Intellectual Property

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Introduction

Copyright Law is based on the premise that the owner of a work is entitled to protection of their intellectual property. The terms “owner”, “intellectual” and “property” require elaboration. This extended essay in two parts seeks two answer two important questions related to the intellectual property laws in the UK. The first part of the essay has explained and discussed how does Copyright Law define and explain these terms. The discussion is carried out in relation to the various Intellectual Property treaties and conventions, relevant EU Law, the CDPA 1988 as well as relevant case law.

The second part of this extended essay has discussed explained the tests that would be utilised in order to decide whether or not there has been either a primary or secondary infringement of those rights. The discussion in this section was carried out the under s.16 CDPA, which defines that the copyright owner has certain “exclusive” rights over the work in question.

Part A

Concept of Owner

The right of property is one of the most important real rights; it is at the heart of the civil code, which has made the right of property an individual right, absolute and perpetual. The right of ownership is only covered by the specific provisions of the laws in the UK. Owner of property is defined by CPDA and The Intellectual Property Act 2014 as the

right holder to dispose and enjoy of property (tenable or intangible) in the utmost complete manner.

Though, two main phenomena have upset the conception of the right of ownership of the civil code, a first transformation of the right of ownership under the combined effects of the evolution of society and the economy. This transformation is marked by the quantitative and qualitative increase in real estate property with a decline in real estate ownership (Bently and Sherman, 2014).

The right of ownership is a fundamental right of constitutional value. The protection of the right of ownership is ensured in terms of international law. The ECHR (Protocol 1) states that every legal or natural individual has possess the respect right for her or his property. That person is legally considered as the owner of the property and no external agency except the public interest can deprive that individual from the right of ownership of that property (Helfer, 2008).

As per Perry v. Truefitt (1842), ownership of a property is exercised within social relations, which is reflected in a certain number of limits which some of them hold for the recognition of other individual rights (eg right to housing) for others to protect the property of others, for others to the pleasure of preserving the interest of the community (eg expropriation for reasons of public interest, the rules of the protection of the environment Brown v Mcasso Music 2005).

Concept of Property

At the legal level "property" is the right to enjoy and dispose of things in the most absolute way. This right applies to property of any kind, to both furniture and buildings.

This right includes the right to use the thing, to give it back to a person, the right to modify it, to destroy it or to dispose itoff.The concept of property under the Intellectual Property Act 2014 refers to intangible property created as a result of intellectual activity of a creator (owner). In Robin Ray v C'lussk FJ Pic (1998) court suggested that intellectual property, quite different to traditional property is not tenable and it's indivisible with the intrinsic provision of gross availability for usage. For instance a book is intellectual property of the author or a publisher and it can be read by innumerable number of reader.

As elaborated in Douglas v hello (2001) case an owner of tangible property can guard it by arranging security people or physical restriction such as boundary walls but property in cases where its outcome of intellect cannot be guarded, this simply. That is why World Intellectual Property Organisation Copyright Treaty (WCT), coupled with Article 1 of the First Protocol: Protection of propertyhas set separate laws for deifying and protecting property created by intellect of human.

as per Donoghue v Allied (1938) property in this context include Intellectual outcomes in the forms of copyright, patents, trademarks, industrial design rights, trade dress, plant variety rights, geographical signs and even trade secrets , under certain jurisdictions are treated as property of certain owner such as business organisations (Stokes, 2014).

Concept of Intellectual and property

In the light of above concepts intellectual property refer to the object on which the so-called intellectual property right falls; that is, the element over which the author exercises the power conferred by the Law. In this regard, it is evident that not all creation is protected by the CPDA. Besides, Universal Declaration of Human Rights

(Article 27), also recogniseintellectual property as a product of intellectual endeavour (artistic, literary or scientific)of individual(s) and its existence as intangible property along with the right of ownership of those creators over that intellectual property (Coombe 1998).

From the legal concept, usingSabel v Puma (1998) can extract what are the fundamental characteristics that a creation must meet so that it can be considered as an intellectual work. In accordance with art 10.1 of CPDA the essential notes that every work must contain are, on the one hand, that they have been made by a person and, on the other, that they are original creations. The Berne Convention for the Protection of Artistic and Literary Works (1886) and the Paris Convention for the Industrial Property Protection (1883) fundamentally laid the foundation of the legal concepts of intellectual property rights.

As per Fisher y Brooker(2008) intellectual works protected by the law are not those spontaneous creations of nature in which a human being has not intervened in its creation; for example a tree, a flower, any animal, a landscape and the sound of the sea etc. In this line, it has been established that the result of a mechanical process performed by a machine will not be included in the concept either (Burt or Colin, 2018). Now, when in these processes the human being intervenes making a contribution to it, we can be talking about a creation protected by the Law. Thus, as a paradigmatic example is precisely the photography in which the contribution or creation of the author consists of in the ability to detect and show the beauty or aesthetic relevance of certain planes, objects, landscapes (Zemer, 2014)

As discussed in Sguuri v Barru (1994),regarding the note of originality, traditionally, a distinction has been made between so-called subjective originality and objective originality. The first one focuses on the singular and unique character of a work in the sense that it is not a copy of another's work. In the second, an element of novelty is added to it, so that it is required that the creation is also something different from what was known until then. In general, it has been established that novel creation is original, creation that provides and constitutes an objective novelty compared to any other pre-existing creation.

Part B

The CR owner, under s.16 CDPA enjoy certain "exclusive" rights over the work being referred to, these are:

(1)The copyright owner of a particular work has, subsequent provisions for the protection of the exclusive right over intellectual property in the UK, which entitles the owner:

(a) To copy the IP protected work;

(b) To issue work' duplicates to masses;

(ba) To lend or rent the work to the uninhibitedly;

(c) To play or show or perform, the public work;

(d) To publicly communicate the work;

(e) To create work’s adaptation or any of the above mentioned acts with regard to work’s adaptation and above acts limited in copyright Act.

The exclusive rights that are most frequently violated in the context of the Internet are reproduction, distribution or transmission, and sometimes adaptation. From the moment

a work is hosted on an Internet server, it needs to reproduce it to transmit it to another server and so on, until it reaches the server of the Internet service provider of the user who requested the work. Under CPDA 1988, there are two forms of infringement, Primary and Secondary infringement.

Usage and Knowledge/ Intention Test

Under the broader Test criteria to determine which use of CR work is primary infringement and which is secondary, the fundamental criteria is that primary infringement contains a direct unauthorised utilisation of copy right protect work by the defender and the secondary infringement entails to the utilisation of such IP by the defendant in a way of facilitating use of such work by another organisation or individual(s) (Zemer, 2014).

Primary CR infringement won't require information or goal to encroach with respect to the ‘infringer’, the infringement of the limited rights is strict obligation "offenses". Primary CR infringement is attempted if an individual takes part in any of the accompanying demonstrations which contradict the limited rights of the owner of the CR work:

- The work duplication
- Release and distribution of CR protected work
- Rent or loan of CR protected work public
- Unauthorised adoption of CR protected work

Tests for determining secondary infringement Under the CPDA (section 16), unlike primary infringement, necessitate that infringer should have adequate knowledge and clear intention about the fact that intellectual property rights of that work are protected and belongs to its owner. Secondary CR infringement must include some information by

the infringer of the copyrighted work. It is typically it is retailers or distributers who are 'Secondary infringers'. Instances of Secondary CR infringement include: • Importing encroaching copy

- Possession of or dealings with encroaching copy
- Providing the open door for producing encroaching copies

Information might be set up on both a goal and an abstract premise. Dispassionately, a Defendant is held to know about CR infringement if a sensible man would land at the important conviction of CR infringement on the specific realities (Stokes, 2014).

The Extrinsic/Intrinsic Test

The extrinsic test is most simple test which not only facilitates determining infringement of CR protected work but also distinguishes the nature of infringement. This test requires the owner of work to render evidence from the original work that work is infringed by the defenders. In most case courts judge the subjective impressions of an ordinary individual to determine his knowledgeability on the nature and scope of the commonalities in original work (text or composition) and the infringed work.

The core criteria of this test are the artwork nature, the subject matter, the used materials and the subject setting. As found in Hadley y Kemnp (1999) case, If it’s proved that original work was available exclusively and not very general, court consider it a secondary infringement but in most of the cases it’s found a case of primary infringement.

The three steps Test

This test determine of the offender was be able to use /exploit a work without the agreement of its author it is necessary to cross three stages of test:

- Exploitation must be authorised by an exception in the law of his country;
- The exception used must not affect the normal exploitation of the work;
- It must not cause prejudice to the interests of the author (Aplin, 2018)/

The test reflects the search for justified equilibrium not only for economic but also normative considerations. It is, in a sense, a test of proportionality between the exclusive rights and the limits to such rights, justified by the public interest. On the contrary, the balance that the public domain maintains in the copyright regime is a priority with respect to the exclusivity conferred by law and it is not necessary to weigh it in relation to the normal exploitation of the works. The public domain is everything that should not receive protection, or whose protection has already expired, and generally is not necessary to subject it to a proportionality test (Aplin, 2018).

Total Concept and Feel Test

This test to determine infringement and nature of infringement of a CR protected work use a general impression in totality of work instead of matching similarities between the original work and infringed work. The test scrutinise the entire piece as whole the expressions and idea and find the significant and critical commonalities between two works. This test is often used in literature work where the theme and crux of a story or write-up is similar. In famous case of Brighton y Jones (2004), using this test it was found that similarities of that nature and scope are can exist in both primary and secondary infringements of work. The subject context of defender plays a critical role in determining the knowledge and intention aspect.

The Pattern Test

This Test necessitatesevaluating expressive aspects of an artwork elements in their order, thus in this manner surrounding an unmistakable grouping of occasions inside the work. The example in this succession of occasions, which is CR ensured, is contrasted and the comparable example inside the purportedly encroaching work. The court then achieves an end on regardless of whether CR infringement has happened dependent on the similitude found among original and copied work (Aplin, 2018).

In the case of CBS Songs v Amstrad, it was ruled by the court that if rights of using a work is granted by the owner in the first place, the potential of infringement could not be averted at gross level and thus its case of secondary infringement unless the power of copy was restricted, which make it primary infringement for instance a fictional story or some of its part (Rahmatian, 2015).

The Abstraction Test

This test, for determining if infringement of an intellectual property is primary or secondary, uses the criteria of detail analysis of every aspect of each work. The court using this test develop impression of the abstracted from of work such as a software and its utility and that evaluate its detail abstraction or configuration, so as to explore commonalities in minor construction. The infringement is declared primary if similarities between two works (software etc) are at the abstraction and infringement is declared secondary if configuration is found similar (Rahmatian, 2015).

The Filtration Test

Using this test for determining nature and scope of infringement in two different intellectual properties, courts use various parameters such as for the filtration. The examination starts from idea screening, scrutiny of unprotected aspects of original work

(for instance a computer programme). After this court evaluate protected element by compare and contrast method and finally overall expression of both works are compared. If all elements are proven out to be identical at each filtration, the infringement is declared as secondary infringement, as it was ruled in the Moorhouse v University case (1976). Court stated that degree of control on original work determines the offence and its nature in case of technical information technology works.

Hence the broader test or the criteria applied in the light of exclusive rights of owner under CPDA, it can be argued that in order to appreciate an act of indirect infringement, it is not necessary to commit acts of direct infringement by the person who receives the essential means offered or delivered by the potential indirect infringer (Rahmatian, 2015).

As noticed inBeckingham v Jodges (2003) case, and how the courts have concluded even in cases of inducement to direct infringement of the patent, so that It can be concluded that someone commits acts of indirect infringement of the patent must be accredited at least the existence of an imminent danger that carry out acts of direct infringement (unless the conduct of the direct infringer is covered by a legally established exception) which can be proved by some evidence.

Conclusion

The analysis of various tests used to determine the nature of infringement of CR protected intellectual property shows that cruse of these ties lies in finding the essential difference between these two categories of infringement is the knowledge on the part of the infringer that copyright is infringed: this knowledge is required in the case of indirect infringement whereas it is not the case of a direct infringement.

References

Aplin, Tanya. "Creativity and the Law."In *The Palgrave Handbook of Creativity at Work*, pp. 399-419. Palgrave Macmillan, Cham, 2018.

Bently, Lionel, and Brad Sherman. *Intellectual property law*. Oxford University Press, USA, 2014.

Burt, Roger, and Colin Davies. "Software: intellectual property and artificial intelligence." In *Research Handbook on Intellectual Property and Creative Industries*.Edward Elgar Publishing, 2018.

Coombe, Rosemary J. "Intellectual property, human rights & sovereignty: New dilemmas in international law posed by the recognition of indigenous knowledge and the conservation of biodiversity." *Indiana Journal of Global Legal Studies* (1998): 59-115.

Helfer, Laurence R. "The New Innovation Frontier-Intellectual Property and the European Court of Human Rights." *Harv. Int'l LJ* 49 (2008): 1.

Rahmatian, Andreas. "Cyberspace and intellectual property rights." (2015).

Stokes, Simon. *Digital copyright: law and practice*. Bloomsbury Publishing, 2014.

Zemer, Lior. *The idea of authorship in copyright*.Routledge, 2017.

Case Law

Perry v Truefitt (1842) 6 Beav. 66

Douglas v Hello No 1 [2001] 2 WLR 992

Sabel Bv v Puma AG 1998 Rpc 199

Newspaper Licensing Agency Ltd v Marks and Spencer Plc: HL 12 Jul 2001

Westminster CC v Croyalgrange Ltd. [1986] 1 WLR 674

CBS Songs Ltd v Amstrad Consumer Electronics Plc CA ([1988] Ch 61

Moorhouse v University of South Wales 1976 rpc 151

Donoghue v Allied Newspapers Ltd [1938] Ch 106

Brown v Mcasso Music [2005] FSR 40

Robin Ray v C'lussk FJ pic [1998] FSR 622

Cyprotex Discovery Ltd v UnîvcrsiyQf Sheffield [2004] RPC 4

Fisher v Brooker [2008] FSR 26 (CA)

Sguuri v Barru [1994] EMLR 448

Hadley v Kemnp [1999] EMiR 589

Brighton v Jones [2004] EMLR 26

Beckingham v Jodges[2 0031 EWCA Civ 143

Statues

Copyright, Designs and Patents Act 1988.

Universal Declaration of Human Rights 1948

The Berne Convention for the Protection of Artistic and Literary Works (1886)

The Paris Convention for the Industrial Property Protection (1883)