechanics behind an illusion such as *Shadows*. What both laws would formally protect is the presentation of a magic trick as a piece of performance art, even if a consequence of this may be to protect its secret.<sup>98</sup> Without explicit protection for the ideas underlying magic tricks, however, magicians arguably remain vulnerable to theft of their secrets, with the law prohibiting their rivals only from copying a substantial part of the specific recorded performance, or otherwise fixed expression, of their most famous tricks. Questions remain, therefore, concerning how magic *should* be protected, and what role copyright ought to play in order to best balance the interests of magicians and the public on both sides of the Atlantic.

### **Concluding Remarks: how *should* magic tricks be protected?**

Opinion is divided on whether IP law should play a greater role in regulating the magic profession. In this concluding section, some arguments by those who believe that magicians may benefit from stronger formal legal protection will be considered. This will be followed by counter arguments suggesting that stronger protection may have a stifling effect on the profession and its creative output.

#### **Arguments *for* stronger copyright protection**

Some of the general justifications in favour of strong copyright protection support the proposition that IP law ought to play a greater role in the regulation of unique professions, such as magic. The first of these justifications is based on the natural rights argument: namely, that “it is right to recognize a property right in intellectual productions *because* such productions emanate from the mind of an individual author”.<sup>99</sup> Unauthorised copying is therefore tantamount to “theft” of the author’s intellectual property. Similarly, justifications based on the concepts of (i) reward: “for the effort expended in creating a work and giving it to the public”;<sup>100</sup> and (ii) incentive: recognising that the production and dissemination of copyright works is of benefit to the public and would not take place without IP protection, both favour extending copyright to illusions that take time, expense and effort to develop, but that can be easily pilfered. Indeed, these justifications provide support for a greater role for copyright in protecting those elements

of illusions that take the most time to develop – namely, their underlying mechanics – as opposed to simply their performance.

However, it is not just these general justifications that support the case for stronger IP protection for magicians. Janna Brancolini claims, for example, that regulation of the magic profession through informal norms and sanctions fails to adequately protect magicians from one another or from third parties intent on revealing the secrets of the trade.<sup>101</sup> Illusions are rather different beasts to other works attracting copyright protection. Literary works, for example, are non-rival resources, meaning that once published, they can be utilised without the value of the original work being depleted. By contrast, magic secrets, once exposed, become far less valuable to their creator. And, according to Sherlock, when exposers reveal a magic secret, “their intentions of using the secret conflict with the intention of the original magician, and subsequently strip the secret of its value”.<sup>102</sup>

Informal industry norms would therefore be ineffective against outsiders who are not part of the “club”, with Sherlock providing the example of someone “that is not part of the fraternity of magicians uploading a rip-off routine on the internet”.<sup>103</sup> Such threats are particularly problematic in the modern world, where readily accessible digital information remains a constant threat to magicians’ secrets being exposed. In this environment, IP law perhaps needs to step up to the plate, with Jenny Small arguing that:

Magicians can instantly lose control over not only the secrets behind their magic tricks, but of their entire craft with just the click of an “upload” button. Consequently, in addition to the traditional code of honor, stronger protection through copyright is needed.<sup>104</sup>

Brancolini does, however, identify a problem with copyrighting magic tricks, relating to the fundamental principle that copyright should not provide monopolies on knowledge.<sup>105</sup> Thus, one of the key aims of magicians – to keep magic secrets hidden from the public – does not sit easily with copyright’s underlying philosophy.<sup>106</sup> According to the commentator, “copyright law benefits the creator in the short-term with the end goal of benefitting the public; ultimately it promotes the twin aims of innovation and distribution”,<sup>107</sup> and therefore should not be utilised to promote secrecy and censorship.<sup>108</sup>

Nevertheless, Brancolini does see some benefit in copyright law for magicians. She highlights that “the commercial value of secrecy seems to have been historically over-stated”,<sup>109</sup> for the “Golden Age” of magic witnessed some of the most brazen and prolific thefts and exposures of magic secrets. This, she claims, drove innovation.<sup>110</sup> In light of this, Brancolini concludes that the true commercial value of the magic profession lies in performance rights,<sup>111</sup> which can be adequately protected by copyright. She concludes, that “it is performance theft – not disclosure – that jeopardizes magicians’ financial wellbeing”.<sup>112</sup>

As has been suggested throughout this article, whilst copyright laws in neither the US nor UK appear particularly conducive to enabling magicians to protect the mechanics behind their tricks, Sydney Beckman has recently argued that Teller’s lawsuit was in fact about protecting the secret behind *Shadows*, even if the case was not framed in this way. According to Beckman, whilst Teller’s lawsuit formally concerned the enforcement of his US copyright protection, in reality his aim was to prevent disclosure of the secret behind his illusion.<sup>113</sup> Dogge’s YouTube videos had been viewed infrequently – as little as 12 to 14 times according to the judgment<sup>114</sup> – and therefore posed little threat to Teller’s performance of the trick. Teller’s lawyer revealed, however, that the magician was “deeply troubled that another magician intends to ruin the magic of his illusion in order to make a few dollars”,<sup>115</sup> thus implying that the copyright infringement claim was simply the vehicle for protecting the underlying secret of *Shadows*.<sup>116</sup>

According to Beckman, the court intertwined the secret behind the illusion with its performance, and thus “when a magic trick is the effect and the effect is the trick...then copyright...effectively protects the underlying method”.<sup>117</sup> He concludes that “the method for the accomplishment of an illusion can be protected by a copyright when the copyright reflects a performance that is intertwined with the illusion”,<sup>118</sup> and that Teller thus “protected with copyright that which only a patent can legally protect: A method for performing a trick”.<sup>119</sup> Where a magician had expressed an allegedly infringing trick in an entirely different way, however, this process would be unsuccessful. If Dogge had, for example, performed the trick by cutting down clothes from a washing line, Teller’s infringement claim would likely have been unsuccessful, even if Dogge adopted the same method and offered to expose this to the public. What *Teller v Dogge* does demonstrate, however, is that in particular circumstances, IP law can be used effectively by magicians to prevent others from stealing and revealing their secrets, thereby providing justification for the continued role of copyright in the protection of magic tricks.

### **Arguments *against* stronger copyright protection**

On the other side of the fence, however, are those who consider stronger copyright protection for magic tricks to be potentially detrimental, and would therefore have viewed *Teller v Dogge* as a step in the wrong direction. Many of these commentators deem the current system of informal regulation and sanctions to represent the most appropriate and effective means of enabling magicians to prevent theft within their ranks, and view stronger legal protection as a threat to the trust and creativity inherent in the profession.

Jacob Loshin observes, for example, that were IP law to play a greater regulatory role, “such efforts would have an unfortunate chilling effect on magic’s vibrant and free-flowing marketplace of ideas”.<sup>120</sup> And Sara Crasson similarly advises that “adding new IP protections could...interfere disastrously with how magicians learn, work, and create new material”,<sup>121</sup> further observing that far from stifling creativity, the current lack of protection “appears to be, on the whole, good for the art form”.<sup>122</sup> Sherlock similarly observes that “while magicians have very little ownership over their creations, the magic industry continues to flourish publicly”.<sup>123</sup> Crasson discusses the specific ways in which stronger copyright protection could negatively impact upon the free-flow of ideas within the profession, particularly if it were to extend to, for example, instructional magic texts, or to magicians taking elements of existing tricks to make new ones:

Magic is a remix culture. Innovative performers make use of old ideas from different places put together in new ways. Adding IP protections would partition off these ideas, make them inaccessible, and cut magicians off from vital source materials.<sup>124</sup>

Crasson further identifies that only the world’s highest paid magicians would have the resources to pursue copyright infringement claims – and indeed Teller’s lawsuit is arguably testament to this – thus giving those at the pinnacle of the profession a considerable advantage over their less high-profile peers. According to Crasson, therefore, the “addition of IP protections would likely only advantage a few of the largest players in the field, and would give no added incentives or benefits to new players to enter the field and create”.<sup>125</sup> She further highlights that “without additional legal protections, the community can still enforce its ethics and standards through social pressures, which, while imperfect, can be very effective”.<sup>126</sup> This idea is further emphasised by Sherlock, who considers good values, character and ethical behaviour to be more effective in protecting the secrets of the magic community than legal regulation.<sup>127</sup> In light of

these arguments, therefore, Loshin suggests that “rather than investing in lawyers, magicians might be better off investing in their own institutions – to strengthen enforcement of the unique norms that otherwise serve them so well”.<sup>128</sup>

It should be noted, however, that some commentators do not take such a firm line in rejecting formal legal protection altogether. They may, for example, refute the suggestion that IP law ought to play no role in regulating magicians’ activities, but consider that it must be adaptable to the peculiarities of the profession. Indeed, Loshin himself suggests that perhaps judges simply “ought to be more willing to heed the role of norms and idiosyncrasies in the application of IP law”,<sup>129</sup> as opposed to “relying on an ill-fitting paradigm of intra-industry competition”.<sup>130</sup>

Alternatives to copyright have also been considered. For example, trade secret law is ostensibly more appropriate for protecting magic secrets. Whilst the idea underlying copyright is protection in exchange for dissemination – namely, putting the idea “out there” in some tangible expressive form to be enjoyed by society – trade secrecy is concerned with the suppression of information that the right-holder does not want in the public domain. This begs the question, is trade secrecy a more appropriate medium for protecting magic secrets?

Most in the industry would answer in the negative. Trade secrecy is weaker than other forms of IP protection, owing to the fact that an action for violation can only be taken if a person or organisation acquired the secret through theft, or the inability to maintain secrecy.<sup>131</sup> It does not “forbid the discovery of the trade secret by fair and honest means, e.g. independent creation or reverse engineering”.<sup>132</sup> Furthermore, the law as it currently stands is designed to protect individuals and organisations – through granting them a competitive advantage over their industry rivals – rather than industries. If a secret were shared within the magic community, it would no longer legally be considered a trade secret, yet the real risk to magicians is exposure of their tricks to the outside world, not to their peers.<sup>133</sup> According to Sherlock, “the limits of trade secret law do not align with the needs of magic practitioners”,<sup>134</sup> and thus it appears to be an ill-fitting mechanism for the unique demands of protecting magic secrets.

Regardless as to whether judges begin to take the informal norms and sanctions regulating the magic profession into account, it is clear that the interaction between IP law and magic has entered a new chapter following *Teller v Dogge*. Opinion amongst commentators remains divided as to whether the encroachment of law into this IP negative space is a positive development,



however. This is particularly so given the observation that what Teller's lawsuit *actually* achieved was protection for the secret behind *Shadows*, as opposed to simply for its presentation as a dramatic work.

According to Crasson, whilst “the current, open, cooperative system does sometimes permit free riders to benefit from the work of others, it makes innovation and collaboration easier and less risky for variety artists and does a better job of encouraging the creation of new works”.<sup>135</sup> It remains to be seen, therefore, whether *Teller v Dogge* will have any stifling effect on the magic profession, or indeed whether the judgment will provide a springboard for the greater encroachment of copyright law into this negative space. A comparable case would, however, be likely to have been similarly decided by a UK court, and for many, this would represent a step in the wrong direction. The judgment may therefore yet exert a chilling effect on an industry that relies so heavily on creativity, secrecy and, ultimately, honourable professional etiquette.

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<sup>1</sup> Spanning the late nineteenth and early twentieth century.

<sup>2</sup> See generally J. Loshin, “Secrets Revealed: Protecting Magicians’ Intellectual Property without Law” in C.A. Corcos (ed), *Law and Magic: A Collection of Essays* (North Carolina: Carolina Academic Press, 2010), pp.123-141.

<sup>3</sup> The Economist, “The capitalism of magic”, 18 September 2007, <http://www.economist.com/node/9825182> [accessed 17 July 2016].

<sup>4</sup> Etiquette is outlined in statements such as: The International Brotherhood of Magicians and the Society of American Magicians, “Joint I.B.M. and S.A.M Ethics Statement”, ”, <http://www.magician.org/pdf/JointIBMAndSamEthics.pdf> [accessed 18 August 2016].

<sup>5</sup> See e.g. The International Brotherhood of Magicians and the Society of American Magicians, “Joint I.B.M. and S.A.M Ethics Statement”, <http://www.magician.org/pdf/JointIBMAndSamEthics.pdf> [accessed 18 August 2016]. For more information, see J. Loshin, “Secrets Revealed: Protecting Magicians’ Intellectual Property without Law” in C.A. Corcos (ed), *Law and Magic: A Collection of Essays* (North Carolina: Carolina Academic Press, 2010), p.136. This idea is similar to the Creative Commons concept: ‘adapt and redistribute, but with attribution’.

<sup>6</sup> *Teller v. Dogge*, 8 F.Supp.3d 1228 (Nev. 2014).

<sup>7</sup> The case was brought in a federal court because the Copyright Act of 1976 is a federal statute.

<sup>8</sup> Whilst a variety of IP protections are potentially relevant for guarding magic secrets, this article focuses on the use of copyright. Patents, trade secrets and trade dress law are all IP protections that magicians may seek to rely upon to protect their tricks. All, however, have their drawbacks. Patents, for example, require disclosure of a trick’s method, with the information then freely available. Disclosure-based legal processes are therefore generally undesirable to the profession. For more information on other IP protections for magic tricks, see F.J. Dougherty, “Now You Own It, Now You Don’t: Copyright and Related Rights in Magic Productions and Performances” in C.A. Corcos (ed), *Law and Magic: A Collection of Essays* (North Carolina: Carolina Academic Press, 2010), pp.101-122.

<sup>9</sup> See below under section heading ‘US Copyright and the *Teller v Dogge* Decision’.

<sup>10</sup> J.R. Sherlock, “The Effects of Exposure on the Ecology of the Magic Industry: Preserving Magic in the Absence of Law” (2015) 6(1) *Cybaris* Article 2, 1-49, pp.3-4. Until *Teller v Dogge*, however, the federal courts had not conclusively ruled whether magic tricks were protectable through copyright. See J. Brancolini, “Abracadabra! – Why Copyright Protection For Magic Is Not Just An Illusion” (2013) 33 *Loy L.A. Ent. Rev.* 103-136, p.112; & J. McKinney, “Can Magic Be Copyrighted?: Teller’s Infringement Lawsuit Against Another Magician May Reveal the Answer” (2012) Patent, Trademark and Copyright Journal 1.

<sup>11</sup> His stage name was Gerard Bakardy.

<sup>12</sup> *Teller v. Dogge*, 8 F.Supp.3d 1228, 1231 (Nev. 2014).

<sup>13</sup> Complaint at 9, *Teller v. Dogge*, No. 2:12-cv-00591.

<sup>14</sup> J.R. Sherlock, “The Effects of Exposure on the Ecology of the Magic Industry: Preserving Magic in the Absence of Law” (2015) 6(1) *Cybaris* Article 2, 1-49, p.18.

<sup>15</sup> Including, for example, lawsuits taken against the FOX network for breaching copyright or trade secret laws in the airing of 1990s television series ‘Breaking the Magician’s Code: Magic’s Biggest Secrets Finally Revealed’. For further information, see G. Tremlett, ‘Spain’s magicians say television show that gives away secrets is a dirty trick’,

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The Guardian, 20 August 2009, <http://www.theguardian.com/world/2009/aug/20/spain-television-masked-magician-tricks> [accessed 14 June 2016]; & O. Solon, ‘Teller sues magician for copyright infringement’, *Wired*, 17 April 2012, <http://www.wired.co.uk/news/archive/2012-04/17/teller-sues-dutch-magician> [accessed 14 June 2016].

<sup>16</sup> 16 So. 2d 53, 55 (Fla. 1943).

<sup>17</sup> The reasoning in this case was, however, based on the fact that the trick did not qualify as a dramatic work and thus only attracted common law copyright rather than federal copyright protection. A court today may thus decide the case differently.

<sup>18</sup> 330 F.3d 1170 (9<sup>th</sup> Cir. 2003).

<sup>19</sup> See below under section heading ‘US Copyright and the *Teller v Dogge* Decision’ for more information about these defences.

<sup>20</sup> See, for example, J. Brancolini, ‘Abracadabra! – Why Copyright Protection For Magic Is Not Just An Illusion’ (2013) 33 *Loy L.A. Ent. Rev.* 103-136; J. Small, ‘The Illusion of Copyright Infringement Protection’ (2013) 12 *Chicago-Kent Journal of Intellectual Property* 217-231; & S. Beckman, ‘A Rose By Any Other Name: How an Illusionist Used Copyright Law as a Patent’ (2015) 14 *J. Marshall Rev. Intell. Prop. L.* 357-377.

<sup>21</sup> F.J. Dougherty, ‘Now You Own It, Now You Don’t: Copyright and Related Rights in Magic Productions and Performances’ in C.A. Corcos (ed), *Law and Magic: A Collection of Essays* (North Carolina: Carolina Academic Press, 2010), pp.101-122, p.104.

<sup>22</sup> 17 U.S.C § 102(b).

<sup>23</sup> *Glazer v. Hoffman*, 16 So. 2d 53 (Fla. 1943); & F.J. Dougherty, ‘Now You Own It, Now You Don’t: Copyright and Related Rights in Magic Productions and Performances’ in C.A. Corcos (ed), *Law and Magic: A Collection of Essays* (North Carolina: Carolina Academic Press, 2010), pp.101-122, p.104. They could, however, attract protection through patents or trade secrets.

<sup>24</sup> Not defined in the 1976 Act, but considered by the Copyright Office to denote a work ‘that portrays a story by means of dialogue or acting and is intended to be performed. It gives directions for performance or actually represents all or a substantial portion of the action as actually occurring, rather than merely being narrated or described’ (Compendium of Copyright Office Practices II § 431 (Washington, DC: Copyright Office, Library of Congress, 1984).

<sup>25</sup> Defined by the Copyright Office as ‘the composition and arrangement of dance movements and patterns, and is usually intended to be accompanied by music. Dance is static and kinetic successions of bodily movement in certain rhythmic and spatial relationships’ (Compendium of Copyright Office Practices II § 450.01).

<sup>26</sup> 17 U.S.C. § 102(a) (Title 17 of the Code of Laws of the United States of America deals with copyright law).

<sup>27</sup> F.J. Dougherty, ‘Now You Own It, Now You Don’t: Copyright and Related Rights in Magic Productions and Performances’ in C.A. Corcos (ed), *Law and Magic: A Collection of Essays* (North Carolina: Carolina Academic Press, 2010), pp.101-122, p.113.

<sup>28</sup> Compendium of Copyright Office Practices II § 460.01.

<sup>29</sup> Compendium of Copyright Office Practices II § 461.

<sup>30</sup> For discussion, see F.J. Dougherty, ‘Now You Own It, Now You Don’t: Copyright and Related Rights in Magic Productions and Performances’ in C.A. Corcos (ed), *Law and Magic: A Collection of Essays* (North Carolina: Carolina Academic Press, 2010), pp.101-122, pp.110-112.

<sup>31</sup> Compendium of Copyright Office Practices II § 450.01 and 460.01 (Washington, DC: Copyright Office, Library of Congress, 1984).

<sup>32</sup> 17 U.S.C § 102(a). For the definition of ‘fixed’, see §101.

<sup>33</sup> ‘Original’ here does not denote ‘novel’, but rather that it originated with the author. Registration of copyright is not required, though does create a presumption of validity in favour of the copyright holder.

<sup>34</sup> J. Small, ‘The Illusion of Copyright Infringement Protection’ (2013) 12 *Chicago-Kent Journal of Intellectual Property* 217-231, p.220. See more on ‘substantial similarity’ below. Under the ‘inverse ratio rule’, the plaintiff enjoys a lower standard of proof if she can show that the defendant had access to her work. See *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9<sup>th</sup> Cir. 2003); & *Smith v. Jackson*, 84 F. 3d 1213, 1220 (9<sup>th</sup> Cir. 1996). And conversely, a plaintiff need not prove access if there is ‘striking similarity’ between the works. See *Smith v. Jackson*, 84 F. 3d 1213, 1220 (9<sup>th</sup> Cir. 1996).

<sup>35</sup> A.J. Thomas, ‘Access Hollywood: In subsequent decisions, the Ninth Circuit seems to have retreated from its interpretation of the extrinsic test in *Metcalf v Bochco*’, *LA Lawyer* 29, May 2005, <http://www.docsrush.net/3251481/andrew-j-thomas-access-los-angeles-county-bar-association.html> [accessed 14 July 2016], 30. See also *Rice v. Fox Broad. Co.*, 330 F.3d 1170 (9<sup>th</sup> Cir. 2003).

<sup>36</sup> See e.g. *Rice v. Fox Broad. Co.*, 330 F.3d 1170 (9<sup>th</sup> Cir. 2003).

<sup>37</sup> J. Small, ‘The Illusion of Copyright Infringement Protection’ (2013) 12 *Chicago-Kent Journal of Intellectual Property* 217-231, p.223.

<sup>38</sup> See e.g. *Rice v. Fox Broad. Co.*, 330 F.3d 1170 (9<sup>th</sup> Cir. 2003).

<sup>39</sup> *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1444 (9<sup>th</sup> Cir. 1994).

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<sup>40</sup> 17 U.S.C. §107 (2006).

<sup>41</sup> J. Small, “The Illusion of Copyright Infringement Protection” (2013) 12 *Chicago-Kent Journal of Intellectual Property* 217-231, p.223.

<sup>42</sup> *Teller v. Dogge*, 8 F.Supp.3d 1228, 1233 (Nev. 2014).

<sup>43</sup> And indeed, Teller himself referenced the application of his illusion only as a ‘dramatic work’ during the lawsuit. See S. Beckman, “A Rose By Any Other Name: How an Illusionist Used Copyright Law as a Patent” (2015) 14 *J. Marshall Rev. Intell. Prop. L.* 357-377, p.364.

<sup>44</sup> J. Dougherty, “The Shadow Tells a Story: Teller Gets Summary Judgment for Copyright Infringement of His “Shadows” Illusion”, Loyola Law School, Faculty Blog, 25 March 2014, <http://summaryjudgments.lls.edu/2014/03/the-shadow-tells-story-teller-gets.html> [accessed 28 May 2016].

<sup>45</sup> Which includes the District of Nevada Court where *Teller v Dogge* was decided.

<sup>46</sup> A.J. Thomas, “Access Hollywood: In subsequent decisions, the Ninth Circuit seems to have retreated from its interpretation of the extrinsic test in *Metcalf v Bochco*”, *LA Lawyer* 29, May 2005, <http://www.docsrush.net/3251481/andrew-j-thomas-access-los-angeles-county-bar-association.html> [accessed 14 July 2016], 30.

<sup>47</sup> *Rice v Fox Broad. Co.*, 148 F.Supp.2d 1029, 1051 (C.D. Cal. 2001).

<sup>48</sup> *Sid & Marty Krofft Television Prods., Inc. v. McDonalds Corp.*, 562 F.2d 1157 (9th Cir. 1977).

<sup>49</sup> See *Metcalf v. Bochco*, 294 F.3d 1069 (9th Cir. 2002); *Rice v. Fox Broad. Co.*, 330 F.3d 1170 (9th Cir. 2003); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994); *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042 (9th Cir. 2002); see also A.J. Thomas, “Access Hollywood: In subsequent decisions, the Ninth Circuit seems to have retreated from its interpretation of the extrinsic test in *Metcalf v Bochco*”, *LA Lawyer* 29, May 2005, <http://www.docsrush.net/3251481/andrew-j-thomas-access-los-angeles-county-bar-association.html> [accessed 14 July 2016], 34. Where the sequence and arrangement of non-protectable elements give rise to copyright protection, this results in ‘thin copyright’, protecting only against virtually identical copying. See *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F. 3d 763 (9th Cir. 2003) at 766; & *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1061 (9th Cir. 2003).

<sup>50</sup> *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042 (9th Cir. 2002); & *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000).

<sup>51</sup> *Teller v. Dogge*, 8 F.Supp.3d 1228, 1235 (Nev. 2014).

<sup>52</sup> *Teller v. Dogge*, 8 F.Supp.3d 1228, 1236 (Nev. 2014).

<sup>53</sup> *Teller v. Dogge*, 8 F.Supp.3d 1228, 1236 (Nev. 2014).

<sup>54</sup> J.R. Sherlock, “The Effects of Exposure on the Ecology of the Magic Industry: Preserving Magic in the Absence of Law” (2015) 6(1) *Cybaris* Article 2, 1-49, p.48. Sherlock is using the word ‘theft’ here in a colloquial sense, for when dealing with copyright infringement, it is not ‘theft’ *per se*.

<sup>55</sup> In particular, the fact that Dogge had sought to reveal, for a fee, the secret underlying Teller’s trick.

<sup>56</sup> It is irrelevant, here, that Dogge’s method of performing the trick differed from Teller’s, for any exposure of the trick’s secret would have been potentially damaging for Teller.

<sup>57</sup> See, for example, J. Brancolini, “Abracadabra! – Why Copyright Protection For Magic Is Not Just An Illusion” (2013) 33 *Loy L.A. Ent. Rev.* 103-136; J. Small, “The Illusion of Copyright Infringement Protection” (2013) 12 *Chicago-Kent Journal of Intellectual Property* 217-231; & S. Beckman, “A Rose By Any Other Name: How an Illusionist Used Copyright Law as a Patent” (2015) 14 *J. Marshall Rev. Intell. Prop. L.* 357-377.

<sup>58</sup> Including the Berne Convention for the Protection of Literary and Artistic Works 1886 and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961.

<sup>59</sup> Agreement on Trade Related Aspects of Intellectual Property Rights.

<sup>60</sup> Works that fall into more than one category can be protected as an original work in each relevant category as long as the criteria for both are met. See *Norowzjan v Arks Ltd (No.2)* [2000] FSR 363.

<sup>61</sup> P. Torremans, *Hollyoak & Torremans: Intellectual Property Law* (Oxford: OUP, 7th edn 2013), p.197.

<sup>62</sup> Terms such as ‘originality’ are not codified or defined in the international conventions and are thus subject to national – or, in the case of the EU, regional – interpretation and definition. See P. Torremans, *Hollyoak & Torremans: Intellectual Property Law* (Oxford: OUP, 7th edn 2013), p.200; & *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465 at 479.

<sup>63</sup> *Infopaq International A/A v Danske Dagblades Forening* [2009] ECDR 16. The law in this area is, of course, likely to be affected by the decision of the UK to leave the EU, and it remains to be seen how this will affect IP law.

<sup>64</sup> P. Torremans, *Hollyoak & Torremans: Intellectual Property Law* (Oxford: OUP, 7th edn 2013), pp.206-208; & L. Bently & B. Sherman, ‘Intellectual Property Law’ (Oxford: OUP, 4th edn 2014), p.102.

<sup>65</sup> *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch) & [2011] EWCA Civ 890.

<sup>66</sup> L. Bently & B. Sherman, ‘Intellectual Property Law’ (Oxford: OUP, 4th edn 2014), p.100, drawing upon *Infopaq International A/A v Danske Dagblades Forening* [2009] ECDR 16.

<sup>67</sup> A. Rahmatian, “Originality in UK Copyright Law: The Old “Skill and Labour” Doctrine Under Pressure” (2011) *IIC* 44(1) 4-34.

<sup>68</sup> CDPA, s3(2).

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<sup>69</sup> CDP, s3(1).

<sup>70</sup> P. Kamina, “Authorship of Firms and Implementation of the Term Directive: The Dramatic Tale of Two Copyrights” [1994] 8 EIPR 319, p.320; see also *Norowzian v Arks Ltd (No.2)* [2000] FSR 363. In keeping with this interpretation, Lord Nourse advised that dramatic works must be ‘capable of being performed’ in *Norowzian v Arks Ltd (No.2)* [2000] EMLR 67 (CA) at 73; see also *Green v Broadcasting Corporation of New Zealand* [1989] 2 All ER 1056.

<sup>71</sup> P. Torremans, *Hollyoak & Torremans: Intellectual Property Law* (Oxford: OUP, 7<sup>th</sup> edn 2013), p.214.

<sup>72</sup> P. Torremans, *Hollyoak & Torremans: Intellectual Property Law* (Oxford: OUP, 7<sup>th</sup> edn 2013), p.215, summarizing the Court of Appeal’s position in *Norowzian v Arks Ltd (No.2)* [2000] FSR 363.

<sup>73</sup> P. Torremans, *Hollyoak & Torremans: Intellectual Property Law* (Oxford: OUP, 7<sup>th</sup> edn 2013), p.216.

<sup>74</sup> P. Torremans, *Hollyoak & Torremans: Intellectual Property Law* (Oxford: OUP, 7<sup>th</sup> edn 2013), p.216; P. Kamina, “Authorship of Firms and Implementation of the Term Directive: The Dramatic Tale of Two Copyrights” [1994] 8 EIPR 319, pp.320-321; & *Norowzian v Arks Ltd (No.2)* [2000] FSR 363.

<sup>75</sup> Compendium of Copyright Office Practices II § 460.01.

<sup>76</sup> L. Bently & B. Sherman, ‘Intellectual Property Law’ (Oxford: OUP, 4<sup>th</sup> edn 2014), p.59.

<sup>77</sup> Again, however, this may be affected by the UK’s decision to leave the EU, though this will only become clear in due course.

<sup>78</sup> It should be noted here that, unlike US copyright law, there is no explicit exclusion of procedures, processes, systems, methods of operation, concepts, principles or discoveries, though the courts would, of course, be unlikely to offer protection for works of this nature owing to the idea-expression dichotomy.

<sup>79</sup> P. Torremans, *Hollyoak & Torremans: Intellectual Property Law* (Oxford: OUP, 7<sup>th</sup> edn 2013), p.255.

<sup>80</sup> CPDA, ss77-85

<sup>81</sup> CPDA, ss77-79.

<sup>82</sup> CPDA, ss80-83.

<sup>83</sup> P. Torremans, *Hollyoak & Torremans: Intellectual Property Law* (Oxford: OUP, 7<sup>th</sup> edn 2013), p.256.

<sup>84</sup> Though an author in the UK must assert in writing their paternity right over their copyright material. See P. Torremans, *Hollyoak & Torremans: Intellectual Property Law* (Oxford: OUP, 7<sup>th</sup> edn 2013), pp.257-258. On this issue, see also E.L. Rosenblatt, “A Theory of IP’s Negative Space” (2011) 34(3) *Columbia Journal of Law & The Arts* 317-365, pp.359-360.

<sup>85</sup> P. Torremans, *Hollyoak & Torremans: Intellectual Property Law* (Oxford: OUP, 7<sup>th</sup> edn 2013), p.270.

<sup>86</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465 at 469.

<sup>87</sup> *Designers Guild v Williams* [2000] 1 WLR 2416 at 2418.

<sup>88</sup> P. Torremans, *Hollyoak & Torremans: Intellectual Property Law* (Oxford: OUP, 7<sup>th</sup> edn 2013), p.274.

<sup>89</sup> [2001] UKHL 38 at para 19.

<sup>90</sup> P. Torremans, *Hollyoak & Torremans: Intellectual Property Law* (Oxford: OUP, 7<sup>th</sup> edn 2013), p.274.

<sup>91</sup> See e.g. *Hubbard v Vosper* [1972] 2 QB 84. In contrast to the US ‘fair use’ defence, ‘fair dealing’ in the UK is excluded when the work has been copied for commercial purposes. Because in *Teller v Dogge*, Dogge’s copying of *Shadows* was clearly intended as a commercial venture in order to sell the secret behind the illusion, fair dealing would not have been available as a defence had the case been decided in the UK, irrespective of the fact that only a handful of viewers had watched Dogge’s infringing video. Dogge could, however, have tried to argue fair use in the US, irrespective of the for-profit aspect of his actions.

<sup>92</sup> The script would, of course, also attract copyright as a literary work, though it is unlikely that Dogge would have infringed the literary copyright through performing the trick. Only copying the script itself would be likely to infringe the literary copyright. On these issues, see *Autospin (Oil Seals) v Beehive Spinning* [1995] RPC 683.

<sup>93</sup> CDP, ss19-20.

<sup>94</sup> *Teller v. Dogge*, 8 F.Supp.3d 1228, 1235 (Nev. 2014).

<sup>95</sup> L. Bently & B. Sherman, ‘Intellectual Property Law’ (Oxford: OUP, 4<sup>th</sup> edn 2014), pp.277-278.

<sup>96</sup> Denoting a distortion or mutilation of the work, or other treatment that is prejudicial to the honour or reputation of the author: CDP, s80(2)(b).

<sup>97</sup> Dogge, for example, used a plastic flower in an empty Coca-Cola bottle in place of a real rose in an elegant vase.

<sup>98</sup> See below under section heading ‘Arguments for stronger copyright protection’.

<sup>99</sup> L. Bently & B. Sherman, ‘Intellectual Property Law’ (Oxford: OUP, 4<sup>th</sup> edn 2014), p.36.

<sup>100</sup> L. Bently & B. Sherman, ‘Intellectual Property Law’ (Oxford: OUP, 4<sup>th</sup> edn 2014), p.37.

<sup>101</sup> J. Brancolini, “Abracadabra! – Why Copyright Protection For Magic Is Not Just An Illusion” (2013) 33 *Loy L.A. Ent. Rev.* 103-136, p.120.

<sup>102</sup> J.R. Sherlock, “The Effects of Exposure on the Ecology of the Magic Industry: Preserving Magic in the Absence of Law” (2015) 6(1) *Cybaris Article* 2, 1-49, p.19; & J. Loshin, “Secrets Revealed: Protecting Magicians’ Intellectual Property without Law” in C.A. Corcos (ed), *Law and Magic: A Collection of Essays* (North Carolina: Carolina Academic Press, 2010), p.130.

<sup>103</sup> J.R. Sherlock, “The Effects of Exposure on the Ecology of the Magic Industry: Preserving Magic in the Absence of Law” (2015) 6(1) *Cybaris Article* 2, 1-49, p.35.

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- <sup>104</sup> J. Small, “The Illusion of Copyright Infringement Protection” (2013) 12 *Chicago-Kent Journal of Intellectual Property* 217-231, p.219.
- <sup>105</sup> J. Brancolini, “Abracadabra! – Why Copyright Protection For Magic Is Not Just An Illusion” (2013) 33 *Loy L.A. Ent. Rev.* 103-136, p.133.
- <sup>106</sup> J. Brancolini, “Abracadabra! – Why Copyright Protection For Magic Is Not Just An Illusion” (2013) 33 *Loy L.A. Ent. Rev.* 103-136, pp.132-133.
- <sup>107</sup> J. Brancolini, “Abracadabra! – Why Copyright Protection For Magic Is Not Just An Illusion” (2013) 33 *Loy L.A. Ent. Rev.* 103-136, p.133.
- <sup>108</sup> J. Brancolini, “Abracadabra! – Why Copyright Protection For Magic Is Not Just An Illusion” (2013) 33 *Loy L.A. Ent. Rev.* 103-136, p.134.
- <sup>109</sup> J. Brancolini, “Abracadabra! – Why Copyright Protection For Magic Is Not Just An Illusion” (2013) 33 *Loy L.A. Ent. Rev.* 103-136, p.135.
- <sup>110</sup> J. Brancolini, “Abracadabra! – Why Copyright Protection For Magic Is Not Just An Illusion” (2013) 33 *Loy L.A. Ent. Rev.* 103-136, p.135.
- <sup>111</sup> Brancolini, J., ‘Abracadabra! – Why Copyright Protection For Magic Is Not Just An Illusion’ (2013) 33 *Loy L.A. Ent. Rev.* 103-136 at 135.
- <sup>112</sup> Brancolini, J., ‘Abracadabra! – Why Copyright Protection For Magic Is Not Just An Illusion’ (2013) 33 *Loy L.A. Ent. Rev.* 103-136 at p.136.
- <sup>113</sup> S. Beckman, “A Rose By Any Other Name: How an Illusionist Used Copyright Law as a Patent” (2015) 14 *J. Marshall Rev. Intell. Prop. L.* 357-377, pp.369-370.
- <sup>114</sup> Order at 11, Sept. 30, 2014 *Teller v. Dogge*, Case No. 2:12-cv-00591 Document 233 at 6: 17-20.
- <sup>115</sup> J. Hagan & W. Samuels, “Teller v. Dogge: When Two Magicians Duel Over the Secret to an Iconic Illusion, They Conjure a Copyright Infringement Lawsuit” (2014) 38(1) *New Matter* 14, p.15.
- <sup>116</sup> S. Beckman, “A Rose By Any Other Name: How an Illusionist Used Copyright Law as a Patent” (2015) 14 *J. Marshall Rev. Intell. Prop. L.* 357-377, p.370.
- <sup>117</sup> S. Beckman, “A Rose By Any Other Name: How an Illusionist Used Copyright Law as a Patent” (2015) 14 *J. Marshall Rev. Intell. Prop. L.* 357-377, pp.370-371.
- <sup>118</sup> S. Beckman, “A Rose By Any Other Name: How an Illusionist Used Copyright Law as a Patent” (2015) 14 *J. Marshall Rev. Intell. Prop. L.* 357-377, pp.371-372.
- <sup>119</sup> S. Beckman, “A Rose By Any Other Name: How an Illusionist Used Copyright Law as a Patent” (2015) 14 *J. Marshall Rev. Intell. Prop. L.* 357-377, p.372.
- <sup>120</sup> J. Loshin, “Secrets Revealed: Protecting Magicians’ Intellectual Property without Law” in C.A. Corcos (ed), *Law and Magic: A Collection of Essays* (North Carolina: Carolina Academic Press, 2010), p.141.
- <sup>121</sup> S.J. Crasson, “The Limited Protections of Intellectual Property Law for the Variety Arts: Protecting Zacchini, Houdini, and Cirque du Soleil” (2012) 19(1), Art 3 *Jeffrey S. Moorad Sports Law Journal* 73-133, p.126.
- <sup>122</sup> S.J. Crasson, “The Limited Protections of Intellectual Property Law for the Variety Arts: Protecting Zacchini, Houdini, and Cirque du Soleil” (2012) 19(1), Art 3 *Jeffrey S. Moorad Sports Law Journal* 73-133, p.126.
- <sup>123</sup> J.R. Sherlock, “The Effects of Exposure on the Ecology of the Magic Industry: Preserving Magic in the Absence of Law” (2015) 6(1) *Cybaris Article* 2, 1-49, p.21.
- <sup>124</sup> S.J. Crasson, “The Limited Protections of Intellectual Property Law for the Variety Arts: Protecting Zacchini, Houdini, and Cirque du Soleil” (2012) 19(1), Art 3 *Jeffrey S. Moorad Sports Law Journal* 73-133, pp.126-127.
- <sup>125</sup> S.J. Crasson, “The Limited Protections of Intellectual Property Law for the Variety Arts: Protecting Zacchini, Houdini, and Cirque du Soleil” (2012) 19(1), Art 3 *Jeffrey S. Moorad Sports Law Journal* 73-133, p.130.
- <sup>126</sup> S.J. Crasson, “The Limited Protections of Intellectual Property Law for the Variety Arts: Protecting Zacchini, Houdini, and Cirque du Soleil” (2012) 19(1), Art 3 *Jeffrey S. Moorad Sports Law Journal* 73-133, pp.132-133.
- <sup>127</sup> J.R. Sherlock, “The Effects of Exposure on the Ecology of the Magic Industry: Preserving Magic in the Absence of Law” (2015) 6(1) *Cybaris Article* 2, 1-49, p.26.
- <sup>128</sup> J. Loshin, “Secrets Revealed: Protecting Magicians’ Intellectual Property without Law” in C.A. Corcos (ed), *Law and Magic: A Collection of Essays* (North Carolina: Carolina Academic Press, 2010), p.141.
- <sup>129</sup> J. Loshin, “Secrets Revealed: Protecting Magicians’ Intellectual Property without Law” in C.A. Corcos (ed), *Law and Magic: A Collection of Essays* (North Carolina: Carolina Academic Press, 2010), p.140.
- <sup>130</sup> J. Loshin, “Secrets Revealed: Protecting Magicians’ Intellectual Property without Law” in C.A. Corcos (ed), *Law and Magic: A Collection of Essays* (North Carolina: Carolina Academic Press, 2010), p.140.
- <sup>131</sup> J.R. Sherlock, “The Effects of Exposure on the Ecology of the Magic Industry: Preserving Magic in the Absence of Law” (2015) 6(1) *Cybaris Article* 2, 1-49, p.29.
- <sup>132</sup> *Kewanee Oil Co v Bicorn Corp.*, 416 U.S. 470, 490 (1974).
- <sup>133</sup> J. Loshin, “Secrets Revealed: Protecting Magicians’ Intellectual Property without Law” in C.A. Corcos (ed), *Law and Magic: A Collection of Essays* (North Carolina: Carolina Academic Press, 2010), p.134.
- <sup>134</sup> J.R. Sherlock, “The Effects of Exposure on the Ecology of the Magic Industry: Preserving Magic in the Absence of Law” (2015) 6(1) *Cybaris Article* 2, 1-49, p.23.

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<sup>135</sup> S.J. Crasson, “The Limited Protections of Intellectual Property Law for the Variety Arts: Protecting Zacchini, Houdini, and Cirque du Soleil” (2012) 19(1), Art 3 *Jeffrey S. Moorad Sports Law Journal* 73-133, pp.132-133.