

## Can There Be an Infringing Copy Without a Copyright Infringement?

In *Infabrics Ltd v Jaytex Ltd* [1980] 2 All ER 669 Buckley LJ discussed at some length, but finally left open, the question whether under the Copyright Act 1956 it is possible for there to be what the Act calls an "infringing copy" in a case where there has been no infringement of copyright. His Lordship said (at p 678) that as at present advised he felt that some limitation on the definition of "infringing copy" must be found or implied so as to give the Act a reasonable and coherent pattern. Donaldson LJ agreed, without going into detail. (The third judge, Goff LJ, died before the reserved judgments of the Court of Appeal were delivered.) On appeal, the House of Lords ratified this view ([1981] 1 All ER 1057). Yet it is submitted with respect that it is manifestly erroneous.

The point arises on s 18 of the Copyright Act 1956. This gives a copyright owner all such rights and remedies in respect of the conversion or detention of infringing copies as he would have if he were their owner. It goes on to define the term "infringing copy", and this is where the trouble comes. Not only does the definition include (as one would expect) a copy the making of which constituted an infringement of copyright, but it goes wider. Imported articles the making of which did not constitute an infringement of copyright are covered where there would have been an infringement if they had been made in the United Kingdom.

The definition is contained in s 18(3). After stating that "infringing copy" means an article which reproduces a work, edition, recording, film or broadcast, the subsection continues:-

"being (in any such case) an article the making of which constituted an infringement of copyright in the work, edition, recording, film or broadcast, or, in the case of an imported article, would have constituted an infringement of that copyright if the article had been made in the place into which it was imported..." (emphasis added).

Now the first thing to be said about the italicised words is that they can only refer to articles not made by infringement, since articles made by infringement are fully covered by the words immediately preceding. Next, it is easy to see the purpose of the italicised words. A foreign article not made by infringement (say because made in a country which does not recognise our copyright law) is imported into the United Kingdom without the copyright owner's authority. It immediately becomes a threat to his exclusive right to exploit the copyright work in the United Kingdom, so the Act says it is to be treated as if it were his own property. It is to be an "infringing copy". In that way it comes within the Act's protective provisions.

If the matter is so clear why did the Court of Appeal raise doubts? Let us look at the points of doubt cited by Buckley LJ (p 677-8).

1. The 1956 Act definition of "infringing copy" goes wider than the corresponding definition in the Copyright Act 1911 "unless the operation of s 18 is restricted to articles in respect of which there has been some actionable infringement by someone".

Comment Here, it is submitted with respect, the learned judge has allowed himself to be led astray by a wholly extraneous consideration. The long title of the 1956 Act states that its purpose is "to make new provision....in substitution for the provisions of the Copyright Act 1911". This indicates as clearly as it possibly could that the object in 1956 was to make a completely fresh start. When a draftsman does this he is not expecting a detailed comparison to be made with the Act replaced. He seeks to set out the whole story in his new Act. I submit with respect that judges ought not to base their judgments on comparison

with superseded law. To do so implies a duty on legal advisers to do the same, and unnecessarily complicates the process of giving advice.

2. Section 5(2) of the 1956 Act renders importation of an article not made by infringement actionable only where to the importer's knowledge its making would have constituted an infringement if done in the country of importation. No such limitation appears in defining "infringing copy" in s 18(3), so that the s 18 remedy in conversion is also available against an innocent importer. This distinction is "absurd" and "affronts common sense".

Comment It is submitted that the scheme of the Act is clear and justifiable. Mere importation of copies not made by infringement is actionable only where there is knowledge, but the remedy given by s 18 is a remedy in rem. The copies are present in the United Kingdom without the consent of the copyright owner. If not within this provision they can be exploited by the importer to his own profit. That would not be fair. Even so, s 18(2) provides an exemption where the defendant is unaware of the copyright or reasonably believes the articles not to be infringing copies.

3. Part III of the 1956 Act, in which s 18 is included, has the cross-heading "Remedies for infringement of copyright". This is another departure from the form of the 1911 Act, where the corresponding heading was "Civil Remedies". Construed literally in the case of an importer of articles not made by infringement, s 18 would give a remedy in conversion where no infringement of copyright had occurred, and this would be contrary to the limitation indicated by the cross-heading.

Comment. It is well established that clear words are not to be construed against their plain meaning because of a heading. A brief heading like this is intended to give an indication of the subject-matter of the sections following it but should not be taken as an exhaustive description.

In the House of Lords only two full judgments were delivered, and on this point they were brief. Lord Scarman (p 1068) held that the literal construction would be "absurdly unjust". He did not say why, and his conclusion is difficult to understand. It would surely be more unjust for the copyright owner to go uncompensated for the commercial exploitation of his copyright work within the United Kingdom in a way he had not authorised. Lord Scarman too relied on the cross-heading. Lord Wilberforce (p 1062) dismissed the point even more summarily, relying entirely on the cross- heading.

We thus find our highest courts determined to deny any meaning to thirty words in a modern Act of Parliament because they consider that meaning unjust. The decision would be cavalier enough if the meaning were indeed unjust. When, as I hope to have shown, the meaning is in fact just, and denying it creates injustice, one can only hope that in future this curious decision will be treated as made per incuriam and therefore not binding.

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