Searching for Certainty in Implying a Copyright Licence

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Landscape of permitted acts

Express Licences granted by the Copyright Owner

- Voluntarily granted
- Commonly adopted

Rigid and formal requirement – clearance culture

Users’ actions could fall through the cracks

Statutory Limitations and Exceptions

- Not voluntary
- Address specific instances
- Narrowly construed

Rigid in nature – legislative process for expansion
Benefits of Implied Licence

Express Licences granted by the Copyright Owner including Author
- Voluntarily granted
- Commonly adopted

Implied Licences
- Save acts which would otherwise be infringement
  1. Flexibility to address diverse situations
     - A judicial intervention
     - Addressing the need for implying a licence on a case by case basis
      - Not as rigid as
  2. Additional means of copyright balancing
     - Broaden permitted use
     - Situation specific response
     - Malleable with evolving technology

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- Narrowly construed
Challenges of Implying a Copyright Licence

Express Licences granted by the Copyright Owner
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- Commonly adopted

Implied Licences

1. Principles of implying a licence
   - Implied terms in a contract
   - Implied easements

2. A concept of licence that spans this spectrum
   - Voluntary to Involuntary

A methodical and transparent manner of implying copyright licences

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Concept of licence

• A licence is not a contract in itself, but can arise within a contractual context
  • A licence can be the consideration in a contract for reciprocal benefit
• A licence at its core is only a permission that can arise under different circumstances
  • Analytical jurisprudence – Hohfeldian notion of licence – a licence simply as a privilege
• Land law notion of licence – a residuary character after all other property interests are classified
  • Ubiquity of licences
• Just as different factors can drive implying a term in a contract, different factors drive implying a copyright licence
Contract Law Rules of Implication

Principles of implying terms geared towards ascertaining the unexpressed joint intention of the parties - **Implied in fact**

- Necessary to achieve 'business efficacy' meaning the commercial objective of the contract – *Moorcock* (1889)

- A term is so obvious that it goes without saying – officious bystander test – *Shirlaw v Southern Foundries* (1939)

- Does the implication spell out in express words what the instrument, read as against the relevant background, would reasonably be understood to mean – *Attorney General v Belize* (2009)

Principles of implying terms geared towards giving effect to a usage in the industry or market - **Implied by usage**

- The practice must be certain in the sense that it is clearly established, identifiable and uniform – *Cunliffe-Owen v Teacher* (1967)

- The practice must be notorious in the sense that it must be well known in the market – *Cunliffe-Owen v Teacher* (1967)

- The practice must not be reasonable and must not be against the law – *Robinson v Mallett* (1874)

Principles of implying terms to bring about fairness, reasonableness, efficiency – **Implied in law**

- Necessary in a particular type of contract – lease of council flats – *Liverpool City Council v Irwin* (1977)


- ‘... reasonableness, fairness and the balancing of competing policy considerations.’ *Crossley v Faithful Holdings Ltd* (2004)
Implied Licences

Frameworks for implying copyright licences

A balance between guidance and flexibility

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Consent manifest in copyright owner’s
- Conduct
- Knowledge

Custom prevalent in relevant trade, industry or profession

Achieving a public policy goal regardless of consent

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Bare licence

Contractual licence

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Limitations of Implied Licence

• Express words can override implied licence
  • No matter how comprehensive a contract, there will always be a gap or a loophole
  • Courts can decide what kind of express words are required to override – can a general term that says all implied licences are overridden sufficient?

• Implied licences are expensive – need to litigate for a result
  • Intellectual Property Enterprise Courts – pecuniary jurisdiction of less than £500,000 go to this court (with an option of small claims track for very small amounts)
  • A robust doctrine of implied licence can bring the certainty that may avoid the need to approach the court
Thank you!!