

RECENT DEVELOPMENTS IN THE LAW OF COPYRIGHT

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When the average person even these days hears the word copyright he thinks of rights relating to literary works or artistic works such as books or paintings. Up to a couple of years ago the average lawyer also thought the same way. When one considers the lethal nature of the rights conferred by the Copyright Act, it is surprising that since 1962 (when the current Act was passed) only six cases have appeared in the New Zealand Law Reports on copyright. When further one considers how common piracy is in industry, it is even more surprising because copyright is not confined to books or works of art, the provisions of the Act are such that any person who copies another man's work must be very careful lest he be guilty of infringement.

I think that people have also always recognised that copyright would exist in musical works and two of the reported cases deal with these. *Australian Performing Rights Association Limited v. Koolman and Another*¹ and *J. Albert & Sons Pty Ltd v. Fletcher Construction Company*.² More in the artistic and literary fields were two others. *Martin v. Polyplas Manufacturers Limited*³ which concerned engravings of coins and *International Credit v. Axelson*⁴ which concerned a Credit Control Manual.

It was however, in my view, not until the case of *P.S. Johnson and Associates Limited v. Bucko Enterprises Limited and Others*⁵, that copyright litigation came down from the lofty plane it had occupied and became involved with industry. The reason of course was that under the 1962 Act a plan ceased to be "a literary work" as it had been under the 1913 Act and was included in the definition of a drawing and a drawing was an artistic work "irrespective of artistic quality".

The work of art in *Johnson v. Bucko* was a drawing of a lavatory pan connector. Mr Johnson had developed this type of rubber sleeve which joined the outlet from a lavatory pan to the soil pipe leading outside the house. It had a pattern of ribs and was so shaped as to fit the different diameter pipes.

Mr Johnson had applied for a patent for his idea but at the time of the case it had not been granted. Mr Buckley had been advised that the connector was not patentable and thought he was free to go ahead and copy it. Unfortunately for him his adviser apparently hadn't considered the possibility of protection under the Copyright Act and Mr Buckley got hold of a copy of Mr Johnson's drawing and possibly one of his connectors, had a mould made from them and started up in competition to Mr Johnson.

Mr Johnson sued for breach of copyright and His Honour Mr Justice Chilwell held that there was copyright in the drawing, that Mr Johnson's company owned the copyright and that Mr Buckley and his company had infringed. He granted injunctions, an enquiry as to damages on the basis of conversion and ordered

1. [1969] N.Z.L.R. 273.
2. [1974] 2 N.Z.L.R. 107.
3. [1969] N.Z.L.R. 1046.
4. [1974] 1 N.Z.L.R. 695.
5. [1975] 1 N.Z.L.R. 311.

delivery up of all pan connectors in the possession, power or control of the defendants.

The next copyright case in the books is *Auckland Medical Aid Trust v. Commissioner of Police*.⁶ This turned on the right of the Crown to use documents in which copyright existed and is on rather a narrow point.

The latest case of which I am aware however, again brought the Copyright Act down into the market place and will I think have wide repercussions. This is the case of *Beazley Homes Limited and others v. Arrowsmith and Others*,⁷ a decision of His Honour Mr Justice McMullin. Beazley Homes Limited produced plans for and built low-cost houses. Mr Arrowsmith had been Beazley's agent in Hastings and had joined up with Mr Allison who had been one of Beazley's franchise builders. Mr Arrowsmith sold and Mr Allison built houses which were copied from and substantially similar to the Beazley plans and houses.

Beazleys sued for breach of copyright and His Honour held that there was copyright both in the plans and in the houses and that Mr Arrowsmith and Mr Allison had infringed. It was suggested that copyright could not subsist in such mundane things as plans for group houses and that in any event a small alteration in the plan was enough to prevent infringement. His Honour held however, that there was sufficient originality to attract copyright and once copying was proved, substantial reproduction was all that was necessary. This case and *Johnson v. Bucko* show, I think, a development in copyright law in New Zealand.

I propose to look at the Copyright Act 1962 particularly with these two cases in mind. This means I shall be dealing only with what are known as "artistic works". Copyright it must be appreciated lies in the form in which an idea is expressed not in the idea and it must be proved that the infringer copied. Compare for example patents which are concerned with ideas and which give protection even against a person who subsequently to registration, arrives independently at the same idea.

The Copyright Act 1962 is a code and no copyright subsists other than by virtue of the Act (s.5.). Broadly speaking copyright subsists in every unpublished original literary, dramatic, musical or artistic work of which the author was a New Zealand citizen or domiciled or resident in New Zealand at the time the work was made. If the work has been published and the first publication of the work took place in New Zealand or the author was a New Zealand citizen or so domiciled or resident, copyright will also subsist. It is necessary therefore to see first whether the work has been published and this is defined in Section 3 in the case of artistic works to mean if reproductions of the work have been issued to the public.

In the *Beazley Homes* case McMullin J. inclined to the view that the plans were published because they were available for perusal at the offices of Beazley agents. He thought also that the houses were published works because substantial numbers of them were erected in New Zealand at the request of purchasers. If they were not published however, he held that copyright still subsisted in them because the authors were resident in New Zealand at the time the works were made (s.7.). If works do not come within Section 7 it is

6. [1976] 1 N.Z.L.R. 485.

7. Supreme Court Napier, 27th June 1977 (A 14/75).

necessary to consider Sections 49 to 51 which deal with artistic works etc. published in other countries or by citizens of other countries. Foreign works and authors have generally the same protection under a convention order made in 1964.

Next the work must be "original". This is a very difficult concept because as I have said, the copyright applies to artistic works and not to the ideas upon which those works are founded. It is original skill and labour in execution which is protected, not originality of thought. Simplicity complicates thinking about originality. In the *Beazley Homes* case McMullin J. was dealing with very simple houses but he said:

"Similarities in other designs do not therefore preclude a claim being made for originality. Indeed it seems to me that there may be some force in the Plaintiff's claim that because the range for skill and design is limited, the need for their exercise is greater".

In the *Johnson v. Bucko* case Chilwell J. referred to:

"The exercise of time skill labour and judgement to translate Mr Johnson's thoughts [shown in a sketch] into a detailed engineering plan containing all the precise information required for the engineering shop to produce the die or mould. The product drawing was not a copy of any other drawing. It was an original execution".

Having surmounted the originality hurdle the person claiming the copyright must then establish that the work protected is an artistic work and as I have said, this is where the development of the law is taking place, because a plan is a drawing and a drawing is an artistic work irrespective of artistic quality. Any sketch therefore provided it fulfills the other criteria I have mentioned may attract copyright and that may restrict the reproduction of that work in any material form (s.7(3)) and give the exclusive right to do so to the owner of the copyright or any person authorised by him. Let us analyse these different requirements.

Reproduction in the case of an artistic work includes a version produced by converting the work into a three dimensional form (s.2.) provided (and this is a very funny section) that the maker of an object of any description which is in three dimensions shall not be taken to infringe the copyright in an artistic work in two dimensions, if the object would not appear to persons who are not experts in relation to objects of that description to be a reproduction of the artistic work (s.20(8)).

The section has been the subject of much comment but the reason is, I think, clear. What is protected is the *expression* of the idea in the artistic work. If a person would have to be an expert to see that the three dimensional object is a reproduction of the two dimensional plan it is more the idea which has been taken than the expression of the idea. For example, the plan of the hull of a boat comprises a number of curved lines which certainly don't mean very much to me. I would not, I think, be able to say that a particular hull was a reproduction of a particular plan because I'm not an expert in boat design — but I would think that an expert would be able to pick the reproduction.

The answer in the case of a pirated boat hull may be that the hull or the mould is a sculpture which again doesn't have to have artistic quality to be an artistic work. Copyright would then subsist in the hull and it would not be necessary to overcome section 20(8).

In *Johnson v. Bucko*, Chilwell J. held that he was not left in the position where he could not say the connector made by Buckley was a reproduction of Johnson's drawing. Note the double negative – it demonstrates where the onus lies. Note also that the judge is entitled to and usually does bring his own non-expert eye to bear. He is not confined to evidence which may be given at the hearing by non-experts. In the *Beazley Homes* case McMullin J. went to look at them and had no difficulty as a non-expert in holding that the houses built by Mr Allison were three dimensional reproductions of Beazley's plans.

I mentioned that the exclusive right to do the restricted acts was confined to the owner or persons authorised by him. Who then is the owner? Section 9 provides the answer. Dealing still with artistic works of the nature I have been talking about the owner is the author of the work except:

1. where someone else commissions the author to make the drawing and pays or agrees to pay for it in which case that person is the owner of the copyright
- or 2. where the work is made in the course of the author's employment under a contract of service or apprenticeship, the employer is the owner of the copyright.

In the course of the *Beazley Homes* case two pitfalls emerged in this regard. One of the plans concerned was drawn, pursuant to a commission by an independent plan drawer for Beazley Homes prior to 1962. Under the old 1913 Act copyright remained with the author. Had it been under the 1962 Act it would have been owned by Beazley Homes. As it was, Beazleys were unable to claim infringement of that plan. The other pitfall arose because although another plan was drawn by an employee of Beazley Homes, he had drawn it for his own home and in his own time and not therefore in the course of his employment. He retained the copyright and it was necessary to join him as a plaintiff in the action.

Having established that there is a work in which copyright can subsist and that it does subsist in the work and that the plaintiff is the owner of the copyright, it finally remains to establish that the copyright has been infringed.

As I have said in the cases I have been referring to, this means reproducing the work in any material form. Funnily enough it doesn't say in the Copyright Act that a person may not copy but it is abundantly clear that it must be proved that the alleged infringer did so. "The copyright work must be the source from which the infringing work was derived" (*Frances Day and Hunter v. Bron*).⁸ This of course is a question of fact to be proved in any way that any fact can be proved. Because however it is very seldom that direct evidence of copying is available – e.g. evidence that the alleged infringer was seen copying the artistic work or evidence that he said he copied it, proof of copying is normally by what I call the multiplication of co-incidences.

In the *Beazley Homes* case copying was denied but when a transparency of the Beazley plan was put over the Arrowsmith plan, they fitted so exactly that there was no doubt that the one could not have been produced without the other. McMullin J. said:

"When the Arrowsmith plans are placed on top of the Beazley plans a striking likeness is immediately demonstrated and in my view the

8. [1963] Ch. 587.

Arrowsmith plans are no more than copies of the Beazley plans with alterations, some for the better, made to them. They appear to be substantial tracings but even if they are not actually traced, it is impossible to escape the inference that the designer of the Arrowsmith plans 6 and 8 copied the Beazley plans, making changes from time to time, some of which may have been intended as genuine improvements (which they are) and some intended to confer a measure of distinction between the two."

What then is the effect of the dissimilarities? They do not demonstrate that a plan has not been copied nor do they mean that copyright has not been infringed. The question is whether a substantial part of the work has been reproduced (s.3). If it has there has been a breach of copyright. Whether it is substantial of course is a matter for the judge but once it has been established that a work has been copied it always seems to me that the copier must go a long way to "uncopy" his work.

Finally, what remedies are available? I mentioned earlier that the rights conferred were lethal and I do not resile from that word. In addition to an injunction the owner may obtain damages or an account of profits and an order that (except in the case of a building) the infringing copy be delivered up or destroyed. It is necessary to consider carefully the advantages which may be obtained from the alternative remedies of damages or account of profits.

Damages are measured by the loss suffered by the owner of the copyright whereas an account of profits measures the gain made by the infringer. These are of course not necessarily the same, nor do they even bear any relation to each other. It usually cannot be postulated that the owner of the copyright would have sold one of the artistic works in place of each one sold by the infringer. If the court thinks having regard to the flagrancy of the infringement and the benefit accrued to the defendant that the plaintiff would not otherwise obtain effective relief, it may award additional damages. These would seem to be in lieu of exemplary or aggravated damages.

Normally an account of profits is granted on the principle that a wrongdoer should not be permitted to keep his ill-gotten gains and this will be the case even if the person wronged has suffered no real loss. Because of this principle however, an account of profits is not usually granted if the wrongdoer didn't know that he was doing wrong. Such a person is only liable to compensate for loss suffered by the wronged person. Funnily enough however, the opposite is the case with copyright. Under s.24(2) if the defendant was not aware and had no reasonable grounds for supposing that he was infringing, damages will not be granted but the owner of the copyright is entitled to an account of profits.

Section 25 of the Act however is the one with real teeth in it. This provides that the owner of the copyright shall be entitled in effect to damages for conversion of any infringing copy. This again does not apply to an innocent infringer but the person who deliberately copies may find that he must pay to the owner of the copyright the full price he received, for any infringing article he sold, less only the cost of sale. In other words he doesn't account only for profits. He pays up the full net sale price. This of course could be ruinous.

To confine my remarks sufficiently to fit into the limited time available I have had to leave out vast areas of the subject. I hope however I have said enough to demonstrate how interesting and valuable a weapon this can be in these days of advancing technology and therefore increasing industrial espionage.

I would like to conclude by saying that in my respectful opinion (although I know that not everyone agrees with me) the use of the Copyright Act in the way I have mentioned is not only legitimate but desirable. Some wish to confine its scope to the traditional artistic works but I think that the theft of a man's skill and labour by copying his drawing, is as reprehensible as stealing his motor-car or his money. If the Copyright Act is not to be used to protect him, some other law reform will have to be introduced which will waste the body of law which has been built up and is being adapted, as the common law so frequently does, to meet the needs of our changing society.