



# Cinematic Urban Geographies of Battersea: bringing film extracts to your mobile

# Cinematic Urban Geographies of Battersea: bringing film extracts to your mobile

The Mobile Collections project brought together a team of researchers and practitioners from research centres, museums and libraries across Cambridge through a series of knowledge exchange activities during 2013. The project researched the complex legal issues associated with mobility and digital cultural collections, including those concerning protection of intellectual property, in particular copyright, and mapped current developments in mobile access to aggregated data across different institutions in the cultural heritage sector through a series of case studies. A series of workshops and seminars took place with the aim of stimulating debate, challenging assumptions, and encouraging new collaborations between researchers and practitioners across the cultural heritage sector. The project was funded by the Arts and Humanities Research Council (AHRC). This report is part of a collection of publications related to the project which can be found online here: <http://www.digitalhumanities.cam.ac.uk/mobilecollections>

**About the author:** Dr Eleonora Rosati is currently a lecturer in IP law at the University of Southampton, independent copyright law & policy consultant, and Deputy Editor of the Journal of Intellectual Property Law & Practice. Previously a research associate at the University of Cambridge, Eleonora holds an LLM from the University of Cambridge and a PhD from the European University Institute (Italy).

Email: [eleonora@e-lawnora.com](mailto:eleonora@e-lawnora.com)

## Project partners

---



# Cinematic Urban Geographies of Battersea:

## bringing film extracts to your mobile

### The project

In 2013 the Faculty of Architecture of the University of Cambridge received funding from the UK Arts and Humanities Research Council (AHRC) to develop a research project entitled “Cinematic Geographies of Battersea”. The project intended to explore the recent past of Battersea, an area in south London which has undergone significant changes over the past decades. Among other things, it sought to undertake “an archeology of Battersea” by addressing the role and social importance of the numerous cinemas that were opened in this area during the 20th century and no longer exist, as well as an analysis of the various films made between 1960s and 1980s that included scenes filmed in Battersea and “often inadvertently, captured the changing fortunes of this part of south London”.<sup>1</sup>

As part of the “Cinematic Geographies of Battersea” project, a team jointly led by the Universities of Cambridge, Liverpool and Edinburgh and English Heritage developed an application (‘app’) for iPhone that would allow the user who happens to move across the Battersea area to receive notifications when in the proximity of one of Battersea ‘ghost’ cinemas, as well as when walking close by an area featured in one of the films included in the iPhone app. The purpose of the app is to provide users with a better understanding of culture and society in this area in south London during the 20th century, by allowing users to play short extracts from iconic films, including *Poor Cow* (1967), *Up the Junction* (1968), *Villain* (1971), *Sitting Target* (1972), *Brannigan* (1975), and *My Beautiful Laundrette* (1985).

The inclusion of copyright-protected materials (the film extracts) in an app for iPhone raises questions regarding potential risks of infringing third party’s rights, as well as the scope of copyright exception allowing fair dealing for criticism and review, pursuant to Section 30 of the UK Copyright Designs and Patents Act 1988 (CDPA).

As part of the AHRC-funded Creative Economy Knowledge Exchange Project on *The Creative Economy, Digital Technology and Innovation*, a legal analysis of the various copyright-related issues facing the inclusion of short film extracts was undertaken. While seeking and obtaining

a licence from relevant rightholders would be a safer option, particular attention was devoted to providing an understanding of the scope of fair dealing for criticism and review, as potentially applied to the “Cinematic Geographies of Battersea” iPhone app.

#### Fair dealing for criticism and review: the law

Section 30(1) CDPA states that:

“Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public.”

Criticism or review of a work has always been permitted and since the 1911 Copyright Act has been the subject of a specific statutory provision.<sup>2</sup> As explained by a leading UK IP textbook:

“In order to rely upon the defence, a defendant must show that (i) the dealing was for the purpose of criticism or review, (ii) the work had been previously been made available to the public, (iii) the dealing was fair, and (iv) the dealing was accompanied by sufficient acknowledgment.”<sup>3</sup>

This copyright exception is being reviewed, as UK Government intends to broaden its scope.<sup>4</sup> Current formulation of the exception for criticism and review appears indeed fairly narrow, especially if one compares UK position to that of other European countries, and what is expressly permitted under Directive 2001/29/EU.<sup>5</sup>

#### Fair dealing for criticism or review: relevant case law

Despite its potential range, this fair dealing defence has not been much elucidated in UK case law.<sup>6</sup> In *Hubbard v Vosper* (a case concerning publication of a book that criticised the Church of Scientology and allegedly included material copied from works by Scientology founder Ron Hubbard), Lord Denning MR clarified that the exception applies equally to the ideas expressed in a work and their

mode of expression, and that overall assessment whether dealing with a work for criticism or review is fair is a matter of impression.<sup>7</sup>

In general terms it can be said that to qualify potentially for this exception it is necessary that the criticism or review is of the work, or another work or a performance of a work. It may concern the work as a whole or a single aspect of a work, the thought or philosophy underpinning a work, or its social and moral implications.<sup>8</sup> Some decisions have suggested that the criticism or review may not be necessarily of a work at all. For instance, in *Time Warner v Channel 4*<sup>9</sup> the Court of Appeal of England and Wales considered whether use in a TV documentary of twelve clips from Kubrick's film *A Clockwork Orange* that varied in length between 10 seconds and 115 seconds and amounting in aggregate to about 12.5 minutes (8% of the film and 40% of the TV programme) could be considered fair. The Court responded affirmatively because inclusion of parts of Kubrick's work served the aim of illustrating the decision to withdraw the film from circulation in the UK. It was held that, although there is no codified test of fairness under UK law, there are criteria that courts take into account, including: (i) to what extent alleged infringing use competes with exploitation of the copyright work by the owner, including any form or activity which potentially affects the value of the copyright work; (ii) the extent of the use and importance of what has been taken; (iii) the purpose of the use, *ie* whether the use was necessary at all to make the point in question; and (iv) proper acknowledgment of the author of the work.<sup>10</sup> It would appear that the *Channel 4* case pushed the exception to the extreme. In another case (*Ashdown v Telegraph*<sup>11</sup>) it was held that publication of the memorandum of the meeting between Ashdown and Blair was not for criticism of "the work" but rather of the political events described/recorded therein. As such, the defence of fair dealing for criticism and review did not apply.

Using a work or a part thereof for another purpose, *eg* education, as well as the purpose of criticism or review, will not prevent application of the fair dealing defence for criticism or review, although this might affect the question of fairness.<sup>12</sup>

### **Fair dealing and the Cinematic Geographies of Battersea iPhone app**

In light of current understanding of fair dealing for criticism and review, an analysis of the fate of Battersea cinemas would not justify showing film extracts *per se*, because there would be no criticism or review of a work as such.

Hence, selection of film extracts should be careful, and preference should be given to scenes set in Battersea. For instance, should the iPhone app include an extract from *Alfie* (1966), it would appear advisable to include part of the scene in which Michael Caine/Alfie watches the christening at St Mary's Battersea Parish Church, rather than extracts from scenes set in other parts of London that might be selected to correspond to particular dramatic moments of the film. In addition, as to the amount, only the minimum necessary for the purpose of the project should be used.

Use of voice-over commentary would also be advisable, to dilute potential "free-riding" claims concerning the iPhone app. In any case, to strengthen reliance on fair dealing defence for criticism and review in the event of potential claims of copyright infringement, any commentary should pertain to the films/scenes included, although this does not exclude that references to the particular area in Battersea represented in a certain film might also be made.

As regards the requirement of acknowledgment, as mentioned above, this must identify the author of the work, not the copyright owner. In the case of films, a distinction should be made depending on when the film was made, as the author has been considered a different subject at different times.<sup>13</sup> Overall, acknowledging both the director and the producer of the film might appear the safest option.

Besides acknowledgment of the author of the original film, if the extract which is used itself reproduces a substantial part of an underlying work, then also the underlying work must be acknowledged. This does not apply where the work in question is an adaptation, *eg* a film made from a book. In this case only the adaptation itself needs to be acknowledged. Use of soundtracks deserves a special mention. Soundtracks were protected as part of the film under the 1956 Copyright Act, then became entitled to copyright separately under the 1988 Copyright Act but, since 1 January 1996, are to be treated once again as part of the film. Because of these different regimes, there are cases in which the original soundtrack might be used only by seeking and obtaining permission from the relevant rightholder. In any case, use of soundtrack might fall outside the scope of fair dealing for criticism and review in the context of an iPhone app that describes the recent past of Battersea, in that it may be questionable whether their inclusion is necessary at all to "make the point".

## (Endnotes)

- 1 See <http://www.cam.ac.uk/research/features/cinematic-geographies-of-battersea>.
- 2 K Garnett – G Davies – G Harbottle, Copinger and Skone James on copyright (16th edn, Sweet&Maxwell:2011), Vol I, 566.
- 3 L Bently – B Sherman, Intellectual property law (3rd edn, OUP:2008), 210.
- 4 See HM Government, Modernising copyright: A modern, robust and flexible framework. Government response to consultation on copyright exceptions and clarifying copyright law (2012), 26 ff.
- 5 “Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: [...] quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author’s name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;” (Article 5(3)(d) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L167, 10-19).
- 6 W Cornish – D Llewelyn – T Aplin, Intellectual property: patents, copyright, trade marks and allied rights (8th edn, Sweet&Maxwell:2013), 494.
- 7 Per Lord Denning MR, Hubbard v Vosper [1972] 2 QB 84, [94].
- 8 See Bently – Sherman, Intellectual property law, cit, 210.
- 9 Time Warner Entertainment Ltd v Channel 4 Television Corporation Plc [1994] EMLR 1.
- 10 As clarified by Section 178 CDPA, “sufficient acknowledgement’ means an acknowledgement identifying the work in question by its title or other description, and identifying the author”. See also Express Newspaper Plc v News (UK) Ltd [1990] FSR 359, [367].
- 11 Ashdown v Telegraph Group Ltd [2001] EWCA Civ 1142; [2002] Ch 149; [2002] RPC 5.
- 12 Garnett – Davies – Harbottle, Copinger and Skone James on copyright, cit, 576, citing Pro Sieben Media AG Carlton UK Television Ltd [1999] 1 WLR 605; Time Warner Entertainment Ltd v Channel 4 Television, cit.
- 13 See Garnett – Davies – Harbottle, Copinger and Skone James on copyright, cit, 250 ff.