Chapter 4: Infringement of copyright

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Idea/expression dichotomy

In *Ashley Wilde Group Ltd v BCPL Ltd* [2019] EWHC 3166 (IPEC), the Intellectual Property Enterprise Court examined a dispute for copyright infringement between two celebrity bedding ranges for Kylie Minogue and Caprice. The question was whether certain similarities between the two lines of linen, such as similarities on the choice of a pattern of scallop-style pleats in horizontal rows, or the spacing between the pleats and their size, created a presumption of copying. Stressing that the question of copying concerns quality, not quantity, as per *Ladbrokes v William Hill*, HHJ Melissa Clarke held that the possibility that the defendant had access to the plaintiff's design as a buyer was immaterial. There were indeed numerous differences between the two products, such as the method of pleating, the size of the pleats and the positioning of rows. Scallops, pleats and scallop pleats have been commonly used in the textile industry for centuries, even though they are not commonplace for duvet covers. Consequently, the only relevant similarities remaining between the two designs were: the crescent shape of the pleated scallops; the broadly similar size of the scallops; and the broadly similar spacing between horizontal rows of these. In addition, the defendant had a plausible claim for independent creation. As a result, copyright infringement could not be established.

Copyright infringement and lookalike products

Islestarr Holdings Ltd v Aldi Stores Ltd, [2019] EWHC 1473 (Ch) concerns a copyright infringement claim on Charlotte Tilbury designs that decorated the lid of a package containing two makeup powders and embossed into the makeup powders in the package respectively. Deputy Master Linwood found the use in question was copyright infringement as the similarities were substantial both from a quantitative and a qualitative perspective. Interesting issues arose by reference to the fixation requirement and the extent to which the products in question met it. As Deputy Master Linwood observed,

> 'I am in no doubt that the design embossed into the powders can be subject to copyright protection in principle. Otherwise, artistic works by, for example, persons

> who make sculptures out of sand at low water on a tidal beach, which are then washed away, could have no claim to copyright in, say, a pre-construction sketch or photograph of the completed work. Likewise, I can see no reason why the creator of a bespoke wedding cake could not claim copyright in his or her work.'

Commenting on the issue of permanence of artistic works, he remarked that the transient existence of a subject-matter does not mean that it cannot qualify as a work and offered the example of a sculpture made of ice, which is no less a sculpture because it may eventually melt.

Communication to the public

In *Wheat v Google*, [2020] EWHC 27 (Ch), the High Court of Justice heard an appeal in a case alleging copyright infringement through hotlinking, i.e. displaying an image on a website by linking to the website hosting the image. Mr Wheat argued Google communicated his copyright works to the public within the terms of s. 20(2)(b) CDPA 1988. He needed to prove that Google communicated his copyright works either (a) to 'a new public' or (b) by a different technical means from that which he had authorised (following CJEU case-law in cases such as *Svensson*, *ITV*, *BestWater* and *GS Media*). The High Court held that the acts complained of against Google were not unlicensed communications as they were not addressed to a new public in the sense that all potential users of the unrestricted website were one public and, in addition, the relevant communications were not realised by a new technical means, on the basis that the internet was a single technical means. As a result, the appeal failed.

Warner Music and Another v TuneIn Inc [2019] 11 WLUK 6 concerned a service enabling users, via a website or app, to access internet music radio stations around the world and the question was whether this kind of use amounted to an act of communication of copyright works to the public contrary to s.20 CDPA 1988. The High Court ruled that unlicensed linking to radio stations that are under a license in the UK does not amount to an act of communication and therefore to copyright infringement. However, where such unlicensed linking is not subject to a license in the UK, it is an act of communication to the public, hence an act of copyright infringement.

Secondary copyright infringement

In *F.B.T. Productions, LLC v Let them Eat Vinyl Distribution LtD & Anor* [2019] EWHC 829 (IPEC), the High Court of Justice considered a case concerning Eminem's *Infinite* album. The first defendant made vinyl copies of the album and supplied them to the second defendant who sold them without authorisation from the claimant record company. As soon as the Court determined that the record company owned copyright on the relevant album and established that the first defendant carried out copyright infringement by making copies in vinyl, it moved onto considering the issue of secondary copyright infringement through importing, offering for sale and selling copies of the *Infinite* album. According to s. 23 of the CDPA 1988, copyright is infringed by a person who distributes, in the course of business, a work which they know, *or have reason to believe is, an infringing copy of the work*. The question was whether the second defendant knew or had reason to believe that this was the case. The test is an objective one and examination ought to take place from the perspective of the reasonable man. As HHJ Hacon remarked it is enough if a reasonable person would have been led to believe on the basis of the facts that dealing in the copies would be in breach of another party's copyright; mere suspicion that this is the case would not suffice. In the present case, HHJ Hacon held that the fact that the first defendant made copies from a WAV file instead of a Master Tape was immaterial and, in his view, the second defendant neither knew nor had reason to believe that the vinyl and CD copies of *Infinite* were infringing copies of a copyright work owned by another party.