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Da Vinci

In a case examining the boundary between ideas and their expression for the purposes of copyright protection, the Court of Appeal has held that the non-textual copying of elements of a theme abstracted from a book does not amount to the copying of a substantial part of that book.

Baigent and Leigh v Random House Group; [2007] EWCA Civ 247; Court of Appeal (Mummery LJ, Rix LJ and Lloyd LJ)

Context

Copyright, Designs and Patents Act 1988 ("CDPA"):

Section 3(1): "In this Part [of the CDPA] "literary work" means any work, other than a dramatic or musical work, which is written, spoken or sung...."

Section 16(1): "The owner of the copyright in a work has ... the exclusive right to do the following acts in the United Kingdom-

(a) to copy the work...."

Section 16(3): "References in this Part [of the CDPA] to the doing of an act restricted by the copyright in the work are to the doing of it-

(a) in relation to the work as a whole or any substantial part of it...."

The Facts

The Claimants were two of the three writers of a book called *The Holy Blood and the Holy Grail* ("HBHG"). The Defendants were the publishers of a novel called *The Da Vinci Code* ("DVC") which was written by the author Dan Brown.

The Claimants claimed that Dan Brown had copied key themes from HBHG and used them in DVC. It is important to note that there was almost no evidence of word-for-word copying by Dan Brown of the text of HBHG. Instead, the Claimants' claim was based on the proposition that the so called Central Themes of HBHG, of which there were 15, had been copied by Dan Brown. This "non-textual copying" was, it was claimed, sufficient to amount to an infringement of the copyright in HBHG by virtue of the copying of a substantial part of HBHG.

At first instance, Mr Justice Peter Smith found that, of the 15 Central Themes, 3 were not present in DVC and one was not present in HBHG. That left 11 of the Central Themes that were present in both HBHG and DVC and, since there was no question that Dan Brown had access to HBHG in the course of writing DVC, inference of copying had arisen. The question therefore was whether what Dan Brown had copied amounted to a substantial part of HBHG. The Defendants argued that, even if Dan Brown had copied elements of HBHG, what was copied was at too high a level of abstraction and generality; that is, it fell on the wrong side of the line between expression and ideas. The Defendants also argued that what was copied was not a substantial part of HBHG. Mr Justice Peter Smith held that (i) the Central Theme was not "expressed as such" within HBHG, (ii) even if it were, it is no more than "an expression of a number of facts and ideas at a very general level" and accordingly not capable of protection (i.e. because it is an idea and not the expression of an idea), and (iii) alternatively, it did not amount to a substantial part of HBHG.

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The Claimants appealed on the basis that Mr Justice Peter Smith had erred in principle by (i) proceeding on the basis that, for a claim based on the copying of a substantial part to be successful, the substantial part must itself be capable of protection as a copyright work, and (ii) failing to consider whether the Central Themes were a substantial part of HBHG.

The decision

Lloyd LJ gave the leading judgment, but Mummery LJ's judgment also provides useful analysis.

Lloyd LJ began by severely criticising Mr Justice Peter Smith's first instance judgment, but ultimately he arrived at the same conclusion. Lloyd LJ held that Mr Justice Peter Smith was right to conclude that what Dan Brown had taken from HBHG:

"amounted to generalised propositions, at too high a level of abstraction to qualify for copyright protection, because it was not the product of the application of skill and labour by the authors of HBHG in the creation of their literary work. It lay on the wrong side of the line between ideas and expression."

Furthermore, Lloyd LJ concluded that the success of the claim depended on showing that the Central Theme was the central theme of HBHG, sufficient to qualify as a substantial part of HBHG, albeit as a combination of features obtained by abstraction. Mr Justice Peter Smith had found that the Central Theme was no more than a selection of features of HBHG collated for forensic purposes rather than emerging from a fair reading of the book as a whole. Mr Justice Peter Smith was therefore justified in finding that whatever elements of HBHG were copied, they did not amount to a substantial part of HBHG.

Appeal dismissed.

Comment

The judgments of both the Court of Appeal and the High Court are not easy to read, but this case, along with other recent cases such as *Nova Games v Mazooma* and *easyjet v Navitaire*, reinforce the well known proposition that copyright law protects the expression of an idea, but not the idea itself. However, whilst these cases provide examples of where the boundary between abstract ideas and the expression of those ideas may lie, it is clear that each case is dependant on its facts and the Court in each case does not go so far as to propose a general rule that would be applicable in all circumstances.

Although the dichotomy between ideas and their expression is not a new concept, the difficulty in locating the boundary between them still has important consequences today. In the context of computer software, it is clear following *Nova* and *Navitaire* that copying the idea underpinning a piece of software without copying the underlying code or the on screen displays does not amount to copyright infringement. Similar concerns would arise for the owners of formats: English does not (yet?) protect format rights as a sui generis right and so format owners have instead had to rely on other intellectual property rights, such as the laws of copyright and trade marks/passing off.

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18 October 2007

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