COPYRIGHT

Is There A Work in Which Copyright Can Subsist?

A. The Test for Subsistence & Originality

1. The material must be expressed NOT merely be the copying of an idea
2. The material must fall within the definition of a "work" ***(s14)***
3. The material must be "original" to the author to attract copyright
4. The material must be recorded ***(s15)***

B. Idea/Expression Dichotomy

Copyright = does not protect ideas, only their expression – art 9(2) TRIPS

- ***RATIONALE:*** intellectual property right **"should not prevent the flow and use of ideas"**, which should remain **"as free as the air"**
  - In ***Johnson v Bucko*** D argued that the infringing drawing was **so simple that the idea** (which is not protected**) and expression** (which is protected) were **virtually the same thing**
    - **YES =** breach b/c evidence of sufficient labour and skill producing the drawing so drawing distinct from "idea" of the design
  - In ***Kenrick v Lawrence*** D created his own voting paper that showed a hand ticking a box that was similar to a pre-existing image
    - **NO =** no breach b/c D had copied the idea not the expression – **you are allowed to be inspired**

C. Is the Material a "Work" s14?

Literary Works

A "literary" work is any work **other than a dramatic or musical work** that is **written, spoken or sung**, and includes **(a) a table or compilation** and **(b) a computer programme** ***(s2)***

Dramatic Works

A "dramatic" work includes any **work of dance or mime**; and a **scenario or script for a film** ***(s2)***

- ***Green v BCNZ [1988] (CA)***
  - **Claim** that the **format of a television programme** was a dramatic work
    - **NO =** the scripts could not be acted or performed so it was not a dramatic work
    - A dramatic work must have "sufficient unity" to be capable of performance (PC)

- ***TVNZ v Newsmonitor***
  - Claim that its **news programme was an elaborate television performance** with a scripted introduction and video "carefully crafted" to slot in at a particular moment
    - **NO =** the video clips were works in their own rights (film)
    - Therefore, without them the news programme lacked "sufficient unity" to be capable of a dramatic works

Musical Works

A "musical work" is any **music, exclusive of any words** (literary) **or of any actions** (dramatic) "the notes" ***(s2)***

Artistic Works

I. DEFINED *(s2)*

i. a graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality; or
ii. a work of architecture, being a building or a model for a building; or
iii. a work of artistic craftsmanship, not falling within subparagraph (i) or (ii)

NOTE: none of these terms have individual/exhaustive definitions so it is therefore the words will mean what the courts, assisted by the dictionary and expert evidence, make of them

II. GRAPHIC WORKS

- Includes: any painting, drawing, diagram, map, chart or plan (non-exhaustive) ***(s2)***
  - ***Painting***
    - Required to occur on a surface cf. a face ***(Harbond)***
    - No reason why a graffiti work would not qualify, just as a traditional masterpiece would
  - ***Drawings, Diagrams, Maps, Charts or Plans***
    - Drawings for the purposes of commercial products ***(Johnson v Bucko)***
    - Issue can arise where a drawing is derived closely from a pre-existing drawing. So long as there are **significant visual changes in the drawings in "the eyes of the relative expert"**. When an engineer looked at the drawings of the chainsaw "teeth" he thought it was an improvement ***(Husqvarna)***
    - The pattern cut for a woman's dress was a drawing and protected by copyright ***(Thornton)***

III. PHOTOGRAPHS

- Defined: "recording of light on any medium on which an image is produced but not including film" ***(s2)***
  - Any part of a film therefore, including one frame is not a photograph
- They are to be **judged irrespective of "artistic quality"** which means the assumption has always been that **minimal labour, skill and/or judgment is required** (selection of subjects, technical choices)

IV. ARCHITECTURE

- Defined: "a building or model for a building" (s2)
  - ***Beazley Homes [1978]***
    - Low standard home plans clearly protected by copyright
    - A building can be any fixed structure, or any part of a building (chimney for ex)
    - Not clear whether any artistic element is required
    - ***Held***, some architectural skill required ("the product of some skill or experience in design")

V. ARTISTIC CRAFTSMANSHIP

- A work falls within the category of "artistic craftsmanship" if it does not fall within the first two categories under "artistic work"

- The author of such a work **must be <u>both</u> a craftsperson <u>and</u> an artist *(Bonz v Cooke)***
  - ***Craftsperson***: makes something in a skilful way and takes justified pride in the workmanship
  - ***Artist***: produces something that has "aesthetic appeal"
  - Hand knitted woollen garments with sheep on the front were found to be works of artistic craftsmanship ***(Bonz)***

Sound Recordings

Recording of sound <u>OR</u> a recording of the whole or any part of a literary, dramatic or musical work *(s2)*

- **KEY** = the sound recording from a musical work can be a separate copyright. Therefore several bands could have their own distinct copyright of the sound recording of a song (with permission of musical copyright owner)
  - ***However***, Copyright Act, s14(2) makes it clear that a straight recording of an earlier sampling might not qualify (not enough originality)

Communication Works

Transmission of **<u>sounds, visual images, or other information</u>**, or a combination of those, **<u>for reception by members of the public</u>** ***(s2 Copyright Amendment Bill 2008)***

- There is no definition of the word "public" but it seems clear enough that it could include a particular group, such as paid subscribers
  - Transmission to individual mobile phones was to "the public" ***<u>(Telstra Corp)</u>***
- Often there is an issue as to **<u>what the programme actually is</u>**:
  - ***Network Ten v TCN Channel 9***
    - D rebroadcast something
    - Issue arose as to what a "broadcast" was
      - ✧ Held, it is a question of fact
      - ✧ It might be an advertisement, particular programme, or a particular episode
      - ✧ **<u>Common sense approach should be used</u>**

Typographical Arrangements of Published Editions

The whole or any part of one or more literary, dramatic or musical works *(s2)*

- This work consisted of the **<u>overall product, such as a whole edition of a newspaper</u>**, not individual articles ***(Marks & Spencer)***
  - It is not the actual content which is protected, **but the arrangement**!
  - In this respect separate "works" may exist (with their own requirements of originality)

C. Is the "Work" Being Copied Original (s14)?

The Test

1. **<u>Must be independently produced</u>**
   - i.e. must come from creator and **<u>not be copied</u>**
   - Can be problematic because most things are not "utterly new" and often borrow from earlier works

2. **<u>The item must result from some "skill, labour and judgment"</u>**

- Amount required is minimal – no real inventiveness or novelty is needed ***(Henkel)***
- The greater the originality, the wider the scope of protection which copyright affords it – and vice versa – **highly original work will be given utmost protection** ***(Henkel)***
- In ***Walter v Lane*** a reporter merely **took down a speech** by Lord Rosebary in the HOL
  - **YES =** reporter owned the copyright
  - This decision has been criticized as a low point in the level of originality

Literary Works

I. WORDS, TITLES AND SLOGANS

- ***Exxon Corporation v Exxon Insurance Held*** = **NO** copyright could not exist in a single word (even though considerable labour was potentially expended)
  - Level of originality is typically low, but this will vary dependent upon the extent to which the work is derived from an existing work

- ***Sunlec International v Electropar***
  - Recent Auckland case about advertising "feel friendly - the best choice for field work"
    - **YES =** in a "startling decision" there had been sufficient "skill, judgment and labour" and that the slogan attracted copyright protection

- ***Infopaq v Danske***
  - A news media group scan newspapers in Denmark and send summaries of articles to subscribers
  - The rights holders of original articles said this was an infringement of copyright
  - In the ECJ for "originality" there had **to be some "creative element" not simply the "the sweat of the brow"**
    - **YES =** 11 words were works of intellectual creation and attracted copyright

- ***The Newspaper Licensing Agency v Meltwater***
  - News monitoring organization
    - ***Held***, headlines were an independent literary work
    - Only has persuasive effect in NZ

II. COMPILATIONS

JURISPRUDENTIAL ISSUE: ought originality to subsist merely through the selecting, collecting, verifying, recording and assembling of factual data?

USA & Australia – Fiest v Rural Telephone	***United Kingdom & NZ - Ladbroke***
"Sweat of the brow" is **insufficient**	"Sweat of the brow" is **sufficient**
A telephone directory did not qualify for copyright because there was no creative element, it was merely a mechanical exercise	Where there is low amounts of skill and judgment, but there is a lot of labour putting it together, the work will be protected

Development:

- ***Telstra v Desktop Marketing [2001] (Aus)***
  - Preserved law on **"originality" from England** - a **substantial investment of labour alone could amount to originality** – **"sweat of the brow" was sufficient**
    - There was **no need to demonstrate** that there had been of a **"spark of creativity"**
    - **"Industrious collection"** - the labour and expense of collecting, verifying, recording and assembling actual data was **sufficient** to give rise to a copyright work

        - Were concerned that the immense expense and labour that Telstra had put into gathering the directories would be wasted - the **D would <u>"reap where they had not sewn"</u>**

- ***<u>Channel 9 v Ice TV [2009]</u> (Aus)***
    - [NEED TO ADD IN HERE]
    - D produced its own electronic copy of a TV guide and to take account of late changes it took "slithers" of information from th P
    - D argued that it had someone employed who sat for 3 weeks watching Channel 9 TV and he came up with a predictive template which enabled Ice TV to produce an electronic guide
    - Conceded that there was an original literary work
        - ***In obiter, <u>Telstra</u>* <u>"may be out of line"</u>**

- ***Telstra Corp v Bone Directories [2010] (Aus)***
    - Most recent
        - ***Held***, in light of ***Ice TV*** there is **<u>no copyright of White and Yellow pages</u>**

- **European Union Database Directive**
    - Harmonization of copyright law forces the UK change its law in relation to databases
    - s3(a) UK Copyright Act: copyright in a database will only **<u>arise where there is intellectual creative input in the selection and arrangement of the information</u>**
    - So "intellectual creative input" required cf. "sweat of the brow"

So Where Does this Leave New Zealand?

- ***LTA v Glogau [1999] 1 NZLR 261 (CA) – LEADING NZ CASE***
    - Taxi driver log book made up of material collated from MOT information which was given particular layout and arrangement
    - COA said the **<u>extent of the labour in a compilation is low</u>**
        - Held, endorses ***Ladbroke*** (sweat of brow) - it only needed to be "more than minimal"
        - On the facts protected by copyright
        - ***NOTE***: this was decided before recent shift in Australia and the law may be different now

Key Issues Going Forward:

- **NZ left isolated – still our position on originality: Has there been sufficient skill, labour and judgment when selecting and arranging the facts? (seems "sweat of the brow" suffices)**
- Questions (to be decided by the Court):
    - Does there need to be any intellectual creativity involved or is just it simply that you can invest enough labour in assembling the facts to warrant copyright subsistence?
    - If that is the case that you only need labour, what sort of labour?
        - In ***Ladbroke***, the decision making behind the betting coupons (as to what would go into them) counted
        - Earlier English cases that protected TV schedules and football fixtures also said that the decision making about when things would be done counted as the labour towards the expression of the copyright work
        - Contrast with ***Ice TV Case*** (where they said ***Ladbroke*** was either wrong or distinguished)
            - ✧ They said that they were **<u>business decisions</u>** not related to expressing a copyright work
    - Out of ***Ice TV*** it was said that the **<u>"misappropriation doctrine"</u>** had been too widely applied.
        - "You should not reap where you have not sewn"

- Instead – just look at the authors and ask: have they put in the necessary skill, judgment and effort?

II. MUSICAL

- ***Sawkins [2005] (UKCA)***
  - P had created original works through his effort, skill and time in making "performing" editions of Baroque music composed in 1726
    - ***Held***, it is **not necessary to isolate particular notes** as the only thing protected by musical copyright, but tempo **and other performance indicators were sufficient** to create a fresh, derivative copyright work

- ***EMI v Larrikin [2011]***
  - Four bars of a famous Australian icon song was sufficient for subsistence of copyright
  - "Kookaburra Sits in an Old Gum Tree"

IV: SOUND RECORDING

- The originality requirement will be fulfilled by the investment and means of recording rather than in the labour, skill and/or judgment spent in selecting or capturing the sounds
  - Therefore, a tape recording of whatever sounds were captured randomly in a room full of people speaking would qualify

D. Has the "Work" Been Recorded?

- Copyright does not exist unless the work is recorded, in writing or otherwise ***(s15)***
  - Known as "fixation" – there must be a permanent record
  - In ***Green v BCNZ*** a P could not point any script of his show (the work) but relied on his verbal description of catch-phrases and the format which was insufficient

E. Does the Creator Qualify for Protection?

- The author "at the material time" is a New Zealand citizen, or domiciled, resident or a body incorporated under New Zealand law ***(s18)***
- Publication must be in New Zealand or another Convention country ***(s19)***

Copyright Duration, Ownership & Special Rights

1. Duration of Copyright
2. Authorship & Joint-Authorship {first author = first owner}
3. Ownership & Exceptions {employment & commissioning}
4. Licensing
5. Moral Rights

A. Duration of Copyright

How Long?

- **Traditional Works** (literary, dramatic, musical or artistic) = **lifetime the author +50 YEARS** (regardless of whether ownership changes hands) ***(s22)***
- **Communication Works, Recordings, Films** = **50 YEARS** from end of calendar year work was made/was made available to the public ***(s23)***
- **Typographical Arrangements** = **25 YEARS** from end of calendar year which work was first published ***(s25)***

B. Authorship

Who is the Author?

- Identifying the author of a copyright important because it will
  i. Help **establish ownership** ***(s21)***; and
  ii. Be required when **determining the term** of the copyright ***(s22)***

- The author is defined as the person who creates it ***(s5)***
- ***Prima facie***, author is the first person to be recognised as the owner of the copyright work ***(s21(1))***
  - For literary, musical, dramatic or artistic: they must be a "natural person" ***(s5)***
  - For a sound recording, film, communication work, or typo-arrangement can be a body corporate ***(s5)***
  - ***ESSENTIALLY,*** a question of fact for the judge

Joint Authorship

- A work produced by the **collaboration of two or more authors** in which the **contribution** of each author is **not distinct** from that of the other author ***(s6(1))***

- ***Chandler v Littin (1970) 1 NZIPR***
  - P had **written some lyrics** and had **an idea for a tune** to go with the lyrics
  - He go assistance from two musically trained people who developed the melody
  - The three then worked as a group to improve the melody
    - ***Held***, P had the **literary copyright to the lyrics**, but that the **musical work (tune) was in joint authorship**

- ***Robin Ray v Classic FM [1998] FSR 622***
  - P consulted with D for P to categorize the radio stations music library based on popularity
  - The system was so popular that D wanted to license it to other radio stations
  - Issue: was this joint ownership between P and D?

- Test: Did the station provide significant creative input? Was its contribution indistinct from that of P?
    - ***Held***, P had a direct responsibility for what appeared in the system
    - The station may have given P some ideas and help but he alone composed and wrote
    - P was sole author

C. Ownership

First Ownership Rule & Exceptions

Prima face, the first owner is generally the person or persons who is/are the author ***(s21(1))*** **subject to two exceptions:**

1. ***Works Made During the Course of Employment (s21(2))***
    - When a person makes a **"traditional work"** in their employment, the **employer is the owner**
    - Must distinguish between ***contract of employment*** and being an ***independent contractor*** because only when under the **former will the exception apply**
    - This is achieved by determining the **"real nature of the relationship"**
    - **Unlike an employee**, an independent contractor does not work regularly for an employer but works as and when required
    - Apart from looking at what is expressly in the agreement itself, you look to the whole relationship between the parties and the actual rights and obligations placed upon each other ***(Robin Ray)***
    - Look at the **degree of control** over the contractor/employee, the method of payment, hours to be worked etc ***(Robin Ray)***

2. ***Where Someone Commissions and Agrees to Pay for the Specifically Listed Item (s21(3))***
    - When a person is commissioned to take photographs, making of computer programme, a painting, a drawing, a diagram, map, chart, plan, engraving, model, sculpture, film or sound recording the **person who commissioned them is the first owner.**
    - Key points from ***Pacific Software v Perry Group [2004]***
        - Question of fact
        - To "commission" means to "order" or "request"
        - There must be an express or implied agreement to pay
        - The payment for the commissioning is the quid pro quo (exchange) for the copyright work
        - A commissioning is not the same as contract – the court looks for an arrangement of the requisite character between the parties and what the terms are

NOTE: these sections do not apply where the parties have reached an agreement for them not to apply i.e. contracted out them ***s21(4)***

Assignment

- **<u>Effectively the "sale" of your ownership rights</u>**
- A copyright assignment is an immediate and irrevocable transfer of the copyright owner's entire interest in all or some of the rights in the copyrighted work
    - If copyright is to be transferred by an assignment, it must be in writing, signed by or on behalf of the owner of the copyright ***(s114)***

- ***Glogau v LTSA (1997)***
  - Considered the overall effect of all the materials placed before it
  - A letter which confirmed the passage to copyright, together with the receipt for the money paid was sufficient
  - There is no need for the words "assign" or "grant" to appear if the intention to assign can be gathered from the contract

D. Licences and Licensing

The Rule

- A licence to do, or authorise the doing of, any restricted act ***(s2)***
  - A licence granted by a **copyright owner (X)** to a **purchaser of that licence (Y)** is binding on all subsequent **absolute owners of that copyright (Z)** except for a purchaser for value in good faith who had **no actual or constructive knowledge of the licence**

Exclusive Licences

- A licence in writing, signed by or on behalf of a copyright owner, **authorizing a licence, to the exclusion of all others (including the copyright owner)** ***(s2)***
- Due to the **special status** accorded to an exclusive licence, it has been suggested that the words expressing this **intention be made clearly** ***(Tamiya Plastic Model)***
- It **may be difficult to distinguish between an assignment and an exclusive licence**
  - For example, the words "exclusive right to print and publish" were held to be a partial assignment of copyright

Implied Licences

- If there is an implied licence, its terms will be determined by the words of the document or oral exchange, or by conduct in a course of dealing
  - For example, if someone commissions you to write an article for a magazine, it will almost certainly be implied that the party commissioning has the licence to publish it
  - **Accordingly, it can be a good defence to any infringement**

The Licensing Industry

- Applies particularly to the music industry
- It is commonplace to have **"collecting societies"** which control the granting of rights
  - Most widely known in NZ is APRA
  - It is APRA's basic task to grant licenses for the broadcasting and public performance of the music and lyrics under its control to users who are required to pay appropriate fees

The Copyright Tribunal

- When a group of copyright owners negotiate a blanket copyright licence covering the works of more than one author, it may be a "licensing body" ***(s2)***
  - Disputes may be referred to the Tribunal where someone requiring licenses ***(s149)*** or by someone wanting a licence under an existing scheme ***(s150)***
  - One recent case occurred in 2005 involved the NZPA who operated a scheme, which allegedly charged unreasonable fees for licenses over the internet
  - Under s150 the Tribunal may make an order either confirming or varying a scheme as it may determine to be unreasonable