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*

F*A 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*