Suggested Answers to the Questions in Chapter 2

1. The assumption that the list of eight categories of protected subject matter under s. 1 CDPA is closed is under challenge. Critically discuss.

The good answer will:

- Demonstrate knowledge of the specific categories of copyright works in the CDPA, including literary, dramatic, musical, artistic, etc. It would be important to note that this is not a formality – in cases like *Exxon* the category of 'literary' has been crucial. For example in that case the word Exxon was held to be original (as it was an entirely new word) but not literary (as it had no literary meaning – it meant nothing) and therefore it could not be protected.

- Demonstrate engagement with the key cases that have arisen at the EU level, such as *Infopaq* and *BSA*, and consider whether these rulings mean that as a matter of EU law the only criterion for a valid copyright work is whether it is 'the author's own intellectual creation'.

- Conclude by considering whether Brexit might make an impact – if the UK is no longer bound by EU law, could the UK courts reassert the concept of separate categories?

Suggested Answers to the Questions in Chapter 2

2. How has the European standard of originality impacted on the traditional 'skill, labour and judgement' approach in the UK? Discuss by reference to relevant cases.

The good answer will:

- Begin by explaining that only original works of copyright are protected by the law and that the standard of originality in classic UK cases like *Ladbroke* is based on the notion of 'skill, labour and judgement'. This standard has been applied in a wide range of UK copyright cases such as *Exxon, Creation Records, Baigent* and *Sawkins*. The threshold of this standard is not a high one, and fairly rudimentary works such as exam papers (*University of London Press*) and football pools coupons (*Ladbroke*) have been found to satisfy it.

- Note that in 2009 the CJEU in *Infopaq* set a test of 'intellectual creation' as the standard of originality for all works of copyright in the EU. This requires some modicum of creativity – meaning that non-creative works that were previously protected in the UK may no longer be protected. This doctrine was emphasised in subsequent EU cases such as *Painer* and *BSA*.

- Conclude by reflecting on the consequences of this legal doctrine, in the UK, considering cases where the UK courts have applied the EU standard, such as *Meltwater* and *SAS*. Reference to academic literature (Rahmatian, Derclaye, etc.) would be welcome.

Suggested Answers to the Questions in Chapter 2

3. Can invented words, short sentences or headlines attract protection under UK copyright and, if so, under which conditions?

The good answer will:

- Demonstrate knowledge of the specific categories of copyright works in the CDPA, including literary works. It would be important to note the classic *Exxon* case where the category of 'literary' was crucial. For example in that case the word Exxon was held to be original (as it was an entirely new word) but not literary (as it had no literary meaning – it meant nothing) and therefore it could not be protected.

- Refer to *Infopaq* where the CJEU said that a single word could not be protected by copyright.

- Conclude by explaining the consequences of the CJEU decision in *Infopaq* and the UK courts in *Meltwater* - that a headline or short sentence can be protected if it reflects the 'author's own intellectual creation'. Reference to academic commentary would be welcome.

Suggested Answers to the Questions in Chapter 2

4. Is the helmet of the Stormtrooper character featuring in Star Wars eligible for copyright protection?

The good answer will:

- Explain the case of *Lucasfilm* in light of the broader question of 'what is a work of art'? The case involved Mr Ainsworth who was the prop-maker for the Star Wars 'Stormtrooper' helmet for the first Star Wars film in 1977. Lucasfilm objected to Ainsworth manufacturing and selling replica helmets online. Whether this was infringement or not hinged on whether the helmet was a copyright work in the form of a sculpture i.e. an 'artistic work' under the CDPA.

- Examine the definition of 'sculpture' in prior UK case law. The specifics of why the Supreme Court in *Lucasfilm* decided against accepting it as a sculpture under copyright law should be explained. The issue of whether an artist should 'intend' to create a copyright work should be explored with reference to academic commentary.

- Conclude by reflecting on whether it is appropriate for courts to be in the position of having to make decisions about the nature of art, given this is a highly contested notion.

Suggested Answers to the Questions in Chapter 2

5. A student keeps notes during a lecture of intellectual property law. Another student records the lecture with a dictaphone. Does copyright subsist in the notes and/or the recording?

The good answer will:

- Note that copyright arises automatically, without registration. The standard of originality in the UK/EU post-*Infopaq* and *Meltwater* is 'intellectual creation'.

- Explain that a set of notes, as a literary work, could be protected if the notes meet this standard of protection. If the student is merely taking down the exact words said by the lecturer, this might simply mean the student is recording, or fixing, the copyright in the lecture spoken by the lecturer – the student is not adding originality of her own. But if the student is adding her own comments, this may be sufficient for copyright to arise.

- Conclude by stating that it is more straightforward for the sound recording – according to the CDPA the author and first owner of the sound recording is the producer (the person who makes the arrangements for the recording and pushes 'record'). The recording would also be a fixation of the lecturer's lecture – but copyright in the lecture itself would remain with the lecturer.

Suggested Answers to the Questions in Chapter 2

6. An atmospheric art installation features neon lights hanging from the gallery's ceiling. A critic referred to it as 'shafts of glimmering light striking their way from the ceiling to the floor'. Can it be protected by copyright?

The good answer will:

- Examine the definition of 'sculpture' in UK case law in the context of installation art. The specifics of why the Supreme Court in *Lucasfilm* decided against accepting a film prop helmet as a sculpture under copyright law should be explained.
- Explore the issue of whether an artist should 'intend' to create a copyright work with reference to academic commentary. Here the intention is clear, unlike in *Lucasfilm*.
- Conclude by reflecting on whether it is appropriate for courts to be in the position of having to make decisions about the nature of art, given this is a highly contested notion.

Suggested Answers to the Questions in Chapter 2

7. Can the portrait photograph of a child at nursery school that was taken by a freelance photographer be protected by copyright?

The good answer will:

- Note that photographs are protected as works of art under the CDPA. Refer to the CJEU *Painer* case, which stated that intellectual creation in the choice and arrangement of photographs is the criterion for judging the originality of photographs.
- Here the freelance photographer would have taken care to arrange the child in place, likely with proper lighting and a suitable background. This would be sufficient to establish originality.
- Conclude by stating that the photographer, not the subject of the photo, would be the author and first owner of the copyright in the photo.

Suggested Answers to the Questions in Chapter 2

8. Can an 11-word extract from a newspaper article attract copyright protection?

The good answer will:

- Explain that a newspaper article would be a literary work under the CDPA. Show knowledge of copyright works in the CDPA, including literary works. Note the classic UK case of *Exxon* where the category of 'literary' was crucial. The word Exxon was held to be original (as it was an entirely new word) but not literary (as it had no literary meaning – it meant nothing) and therefore it could not be protected.

- Refer to the crucial *Infopaq* case where the CJEU said that a single word could not be protected by copyright but that an 11-word extract could be if it reflects the intellectual creation of the author. Reference to academic commentary would be welcome.

- (Aspects of this question involve the doctrine of copyright infringement which students will learn about in a subsequent chapter, so for present purposes the discussion does not need to go further.)

- Conclude by explaining the consequences of the CJEU decision in *Infopaq* and the UK courts in *Meltwater* - that a headline or short sentence can be protected if it reflects the 'author's own intellectual creation'.

Suggested Answers to the Questions in Chapter 2

9. A musicologist works on the unfinished music scores of a 17th-century composer and produces performing editions of music that can be thereinafter orchestrated. Does copyright subsist in modern performing editions of the out-of-copyright music?

The good answer will:

- Begin by explaining that only original works of copyright are protected by the law and that copyright is a time-limited right, lasting for 70 years after the death of the author in the case of literary, dramatic, artistic and musical works. Once copyright expires, the work is in the public domain.
- Cite common examples, such as Mozart's symphonies. The student should then explain that where a new author adds originality to a public domain work, the new author can claim authorship/ownership of this new adaptation or arrangement, but only to the extent of the new originality. The existing public domain work remains in the public domain and can be adapted by other authors.
- Focus on the case of *Sawkins*, which dealt with these issues – explaining what exactly Dr Sawkins was able to claim as his work of authorship, and why the dispute with Hyperion Records occurred in the first place.
- Conclude by reflecting on the consequences of this legal doctrine, examining whether it could, through the incentive/reward theory, encourage further acts of creativity and adaptation or whether it simply adds to the 'enclosure' of the public domain and the 'expansion' of copyright.