EU & UK Copyright Law – Conditions of Protection & the Right of Communication to the Public

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Focus of this presentation

A. Conditions of protection
   • Originality / creativity
   • Protected works
   • Fixation / recording

B. The right of communication to the public

C. Reception of CJEU jurisprudence - further issues
Conditions of Protection – Originality / Creativity

• Traditional United Kingdom approach

• “Labour and skill” - relatively low threshold
  – Examples of “labour and skill” protected
    • Sawkins v Hyperion Records Ltd [2005] EMLR 29 (CA)
    • Ladbroke v William Hill [1964] 1 WLR 273 (HL)
Conditions of Protection – Originality / Creativity

• Partial adjustment of statute in face of Directives

• Challenges from CJEU
  – Infopaq and subsequent cases confirming application of “creativity” standard across the board
  – (C-604/10) Football Dataco Ltd v Yahoo! UK Ltd referred from the UK
(C-604/10) *Football Dataco Ltd v Yahoo! UK Ltd*

- Creation of data not part of selection or arrangement

- Irrelevant that selection or arrangement of database added “important significance” to data

- “Labour and skill” alone (i.e. without “creativity”) insufficient
Conditions of Protection – Originality / Creativity

• Impact on the law in the UK
  – Likely to involve a somewhat different approach
  – If anything, standard raised:
    • *SAS Institute Inc. v. World Programming Ltd.* [2013] EWCA Civ 1482 (Ch)
Conditions of Protection – Originality / Creativity

• Impact on the law in the UK [cont]
  – However (C-145/10) Painer indicates European threshold not high
  – Reception:
    • Newspaper Licensing Agency Ltd. v. Meltwater Holding BV [2011] EWCA Civ 890, (suggesting little likely difference)
Conditions of Protection – Originality / Creativity

• Pre-expression contributions?

• Labour and skill in creating exact reproduction?

• Labour and skill of the “wrong kind”? 
Conditions of Protection – Protected Works

• UK system based on an exhaustive list of protective “works” (CDPA 1988, s 1(1)):

  • “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.”
Conditions of Protection – Protected Works

• Typically further definition offered, eg:

  “... “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))
An example – an “engraving”
Conditions of Protection – Protected Works

• Is this approach challenged by CJEU’s jurisprudence?

• “Consequently, the graphic user interface can, as a work, be protected by copyright if it is its author’s own intellectual creation. ….”

(C-393/09) BSA v Ministry of Culture of the Czech Republic
Conditions of Protection – Protected Works

• The end of the “closed-list system”?  
  – Acknowledgement of the issue  
  – See Arnold J in *SAS Institute Inc v World Programming Ltd* [2013] EWHC 69 (Ch) [27]-[29]  
  – Outer boundary still provided by the Berne Convention - ”literary or artistic work”
Conditions of Protection – Fixation / Recording

• “Copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise…”

  (CDPA 1988, s 3(2))

• Requirement also challenged?
The Right of Communication to the Public (CDPA 1988, s 20)

• Exclusive rights under the CDPA 1988
  – Copying (reproduction)
  – Issuing copies to the public (distribution)
  – Rental / lending to the public
  – Performing, playing or showing in public
  – Communication to the public
  – Adaptation
“Communication to the public” (s.20)

• Before implementation of the Information Society Directive, copyright owners had a right to control:
  • Broadcasting, and
  • Cabling
“Communication to the public” (s. 20) – post ISD

• “(1) The communication to the public of the work is an act restricted by the copyright in –
  – (a) a literary, dramatic, musical or artistic work,
  – (b) a sound recording or film, or
  – (c) a broadcast…”
Communication to the public (s 20(2))

“References…to communication to the public by electronic transmission, and in relation to a work include-

• the broadcasting of the work;
• the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them..”
Interpretation in the UK – “constitutional” questions

• Could s 20 be interpreted compatibly with the judgment of the CJEU in (C-403/08) Football Association Premier League v QC Leisure?

  – Football Association Premier League v QC Leisure [2012] EWHC 108 (Ch)
Interpretation in the UK – “constitutional” questions

• Was extension of right of “communication to the public” to broadcasts permissible?

  – ITV Broadcasting Ltd v TV Catchup Ltd (No 2) [2011] FSR 40
“Communication to the public” - interpretation in the UK

- Interpreted as encompassing linking to infringing works in some circumstances:
  - *20th Century Fox Film Corp v Newzbin* [2010] FSR 21
  - *EMI Records Ltd v BSB Ltd* [2013] EWHC 379 (Ch)
  - *Paramount Home Entertainment International Ltd v. BSB Ltd* [2014] EWHC 937 (Ch) (post-Svensson)
Impact of CJEU interpretation of the right of communication to the public

• Some bemusement as to application
• Acknowledgment of overlap with public performance right - *Football Association Premier League v QC Leisure* [2012] 2 CMLR 16
• Application of the “targeting” approach from (C-173/11) *Football Dataco Ltd v Sportradar GmbH*
FA Premier League v QC Leisure [2012] 2 CMLR 16 (Ch); [2012] EWCA Civ 703

• CJEU interpretation of Art 3 resulting in overlap with public performance right
  – “The performance of the work in public is an act restricted by the copyright in a literary, dramatic or musical work.” (s 19(1))

• Potential difficulties caused by overlap
Application of exception - CDPA 1988, s 72(1)(c)

• The limits of compatible interpretation:
  – “The showing or playing in public of a broadcast . . . to an audience who have not paid for admission to the place where the broadcast . . . is to be seen or heard does not infringe any copyright in
    • (a) the broadcast
    • …
    • (c) any film included in it.”
Cases which adopt “targeting” approach

- Football Association Premier League v. BSB and ors [2013] EWHC 2058 (Ch), [42]

- EMI Records Ltd v. British Sky Broadcasting Ltd [2013] EWHC 379 (Ch), [50]–[51] per Arnold J (outlining some factors)
Reception of CJEU jurisprudence – some other issues

• (C-168/09) *Flos SpA v Semeraro Casa* – repeal of s 52

• New exceptions:
  – e.g. Copyright and Rights in Performances (Quotation and Parody) Regulations 2014
Reception of CJEU jurisprudence – some other issues

• Approach to infringement:
  – *SAS Institute Inc. v. World Programming Ltd* [2013] EWHC 69 (Ch); [2013] EWCA Civ 1482

• ISD, Art 5(1) - (C-360/13) *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd*