

Kluwer Copyright Blog

Not a Happy Camper: interim injunctions and copyright infringement

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In *Happy Camper Productions Ltd v British Broadcasting Corporation*, the claimant sought an interim injunction in the context of alleged infringement of copyright in a script. The claimant failed in its application for multiple reasons as we explore.



The claimant company was the purported owner of the copyright in a script for a pilot episode of a comedy drama called “Down the Caravan”. The script was written in 2013 by Kay Lockett, one of two directors of the claimant company (the other director being Mrs Lockett’s husband, Jerry). The pilot episode sets up an uncomfortable business relationship between two women who inherit equal shares in a caravan site in Wales, following the death of the site’s owner.

Following the script’s production in 2013, the claimant made various attempts to get “Down the Caravan” commissioned by the BBC. These attempts included sharing the script with the individual responsible for Comedy Commissioning at the BBC and, separately, with a producer who had worked on BBC projects at different times through her career. The claimant was unsuccessful; on one occasion being told that the script is “really not very good” and on another being told that the BBC had already commissioned a comedy show with a similar setting.

Later, in August 2018, the claimant obtained a copy of the script for a BBC comedy called “Pitching In”, which was also set on a caravan site in Wales. The claimant was

apparently struck immediately by the similarities between its script for “Down the Caravan” and that for “Pitching In”. However, for reasons that are not explored in the Court’s judgment, the claimant waited six months (until just five days before the first episode of “Pitching In” was due to air on BBC One Wales) before applying for an interim injunction to prevent the broadcast of the BBC programme.

Serious issue to be tried?

When considering the grant of an interim injunction the court applies the seminal House of Lords decision in *American Cyanamid* which provides the approach to apply.

First, is there a serious question to be tried? The applicant’s claim should not be “frivolous or vexatious” and there should be a “real prospect” that the claimant would succeed in its claim for a permanent injunction at trial.

Having considered the evidence presented to him, the judge doubted whether the claimant could surmount even this low bar. The judge had two major reservations regarding the copyright infringement claim.

Firstly, the judge had seen no evidence that copyright in the “Down the Caravan” script had been assigned from its author (one of two directors of the claimant company) to the claimant. Thus, the claimant did not own copyright. The judge’s second major reservation related to the allegation of copying. While he accepted that there were similarities between the two scripts “at a very broad level” and “at quite a high level of generality”, he did not believe the similarities were so great that he could infer that *any* copying had occurred, let alone copying of a *substantial part* of the script (as is required for a finding of copyright infringement). In particular, one “very distinctive idea” within the “Down the Caravan” script was missing from the script for “Pitching In” – the idea of the whole comic scenario for the drama being established by the death of the caravan site’s owner, with him leaving behind a video message for the two women who were most important in his life. In the circumstances, the judge said it was impossible to infer copying from the evidence before him.

Damages an adequate remedy?

The second main consideration is who would suffer more harm and would damages be an appropriate remedy? Yet another point which went against the claimant was the judge’s view that it could be adequately compensated by a damages award if the copyright in its script were found at trial to have been infringed.

Any value in the copyright in the “Down the Caravan” script is a commercial value. Although it may be difficult to assess the extent to which an infringement has diminished the value of the copyright, this is not an impossible task. Therefore, damages would be an adequate remedy for the claimant.

The judge stated that this finding alone was sufficient to dispose of the interim injunction application, but he went on to consider the third limb of the *American Cyanamid* test nonetheless.

The judge found that all relevant factors indicated the balance of convenience lay in

refusing to grant an interim injunction. Considering the claimant's situation first, the judge noted that the claimant's script had failed to achieve any commercial success for more than five years, and there was nothing to suggest that commercial success was a realistic prospect. Furthermore, any harm to the value of the copyright could be compensated in damages.

The BBC would suffer more unquantifiable loss if it were required to pull "Pitching In" from its schedule just a day before the intended broadcast, as the BBC would suffer both financial and reputational damage. In addition, the planned broadcast of "Pitching In" would fulfil part of BBC One Wales' obligation to show a certain quantity of programmes including Welsh content. A replacement programme found at short notice would not fulfil the relevant obligation.

Finally, the judge took two further points into consideration. The first was the claimant's delay (approximately six months) in filing the application for an interim injunction, for which no explanation appears to have been given. The second additional point was the judge's concern over the claimant's ability to compensate the defendant (if called upon to do so) under a cross-undertaking in damages. The BBC indicated that the financial loss it would suffer if the interim injunction were to be granted would be in the region of £130,000. Given that the claimant company is non-trading, and exists solely for the purpose of holding and exploiting the copyright in the "Down the Caravan" script, it has no apparent means of paying damages.

Comment

In light of the multitude of reasons the judge in this case found to refuse the application, the judgment serves as a useful guide to what *not* to do when considering applying for an interim injunction in a copyright infringement case in the UK.

The first point to note is that in circumstances where there is no clear evidence of copying and/or there is a dispute as to how or when copying could have occurred, far more than just broad similarities between the two works will be required for the Court to make an inference of copying. It is likely that a number of significant and distinctive elements of the claimant's work must be reproduced in the defendant's work in order for the Court to infer that copying has taken place.

Secondly, make sure you have evidence of suffering harm which is not adequately repaired by damages. This is usually a primary consideration and if the alleged harm is simply a lost commercial opportunity, it is most likely possible to be compensated by damages.

Don't delay unnecessarily in filing an application for an interim injunction. It is a discretionary award and if the judge considers there is no urgency to the application there will need to be good reasons for the delay.

Finally, a claimant should give careful consideration to its ability to pay damages under a cross-undertaking. If there is any room for doubt in this regard, it may assist the application if additional individuals or companies connected with the claimant also offer undertakings in damages.

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