

WIPO/BCC Training Seminar 2018  
Advanced Level Training Course in Copyright & Related Rights

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# **General Principles of Copyright Law - the United Kingdom in an International Context (with some Illustrative Context)**

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# Covered in this session

- Key features of UK copyright law
- Subject-matter
- Criteria for protection
- Ownership of copyright
- Exclusive rights / infringement
- Moral rights
- Exceptions and defences

# UK Copyright Law – key features

- An example of a system of “common law copyright”
- Governed by the Copyright Designs & Patents Act 1988 (CDPA 1988) - Part I (Copyright); Part II (Rights in Performances; Part III (Design Right)
- Importance of case law
- Membership of leading Conventions on copyright and related rights

# UK Copyright Law – key features

- International treaties not directly applicable
- Membership of the European Union resulting in significant change since 1990s – via legislation and Judgments of the Court of Justice of the European Union
- Brexit?

# Subject-matter - copyright as a “closed list” system

- “*Copyright is a property right which subsists... in the following descriptions of work:*
  - (a) original literary, dramatic, musical or artistic works;*
  - (b) sound recordings, film or broadcasts, and*
  - (c) the typographical arrangement of published editions.”* (CDPA 1988, s 1(1))
- Note the treatment of “related rights”

## Further definition – eg artistic works

- “. . . *“artistic work” means -*
    - (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality,*
    - (b) a work of architecture being a building or a model for a building, or*
    - (a) a work of artistic craftsmanship.”*
- (CDPA 1988, s 4(1))

# Artistic works

- ... *“building” includes any fixed structure, and a part of a building or fixed structure;*
- *“graphic work” includes:*
- *(a) any painting, drawing, diagram, map, chart or plan, and*
- *(b) any engraving, etching, lithograph, woodcut or similar work;*
- *“photograph” means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film;*
- *“sculpture” includes a cast or model for purposes of sculpture.”*

(CDPA 1988, s 4(2))

**“Engravings”?**





# Sculpture?



## Artistic works - sculpture

- *Lucasfilm Ltd v Ainsworth* [2008] [2008] ECDR 17, paras 94-135; [2009] EWCA Civ 1328, paras 44-82 (CA); [2011] 3 WLR 487 (Sup Ct), paras [28]-[48]
- UK cases available via the BAILII website – [www.bailii.org](http://www.bailii.org)

# Problems with the “fixed list” system?



# At EU level – the taste of cheese?



# Criteria for protection

- Recording / fixation
- Originality / creativity
- Qualification

# “Originality” – traditional approach in the UK

- Not a high degree of creative merit
  - “*The word ‘original’ does not in this connection mean that the work must be an expression of original or inventive thought...*”  
(*University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, per Peterson J.)
- “Not copied” and need for “labour” and “skill”
- Case examples
  - *Walter v Lane* [1900] AC 539 (HL)
  - *Sawkins v Hyperion* [2005] EMLR 29 (CA)

# European “originality”

- For example
  - “[...][D]atabases which, by reason of their selection or arrangement of their contents, constitute *the author’s own intellectual creation* shall be protected as such by copyright...” .  
(Directive 96/9, Art 3(1))
- (C-5/08) *Infopaq International A/S v Danske Dagblades Forening*

# Creativity in the Court of Justice - (C-145/10) *Painer v Standard Verlags GmbH*

- An *intellectual creation* is an author's own if it reflects the author's personality (Recital 17, Directive 93/98)
  - “That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices...” [89]



# Resistance in some Member States



# **Impact of the adoption of a “creativity” standard in the UK**

- Little difference?
- Higher standard - if anything
- Situations requiring reconsideration?

# Ownership of copyright in works in the United Kingdom (s 9)

- Author generally the first owner, but note CDPA 1988 s 11(2):
  - *“Where a literary, dramatic, musical or artistic work is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary.”*
- Subsequently, copyright freely transferable as property

# **Exclusive rights of the copyright owner (CDPA 1988, s16)**

- Copying
  - Issuing copies to the public
  - Rental / lending to the public
  - Performing, playing or showing in public
  - Communication to the public
  - Adaptation
- 
- Significant harmonisation at international and EU level (note potential impact of 2019/790 Copyright & Related Rights in the Digital Single Market Directive)

# Infringement – general issues

- Need for a causal link
  - Similarities raise inference of copying
  - Subconscious copying
- In “relation to the work as a whole or *any substantial part* of it...” (CDPA s.16 (3)(a))
  - The traditional approach in the UK
  - The impact of EU law

# ***Temple Island Collections Ltd v New English Teas [2012] EWPC 1***



# ***Temple Island Collections Ltd v New English Teas [2012] EWPC 1***



# Moral rights – general issues

- Required under the Berne Convention (Art 6 *bis*)
  - Right to claim authorship
  - Right to object to distortion/mutilation etc
- Actionable as breach of statutory duty
- Only for works requiring originality
- Actionable by author/director only
- Not assignable



# **The right to be identified as author/director (s 77-79)**

- Requirement of assertion (compatible with the Berne Convention?)
- Situations in which right applies (s 77)
- Significant exclusions – types of work, works created in the course of employment

# Right to object to derogatory treatment (s 80)

- “Treatment” requiring some form of interference with the work
- Meaning of “derogatory”
  - *“the treatment of a work is derogatory if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director;...”*

# **“The Angel of the North” - Gormley**





I'M  
cheaper  
at Morrisons

# Defences to Copyright Infringement - General

- Terminology – defences, permitted acts, exceptions, limitations....
- Relationship with EU copyright law – exceptions and limitations covered in *acquis* (particularly, Art 5, Information Society Directive)
- Typical form in the CDPA 1988

# Recording for purpose of time-shifting (s 70)

- “(1) The making in domestic premises for private and domestic use of a recording of a broadcast solely for the purpose of enabling it to be viewed or listened to at a more convenient time does not infringe any copyright in the broadcast or in any work included in it.
- (2) Where a copy which would otherwise be an infringing copy is made in accordance with this section but is subsequently dealt with –
- (a) it shall be treated as an infringing copy for the purposes of that dealing...”



## **Permitted acts - coverage**

- s 28A Temporary copies
- s 29-30 Fair dealing
- s 31 – Incidental inclusion
- S 31A-F – Visual impairment
- S 32 – 36A – Education
- S 37 - 44A – Libraries & archives
- S 45 – 50 - Public administration

# Permitted acts - coverage

- S 50A – s 50C - Computer programs
- S 50D – Databases
- S 51-3 – Designs
- S 54-5 – Typefaces
- S 56–76 - Miscellaneous



# Defences – the European framework

- Specific rules – software, databases
- List of permissible exceptions in Art 5, Information Society Directive
- Potential impact of Digital Single Market Directive
- Interpretation of the defences by the CJEU

# Permitted acts – Fair dealing

- Fair dealing for the purpose of:
  - research or private study (CDPA 1988, s.29)
  - criticism or review (s 30(1))
  - reporting current events (s 30(2))
  - quotation (s 30(1ZA))
  - parody, caricature or pastiche (s 30A)
- What is “fair dealing”?
- cf “fair use”

## **Fair dealing for the purpose of reporting current events (s 30(2))**

- “Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that...it is accompanied by a sufficient acknowledgement.”
- An application of the defence..

# *EWCB v Tixdaq and Fanatix Limited [2016] EWHC 575*



# ***EWCB v Tixdaq and Fanatix Limited [2016] EWHC 575***

- “Citizens’ journalism” potentially covered by the defence.
- On the facts, distinction drawn between “reporting current events” and presenting images to an audience for consumption for their own intrinsic value.