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Case Comment

Of maps, Crown copyright, research and the environment

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***E.I.P.R. 162** *The HMSO and Ordnance Survey v Green Amps* case discusses the fair dealing exception for research for the first time and implies that copyright could be trumped by the Re-Use Public Sector Information Regulations. It also raises the question whether protection of the environment can be an arguable defence to copyright infringement.

A few months ago, the Chancery Division gave its ruling in *The Controller of Her Majesty's Stationery Office, Ordnance Survey v Green Amps*.¹ The main interest of this case lies in the fact that it is the first one interpreting the exception of fair dealing for the purposes of research.² Article 5(3)(a) of the Copyright Directive,³ which the United Kingdom implemented in the Copyright and Related Rights Regulations 2003⁴ states that:

"Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved".

It therefore forced the United Kingdom to modify its corresponding exception which previously implied that commercial research could be fair dealing.⁵ Accordingly, s.29(1) now provides:

"Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a noncommercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement."

The legislative scene being set, one can turn to the case.

Facts and ruling

The claimants, Ordnance Survey and the Controller of Her Majesty's Stationery Office, have Crown copyright in digital maps. The defendant, Green Amps, a company providing wind turbines that generate renewable energy, employed a student of the University of Southampton during his holidays. After the student left, Green Amps used the username and password of one of his fellow students (that the student they had employed had been using) to download maps from Ordnance Survey's Digimap database.⁶ By accessing Digimap in that way, Green Amps would have seen the screens advising that the maps were copyright and that the service was restricted to educational institutions and for educational purposes, which included research. Their downloading was clearly held to be a copyright infringement.

Green Amps sought to rely on several defences. The first lies in the Re-Use of Public Sector Information Regulations 2005, which implemented Directive 2003/98/EC. It allows public sector bodies, "to charge only for the cost of reproducing the maps plus a reasonable return on the amount expended in doing this."⁷ Accordingly, for the court, the Regulations did not allow the defendant to download the maps free of charge, as it did. If someone believes the charge is excessive, they must use the internal complaints procedure set out in the Regulations, which Green Amps did not do. Section 29(1) of the Copyright, Designs and Patents Act (CDPA) 1988 was Green Amps' second defence. It argued that it used the maps it downloaded from Digimap for a "mapping tool" which at the moment of litigation still had "R&D status". As the end-use of the maps was to make a commercial toolkit, the judge found that the research was for a commercial purpose and the defence did not apply. The court added that the dealing was clearly not fair. The amount taken was too great, the dealing implied competition with the owner's exploitation of ***E.I.P.R. 163** his work and the defendant

must have known that the way it downloaded the material was illegitimate. The defendant raised five other defences in writing but did not pursue them orally. The judge rejected them all as they were clearly not applicable. One of them is nevertheless worth mentioning. Green Amps argued that its toolkit was for the greater good as it assisted in the fight against global warming.

Comment

Unfortunately for copyright scholars, the first case interpreting the research exception is too straightforward. Nevertheless, it begins to clarify that research must be completely non-commercial, from beginning to end. To strengthen its ruling, the court could have drawn from the source, i.e. the Copyright Directive, whose recital 42 gave the answer to the case. It states:

“When applying the exception or limitation for noncommercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.”

This can be seen as worrying for academics as most of their research is multi-purpose: for teaching purposes, for pure research purposes (the publication of an article in a review or journal does not generally entail the payment of any remuneration or royalties) and for commercial aims (the publication of a book, as this is generally for profit). Some asked whether this would make the initial research commercial in nature.⁸ Arguably, the answer was already given in recital 42 of the Copyright Directive. Therefore, if an academic re-uses substantial parts of someone's copyright work in a book, the research becomes commercial or rather it was commercial at the outset. This may arguably not occur often as the parts taken are generally not substantial in the first place. This is true for literary works but may be less true for artistic works (graphs and drawings generally have to be reproduced in their entirety if they are to be understood). The interpretation of the research exception is becoming important as it is being considered by the Intellectual Property Office, following the Gowers Review and a consultation has been opened on whether it, and other exceptions, should be reviewed.⁹

Another interesting point is the possible application of Re-Use of Public Sector Information Regulations to Crown copyright. Unfortunately, because the defendant did not comply with the complaints procedure, the court did not have to discuss the application of the Regulations. It would have provided a useful discussion of whether the Regulations applied, i.e. whether Ordnance Survey is a public sector body and whether it fulfils a public task when supplying its maps. If it did, it would have trumped copyright somewhat in the sense that if Green Amps could prove the charge was in excess of a reasonable return, the latter could have been reduced. These regulations can therefore be seen as an external limit or exception to one type of copyright--Crown copyright. But beyond this question, this case raises a more fundamental issue: whether there should be any Crown copyright at all. In most continental countries and even in the United States,¹⁰ official documents are not copyrighted.¹¹ There is a good reason for this. These documents are produced with taxpayers' money. The public should not be asked to pay to use works it has already subsidised.¹² Arguably, in this case, the digital maps may not strictly have been official material. Indeed, Ordnance Survey argued that it was, “an independent non-ministerial government department with Executive Agency status” and was “managerially separate from government”.¹³ It added that it finances all its operations through its revenue whose primary source is the, “licensing income received for digital mapping products provided in the course of its commercial activities”.¹⁴ The court however clearly stated that the claim was for breach of Crown copyright. If Crown copyright did not exist, the status of Ordnance Survey would have been decisive: if it was a public sector body or part of the government, it would have lost the case. It may be time, in view of users' growing anger as to the extent of copyright protection, to get rid of Crown copyright altogether. This may not be necessary, as copyright owners have to comply with the Re-Use of Public Sector Information Regulations. In other words, Crown copyright may in fact be dead letter just because of the Regulations. For clarity's sake however, doing away with Crown copyright may send a more transparent message to the public and would calm down its ire a little.

Finally, the argument raised by the defendant regarding the fight against global warming raises some interesting questions. Surely, the judge implied that the defence did not work because there is no exception in the CDPA which specifically exempts from copyright infringement a defendant who uses copyright works in order to lower greenhouse gases in the earth's atmosphere. But could s.171(3) of the CDPA be used **E.I.P.R. 164* to that effect?¹⁵ Of late, the use of this section has not been very successful and its interpretation has been rather restrictive.¹⁶ However, in *Ashdown v Telegraph Group Ltd*,¹⁷ the Court of Appeal left the notion of public interest (albeit only slightly) open. Therefore,

by analogy with the potential conflicts between copyright and human rights, a defendant may want to use this section if for instance an environmental statute or a higher environmental norm (e.g. a directive, a regulation,¹⁸ Art.2 of the EC Treaty¹⁹ or an international convention²⁰) clashes with copyright law or for that matter any other intellectual property right.²¹ In the case at hand, Green Amps' general argument obviously did not convince the court. However, such more elaborated discourse may convince a court in future, in view of the international and European obligations of the United Kingdom in the environmental area and more general pressing moral needs. If the argument convinces the courts, fine tuning will be necessary so that incentives to create copyright works are not annihilated. Maybe s.171(3) has a brighter future than can be thought. The waves have been made. So, as the saying goes, let us wait and see.

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1. [2007] EWHC 2755, November 5, 2007.
2. *Universities UK v Copyright Licensing Agency Ltd* [2002] E.M.L.R. 35; [2002] R.P.C. 36; (2002) 25(3) I.P.D. 25021 briefly touched upon the interpretation of s.29(1) at para.34 where the Copyright Tribunal stated that "... [c]learly, a student who takes a photocopy for the purposes of his course of a relevant article, or a relevant short passage from a book is likely to do so in circumstances which amount to fair dealing. At the other extreme, if he were to take a photocopy of a whole textbook, we think that his dealing would not be fair, even if done for the purposes of private study".
3. Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L167, June 22, 2001, p.10-19.
4. SI 2003/2498 is available at <http://www.opsi.gov.uk> [Accessed January 28, 2008].
5. Parliament refused to require a non-commercial purpose because it is often difficult to draw the line. See W. Cornish and D. Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 6th edn. (London: Sweet & Maxwell), para.12-39, p.476. As an example of borderline situations, they mention the case of a student subsidised by a firm.
6. Green Amps obtained the username and password of the fellow student because they were cached on its computers. The student they employed was not a party to the litigation.
7. Para.15 of the judgment.
8. P. Torremans, *Holyoak and Torremans' Intellectual Property Law*, 4th edn (Oxford: Oxford University Press, 2005), p.255.
9. See "Taking forward the Gowers Review of Intellectual Property, Changes to copyright exceptions " available at <http://www.ipo.gov.uk/consult-copyrightexceptions.pdf> [Accessed January 28, 2008].
10. Section 105 of the US Copyright Act 1976 as amended (copyright protection is not available for any work of the US Government).
11. See for instance Art.8(2) Belgian Copyright Act; Art.5 Italian Copyright Act; Art.5 German Copyright Act; Art.8 Austrian Copyright Act; J. Sterling, *World Copyright Law*, (London: Sweet & Maxwell, 1998), p.219, n.6.35 notes that civil law countries however do "not normally extend the exclusion of protection to government reports and documents prepared by government departments."
12. For a similar argument in relation to the database right, see E. Derclaye, *The Legal Protection of Databases, A Comparative Analysis* (Cheltenham: Edward Elgar, 2008), p.274. See also Y. Gendreau, "Les leçons du droit comparé" [1996] 30 *Revue Juridique Themis*, p.243 *et seq.*, who is also in favour of abolishing Crown copyright and mentioning another reason, that is the public is the author of statutory law, if not even judgments, by delegation.
13. Para.3 of the judgment.
14. Para.3 of the judgment.
15. Section 171(3) provides "Nothing in this part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise".
16. *Hyde Park Residence Ltd v Yelland* [2000] R.P.C. 604.
17. [2001] EWCA Civ 1142, at 257: "... [W]e do not consider that Aldous L.J. was justified in circumscribing the public interest defence to breach of copyright as tightly as he did. We prefer the conclusion of Mance L.J. that the circumstances in which public interest may override copyright are *not capable of precise categorisation or definition*. Now that the Human Rights Act is in force, there is the clearest public interest in giving effect to the right of freedom of expression in those rare cases where this right trumps the rights conferred by the Copyright Act. In such circumstances, we consider that section 171(3) of the Act permits the defence of public interest to be raised." (Emphasis supplied.)
18. There are now a number of directives and regulations in the field of environmental law, which may clash with intellectual property rights. See for example Directive 96/57 on energy efficiency requirements for household electric refrigerators, freezers and combinations thereof (1996) OJ L236, p.36; Commission Directive 95/12 implementing Directive 92/75 with regard to energy labelling of household washing machines (1995) OJ L136, p.1; Commission Directive 96/60 implementing Directive 92/75 with regard to energy labelling of household combined washer-driers (1996) OJ L266, p.1. See also Directive 2004/101 amending Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of Kyoto Protocol's project mechanisms (2004) OJ L338, p.1.
19. This article provides the obligation for the EU to promote a "harmonious, balanced and sustainable development of economic activities" and applies across all areas. It has not been interpreted by the ECJ yet but there are two documents so far at EC level, which set priorities, including climate change but they and their objectives are not legally binding. See S. Bell & D.McGillivray, *Environmental Law*, 6th edn, (Oxford: Oxford University Press, 2006) p.64-65.
20. See the 1997 Kyoto Protocol.
21. For developments on this new issue, see E. Derclaye, "Intellectual Property Rights and Global Warming" (2008) in *Marquette Intellectual*

Property Review, forthcoming (abstract available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1016864 [Accessed January 28, 2008]).

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