continuing expansion of remedies in our landlord and tenant law is nevertheless to be welcomed.

STUART BRIDGE

THE JUSTICIABILITY OF FOREIGN COPYRIGHT CLAIMS

WHEN can English defendants be sued in England for the infringement of a foreign copyright? They were once immune, for two distinct reasons. English law formerly governed liability even for foreign torts, the effect of the rule in *Phillips* v. *Eyre* (1870) L.R. 6 Q.B. 1. Such claims were therefore pointless because English copyright protection extends only to English infringements; English law, although in principle applicable, could not be applied. Less convincingly, foreign intellectual property rights, like rights in foreign land, were generally regarded as non-justiciable under the rule in *British South Africa Co.* v. *Cia. de Moçambique* [1893] A.C. 602.

The obstacle presented by *Phillips* v. *Eyre* has now disappeared. The *lex loci delicti* governs foreign infringements by virtue of section 11 of the Private International Law (Miscellaneous Provisions) Act 1995 (a provision presaged in *Red Sea Insurance Co.* v. *Bouygues S.A.* [1995] 1 A.C. 190). But doubt has persisted concerning justiciability. There are three possible views: (1) Foreign copyright claims are in principle justiciable. Arguably, it is false to equate intellectual property rights with those in land. Alternatively, (2) such claims are *not* justiciable at common law, but are admissible whenever an English court assumes jurisdiction under the 1968 Brussels Convention, wherever the infringement occurs. Arguably, it is improper to decline jurisdiction in such cases save as the Convention itself provides. Alternatively, (3) such claims are not generally justiciable, but are admissible if the court assumes jurisdiction under the Convention, provided the infringement occurs in another Contracting State. In any other case the Convention is irrelevant because it only allocates jurisdiction between Contracting States (*Re Harrods (Buenos Aires) Ltd.* [1992] Ch. 72).

Principle favours position (1) (see (1997) 56 C.L.J. 505). The arguments for applying the *Moçambique* rule to copyright claims are unsatisfying. And the relevant authorities are insecure, especially Vinelott J.'s controversial decision in *Tyburn Productions Ltd.* v. *Conan Doyle* [1991] Ch. 75. Moreover, if such claims are inadmissible, the copyright protection afforded by English courts is seriously reduced. And those whose rights are infringed in several jurisdictions must litigate where each infringement occurs, perhaps at prohibitive expense, rather than consolidate their claims against an English

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infringer in England. If position (1) is adopted, positions (2) and (3) become irrelevant, no conflict arising with the Brussels Convention.

The problem of justiciability arose in *Pearce* v. *Ove Arup Partnership Ltd.* [1999] 1 All E.R. 769. The English defendants were sued in England for the infringement in the Netherlands of the claimant's Dutch copyright in certain architectural plans, the court having jurisdiction under Article 2 of the Brussels Convention. Lloyd J., rejecting position (1), adopted position (3) ([1997] 3 All E.R. 31). Unfortunately, the Court of Appeal's solution is harder to discern.

One difficulty concerns the court's puzzling treatment of the common law rule in *Phillips* v. *Eyre* (the claim having arisen before the implementation of the 1995 Act). Actionability under English law and justiciability under the *Moçambique* rule were treated as interchangeable and interdependent issues. Yet they are conceptually distinct, concerning liability and competence respectively. Nor, curiously, were the implications of the *Red Sea* decision fully explored. The significant relationship test for identifying the applicable law, which *Red Sea* endorsed, is surely more flexible, more complex, and more ambiguous, than its treatment in *Pearce* suggests.

The court's handling of justiciability is equally troublesome. Much of the reasoning implicitly supports position (1), most importantly because *Tyburn* was not followed; indeed *Tyburn's* application to infringement cases was doubted altogether. But the decision in *Pearce* is expressly confined to infringements in other Brussels Convention countries, a meaningful restriction only if position (3) is adopted. The court's approach is also rooted in the belief that only the Convention can prevent application of the *Moçambique* rule, at least as regards rights in foreign land.

So what does *Pearce* decide? The underlying logic of the reasoning, although sometimes elusive, suggests endorsement for position (3). The emphasis on the Convention and its impact on the *Moçambique* rule is explicable only on the basis that the latter might indeed extend to copyright claims. And however much *Pearce* undermines that proposition, it was never decisively rejected. One might regret this somewhat conservative approach. But *Pearce* may encourage another court to rule finally that foreign copyright claims are admissible, wherever the infringement, and whether or not the Brussels Convention applies, as the Court of Appeal might have done had the Convention not permitted a narrower conclusion.

But *Pearce* also hints at problems yet to come. Section 11 of the 1995 Act suggests that the law of the place of infringement should govern an infringer's tortious liability. But might another law be more appropriate, as perhaps where both parties are English, as in *Pearce*

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itself, or where a foreign infringement is orchestrated from England? If so, section 12 would require the application of English law. But then the claim would fail automatically because English law regulates only infringements in England. It is inherent in the conflicts process that the applicable law may not always be one which recognises a plaintiff's claim. But there is something singular about applying the general rules for choice of law in tort to copyright infringements. The universally recognised principle of territoriality, limiting copyright protection to local infringements, ensures that only the law of the place of infringement *could* govern in such cases. For this reason Roch L.J. apparently assumed that only Dutch law could apply in *Pearce,* being that of the place of infringement, a solution canvassed by Lloyd J. at first instance. Identifying the law applicable to a tort normally involves a more subtle balancing of interests and connections, as it should have done in *Pearce.* But Roch L.J.'s approach echoes Ulmer's view that the applicable law should always be that which grants protection, the *lex protectionis* (*Intellectual Property Rights and the Conflict of Laws* (1976)). By answering one question, it seems, *Pearce* merely begs another: even if such claims are justiciable, which law governs the infringement of a foreign copyright?

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THE GREAT CANADIAN JUICE WAR

IN the recent case of *Cadbury Schweppes Inc.* v. *FBI Foods Inc.* (1999) 167 D.L.R. (4th) 577, the Supreme Court of Canada considered the case of an action for breach of confidence involving "Clamato" juice (a mixture of clam broth and tomato juice). For the uninitiated, Clamato juice is mixed with vodka, oregano and Worcestershire sauce to become a "Bloody Caesar", a drink popular with Canadians but apparently few others.

C Ltd., the plaintiff (confider), disclosed confidential information respecting its product, Clamato juice, to CC Ltd. (the confidant), which agreed to manufacture and sell the drink in Canada. The information took the form of a list of some of the ingredients used in the recipe and detailed manufacturing specifications, but not the recipe itself. With the express consent of the confider, the confidant sub-contracted for the manufacture of the juice with F Ltd., the defendant (third party), and disclosed the confidential information to it. Whilst the confider and the third party were not directly linked by contract, the agreements between the confider and confidant and the confidant and the third party each contained a five-year non-

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