The idea and the expression philosophy essay

Courts have traditionary declined to put forth a straightjacket definition for the term idea. An idea has been described as a thought, as a mental image, as a conception of a theory. In ordinary parlance, an idea can therefore be described as a formulation of thought on a particular subject while expression would constitute implementing an idea. Needless to state, the same idea can be expressed in so many ways and this is where the issue of copyright arises. If the same idea can be expressed in a number of distinct ways, a number of different copyrights may co-exist and no infringement will result. However, one is faced with a problem when it becomes difficult to delineate between an idea and its expression. Herein lies the idea of merger where the idea and the expression cannot be separated and they said to have merged. When merger has occurred, the expression may not b e copyrighted, because to do so would in effect be copyrighting the idea. However an oft quoted policy concern of this doctrine is that when the idea and its expression are thus inseparable, protecting an expression in such circumstances would confer a monopoly of the idea upon the copyright owner. At the same time, an idea can also have certain expressions, without which the idea cannot exist. Putting it differently, there can exist an idea where changing the expression of the same in a particular form would, in effect change the idea itself. Most courts consider these essential ideas not copyrightable, as to copyright them would also, in effect copyright the idea. This type of merger is sometimes called scenes a faire. Another form of a merger is when there are only a very few ways to express an idea. This is called the idea expression identity exception when specific instructions, even though previously copyrighted, are the only and essential means of accomplishing a given task, their later use by another will not amount to an

infringement. Although the idea/expression dichotomy is such a honored doctrine, it has been subjected to fierce criticisms for its failure to provide practical guidelines underneath its metaphysical surface. The intimacy lies in the fact that very few, if any, works contain exclusively either ideas or expressions. Indeed almost any work can be abstracted into a spectrum of various levels of generality, at one extreme of which is the principal goal or theme of the work and the other extreme is the literary expression.

For idea/expression dichotomy to be comprehended and discerned fully, this piece of work will start by further elucidating what an idea is, then expression, followed by idea/expression merge doctrine under copyright law. The last part takes into perspective ‘ Substantial taking’ with respect to the idea/expression dichotomy.

IDEAS

The answer to the question of what an idea is is central to the attempt to draw the difference between idea and expression and therefore the subsequent resolution to the idea/expression dichotomy. According to Lord Hailshaw in LB (Plastics) Ltd v Swish Products limited, the difference is dependent upon what one means by ‘ ideas’.

In Michael Baigent & Richard Leigh v The Random House Group Ltd (The Da Vinci Code case), according to Per Lloyd, ideas lie on the left side of the line between idea and expression, and hence copyright cannot protect them. Copying an idea does not tantamount to copyright infringement. The reasons why copyright law does not protect ideas is that; if the first person to produce a work based on an idea has a monopoly over it, the spread of

knowledge and invention and innovation would be greatly hindered. Fishman (2011, p. 116) has the similar reasoning as he states that, “ if authors are allowed to obtain a monopoly over the ideas, the copyright law could end up discouraging new authorship and the progress knowledge – the two goal copyright is intended to foster”. The Copyright doctrine grants the authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. According to Barrett (2008, p. 101), “ the law must ensure that the basic building blocks of expression (ideas, facts & elements that are standard or routine in connection with a given kind of work) remain in the public domain free from copyright owners control, in order to ensure a continuing flow of new authorship in future”. The courts have in several cases highlighted that copyright right law does not assure authors protection in ideas. In Michael Baigent v The Random House Group Ltd where an allegation had been made that the novel Da Vinci Code infringed the copyright in the work entitled the Holy Blood and The Holy Grail (HBHG), Mummery LJ said “ Original expression includes not only the language in which the work is composed but also the original selection, arrangement and compilation of the raw research material. It does not however, extend to the clothing information, facts, ideas, theories and themes with exclusive property rights, so as to enable the claimants to monopolize historical material. Theories propounded, general arguments deployed or general hypotheses suggested or general themes written about”. The foregoing statement points that the subsistence may extend to the way in which facts, ideas and theories are expressed by the author but this does not mean that facts and ideas are themselves the subject matter of copyright protection (Bainbridge, 2010 p. 55).

Expression

In the case of University of London Press Ltd v University Tutorial Press Ltd, Peterson J stated that “ Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and in case of a ‘ literary work’, with the expression of thought in print or writing”. This was also brought to light in two other cases; Feist Publication, Inc v Rural Telephone, and Michael Baigent v The Random House Group Ltd. In the former case, it was held that copyright infringement may lie only in the copying copyrightable expression. In the latter case, it was held that copyright subsistence may extend to the way in which ideas, facts and theories are expressed by the author.

The part of work that Expression comprises is protectable under copyright law. Article 2 of the WIPO Copyright Treaty provides that “ Copyright protection extends to expressions and not to ideas, procedures, and methods of operation or mathematical concepts as such”. Copyright laws were enacted to encourage originality by regulating creative expression. Mummery LJ in Michael Baigent v The Random House Group Ltd describes an expression as follows, “ Original expression includes not only the language in which the work is composed but also the original selection, arrangement and compilation of the raw research material”. The subject matter of copyright protection is ‘ original works of authorship fixed in any tangible medium of expression’ (Dratler, 2006 p. 15). Copyright gives authors rights in particular means of expressing ideas and facts, never in ideas and facts themselves. According to Netane (2008, p. 61), copyright law prevents others from copying only the copyright holder’s particular “ expression”, not ideas that are expressed.

IDEA/EXPRESSION MERGE DOCTRINE

It is clearly stated that copyright law grants rights in the author's expression of ideas, and that protection will be given as long as the expression of the same ideas are distinct. However, there are times when there is one way, or only a few, to adequately express a particular idea. Ideas pretty much dictate the form of expression as highlighted in Landsburg v Serabble Crossword Game Player. This results in the idea and its expression being considered to be one. According to Fishman (2011, p. 117)," In such cases, the idea and its particular expression are deemed to merge and the expression-the author's words- is either treated as if it were in the public domain or given very little copyright protection". The effect of this is that protection may be lesser than when idea and expression are not merged. This is demonstrated in Kenrick v Lawrence were effective protection was denied to a drawing showing a hand holding a pen and marking a ballot paper. The intention of the person commissioning the drawing was that it could be used to show persons with poor literacy skills how to vote. It was held that a similar drawing did not infringe because it was inevitable that any person who attempted to produce a drawing to show people how to vote would create a similar drawing (Bainbridge, 2010 p. 49).

SUBSTANTIAL TAKING

Section 2 of The Copyright and Performance Rights Act 1994 provides that substantial part includes any part of the work which on its own can be identified as part of the work of someone who is familiar with the work. Therefore substantial taking is the copying of the substantial part of a given work. However, it is difficult to determine what a substantial part is as no

standard measure exists (Plastics) Ltd v Swish Products Ltd. The courts determine substantial by reference to the quality of what was taken and not the quantity. This was also highlighted in Ladbroke (Football) Ltd v William Hill (Football) Ltd where it was held that substantial must be decided by its quality rather than quantity, and that the significance of the part taken is a matter of fact and degree. This means that even a very small part of work can be substantial if it is the most valuable or memorable piece in the work.

The principle of substantial taking displaces the earlier notion that ‘ any’ copying of a protected work will automatically translate to infringement. The principle of substantial taking stipulates that copyright infringement will only result from the copying of the substantial part of a protected expression not the unprotected idea. Therefore, the determination of infringement depends on the quality of the work portion used in relation to the copyrighted expression as a whole. In the Harper v Row it was held that the determination of substantiality should not only the proportion taken but also on the “ the qualitative importance of the quoted passages of the original expression” (Alces, 1994 p. 1).

CONLUSION

In deduction let us end by elucidating how one of the world’ s most valued assets came into being, that is, bringing this to light in line with idea/expression dichotomy. This asset being talked about here is a woman, who was made from a rib of a man, under his arm to be protected by him, on the side of his body to walk side by side and near his heart to be loved by him. Before God made a woman he had an idea that another being was needed to comfort the man. When this being was made, that is, a woman, an

idea was expressed. We can now say that an idea is a thought, a mental image, or a conception of a theory. Expression is when these variables are put into action thereby applying labor and skills, converting them into tangibility. This is clearly illustrated by the occurrences of the bible: Genesis 2: 18 “ And the LORD God said, it is not good that the man should be alone; I will make him a help meet for him” (idea), and, Genesis 2: 21 “ And the Lord God caused a deep sleep to fall upon Adam, and he slept: and he took one of his ribs and closed up the flesh instead thereof; verse 22: And the rib which the LORD God had taken from man, made he a woman, and brought her unto a man” (expression).

An Idea parents an expression. It marks a starting point of a work, while the end point is marked by an expression. The first thought of generating a particular work comprises an idea; the translation of this thought into a tangible form is what forms up an expression. However, though an expression is protected, copying it does not automatically result in infringement. Substantial taking is what ultimately determines whether or not copyright has been infringed. The protection of an expression hence rests on the quality of the portion of the expression copied. Infringement will only result from the copying of the substantial part of a protected expression not the unprotected idea.