LAWS5150 Intellectual Property
2025 - Complete Notes

Infringement of Copyright
Readings: Textbook Chapter 6 pg 185 - 210 & 234 - 283

Chapter 6: Infringement of Copyright

Direct Infringement: General Principles

Summary

Under the *Copyright Act 1968* (Cth), direct copyright infringement occurs when a person, without permission from the copyright owner, performs or authorises an act that falls within the exclusive rights of the copyright owner (*ss* 36(1), 101(1)). A claimant (typically the copyright owner or an exclusive licensee) must establish several elements to prove infringement:

1. **Copyright subsistence and ownership** – The claimant must first establish that copyright exists in the subject matter and that they own the rights (or hold an exclusive licence).

2. **Sufficient relationship between the alleged infringement and the original work** – This involves proving:
    - A **causal connection** (i.e., the alleged infringing work is derived from the copyright work).
    - **Objective similarity** (the alleged infringement bears a resemblance to the copyright work).
    - **Substantial part** (the copied portion is significant in relation to the copyright work).

These three elements—causal connection, objective similarity, and substantial part—are interrelated and often overlap in judicial analysis.

3. **Acts falling within exclusive rights** – The claimant must prove that the defendant engaged in acts reserved for the copyright owner, as outlined in *ss* 31, 85–88.
4. **No applicable exceptions** – The defendant may escape liability if they establish a statutory exception to infringement (*see s* 115(3) for innocent infringers). Importantly, direct infringement does not require proof of intent or knowledge.

For **Part IV subject matter** (sound recordings, films, broadcasts, published editions), infringement occurs only if actual images or sounds from the original work are used—causal connection and objective similarity are automatically established. However, the "substantial part" test still applies.

Study Notes

Elements of Direct Infringement

1. **Copyright subsistence and ownership**

    - Copyright must exist in the work.
    - The claimant must be the copyright owner or exclusive licensee.

2. **Relationship Between Original and Alleged Infringement**

    - **Causal connection**: The alleged infringing work must be derived from the copyright work.
    - **Objective similarity**: There must be a resemblance between the two works.
    - **Substantial part**: The copied portion must be significant.

3. **Infringing Act**
    - The act must fall within the exclusive rights of the copyright owner.
    - Covered under *ss* 31, 85–88.
4. **Defences and Exceptions**
    - The defendant may argue statutory exceptions to avoid liability.
    - No requirement to prove intent (except for damages mitigation under *s* 115(3)).

Key Judicial Precedents

- **IceTV Pty Ltd v Nine Network Australia Pty Ltd (2009)** – Considered whether "intent to steal" (*animus furandi*) was relevant, but later Full Federal Court rulings clarified that intent is not an element of direct infringement.

Distinction Between Part III and Part IV Works

- **Part III (literary, dramatic, musical, artistic works)** – Requires proving causal connection, objective similarity, and substantial part.
- **Part IV (sound recordings, films, broadcasts, published editions)** – Only literal or mechanical copying constitutes infringement; causal connection and objective similarity are presumed once copying is established.

CAUSAL CONNECTION

Summary

To establish **direct copyright infringement**, the claimant must prove a **causal connection** between the original work and the alleged infringement. Independent creation is not infringement—if two people create similar works independently or derive them from a common third source, there is no copyright violation (*Creation Records Ltd v News Group Newspapers Ltd* (1997) 39 IPR 1).

Since a claimant may not always have direct proof of copying, they often rely on:

1. **Substantial similarity** between the two works.
2. **Likelihood of access**—evidence that the defendant had the opportunity to encounter the plaintiff's work.

If these elements are established, a rebuttable **presumption of copying** arises (*Francis Day & Hunter Ltd v Bron* [1963] Ch 587). The defendant can counter this presumption by showing:

- **Independent creation** (e.g., sketches, drafts proving original development).
- **Lack of access** (demonstrating unfamiliarity with the plaintiff's work).
- **Alternative sources** (showing inspiration from a different work).

Copyright infringement does **not require intent**—even unconscious copying is sufficient, as seen in *Bright Tunes Music Corp v Harrisongs Music, Ltd* (1976), where George Harrison was found to have subconsciously copied *He's So Fine* when composing *My Sweet Lord*.

Even **indirect copying** can amount to infringement, such as copying a derivative work rather than the original (*Plix Products Ltd v Frank M Winstone (Merchants) Ltd* (1984) 3 IPR 390). However, Australian law limits reliance on copyright in industrial designs under *ss* 74–77A.

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Key Principles of Causal Connection

1. **Independent creation is not infringement**
    - Similarity alone does not prove copying.
    - No infringement if both parties derive their work from the same third-party source.
2. **Rebuttable presumption of copying**
    - Plaintiff must show **substantial similarity** and **access**.
    - Defendant can rebut by proving independent creation or lack of access.
3. **Unconscious copying is still infringement**
    - *Bright Tunes v Harrisongs*: Even if unintentional, subconscious copying is infringement.
4. **Indirect copying**
    - Can infringe even if only accessing a derivative version of the work.
    - *Plix Products Ltd v Frank M Winstone*: Indirect copying upheld.
    - Design drawings of utilitarian objects may lose copyright protection under *ss* 74–77A.

Key Cases

- *Creation Records Ltd v News Group Newspapers Ltd* (1997) – No infringement if both works were independently created.
- *Francis Day & Hunter Ltd v Bron* (1963) – Presumption of copying arises with similarity and access.
- *Bright Tunes Music Corp v Harrisongs Music, Ltd* (1976) – Subconscious copying is still infringement.
- *Boomerang Investments Pty Ltd v Padgett* (2020) – Alleged unconscious copying dismissed in favour of conscious copying.
- *Plix Products Ltd v Frank M Winstone (Merchants) Ltd* (1984) – Indirect copying found to be infringement.

Summary: Plix Products Ltd v Frank M Winstone (Merchants) Ltd (1984) 3 IPR 390

In *Plix Products Ltd v Frank M Winstone (Merchants) Ltd*, the plaintiff designed plastic pocket packs for kiwifruit, which became the industry standard. The defendant created similar trays using only written specifications, measurements, and industry guidelines, without directly viewing the plaintiff's original drawings. The plaintiff claimed this amounted to **indirect copying** of their copyright-protected designs.

The High Court of New Zealand held that:

- **Copying requires a causal connection** between the original and the alleged infringing work.
- **A written or verbal description is not a reproduction** of an artistic work and does not inherently infringe copyright.

- **Indirect copying can be infringement** if a description conveys the **form or shape** of the original work, functioning as a substitute for a direct copy.
- However, if a designer **independently reconstructs** a product using only general ideas or industry knowledge, this is **not copying**.

The case clarified that **not all indirect copying amounts to infringement**—only when a written description is detailed enough to replicate the form of the original work can it create a sufficient **causal connection** for copyright liability.

Study Notes: Plix Products Ltd v Frank M Winstone (Merchants) Ltd

- **Issue:** Whether following a **written description** of a copyright-protected design amounts to **indirect copying**.

- **Held:**
  - Copying must involve a **causal connection** between the original work and the alleged infringement.
  - A **verbal/written description** alone does not constitute **copying** unless it conveys the **precise form** of the original work.
  - **General ideas** or industry standards **do not infringe copyright**.

- **Key Principle: Indirect copying can constitute infringement, but only if the intermediary description acts as a substitute for a direct copy of the original work.**

This case is significant for clarifying the **limits of indirect copying** in copyright law.

OBJECTIVE SIMILARITY

Summary: Objective Similarity in Copyright Infringement

To establish a **causal connection** between a copyright work and an alleged infringement, the next key issue is **objective similarity**. This involves determining whether the alleged infringing work is **sufficiently similar** to the original copyright work to be considered a copy. While some cases involve clear reproduction, disputes can arise when a defendant argues that their work is **not substantially similar** to the copyrighted material.

A notable example is *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd*, which examined whether a **short musical phrase** from the song *Kookaburra Sits in the Old Gum Tree* was copied in the flute riff of *Down Under* by Men At Work. The court ultimately found that the riff was **objectively similar** to the original work and constituted infringement.

Case Summary: EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd (2011) 191 FCR 444

Facts:

- *Kookaburra Sits in the Old Gum Tree* is a well-known Australian children's song written by Marion Sinclair in 1934.
- Larrikin Music Publishing acquired the copyright to *Kookaburra* and alleged that Men At Work's song *Down Under* (1981) **infringed copyright** by incorporating a flute riff that was substantially similar to the melody of *Kookaburra*.
- The song's composers, Colin Hay and Ronald Strykert, denied infringement, arguing that the similarity was **incidental and trivial**.