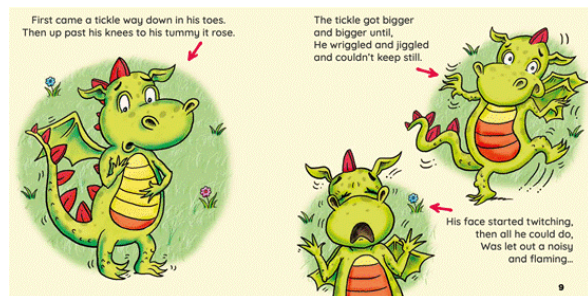


Introduction to Copyright



Mishcon de Reya

It's business. But it's personal.



Overview

**Copyright
subsistence**

**Authorship
&
Ownership**

**Copyright
infringement**

Defences

Remedies

Other topics

Overview and Frameworks

Copyright in the UK: Overview

- Copyright, Designs and Patents Act 1988 + some EU harmonisation (InfoSoc Directive, Software Directive, Database Directive, Term Directive) + international conventions (e.g., Berne)
- Protects expression of ideas, not ideas themselves
- Arises automatically once qualifying work recorded in any material form and is territorial
- Not a monopoly right: must prove copying
- Defences included fair dealing e.g., for purpose of parody, quotation, criticism & review, reporting current events
- Moral rights and other related rights

Impact of Brexit

- Copyright law remains largely unchanged following Brexit (for now):
 - Existing harmonised EU copyright law has been retained in the UK
 - CJEU case law up to 31/12/20 is retained EU law. Only Court of Appeal/Supreme Court can depart from it: Court of Appeal chose not to in *Tunel*
- Over time, will copyright law in the UK and the EU diverge?
 - UK Courts can no longer refer questions to CJEU
 - UK is not unconstrained in its law-making: international treaties and free trade agreements / Trade & Co-Operation Agreement contain IP provisions

Copyright subsistence & ownership

What is protected by copyright?

- UK: a ‘work’ must fall within closed list of categories of protection in CDPA
- Article 2(a) InfoSoc Directive: protection is given to authors of a ‘work’
- CJEU set out conditions for a ‘work’ in *Levola*:
 1. Subject matter must be **original** in the sense that it is the **author’s own intellectual creation**
 2. Only something which is the **expression** of the author’s own intellectual creation may be classified as a work
 3. Must be expressed in a manner which makes it identifiable with **sufficient precision and objectivity**, even though that expression is not necessarily in permanent form



Impact of CJEU decisions in *Cofemel* and *Brompton*

- EU law provides that designs may also be protected by copyright, but some Member States required an ‘aesthetic effect’
- CJEU in *Cofemel* applied its earlier decision in *Levola*: only requirement is author’s own intellectual creation, i.e., there can be no subjective element
- May have significant impact on key principles of UK copyright law and lead to copyright protecting more ‘functional’ designs?

Cofemel and Brompton



UK 'Closed List' approach: Authorial works

- Literary works (s.3(1) CDPA)
- Musical Works (s.3(1))
- Dramatic Works (s.3(1))
- Artistic works:
 - Graphic works and sculptures “irrespective of artistic quality” (s.4(1)(a) CDPA)
 - Works of artistic craftsmanship (s.4(1)(c))

How long are authorial works protected?

Life of author + 70 years

(used to be 25 years for some works of artistic craftsmanship)



Literary works

- All works of writing, provided meets requirements of fixation, originality and qualification e.g., novel, instruction manual, content of website, business letters
- Names / invented words / titles / characters
 - ‘exxon’ not protected
 - Opportunity Knocks and ‘The Man Who Broke the Bank at Monte Carlo’ not protected
 - Post-*Infopaq*: no minimum requirement (11 words) and in *NLA v Meltwater* court held newspaper headlines capable of being original literary works
 - ‘Del Boy’ the character is a literary work (*Shazam v Only Fools the Dining Experience*)
- Computer programs – some aspects will be protected as literary works, others perhaps as artistic work. Not all aspects of a program will be protected by copyright.

Artistic works: Sculpture

— *Lucasfilm v Ainsworth* (Supreme Court, 2008)

- Star Wars Stormtrooper helmet and armour were not sculptures or works of *artistic* craftsmanship
- No aesthetic appeal: the purpose was primarily utilitarian i.e., to give impression in the film



Is this a work of 'artistic craftsmanship'?



Works of artistic craftsmanship

- What is a work of artistic craftsmanship?
(*Response Clothing v Edinburgh Woollen Mill*)
 - Craftsmanship where work make in a skilful way and the craftsman takes justified pride in their workmanship
 - Artistic where someone with creative ability produces something which has aesthetic appeal
- Furniture, fashion, tableware, lighting?



Authorial works: Originality

- Authorial works must be original – must not be copied (baseline).
- ‘Old’ UK approach – labour, skill and judgment
- CJEU decisions in *Infopaq* and its ‘progeny’ created a new test: based on requirement of ‘author’s own intellectual creation’:
 - “Stamps personal touch”, “reflects the author’s personality”, “makes free and creative choices” ...
 - An I I word extract may be protectable – impact on titles and headlines?

UK Categories: Entrepreneurial works

- Sound recordings, films, broadcasts
- Typographical arrangements of published editions
- New ancillary right for press publishers? (Article 15, Directive on Copyright in the Digital Single Market: NOT part of UK law)
- No originality requirement
- Note terms of protection for different rights

Ownership of copyright works

Author

- First owner of copyright work (even if commissioned by a third party)
- May need assignment when commission someone to create a copyright work

Joint authors

- Own work jointly
- Work produced by collaboration of 2 authors in which each author's contribution is not distinct from other author/s (e.g. *Martin v Kogan*, 2019)

Employee works are owned by employer

- Made by employee in course of employment, subject to any agreement to contrary s.11(2)
- See e.g., *Penhallurick* re works created at home etc

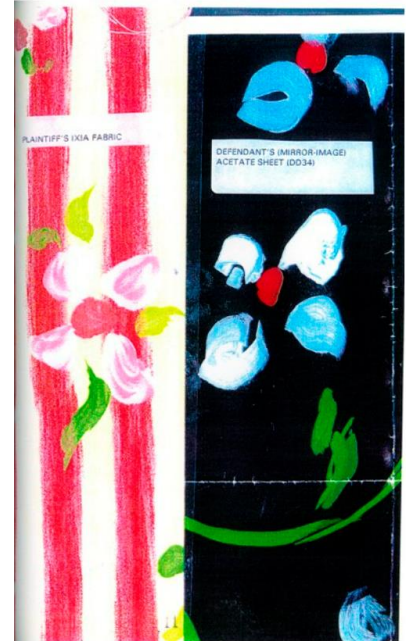
Copyright infringement

Exclusive acts of the copyright owner

- Copying (reproducing) the work or any ‘substantial part’ in any material form without consent of copyright owner
- Other acts of infringement e.g. issue copies to the public, perform the work in public, communication to the public (important re online infringement), adapt the work
- Secondary infringement:
 - dealing in infringing copies or facilitating infringement
 - requires knowledge

Infringement criteria

- Is there copying of the whole or a substantial part of the work?
 - Assessed qualitatively, not quantitatively (*Designers' Guild v Williams*)
 - Does the part taken contain elements which are the expression of the intellectual creation of the author of the work?
- Are there similarities between the copyright work and the alleged infringement?
- Did the Defendant have access to the copyright work?
- If there are sufficient similarities + access, burden of proof shifts to the Defendant to prove 'independent design'



The 'Red Bus' case



Temple Island v New English Teas

INFRINGEMENT OF COPYRIGHT?

Hyperlinking: When does it infringe?

- No infringement when website hyperlinks to copyright works freely available on another website (*Svensson*) (i.e. no communication to the public)
- May be infringement when hyperlink to copyright works that are freely available on another website, but without copyright holder's consent (depends on knowledge) (*GS Media v Sanoma*)
- Recent example: *Warner Music v Tuneln Radio*

Defences to infringement

Fair dealing defences

- Applies to six defences in CDPA (closed list)
 - For the purposes of research or private study
 - For the purposes of criticism or review
 - For quotation
 - For purpose of reporting current events
 - For purposes of ‘parody, caricature or pastiche’
 - For the purposes of illustration for instruction
- Dealing: merely that the Defendant has made use of the work, no need for a transaction
- Purposive list: except in relation to quotation. The use must be related to one of the specified purposes, assessed objectively

What is 'fair'?

- Multi-factorial approach, driven by public interest factors
- Question of degree and impression (*Hubbard v Vosper*)
- *Ashdown v Telegraph*: Court identified 3 factors relevant to fairness: commercial competition, prior publication, the amount taken and its importance
- *Hyde Park v Yelland*: “the Court must judge the fairness by the objective standard of whether a fair minded and honest person would have dealt with the copyright work in the manner that *The Sun* did, for the purpose of reporting the relevant current events, in this case the published untruthful statements of Mr Al Fayed”. See here for how *The Sun* used the images:
<https://www.civil.law.cam.ac.uk/virtual-museum/hyde-park-residence-ltd-v-yelland-2000-rpc-604>

Fair dealing for criticism or review

- Work has **previously been made available to the public**, i.e., published works only
 - Broadly defined but *HRH Prince of Wales v Associated Newspaper*. Prince Charles' diaries not made available to the public (had been sent to 75 people, but they understood it was in confidence)
- For **purposes of criticism or review of the work, or another work**, or performance of a work:
 - Not criticism at large, unless connected to a work or performance
 - BUT need not be limited to criticism of style; may extend to the ideas to be found in a work and its social or moral implications
- **Fair dealing**: particularly here, the effect on market, and the nature of the dealing
- Accompanied by **sufficient acknowledgement** (unless impossible...)

Fair dealing for quotation

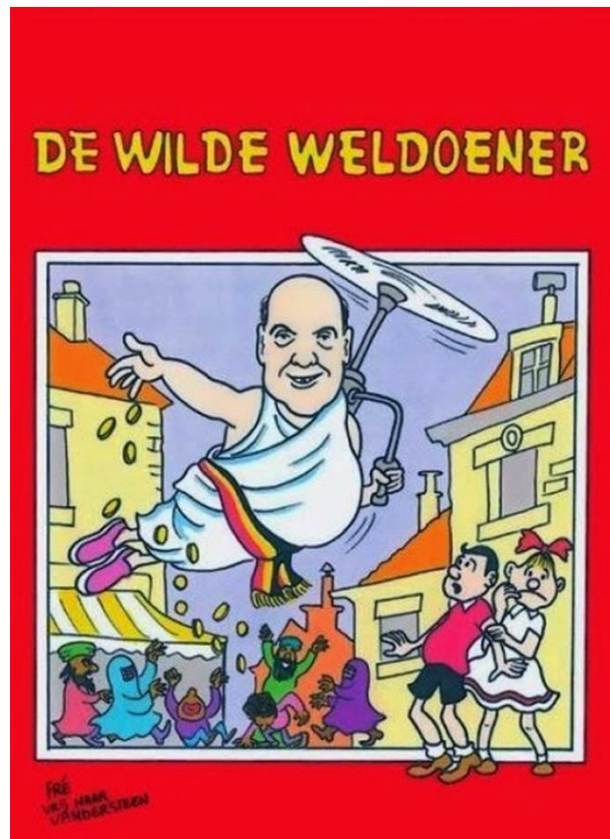
- Work has **previously been made available** to the public
- Use of quotation is **fair** (will depend upon the purposes for which the quotation is used: e.g., social, cultural or informational benefit?) and accompanied by **sufficient acknowledgement** (unless impossible...)
- Quotation can be **for any purpose**, provided extent of quotation is no more than is required by the specific purpose for which it is used
- Will quotation defence be interpreted broadly? **See Govt guidance**

Fair dealing for quotation: CJEU case law

- *Pelham* C-476/17: 2 second sample from Metall auf Metall used by Pelham in song Nur Mir
 - Use of a sample may in principle rely on quotation defence if sample is recognisable to the ear
 - Essential characteristics of a quotation:
 - Use by user other than copyright holder of work/extract
 - For purposes of illustrating an assertion/defending an opinion/allowing an intellectual comparison
 - User must have intention of entering into 'dialogue' with the work
- *Spiegel Online* C-516/17: article contending false claims made by politician linked to his manuscript and an article
 - Quoted work can be by hyperlinking
 - Use must not extend beyond confines of what is necessary to achieve informatory purpose of the quotation

Fair dealing for parody, caricature or pastiche

- Fair dealing with a work for the purposes of parody, caricature or pastiche
- No acknowledgement requirement
- Previously, had to rely upon criticism or review fair dealing defence (or argue it was not a substantial taking of the copyright work)
- A parody etc may amount to a derogatory treatment, or e.g., be defamatory



What is parody?

Deckmyn v Vandersteen

- Parody is an autonomous concept of EU law
- Two essential characteristics:
 - (1) to **evoke an existing work whilst being noticeably different from it**
 - (2) to constitute an **expression of humour or mockery**
- The parody does not need an original character of its own and does not need to refer to the original source (i.e., can be ‘weapon parody’ as well as ‘target parody’)
- Need to ensure fair balance between rights and interests of copyright authors and freedom of expression of users in the circumstances of the case

Parody or pastiche?

- Only Fools Dining Experience could not rely upon fair dealing for parody or pastiche defence
 - **Parody** must express some **kind of opinion by means of** its imitation, but noticeable difference, from the work parodied
 - Works of parody can only facilitate dialogue or give rise to artistic confrontation if they are in some sense themselves **an expression of opinion expressed as humour or mockery**
 - **Pastiche** involves use which **imitates the style of another work**, or which is a medley of a number of pre-existing works. In both cases, the product must be **noticeably different** from the original work.

Fair dealing for reporting current events

- Fair dealing with any work (except a photo) for the purpose of reporting current events where sufficient acknowledgement

ECB v Tixdaq

- 8-second clips of cricket matches were a communication to the public and the clips were *qualitatively* significant
- D was not reporting current events:
 - Court adopted ‘living’ interpretation and applied broad meaning: extends to ‘citizen journalism’
 - But D’s objective was purely commercial, rather than genuinely informative
 - Also, not fair dealing in any event



Remedies



Website blocking orders

- 2011: film & TV industry test case in relation to the Newzbin website (*Twentieth Century Fox Film Corp v British Telecommunications plc*)
- Since then, film, TV, music and sport rightholders have brought numerous successful applications against the 5 major UK ISPs, with 100s of websites blocked
- Court grants website blocking order under CDPA where conditions are met and it is proportionate

Sorry, the web page you have requested is not available through Virgin Media.

Virgin Media has received an order from the Courts requiring us to prevent access to this site in order to help protect against copyright infringement.

If you are a Virgin Media home broadband customer, for more information on why certain web pages are blocked, please click [here](#).

If you are a Virgin Media Business customer, or are trying to view this page through your company's internet connection, please click [here](#).



Additional statutory damages

- court may in an action for infringement of copyright having regard to all the circumstances, and in particular to (a) the **flagrancy of the infringement**, and (b) **any benefit accruing to the Defendant** due to the infringement, award such **additional damages** as the justice of the case may require”
- £300,000 additional damages recently awarded as additional damages in a design infringement case (*Original Beauty v G4K*)
- Enforcement Directive and damages for moral prejudice: *Henderson v All Around the World*: moral prejudice covers mental distress, injury to feelings and humiliation

Other topics



Moral rights (S.77 – 89)

- Paternity Right
- Integrity Right
- Right against false attribution
- Right of privacy in photographs

Database right & database copyright

- Database Directive introduced two tier regime: harmonised copyright protection and *sui generis* database right
- **Copyright:** where by reason of selection or arrangement of contents, database constitutes author's own intellectual creation
- **Database right:** where been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents
- **Impact of BREXIT:** database rights existing in the UK or EEA before 1 January 2021 are unaffected; from 1 January 2021 only UK entities can qualify for UK database right (and EU entities for EU database rights)

NFTs/the Metaverse

— Who owns the NFT?

- The NFT is simply a record linked to an underlying asset.
- There is no copyright in the NFT itself - it is purely metadata.

— Who owns the underlying asset?

- The author of the work is the first copyright owner.
- Usually, the buyer is granted a non-exclusive, non-transferable, royalty-free licence to use, copy and display the underlying work for specific purposes.

— Copyright infringement?

- Minting NFT may be communication to the public?
- Listing on platform will likely include reproduction of infringing material and so most issues are resolved at platform level through Notice and Takedown procedures

Hot topics: AI

- Are the inputs infringing?
- Is copyright available to protect works generated by AI?
- Are the outputs infringing?

Questions



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