
Issues and Perspectives in Business and Social Sciences

The peculiar case of property rights in legal clauses

Dennis W. K. Khong

Faculty of Law, Multimedia University, Malaysia

correspondence: wkkhong@mmu.edu.my

Abstract

Despite the tremendous value in well-written legal clauses, legal clauses enjoy little property rights protection under intellectual property law such as copyright. For example, in most jurisdictions, legislation is excluded from copyright protection. And even if they are technically covered under crown copyright as in the United Kingdom, licensing requirements may be waived and there is no legal repercussion for reusing partly or wholly such legal documents. Even in drafting legal agreements, lawyers tend to reuse clauses from templates and precedents. Commonly, sharing of such legal clauses is the norm rather than the exception. This article examines the relevant copyright law in the United Kingdom, the United States and Malaysia on this subject matter. It then looks at the economic justification for the lack of property rights recognition in legal clauses, such as efficiency and public goods argument. High transaction costs may partially account for the absence of property rights, but other economic considerations such as network effect may also be at play.

Keywords:

Legal clauses;
Copyright;
Property rights;
Non-protection;
Economic justifications.

Received May, 2021

Accepted July, 2021

Published Jan, 2022

1. Introduction

Legal clauses are phrases use in legal instruments such as statutes, contracts, memoranda, statements and notices. Frequently, but not necessarily, they are drafted or written by lawyers. Unlike general literary writing, legal clauses tend to be more stylised and employ specific terminologies and phraseologies. Therefore, although different legal instruments may serve different purposes and have to be written in different ways, there is still substantial reuse of legal clauses in these instruments.

There is tremendous value in well-written legal clauses. Well-written legal clauses contain fewer mistakes and bring less legal uncertainty to those who adopt them. They are time-tested in courts and most likely have been accepted by the courts without much difficulty. Often, well-written legal clauses are easy to be understood and interpreted by lawyers familiar with the subject matter. In essence, well-written legal clauses give great benefits to those who adopt them.

In general, we can find reuse of legal clauses in both legislation and non-legislative documents. With regards to legislation, it is common in the legal world for legislatures to reproduce provisions of statutes from another country or jurisdiction into their own. Reproduction of statutory provisions from one jurisdiction to another is a quick and easy way to effect legal transplants (Fedtke, 2006). Courts in common law countries routinely refer to judgment from

other common law jurisdictions for guidance on the interpretation of terms and phrases when the provisions there are *in pari materia* to those in their home countries. Similarly, for non-legislative material, lawyers routinely reuse legal clauses from pr

ecedences prepared by others or themselves when drafting legal documents. This practice saves time, ensures certainty of interpretation and minimises mistakes in the drafting of legal documents.

The length of re-used legal clauses varies from a few words to a complete document running to tens or hundreds of pages. Given that there is a lot of value in well-written legal clauses, it is indeed a puzzle why intellectual property law, particularly copyright law, is not often used to create exclusive rights in these legal clauses for the original creators to extract extra profits.

This paper thus proposes to examine the copyright protection (or non-protection) of legal clauses and discuss possible economic reasons why such behaviour is observed. The methodology used in this paper is primarily legal doctrinal analysis (Dobinson and Johns, 2007). Doctrinal analysis is a legal research methodology that is used to answer the question of “What is the law?”. Additionally, an economic analysis of law approach is used to provide an economic explanation of the law.

The jurisdictions that are examined are limited to the United Kingdom, United States and Malaysia, for the reason that the first two are major common law countries, and that Malaysia, where the author resides, is also a common law country. The same arguments raised may apply to other non-common law jurisdictions, but this has to be confirmed by other researchers in the future.

2. Copyright protection of legal clauses

Copyright law around the world is largely harmonised under the Berne Convention for the Protection of Literary and Artistic Works 1886 (‘Berne Convention’) and the Agreement on Trade-Related Aspects of Intellectual Property Rights 1995 (‘TRIPS Agreement’). Legal clauses fall under the category of copyright works known as ‘literary works’. Most legislative provisions and case laws dealing with the copyright of legal clauses concern with copyright protection of legislation instead of specific non-legislative legal clauses. We can, however, look at examples from three common law jurisdictions to see what the legal position is with regards to copyright protection of legal clauses.

2.1 United Kingdom

In relation to copyright protection of legislation, section 164(1) of the Copyright, Designs and Patents Act 1988 provides for the concept of Crown copyright. It enables the UK government to claim copyright ownership over all legislation of its legislature. The original function of this is to allow the UK government to claim royalties for printing official documents, including statute books. But in line with efforts to liberalise access to legislation online, legislation available on the UK government’s website is available for free and re-usable under an Open Government License, which permits free re-use and distribution of the legislation (The National Archives, 2016). Also, a quick search on the Westlaw database did not turn up any reported court decision concerning section 164, suggesting that there was no reported decision involving the enforcement of section 164. Most likely, and in common practice, the British Crown does not sue individuals and other countries for copying and using sections of its Acts of Parliament.

Section 45(1) of the Copyright, Designs and Patents Act 1988 further states that “[c]opyright is not infringed by anything done for the purpose of parliamentary or judicial proceedings.” This provision explicitly exempts the reproduction of legal clauses, statutory provisions and written judgments for a judicial proceeding, which include both the pleadings and judgments. Section 45(1), however, does not grant an excuse for infringing copyright in legal clauses in a non-judicial context, i.e. drafting of legal documents.

Given the sparse legislative exception in the copyright statute, we have to look to the copyright doctrines for an answer. The first approach is to look at the extent copyright law gives protection to short phrases. In *Francis Day and Hunter, Ltd v Twentieth Century Fox Corporation, Ltd*, the Privy Council, in an appeal from Ontario, held that the title of a song entitled “The Man Who Broke the Bank at Monte Carlo” is not a literary work as not capable of copyright protection in its own right. In a related case, *Exxon Corporation v Exxon Insurance Consultants International Ltd*, the court held that a single invented word, ‘Exxon’, is not capable of being protected under copyright law as it is not a literary work. However, in a more recent decision, the UK court has departed from the previous approach. In *The Newspaper Licensing Agency Ltd v Meltwater Holding BV*, the Court of Appeal held that “newspaper headlines are capable of being original literary works”. Hence, it is no longer true that the length of a sentence or a paragraph is a useful determinant of the copyrightability status of the sentence or paragraph.

The second approach is to rely on the distinction between non-copyrightable ideas and copyrightable expressions. According to Lord Hoffmann in *Designers Guild Ltd v Russell Williams (Textiles) Ltd*, that “certain ideas expressed by a copyright work may not be protected because, although they are ideas of a literary, dramatic or artistic nature, they are not original, or so commonplace as not to form a substantial part of a work.” It follows that although a legal document is a proper subject matter of copyright, commonplace legal clauses may not be protected under copyright law under the principle enunciated in *Designers Guild*.

The third approach is based on the principle of *de minimis non curat lex*. In *Frederick B Chatterton and Benjamin Webster v Joseph Arnold Cave*, the House of Lords had the opinion that “the principle of *de minimis non curat lex* applies to a supposed wrong in taking a part of dramatic works, as well as in reproducing a part of a book”. In other words, if the infringement is of little harm and not substantial, the court would not grant a remedy. This same principle was also applied in *Trade Auxiliary Company v Middlesborough and District Tradesmen’s Protection Association*.

In conclusion, the position of the copyrightability status of short sentences or phrases is less clear now in English law. Older authorities appear to take the position there is no copyright in short sentences while the newer approach following *Meltwater* may differ. Also, as the length of the legal clauses that have been taken increases, copyright protection will kick in at some point or another.

2.2 United States

In the United States, copyright is governed by the Copyright Act of 1976. According to §105, copyright protection “is not available to any work of the United States Government”. In contrast to the approach of the United Kingdom, the effect of §105 is that all legislation passed by the federal government in the United States are not subject to copyright protection and thus are in the public domain. The philosophical rationale is that “[t]he citizens are authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process” (*Building Officials and Code Administration v Code Technology, Inc*).

There was a long-standing tradition in the United States that judicial opinions and legislation were not subject to copyright protection. In *Banks v Manchester*, the United States Supreme Court held that judgments of courts are not copyrightable. *Veck v Southern Building Code Congress International, Inc*, extended that principle to cover legislation passed by local government. In *Veck*, the US Court of Appeals for the Fifth Circuit held that a building code that was drafted earlier by a private entity but adopted as part of the local building code of two towns is not protected by copyright law.

Doctrinal support for not protecting legislation include the merger doctrine. According to this doctrine, “if an idea is susceptible to only one form of expression, the merger doctrine applies and §102(b) excludes the expression from the Copyright Act” (*Veck v Southern Building Code Congress International, Inc*). Since statutory language has to be precise and phrases have to be expressed exactly as passed by the relevant legislature, copyright protection for legislation may be exempted under the merger doctrine.

Another approach is to examine whether legal clauses may fall within the fair use exception in copyright law. In a recent US Supreme Court decision in *Google LLC v Oracle America, Inc*, the fair use defence was held to apply to Google’s copying of some parts of the ‘declaring codes’ from the Java programming language API (Application Programming Interface), the copyright of which is owned by Oracle America, when developing their own Java-compatible Android system. The Supreme Court held that:

“Google’s basic objective was not simply to make the Java programming language usable on its Android systems. It was to permit programmers to make use of their knowledge and experience using the Sun Java API when they wrote new programs for smartphones with the Android platform. In principle, Google might have created its own, different system of declaring code. But the jury could have found that its doing so would not have achieved that basic objective. In a sense, the declaring code was the key that it needed to unlock the programmers’ creative energies. And it needed those energies to create and to improve its own innovative Android systems.” (*Google v Oracle America*).

In summary, the US Supreme Court recognised that the declaring code of an API falls within a fair use exception.

It is conceivable that a similar fair use reasoning may be applied to time-tested legal phrases and legal clauses. A drafter is at liberty to creatively draft a legal document without copying these clauses, but doing so risk having the legal document being interpreted not the way the author intended, or worse, being declared void on the ground of ambiguity. Therefore, for the social benefit of standardisation, a fair use argument may be raised that legal clauses should be exempted from copyright protection.

2.3 Malaysia

Malaysia follows the English common law tradition and adopts case laws from the United Kingdom in interpreting its Copyright Act. Section 2 of the Copyright Act 1987 excludes from the definition of ‘literary works’, “official texts of the Government or statutory bodies of a legislative or regulatory nature, or judicial decisions ...”. Furthermore, section 13(2)(1) excludes “any use of a work for the purposes of any judicial proceedings, the proceedings of a royal commission, a legislative body, statutory or Governmental inquiry, or of any report of any such proceedings, or for the purpose of the giving of professional advice by a legal practitioner” from the exclusive right of a copyright owner. Under the exclusion in section 2 and unlike the case in the United Kingdom, the government of Malaysia could not claim ownership over legislation passed by the

relevant legislative bodies. This position is similar to that of the United States, but the language of this exception is wider and clearer than the exception in 17 USC §105, which covers only United States' federal legislation.

It is not clear however whether reusing legal clauses from a copyrighted source falls under the exception in section 13(2)(l) under the phrase "giving of professional advice". It can be argued that drafting legal documents is not the same as giving professional advice, and thus re-using legal phrases in legal documents does not fall within this exception. In *Public Performance Malaysia Sdn Bhd & Anor v PRISM Bhd*, the High Court of Malaya accepted that the defendant has infringed the plaintiff's copyright in a licensing document when the former copied and used almost the whole of the latter's document. The court accepted that a licensing document is an original literary work. The issue of an exception under section 13(2)(l) was not raised in that case and does not appear to be relevant.

Legal doctrines in UK copyright law apply equally in Malaysia. Therefore, doctrines as discussed above can also be used in Malaysia. As in the United Kingdom, lawyers routinely re-use precedences for legal documents while drafting and employ well-crafted legal clauses in their practice. With the authority from *Public Performance Malaysia Sdn Bhd & Anor v PRISM Bhd*, lawyers should now be more careful in copying from precedences, especially the copying if more than a few lines and can be considered substantial.

An amendment to the Copyright Act in 2012 can be interpreted as transplanting the American fair use doctrine to Malaysian copyright law (Khong, 2021). Although technically, the exception in section 13(2)(a) is still known as 'fair dealing', it is no longer the same limited 'fair dealing' before 2012. The nifty addition of the word 'including' preceding the list of acceptable purposes for this exception, makes the list illustrative instead of definitive. Furthermore, the four conditions for fair use in the US copyright statute are reproduced *mutatis mutandis* as a new subsection. Therefore, it can be argued that the logic in *Google LLC v Oracle America, Inc* may be referred to in interpreting the new 'fair use' provision in Malaysian copyright law.

2.4 Summary of legal positions

Notwithstanding the differences in the legislative approaches in the three countries studied above, the general conclusion is that copyright law does not protect legislation, or at least the government opts not to enforce it, as in the case of the United Kingdom. This is especially apparent in the case of the United States and Malaysia, where copyright law explicitly excludes protection for legislation. In addition to legislation, re-using of legal clauses in non-legislative drafting is likely to be not infringing copyright law under the *de minimis* rule, merger doctrine, fair use or fair dealing exception, or the principle that short phrases are not literary works. On the other hand, as illustrated in the Malaysian decision of *Public Performance Malaysia Sdn Bhd & Anor v PRISM Bhd*, the wholesale copying of a substantial part of a legal document may still amount to copyright infringement.

3. Efficiency consideration

More than half a century ago, Arrow (1962) has already identified an economic rationale for intellectual property rights. Since, words, phrases, writings and literary works are all informational in nature, the analysis by Arrow is relevant. He notes:

“The cost of transmitting a given body of information is frequently very low. If it were zero, then optimal allocation would obviously call for unlimited distribution of the information without cost. ...

In the absence of special legal protection, the owner cannot, however, simply sell information on the open market. Any one purchaser can destroy the monopoly, since he can reproduce the information at little or no cost. Thus the only effective monopoly would be the use of the information by the original possessor. This, however, will not only be socially inefficient, but also may not be of much use to the owner of the information either, since he may not be able to exploit it as effectively as others.”

The analysis by Arrow (1962) shows that the first-best efficient solution for the use of information is for it to be free to use and free to distribute. However, such free use and free distribution inevitably lead to a sub-optimal incentive and investment problem. Therefore, the intellectual property law solution is to grant an exclusive right to the creator of information to extract a profit through selling copies of his work or charging a license royalty (Khong, 2019). Infringement of such exclusive right is then enforced by civil action, or in some cases, criminal prosecution. As such, intellectual property rights is only a second-best solution for the use and dissemination of information.

Notwithstanding this, the use of an intellectual property right is not absolute. There might be economic considerations for not enforcing such a right. In the discussion below, we will look at a few possible exceptions to property rights.

3.1 The public goods problem resolved

Propertisation through intellectual property rights, as a second-best solution, is only necessary to solve the incentive and investment problem associated with the production of public goods. According to the theory of public goods, the two characteristics of public goods are non-rivalry in consumption and non-excludability (McNutt, 1999). The non-rivalry in consumption characteristic is a good characteristic because it means that the public goods can be consumed by an infinite number of consumers without a decrease in quantity and quality. Information is an example of a good with a non-rivalry in consumption characteristic because once information is released to the public, it does not decrease in quantity and quality regardless of the number of consumers of that information.

The second characteristic, non-excludability, is a bad characteristic. Once a public good is made available to the public, it is extremely difficult, if not impossible, to exclude non-payers from consuming or enjoying the benefit of the public good. This enjoying without paying is known as the free-riding problem. The traditional solution to the free-riding problem is to exert a non-voluntary payment such as taxation, to fund the provision of public goods. The typical textbook example of such a public good provided through taxation is national defence (McNutt, 1999), whereby the safety from attacks by hostile enemies is enjoyed by everyone in the protected population.

It can be seen that the drafting of laws by the executive and the passing of laws by the legislature are activities typically funded by the taxpayers. Similarly, the administration of the courts is also financed through public funding. That means the free-riding problem is resolved through taxation. Hence, the socially optimal use of information derived from such processes, such as legislative bills, legislation and court decisions, should be “unlimited distribution of the information without cost” (Arrow, 1962).

The treatment of copyright law to legislation and court decisions, as discussed above, tends to be in line with the conclusion above. The solution of public funding can encourage optimal use and distribution of legislation and court judgments through a free use and distribution policy. Notwithstanding this, the public funding argument does not seem to apply to legal clauses drafted by experienced lawyers, but not yet incorporated into legislation or tested in the courts. Thus, an alternative argument for the non-protection of such clauses needs to be sought.

3.2 Transaction cost

Copyright of information entails the exclusive right to the copyright owner to make copies, presumably for sale, of his work, or to grant a licence, upon payment of royalties, to do certain actions under the exclusive purview of the copyright owner. Unlike the sale of a copy, licensing means that the potential user of a copyrighted work will need to seek out the copyright owner or his representative to negotiate and enter into a licensing agreement. The transaction cost of licensing is not insignificant. Thus, when the transaction cost of licensing is higher than the benefit of using a copyrighted work, then proprietisation will lead to a 'market failure', where private bargaining is not a solution to optimal use of an intellectual property (Gordon, 1982, 2002).

As a reason to invoke the fair use doctrine in American copyright law, Gordon (2002) suggests two different categories of cases: excuses and justifications. A justification for fair use occurs when for policy reasons, we do not want a user to bother with asking for a licence from a copyright owner, even if the copyright owner may wish to grant such a licence, and the user is willing to pay for it. An example of a justification is when the fair use doctrine is applied on free speech situations, e.g. criticism of the copyright owner's work. Since it is uncertain that, under such situations, whether all copyright owners are willing to grant a licence for strategic reasons, the law intervenes by dispensing the need for a license.

An excuse to invoke the fair use doctrine, on the other hand, is largely based on a transaction cost reason. But for high transaction costs, the use of copyrighted work should be left to the market and private bargaining. Hence when the transaction cost of licensing can be lowered through institutional or technological change, the fair use doctrine should cease to apply. Gordon suggests that the use of the fair use doctrine to allow private recording of television programmes on video cassette tapes for time-shifting purposes, in the *Sony Corporation of America v Universal City Studios, Inc*, can be explained as a fair use excuse. In the same way, the *Google LLC v Oracle America, Inc* decision can be rationalised as an excuse.

To determine whether a copyright exception is invoked because of an excuse or a justification, we can ask the hypothetical question of "If licensing costs were zero, would the copyright owner still strategically refuse to license his work to a user?" If the answer is yes, then those situations would be good candidates for an exception with a justification.

Well-crafted legal clauses are very useful and valuable to the legal profession as a whole, and legislature worldwide. If a person is granted an exclusive right over some legal clauses, he may strategically refuse to license his copyright to a competing lawyer, so that the latter has to use less elegant clauses in place of the protected clauses. For this reason, a copyright exception should be raised on what Gordon calls a justification.

Similarly, non-protection of the legal clauses in the law can be explained by a justification as without the ability to quote in verbatim the wording of the law, citizens would not be able to communicate effectively with others with regards to the rights and obligations conferred by the law. Non-protection of legal clauses may also be explained as an excuse. If each enforceable clause is owned by a party, the licensing cost of drafting a legal document containing protection clauses

will be very high. This in turn will increase the barrier to access to justice and raise the cost of using the legal system.

3.3 Divergence versus convergence

Lord Hoffmann quipped in *Designers Guild Ltd v Russell Williams (Textiles) Ltd*, that “[c]opyright law protects foxes better than hedgehogs.” This is an allusion to an ancient Greek phrase by poet Archilochus: “the fox knows many little things, but the hedgehog knows one big thing.” Arden LJ in *L Woolley Jewellers Ltd v A & A Jewellery Ltd* tried to explain what Lord Hoffmann could have meant:

“... the fragment may also be taken figuratively as contrasting those with a single central vision and organising principle as against those who pursue many ends, often unrelated or contradictory. It was, the Author [Arden LJ] thinks, in the figurative sense that Lord Hoffmann was using his metaphor.”

An alternative interpretation of Lord Hoffmann’s metaphor is possible. If by foxes, we mean ‘many ways’, and by hedgehogs, we mean ‘one way’, then the phrase would translate into “copyright law protects expressions which can be made in many ways better than expressions which can only be made in one way.” Incidentally, this principle is nicely captured by the American merger doctrine, which can be explained as having an anti-monopolisation function (Samuelson, 2016). Under the merger doctrine, when an idea can only be expressed in one or a limited number of ways, the doctrine considers those expressions as not capable of being protected by copyright.

Another way of looking at the foxes versus hedgehogs distinction is to say that copyright promotes divergence of expressions, and when expressions could not diverge then copyright will not protect them. Given that society is best served by using the most suitably crafted legal clauses instead of competition towards fanciful and fantastic language, legal clauses should undergo some form of linguistic evolution in the form of ‘survival of the fittest’, where judges and the legal profession select the best clauses and discard the worst.

Since good legal clauses tend to converge to a standard as a result of this linguistic evolutionary selection, there should be no intellectual property rights protection to prevent monopolisation of the legal language.

3.4 Network externalities

The value of a language can be analysed using the concept of network externalities (Dalmazzone, 1999). As the number of users of a language increases, the higher the value of knowing that particular language. This phenomenon also applies to legal clauses. As legal clauses become more well-known and commonly used, the more valuable they become to the legal profession.

Network externalities may yield both positive and negative effects. The positive effect of network externalities is easy to understand. As legal clauses become widely and commonly known and used, the value of consistency and certainty of the meaning of those clauses increases. Therefore, instead of choosing some other similar clauses, using well-known clauses will provide more certainty of meaning to those usages. To a certain extent, this positive effect reinforces itself such that it becomes crucial to employ well-known legal clauses to minimise errors and misunderstandings in legal drafting.

The economic literature recognises that inefficiency may result from network externalities when an inferior standard dominates over a superior standard due to the former's network externalities. A clear example is the Qwerty keyboard where one of the original reasons for such an arrangement is to prevent typewriter keys from being stuck together when typing too fast, but due to its early dominance of the Qwerty keyboard, a better alternative keyboard arrangement could not take hold (David, 1985; Liebowitz and Margolis, 1990). This is particularly clear in this age of soft keyboards on touch screens, where there is no good reason for the persistence of the Qwerty standard apart from it being prevalent since the time of typewriters and computer keyboards.

The same thing may also happen to legal language, where archaic legal clauses persist notwithstanding the best efforts to modernise and simplify legal language (Sobota, 2014). One of the reasons is that once a legal clause is commonly and widely used, lawyers will have a shared understanding as to its intended meaning, even though the passage of time might place it in the more obscure sections of the dictionary.

On technology adoption, the risk of lock-in due to network externalities has been recognised as a possible justification for limiting intellectual property rights (Farrell, 1989). In particular, anti-competitive behaviour may arise from intellectual property rights owners against new competitors. By the same analogy, the risk of anti-competitive behaviour from monopolisation of legal language, which we show is susceptible to network externalities, means that limited or even dispensing with intellectual property protection may be the socially ideal arrangement.

4. Conclusion

This paper examines the peculiar case of non-existence or non-enforcement of intellectual property rights in legal clauses, notwithstanding that *prima facie* well-written legal clauses are very useful to the legal profession and society as a whole. Several economic justifications such as efficiency consideration, public goods, transaction cost, standardisation and network externalities may explain the above peculiar phenomenon.

One lesson that may be learned from this exercise is that propertisation and ownership may not necessarily be the best solution to the use of resources, particularly if they exhibit public goods characteristics. There may be good reasons why valuable resources such as well-crafted legal clauses remain unprotected as intellectual property so that they may be used for social good.

As has been indicated in the Introduction section above, this paper limits its examination to the laws in the United Kingdom, United States and Malaysia. Further investigations can be made on whether the same legal positions are found in other non-common law jurisdictions and whether the same economic arguments apply.

Acknowledgement

An earlier version of this paper has been presented at the 13th Annual Asian Law and Economics Association (AsLEA) Conference at the University of Economics, Ho Chi Minh City, on 22 June 2017. Kind comments from the participants of the AsLEA conference are acknowledged. Thanks also to the reviewers of this paper for their kind comments and suggestions.

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