Specific Copyright Law Model In The United Kingdom

For the past three centuries, a specific copyright law model has evolved in the United Kingdom. Whilst copyright has remained far less harmonized across European Union (EU) member states than other intellectual property rights, one aspect of UK law that was impacted by the EU was the originality threshold necessitated for copyright to subsist in databases and arguably in authorial works. Originality must be the author's "own intellectual creation" as appeared in the Software Directive [1] and the Database Directive [2]. [1: Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L 111/16 (Software Directive).] [2: Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of computer program [1996] OJ L 77/20 (Database Directive).]

The Infopaq decision: a coup de main?

Under Copyright Act 1842 [3], there will be no specific requirement of originality [4] as the law has replicated the requirement of "labour, skill and judgement" [5] and that originality necessitated just the work originated from the author as it depicted that such a low threshold is demanded in balancing two rivalrous policy intentions. Nevertheless, the key challenge to the traditional "skill and labour" test has come about through European jurisprudence. Contrasting the English common law "skill and labour" test, Computer Programs Directive has granted copyright protection to computer programs as well as design material because they are the "author's own intellectual creation" [6]. Articles 1(3) and 6 of the Copyright Term Directive has set the exact standard for photographs thus this approach has played a significant role in upholding justifying opposition to expansionist pressures in the law [7]. [3: Copyright Act 1842 (5 & 6 Vict) c 45; See also: Jarrod v Houlston (1857) 69 ER 1294.] [4: Lewis v Fullarton (1839) 48 ER 1080 (Ch).] [5: Ladbroke v William Hill [1964] 1. WLR 273.] [6: Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs OJ L122/42 (Computer Programs Directive).] [7: Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights [2006] OJ L 372/12 (Copyright Term Directive).]

The traditional 'labour, skill and judgement' criterion. Is it still relevant?

In the UK, the originality threshold was traditionally low. Authorial work has to be "original" [8] for copyright to exist. Justice Laddie deduced, "you can have too much of a good thing and we have too much copyright" [9]. Hence, drawings of bolts and screws were adequate to impart originality [10] by leading to industrial articles being given "proxy protection" via the copyright placed on their drawings. [8: Copyright Designs and Patent Act 1988, s 1(1).] [9: J Laddie, 'Copyright: over-strength, over-regulated, over-rated?' (1996) 18 EIPR 253, 255.] [10: Northrop v Texteam Blackburn [1974] RPC 57.]

The phrase "labour, skill and judgement" has been exploited by the courts and originality is a "question of fact and degree" however this could be doubtable [11] as the law remains

uncertain. The House of Lords has dissented with this ruling expounding there was no “element of skill or originality in the order in which the tables were arranged”. Therefore, this has depicted minimal margins that could adjudicate whether originality is subsisted, and it is necessary for more peculiar guidance to be provided in ensuring certainty in the law [12]. Lord Atkinson stated that an accurate term could not be furnished, and every case will be adjudicated upon its facts [13]. [11: Cramp & Sons Ltd v Frank Smythson Ltd [1944] AC 329.] [12: A Brown and others, Contemporary Intellectual Property: Law and Policy (5th edn, OUP 2019).] [13: MacMillan v Cooper (1924) 40 TLR 186.]

Did the CJEU’s decision in Infopaq increase the originality threshold for copyright?

The CJEU further evolved the concept of an “author’s own intellectual creation” in its decision whereby the CJEU held that the reproduction of 11-word extracts via newspaper articles amounted to the reproduction of a copyrighted work if the fundamentals were reproduced were the expression of the author’s intellectual creation. Proudman J deemed that the test of quality had been reworded but not modified by Infopaq [14].The English Judiciary has employed the Infopaq decision under UK copyright law prior to Meltwater [15]. The Court of Appeal reckoned that Infopaq made little or no discrepancy [16] whereas Rosati conceived that the impact of Infopaq will be “certainly affect low-creativity and technical subject matter” [17]. [14: Infopaq Internaitonal A/S v Danske Dagblades Forening [2009] C-5/08, [2009] EUECJ C-5/08, [2012] Bus LR 102, [2009] ECR I-6569, [2010] FSR 20, [2009] ECDR 16.] [15: The Newspaper Licensing Agency Ltd and Others v Meltwater Holdings Bv and Others [2011] EWCA Civ 890, [2012] RPC 1, [2012] Bus LR 53.] [16: University of London Press v University Tutorial Press [1916] 2 Ch 601; See also: Ladbroke v William Hill (n 5) 1.] [17: E Rosati, ‘Originality in a work, or a work of originality: the effects of the Infopaq decision’ (2011) 33 EIPR 746, 750.]

HHJ Birss authenticated that the work was originally based on “the expression of the skill and labour exercised by the author or in Infopaq terms [18]. Such odds and ends indicated that UK judges did not take the EU test of originality into consideration in replacing the long-standing UK tests. The Court of Appeal insinuated that Infopaq may have altered the traditional English test [19]. Arnold J conceived it necessary in reverting to Article 1(2) [20] following Articles 9(2) TRIPS558 and 2 of WIPO Copyright Treaty. Harkening back to the Infopaq decision, the Court held that the discrete parts of a work has enjoyed protection under given that they had contained some elements that are the expression of the author’s own intellectual creation work [21]. [18: Temple Island Collections Ltd v New English Teas Ltd [2012] EWPCC 1.] [19: SAS Institute v World Programming Limited [2010] EWHC 1829 (Ch).] [20: Software Directive, art 1(2).] [21: 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 [2001] OJ L167/10 (Information Society Directive).]

The CJEU has made the decision on whether portrait photographs deserved weaker copyright protection hence the CJEU has addressed this by harking back to its previous Infopaq decision [22] by pinpointing that copyright protection is to arise relating to a subject matter which is original. The Court ruled that this was the correct elucidation of the originality requirement, in contrasting the reasoning whereby it judged that sporting events is disregarded as intellectual creations classifiable as works [23]. [22: Eva-Maria Painer v Standard VerlagsGmbH [2011] Case C-145/10.] [23: Karen Murphy v Media Protection Services Ltd [2007] EWHC 3091.]

The allegations of the Football [24] decision is ostensible hence the CJEU decided to heed the opinion of AG Mengozzi by which the decision's implications are three-fold. From the decisions with reference to Infopaq, it is apparent that precedents are no longer valid [25]. Trevor Cook pinpointed that the test for a work's originality can no longer be a matter of degree subject to the amount of judgment, labour or skill evolved in its making. [24: Football Dataco Ltd v Brittens Pools Ltd [2010] EWHC 841 (Ch).] [25: University of London Press v University Tutorial Press (n 16) 2.]

Will English courts revert to the pre-Infopaq test after Brexit?

English judges might be leaned to revert to evaluating originality on the basis of "labour, skill or effort" once the UK leaves the EU. The "author's own intellectual creation" test will remain the threshold for originality unless Copyrights, Design and Patents Act 1988 [26] is amended or repealed. One potentiality is in line with other common law countries like the United States by pioneering a negotiable 'fair use' exception or annulling the droit de suite. Hence, some judges will see this freedom as a chance to revert to the pre-Infopaq test for evaluating originality. [26: Copyrights, Design and Patents Act 1988, s 3A.]

Are the approaches in other foreign jurisdictions really different?

Holland Academician Visser deduced, "in practise, Infopaq will make absolutely no difference" nevertheless he stated that a court who wants to do it "completely right should adopt the formulation of the Infopaq test" [27]. The Dutch court did not follow this advice whereby the judge mentioned the "author's own intellectual creation" [28] nonetheless there was no real substance behind this. In Germany, it must be of the authors "personal intellectual creation" [29] for a protected work. The higher threshold has protected copyright's aim of "encouraging and protecting the result of intellectual creativity" [30], whilst protecting those works that do not meet the higher originality threshold by portraying the implicit disparity between Germany and the UK [31]. The originality standard is higher as in the French case [32] held that a working exhibit "the imprint of their author's personality" to gain protection. This requirement has the possibility in remedying Law's wide nature whereby it permits a low threshold for creative works [33], whilst making it harder for functional work hence would be determined distinctly under French Law [34]. [27: Visser, 'Endstra overtaken by Infopaq: the threshold for copyright protection harmonised across Europe' (2009).] [28: DMO Marketing BV v FA-MED BV, Utrecht District Court, September 9, 2009 Case HA ZA 09-110.] [29: Authors Right Act 1965, art 2(2).] [30: D Gervais, 'The compatibility of the skill and labour originality standard with the Berne Convention and the TRIPs Agreement' (2004) 26 EIPR 75, 78.] [31: Sawkins v Hyperion Records Ltd [2005] EWCA.Civ.565.] [32: Cour de Cassation (2006).] [33: A Waisman, 'Revisiting Originality' (2009) 31 EIPR 370, 372.] [34: Northrop v Texteam Blackburn (n 10) 2.]

Further potential implications after Infopaq

Infopaq could well be the extension that signals the end of the traditional test criteria. The Brompton bicycle would not be an original work due to intellectual creation where its realization had been decreed by technical deliberations [35] that has limited room for creative freedom by which the idea and its expression became inseparable [36] with reference to SAS [37] further the Infopaq decision. There were triable issues as to the product's originality and whether

copyright existed in the design and a substantial argument as to whether what the claimant has tried to protect was the software's functionality that was released with the copyright protection's scope [38]. [35: SL v Chedecht [2020] 2 WLUK 28.] [36: D Inguanez, 'Response Clothing Ltd v Edinburgh Woollen Mill Ltd' (2020) 51 IIC, 797, 780.] [37: SAS Institute v World Programming Limited (n 19) 3.] [38: Oysterware Ltd v Inventor Ltd [2020] EWHC 2125 (Ch).]

The court opined that while including works of applied art, industrial designs that comprised an artistic creation in the list of works protected by national copyright law, the degree of originality necessitated for such works to gain from that protection was not identified [39]. It is not upheld in excluding a priori the objects of the applied arts from copyright protection due to their functional character in line with the Infopaq decision. Although the maker of Aldi may be impacted by other works, nonetheless this is not a bar to originality considering it was not intensively copied with reference to the Infopaq decision [40]. [39: Cofemel v G-Star Raw [2019] 5 WLUK 16.] [40: Islestarr Holdings Ltd v Aldi Stores Ltd [2019] EWHC 1473 (Ch).]

Vousden critisized this decision claiming the European Court of Justice (ECJ) was "making the law rather than interpreting it" [41]. This is agreeable as Rosati pinpointed the court has derived support from the fact that "intellectual creation" subsisted in other directives [42]. In stark contrast, Derclaye believed that the judgment was "generally beneficial for the authors and legal certainty" [43]. Derclaye and Vousdan deemed cases could be decided distinctively under Infopaq as the ECJ wanted the national courts to consider qualitative work aspects instead of quantitative [44]. [41: S Vousden,'Infopaq and the Europeanisation of Copyright Law' (2010) 1(2) WIPOJ 197, 199.] [42: E Rosati, 'Originality in a work, or a work of originality: the effects of the Infopaq decision' (n 17) 746, 748.] [43: E Derclaye, 'Infopaq International A/S v Danske Dagblades Forening (C-5/08): wonderful or worrisome? The impact of the ECJ ruling in Infopaq on UK copyright law', (2010) EIPR 247.] [44: Francis Day and Hunter Ltd v Twentieth Century Fox Corporation Ltd [1940] AC 112.]

Conclusion

The CJEU judgment in Infopaq has more outcomes for UK copyright law than it seems to encompass at first sight [45]. Not just the UK courts found it hard to comprehend the implications, but commentators have taken on different perspectives. Some commentators had pinpointed that Infopaq might result to the desertion of traditional UK standards with a higher threshold to copyright protection [46] while its decisions in Football [47], Painer [48], and SAS [49] have added 'creative freedom', 'free and creative choices' and 'form of expression' [50]. These decisions bring into question the consistency of the UK's closed subject matter categorisation with EU law. [45: E Derclaye, 'Infopaq International A/S v Danske Dagblades Forening (C-5/08): wonderful or worrisome? The impact of the ECJ ruling in Infopaq on UK copyright law' (n 43) 247.] [46: E Rosati, 'Originality in a work, or a work or originality: the effects of the Infopaq decision' (n 17) 764, 752.] [47: Judgment in Football Dataco v Yahoo! UK Ltd, C-604/10, EU:C:2012:115, para 38.] [48: Eva-Maria Painer v Standard VerlagsGmbH (n 22) 3.] [49: Judgment in SAS Institute v World Programming Ltd, C-406/10, EU:C:2012:259, para 46.] [50: L Bentley and others, Intellectual Property Law (5th edn, OUP 2020).]