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Evolving concepts of work and sustainability of copyright: the curious case of curated fireworks displays

▲ Eleonora Rosati  Tuesday, September 18, 2018 - notion of work; dramatic works; originality; artistic works; Akshat Agrawal; fireworks displays; unconventional works; copyright

Over the past few years The IPKat has discussed copyright protection in relation to many different types of less conventional works. Today, we are happy to host the following guest contribution by Akshat Agrawal (India Global Law School), who discusses copyright protection in fireworks displays.

Here’s what Akshat writes:

With advancement in technology, artists and creators have been relying on various new and unconventional mediums as modes of expression of creative thoughts and ideas. A prime example of this is the concept of curated fireworks displays. Various pyrotechnicians are involved in specializing in the art of blending fireworks to music, with specific timings, to generate a particularly envisioned spectacle in the sky, sometimes using a firing software and a detonator or sometimes manually. This has previously been argued to involve substantial amount of skill and judgment and hence originality so to constitute a work capable of copyright protection. The question, however, is whether the state of copyright acts around the world allow for such protection, and whether fireworks displays actually come under the ambit of protectable subject matter in line with copyright theoretical foundations.

STATUTORY AMBIT AND FORMS OF EXPRESSION

Curated and planned fireworks displays, which are carefully and specifically designed to portray particularly conceived effects in the sky, are expressed generally by a medium of performance. In jurisdictions where subject matter is not categorized or limited to certain categories, there is merely a requirement of originality and sometimes fixation to ensure certainty of expression. This poses little or no problem due to the inclusiveness with respect to the kind and form of works which can be protected. Hence for instance, France has levied copyright protection to a designed fireworks display due to its law being broad enough to include this within the scope of protection. Section 1 of the French IP Code requires a work to merely be one which involves application of mind and for it to be an expression in material form. It is in consonance with the Berne Convention, which provides under Article 2, for a wide and inclusive definition of “works” to include intellectual creations that evolve with technological advancements, while leaving it to the legislature of individual countries to categorise and establish a requirement of fixation (upon discretion). The problem of protection arises

Kat on fire!

in jurisdictions which have established such categories for protection as it is tough to include fireworks displays under the established interpretations of such categories. Generally the categories include literary, musical, artistic, dramatic and cinematographic works which have established definitions either given in the statute or devised by mechanisms of interpretation in case law. For example, a fireworks display - being a work of action - cannot be protected as an artistic work, despite its aesthetic and artistic creativity because an artistic work entails a static work of art. Things become more interesting in the case of a dramatic work, which is the only other option capable of including such unconventional creations.

**DRAMA IN THE DEFINITION OF A DRAMATIC WORK**

“Dramatic works” has not exhaustively been defined in any of the statutes across jurisdictions and generally has evolved through case law. It is an inclusive notion, which includes dance and mime in most jurisdictions. This poses a problem for the determining the actual breadth of the concept. It has widely been held by courts that an inclusive definition is illustrative and not exhaustive. A US court has held in *Seltzer v. Sunbrook* that, for it to be a dramatic work, it is essential that the work at issue conveys a story or entails an element of drama i.e. character, passion and evocation of emotion. Further it needs to involve a related set of events forming a plot. This definition has been applied in the case of *Fuller v. Bemis* (1892) 50 F 926 (CCSD New York), where a dance involving aesthetic movements without a connected plot was held to be not a protectable dramatic work, due to lack of a story or dramatic element. This implies that a merely aesthetically pleasing performance, without a story, cannot be a dramatic work capable of copyright protection. However in the old Queen’s Bench case of *Russel v. Smith* (1848) 12 QB 217, a wide meaning of drama was envisaged. This jurisprudence may be relevant in deciding whether a contemporary fireworks display, which is planned and curated to be aesthetically pleasing, can be protected as a dramatic work or not. I am of the opinion that in accordance with the Berne Convention and expanding modes of expression, the archaic involvement of a story element or a connected plot needs to be done away with, to include within its purview, choreographed sports routines, *dramatized magic shows* (not tricks) and such curated fireworks displays which are essentially a depiction of creative involvement of skill and judgment. A fireworks display is essentially a series of actions, choreographed to music to evoke certain emotions in the audience and broadly fulfils the requirement of a dramatic work. Even in the case of *Norowzian v. Arks* (2000) FSR 363), it was held that a dramatic work is one which is a work of action capable of being performed, which is again a wide and inclusive connotation. It has though been argued that this case was merely focussing on copyright protection of a film (presumed to have a story), and did not aim to answer a question on requirement of a story. Yet, this wide approach, in correspondence with evolution of modes of expression, needs to be acknowledged and appreciated.

**THE QUESTION OF UNITY AND CERTAINTY**

Another question arises upon the presence of unity and certainty in a fireworks show. It has been held in *Green v. Broadcasting Corporation of New Zealand* (1989) RPC 700) that unity and certainty of action is imperative in a work for it to be protectable as a dramatic work. This is because a monopoly cannot be conferred upon a varying work, where the conception or specific expression of the curator cannot be identified sufficiently. Determination of certainty in jurisdictions requiring fixation is a tough task. Fireworks are inherently uncertain products and certainty of the effect cannot be guaranteed as each show will involve use of new fireworks. Also, the ultimate effect that each Firework will produce cannot be conclusively ascertained, but rather can be just assumed. There is a scope of variation in the actual performance and what is envisioned by the curator. This has been acknowledged in *Nine Network v. Australian Broadcasting Corporation*, where the court said that “there prevails a question of whether the Fireworks show is really a material form of what was planned.” On these grounds, a fireworks display was denied protection as a dramatic work.

Arguably this case failed to acknowledge the jurisprudence on “variations” around the world, where certain *invariable variations which do not substantially change the expression* have been allowed (see *WMS Joint Sports Claimants v Canada* (1992) 1 FCR 487) and *Kantel v. Grant* [1933] Ex. C.R. 84). An expansionary view in accordance with this is imperative, if nothing else because the nature of product used mandates recognition of the creative effort. The contingency of non-performance exists even in the case of a dramatic play, where an actor may forget his lines, but as long as it does not affect the expression substantially, it is no ground to deny protection and recognition of original content. So long as there exists a script or a video of the envisioned performance, protection cannot be denied on these grounds even in jurisdictions where fixation is required. Further, as long as there exists a coherent framework or structure that can be relied upon to reproduce the show in the same way, any minor variation is insufficient to deny copyright. (*Banner Universal Motion Pictures Ltd v. Endemol Shine Group Ltd & Anoi* [2017] EWHC 3600 (Ch)). A planned fireworks display is a predetermined, cohesive series of actions. It entails a scheduled, creative order of emission of...
individual fireworks which coherently form patterns and expression in the sky. Hence, this fulfils the requirement of a coherent reproduceable framework.

**THE PROBLEM OF ENFORCEABILITY**

The final problem which courts have acknowledged (*Nine Network*) with respect to protection of a fireworks display, is its ephemeral nature and problems of enforceability of non-filming regulations. The presentation of such displays, being in the open sky, raise problems of restraining access and curbing filming and recording of such shows. This, in my opinion, is not sufficient to deny copyright or a right of restraining commercial use of the show. Even in France, where there is a certain kind of lighting which takes place on the Eiffel Tower, an argument for the extension of Freedom of Panorama was dismissed in the past due to the lack of permanence of the effect.

Hence in accordance with the evolutionary nature of modes of creative expression, a wide and inclusive nature of copyright legislation is required, and there exists no reason as to why a planned and curated fireworks display should be denied protection.

**THE QUESTION OF PUBLIC POLICY**

Having said so, an argument which may come up to deny copyright protection in fireworks displays is one on grounds of maintenance of public health. Certain "works" have been denied copyright protection or the relevant copyright was found to be unenforceable around the world on grounds of public policy (see here, and *Martinetti v. Maguire* 16 F. Cases 920). One of such instances was consideration that protection would result in an incentive to create more of such "works" which are detrimental to public health, safety or morality. The only condition which ideally needs to be fulfilled is of undisputable, clear and proximate harm to public health, safety or morality. It has been acknowledged by the Supreme court in India (*Arjun Gopal V. Union Of India* (2017) 1 SCC 412), while issuing an interim ban on fireworks, that firework effects are undisputedly harmful for the lungs, eyes and ears of people and hence are detrimental to public health in India. It's the state's duty to ensure effective security of public health and hence because of acknowledged undisputable harm, copyright protection to fireworks displays can be denied on this ground, specifically in jurisdictions like India. Various jurisdictions are gradually recognising the harms associated with the usage of fireworks. Interim bans on usage of fireworks have been levied in Ireland, Chile, China and UK. Upon acknowledgment of definite and clear harm (discretion of individual jurisdictions), the argument of denial of copyright on the ground of public health may be strong and is definitely something to ponder upon.

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