

PROPRIETY ESTOPPEL AND COPYRIGHT LAW

Author: Dr Poorna Mysoor

I am a Leverhulme Trust Early Career Fellow at the Law Faculty at Oxford. I completed my DPhil at the Faculty on implied licences in copyright law. I have offered tutorials in Land Law, Contract Law and Tort Law at various colleges in Oxford and in Copyright Law at the Faculty. I was in practice of intellectual property law for several years before embarking on the academic career.

Affiliation: Leverhulme Trust Early Career Fellow, Faculty of Law, University of Oxford

Email: poorna.mysoor@law.ox.ac.uk

Mobile: +44 747 212 0002

Address: Queen's College, High Street, Oxford OX1 4AW

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Abstract

In the copyright context, courts have applied proprietary estoppel to assess whether an implied bare copyright licence has become irrevocable due to long periods of inaction on part of the copyright owner, normally called acquiescence. Such inaction is generally attributable to a lack of awareness by the claimant of her copyright entitlement or to the lack of bargaining power to assert her rights. One may rely on land law for guidance, since historically courts had developed elaborate principles to established acquiescence in cases like *Willmott v Barber*. However, in the last few decades courts have moved towards a unified approach to proprietary estoppel. Academic opinions differ as to the desirability of the unified approach, but the process of unification has resulted in a loss of nuance in assessing in particular, the acquiescence-type cases. However, even if *Willmott* were to be resurrected, the only reason tolerated for inaction in land law is the lack of knowledge as to the landowner's own rights. This article argues that in order to do justice in copyright cases, the acquiescence principles must have more nuance to accommodate the reasons peculiar to the copyright context that drive a copyright owner's inaction. The assessment of detrimental reliance should be robust, and the grant of relief should be mindful that inaction is the basis of proprietary estoppel in these cases.

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Dr Poorna Mysoor*

It is said that one of the objectives of proprietary estoppel is to protect a person from suffering a detriment as a result of his reasonable reliance on the commitment by the property owner.¹ This could be because property owners are perceived to command a more powerful position. Indeed, some commentators in the context of land law observe that proprietary estoppel serves to prevent the abuse of such power.²

However, in many of the copyright cases in which proprietary estoppel has arisen,³ the power relationship is reversed. These copyright cases are characterised by the absence of an express licence by the copyright owner permitting her work to be used. As such, a court must scrutinise both the actions and the inaction on part of the copyright owner to form a view as to whether a licence may be implied based on her conduct. In these cases, there are extended periods of inaction on part of the copyright owner in asserting her rights. The question for the court is whether the licence so implied has become irrevocable such that the copyright owner is estopped from asserting her rights due to her inaction. It must be pointed out however, that such inaction on part of the copyright owner is generally attributable either to her lack of awareness of her own rights given the complexity of authorship and joint ownership rules, or to her weaker bargaining position as against those who use her work. Thus, it may well be that it is not the persons relying on copyright owners' conduct, but the copyright owners themselves who need protection. Is the doctrine of proprietary estoppel equipped to deal with such situations?

It may be that the doctrine of proprietary estoppel does not need a reformulation for copyright cases, but simply needs more nuance to address these cases in a balanced manner. Historically, courts have developed reasonably elaborate requirements when there was inaction on part of the land owner, under the broad umbrella of acquiescence.⁴ However, over the years, the effort of the courts has been more towards unifying the doctrine of proprietary estoppel under a single formulation.⁵ There is an ongoing academic debate as to the nature and desirability of the unifying approach. Some scholars commend the clarity brought about by the unification marking a decisive break from the historical confusion in the area.⁶ Others argue that proprietary estoppel must be analysed under separate strands addressing inaction and actions of different kinds.⁷

* Leverhulme Trust Early Career Fellow, Faculty of Law, University of Oxford. The author is grateful for the preliminary discussions she has had with Professor Simon Gardner, and to Professor Graeme Dinwoodie for his comments on the earlier versions of this piece. Any errors are the author's own.

¹ Ben McFarlane, *Structure of Property law* (Hart Publishing 2008) 445; see also, Simon Gardner and Emily McKenzie, *An Introduction to Land Law* (4th edn, Hart Publishing, 2015) 159-60, where the authors refer to the correction of reliance loss as one of the projects of proprietary estoppel that can be reasonably supported in principle.

² Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th edn, OUP 2009) para [9.2.3], relying on the Australian High Court decision in *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, at 440-41 (per Deane J).

³ Proprietary estoppel has long been held to extend beyond land law, to intellectual property cases. *Proctor v Bennis* (1887) 36 Ch D 740 (CA), which concerned patent rights.

⁴ *Willmott v Barber* (1880) 15 Ch D 96.

⁵ *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133; and *Thorner v Major* [2009] UKHL 18.

⁶ Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2000) 60-65; Piers Feltham *et al*, *Spencer Bower: Reliance Based Estoppel* (5th edn, Bloomsbury, 2017) paras [1.104] - [1.106].

⁷ Ben McFarlane, *The Law of Proprietary Estoppel* (OUP 2014) paras [1.03], [1.05], [1.24]-[1.27]; and John Mee, 'Proprietary Estoppel, Promises and Mistaken Belief' in Susan Bright (ed), *Modern Studies in Property Law* (Hart Publishing 2011) 181-84.

Whether one supports or rejects the unified approach to proprietary estoppel, at a minimum the framework should recognise the distinction between proprietary estoppel triggered by the action of the property owner and those triggered by her inaction. The circumstances unique to the copyright context test the doctrine of proprietary estoppel in ways that land law scenarios do not – chief among these circumstances being the reversal of power relations between the owner and the user of property. Given a significant inaction on part of the copyright owner and varying reasons contributing to such inaction, it is important that the doctrine of proprietary estoppel especially as it relates to acquiescence is reassessed.

Courts have had an opportunity to analyse acquiescence within proprietary estoppel more in land law than other areas. Therefore, this article begins in Section 1 by putting proprietary estoppel in perspective, providing a brief outline of land law cases that have contributed to the development of acquiescence to the extent these may be useful in the copyright context. It goes on to analyse why acquiescence is different from other approaches to establish proprietary estoppel and to demonstrate how the courts have adopted a unifying approach to proprietary estoppel, resulting in the loss of nuance. Section 2 deals with copyright cases, discussing firstly, the complexities involved in establishing authorship and in implying a bare licence. It goes on to address the question of irrevocability of implied licence, demonstrating how the loss of nuance brings unsatisfactory results in copyright cases. It concludes by showing what sort of nuance is required in establishing acquiescence in copyright cases to produce a just and fair result.

1. Proprietary estoppel as developed in land law

Judges and academics generally agree that the contemporary understanding of proprietary estoppel has three components: commitment (representation), reliance and detriment.⁸ Although the first of these requirements is simply termed ‘commitment’, the conduct on part of the land owner inducing detrimental reliance can range from the inaction of simply standing by, to the making of active and repeated statements. The framework for proprietary estoppel must be equipped to deal with such diversity of the land owner’s conduct. One suggestion is that this may be achieved by separating three distinct strands of proprietary estoppel, namely: acquiescence capturing the inaction of the land owner, and representation and promise capturing action of the land owner as to an existing or future state of affairs respectively.⁹ Another suggestion is have a single overall framework, but providing guidelines that in all cases courts may take into account factors such as the behaviour, the state of mind or the circumstances of either party.¹⁰ Since detrimental reliance is the common underlying theme of what are called reliance-based estoppel, there is yet another suggestion of unifying proprietary estoppel only to the extent of detrimental reliance, but encouraging nuanced appreciation of the conduct of the copyright owner.¹¹ Common law has traditionally been hesitant towards placing liability on inaction. Thus, it has been argued that the liability of a landowner for inaction or omissions must stand on a different footing from that for actions.¹²

Deciding which of these approaches must be followed is not the central theme of this article. The quest here is whether one can find a framework of proprietary estoppel in land law that can be used to address the inaction of the type seen in copyright cases. With this objective in

⁸ Gardner and McKenzie, *Introduction to Land Law*, p. 144; McFarlane, *Structure of Property law*, p. 444; Gray and Gray, *Elements of Land Law*, para [9.2.8].

⁹ McFarlane, *Law of Proprietary Estoppel*, paras [1.03], [1.05], [1.24]-[1.27].

¹⁰ Cooke, *The Modern Law of Estoppel*, pp 63-64.

¹¹ Feltham *et al*, *Spencer Bower: Reliance Based Estoppel*, paras [1.104] - [1.106].

¹² Irit Samet, ‘Proprietary Estoppel and Responsibility for Omissions’, [2015] 78 MLR 85, 90.

mind, the following paragraphs explore how courts have approached acquiescence over the last two centuries.

1.1 Expounding acquiescence – early authorities

Acquiescence concerns cases where the claimant suffers detriment based on the claimant's reliance on the land owner simply 'standing by'. Arguably, one of the first attempts at identifying in detail the conduct of the land owner under these circumstances was made in *Willmott v Barber*.¹³ Some scholars take it back even further to *Ramsden v Dyson*.¹⁴ However, *Willmott* identified the components of estoppel by acquiescence with a level of granularity which *Ramsden* did not provide.

In *Willmott, Barber*, the first defendant held a lease over certain land, the terms of which barred him from assigning or sub-letting the land without the consent of his landlord, the second defendant, Bowyer. Without seeking Bowyer's consent, Barber granted a sublease to Willmott, the claimant, together with an option to purchase the remaining term on Barber's tenancy. Bowyer claimed he was unaware that his consent was required for the sublease.¹⁵ Willmott went ahead and made improvements to the land, allegedly with Bowyer's knowledge. While Willmott was doing so, Barber surrendered his lease and entered into a new lease with Bowyer for a fresh term, which also required Bowyer's consent for assigning and subletting the property.¹⁶ This time, Bowyer appears to have noticed this term in the agreement. A few years later, when Willmott tried to exercise his option to purchase Barber's remaining term of tenancy, Bowyer refused consent. The question was whether Bowyer had acquiesced in Willmott's expenditure, and therefore could not refuse consent.¹⁷ In this context, Fry J identified the following five elements (commonly called the probanda) which must be present before acquiescence can be found.¹⁸

- firstly, a mistake on part of the claimant as to her legal rights;
- secondly, the defendant must know of the claimant's mistaken belief of her rights;
- thirdly, the defendant must know of the existence of her own right which is inconsistent with the right claimed by the claimant.
- fourthly, the claimant must have expended some money or must have done some act on the faith of her mistaken belief.
- lastly, the defendant must have encouraged the claimant in her expenditure of money or in other acts which she has done, either directly or by abstaining from asserting defendant's legal right.

Applying these to the facts, Fry J found a mistaken belief on Willmott's part, but did not find that Bowyer had the knowledge of Willmott's mistake or Bowyer's own right to consent to the assignment of the lease to Willmott. Fry J went on to hold that the expenditure Willmott incurred was not in reliance of the exercise of the option to purchase, but was independent of it. Fry J, therefore, held that Bowyer had not acquiesced in Willmott's conduct of accepting the assignment of the lease and in incurring expenditure.

¹³ (1880) 15 Ch D 96, 105-6.

¹⁴ (1866) LR 1 HL 129.

¹⁵ (1880) 15 Ch D 96, 97-98.

¹⁶ *ibid*, p. 98.

¹⁷ *ibid*, p. 96, 99.

¹⁸ *ibid*, p. 105-6.

For our purposes, the enquiry is – what should have been Bowyer’s conduct for him to lose his right to consent to Barber assigning the lease to Willmott? Bowyer had only stood by, while Willmott expended money on improvements. For this inaction alone to be sufficient, Bowyer needed to know not only that Willmott was under a mistake that he could take the sublease and the assignment of the remainder of the lease, but also of Bowyer’s own right to refuse consent to the sub-lease and assignment. Bowyer knew of neither. Such lack of knowledge is likely to have prompted Bowyer to stand by, while Barber sub-let the premises to Willmott and Willmott made those improvements. Therefore, before depriving Bowyer of his right to refuse consent because of his inaction, the court found it essential to enquire why there was such an inaction. The lack of knowledge of one’s own rights could be only one of the reasons for the inaction. However, it is at least asking a question in the right direction in focusing on what may have prompted the inaction. This aspect, as we shall see in Section 2.3 below, is significant in copyright cases, since copyright owners are sometimes unaware of their own rights.

Not every case where proprietary estoppel is claimed is a case of the defendant’s inaction. If there is some action on part of the defendant which the claimant can rely on, a detailed analysis of the knowledge the defendant may not be necessary. This is because a person is presumed to be aware of the natural consequences of her actions, and those are the actions on which the claimant relies. In deciding subsequent cases if judges had realised that *Willmott* was trying to address only a type of proprietary estoppel cases, it would have resulted in much more clarity. Although there was some acknowledgement of this,¹⁹ commentators believe that many judges took the *Willmott* rules as the only way proprietary estoppel could come into existence, putting all proprietary estoppel into one straight-jacket.²⁰ A significant example is of *Crabb v Arun District Council*²¹ where the defendant District Council had put up a gate to let the claimant have access over their land – which counted as an action encouraging the claimant to sell a part of his land in reliance of having access to the retained land over the defendant’s land. Nevertheless, Scarman LJ held that *Willmott* criteria applied in this case and were satisfied.²² The requirements that fit an active defendant, rather than a passive one should have been distinguished, as the discussion below elaborates.

1.2 Distinguishing inaction from action

An unequivocal action on part of the defendant that conveys the existence of a state of affairs must be distinguished from standing by as in acquiescence. The circumstances in which *Willmott* probanda, and in particular, the knowledge of the property owner of his own rights, came into sharp focus in *Taylor’s Fashions Ltd v Liverpool Victoria Trustees Co Ltd*.²³ Here, the defendant had granted a long lease to the claimants in separate actions, with an option to renew it at the end of the lease. However, the option to renew was not registered. Due to an uncertainty in the law, none of the parties to the suit knew of the need for registration.²⁴ The claimant argued that the five elements in *Willmott* did not provide the appropriate criteria to establish proprietary estoppel in

¹⁹ For example, *Electrolux Ltd v Electrix Ltd* [1953] 71 RPC 23, 33 (per Evershed MR).

²⁰ Gray and Gray, *Elements of Land Law*, para [9.2.31]; Cooke, *The Modern Law of Estoppel*, p. 77.

²¹ [1975] 1 Ch 179.

²² *ibid*, p. 195. Scarman LJ held that the first four of *Willmott* criteria were satisfied without any discussion. He elaborated only on the application of the fifth criterion, namely, whether the defendant had encouraged the claimant in the expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting their legal rights. In effect, the discussion was only of reliance and detriment.

²³ [1982] QB 133.

²⁴ *ibid*, p. 138. See also, Martin Dixon, ‘Taylor’s Fashions Ltd v Victoria Trustees Co Ltd; Old & Campbell Ltd v Liverpool Victoria Friendly Society (1979) Stitching Together Modern Estoppel’ in Nigel Gravells, ed, *Landmark Cases in Land Law* (Hart Publishing, 2013) pp. 86-90.

this case because *Willmott* requires a unilateral mistake on part of the claimant. But in this case, the parties were under a bilateral mistake that no registration of the option to renew was required. The defendant claimed that *Willmott* did apply, and in particular, that the requirement of the defendant's knowledge of his own rights was essential to be satisfied before claiming proprietary estoppel against him.²⁵

Oliver J accepted that *Willmott* could apply to certain specific cases 'where all that has happened is that the party alleged to be estopped has stood by without protest while his rights have been infringed'.²⁶ He further opined that in case of mere passivity, it is readily intelligible that there must be shown a duty to speak, protest or interfere, which cannot normally arise in the absence of knowledge or at least a suspicion of the true position. However, he went on to say that acquiescence or encouragement could take several forms – from active encouragement to standing by in silence while one party unwittingly infringes another's legal rights.²⁷ This meant that proprietary estoppel could arise despite the absence of the unilateral mistake and the knowledge of the defendant of her own rights, if the defendant had 'acted' in such a way as to encourage the claimant to act on it. With this, Oliver J appeared to be drawing a distinction between two forms of estoppel, one drawn from acquiescence as in *Willmott*, and another which is based on representation. If he had stopped here, it may have brought some clarity. But he noted:²⁸

... the ... principle, whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial – requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, *knowingly or unknowingly*, he has allowed or encouraged another to assume to his detriment, than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.'

Having warned against using universal yardstick of the 'formula' in *Willmott*, Oliver J did exactly that – to bring all forms of conduct under one yardstick of unconscionability.

Furthermore, he went to great lengths to support this statement with prior authority that there can be cases where the person being estopped is not aware of his own rights.²⁹ This may be true of cases where there is a decisive action on part of the landowner, like in *Taylors* itself. But because of the unified approach, this meant that even in a case of inaction, if the landowner was unaware of her own rights which led to her inaction, it is still possible to stop her from asserting her rights. Although Oliver J did speak of duty to speak as a requirement in case of inaction, it may well be that this duty can arise without the landowner knowing her own rights. The only line of enquiry as to why there was an inaction on part of the landowner, which *Willmott* had carefully put in place, was dropped rather unwittingly in this case. This approach is referred to as *Taylors* approach in Section 2.3, when analysing copyright cases.

To be fair, Oliver J was correct in not applying *Willmott* to *Taylors*. But he would have brought a lot more clarity to his decision had he explained this fully based on *Taylors*' facts. The first and the second elements (claimant's unilateral mistake as to his rights and defendant's

²⁵ [1982] QB 133, 144.

²⁶ *ibid*, p. 147.

²⁷ *ibid*, p. 148.

²⁸ *ibid*, p. 151-52 (author's emphasis).

²⁹ *ibid*, p. 151-53.

knowledge of such mistake) do not apply to this case because *Taylor's* did not present a case of acquiescence. It was not a case where the defendant simply stood by and watched while the claimant incurred all the expenses. It was a case where the defendant made a very specific representation in the lease agreement by offering an option to renew, which the defendant intended the claimant to rely on. The claimant being also a party to the lease agreement, unsurprisingly, did rely on it. This essentially means that there is no room for any mistake as far as the rights and obligations of the parties were concerned. The lack of formality or registration only made the obligation to honour the option to renew a contractual, as opposed to a property right. As such, the claimant's and the defendant's bilateral mistake that no registration was required, did not affect their understanding in relation to the mutually agreed rights and obligations. The third probandum that the defendant must know his own right being incompatible with that of the claimant's, did not apply either, because the defendant had no right inconsistent with that of the claimant's, which the defendant needed to be aware of. Therefore, *Taylor's* was a case of representation by the defendant, which could not have been dealt with by the acquiescence approach.³⁰

Regarding detrimental reliance, Oliver J held that the connection between detriment and reliance should be such that the detriment should not have occurred without the reliance being placed by the defendants on the representation.³¹ To this extent, *Taylor's* further strengthened the causal relationship between the detriment and reliance, which may not have been obvious in *Willmott*.

Some commentators regard *Taylor's* a watershed case and speak commendably of a decisive move away from *Willmott* and for ushering in the modern synthesis of proprietary estoppel under unconscionability.³² However, the importance of *Taylor's* should not lie in its unifying principle, but in clarifying that acquiescence cases can and do still arise and in those cases, an enquiry into the state of mind of the defendant is still necessary, as required by *Willmott*. Some commentators and judges did point out the importance of *Willmott* in appropriate cases.³³ However, many decisions that followed *Taylor's* had the effect of almost burying the importance of *Willmott*, and overemphasising unconscionability.³⁴

Some scholars question unconscionability as a sufficiently viable and objective standard,³⁵ while others admire its ability to be sensitive to the facts and circumstances of a particular case.³⁶ More recently, it has been clarified that unconscionability does not give the judges a licence to abandon careful analysis in favour of unprincipled and subjective judicial opinion.³⁷ Some commentators believe that unconscionability must be read into each of the three ingredients of commitment, reliance and detriment,³⁸ while others believe that unconscionability is a requirement

³⁰ See also, Dixon, 'Taylors Fashions Ltd', p. 91-92.

³¹ [1982] QB 133, 153.

³² Gray and Gray, *Elements of Land Law*, para [9.2.36]; Cooke, *Modern Law of Estoppel*, p 78.

³³ Gray and Gray, *Elements of Land Law*, paras [9.2.52]-[9.2.57]. See also *Cobb v Yeoman's Row Management Ltd* [2008] UKHL 55 [56]-[58], [63] (per Lord Walker).

³⁴ See for example, *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 1 WLR 1265 at 1285.

³⁵ Mischa Balen and Christopher Knowles, 'Failure to estop: rationalising proprietary estoppel using failure of basis' [2011] Conv 176, 180; McFarlane, *Structure of Property Law*, p. 456.

³⁶ Dixon, 'Taylors Fashions Ltd', p. 97-98. Indeed, Dixon regards the flexibility that unconscionability provides to proprietary estoppel as the 'legacy' of *Taylor's*.

³⁷ *Cobb v Yeoman's Row Management Ltd* [2008] UKHL 55 at [59] (per Lord Walker).

³⁸ Nicholas Hopkins, 'Proprietary Estoppel: A Functional Analysis' [2010] 4 Journal of Equity 201, 217-18.

over and above the three requirements.³⁹ However, unconscionability managed to rob much of the nuance that had been built into proprietary estoppel by *Willmott*.

1.3 Unified approach for action and inaction further strengthened

Proprietary estoppel took another turn in *Thorner v Major*, where the claimant, a taciturn farmer spent over thirty years working on his uncle's land without any wages, relying on a verbal promise of his uncle made to him that the uncle would bequeath that land to him upon the uncle's death. The court held that proprietary estoppel required the following three ingredients to be satisfied:⁴⁰

- a representation or assurance made to a person;
- reliance on it by that person; and
- detriment to that person consequent upon his (reasonable) reliance.

Thorner was not a case of inaction, but of a definite action embodied in the promise. This case would have been less relevant for our purposes if not for Lord Walker's statement that acquiescence or standing by cases also count as assurances, if one were to analyse all cases on proprietary estoppel under the above criteria.⁴¹ All the nuance that had been identified by *Willmott* was merged in this one ingredient of assurance. With this identification of the requirements of proprietary estoppel, an enquiry into the state of mind of the defendant was rendered unnecessary, so long as there is detrimental reliance, even if all that defendant has done is to simply stand by.

With *Taylor*s, at least there was an acknowledgment that the acquiescence-type cases could exist. In *Thorner*, however, there is a strong implication that no other assessment is necessary even in standing by cases, as they count also as assurance cases. After *Thorner*, it may not matter whether the conduct of the defendant entailed an action or an inaction, resulting in a further loss of nuance in approaching the diverse cases of proprietary estoppel. There is a strong academic approval to regard inaction also as an assurance – assurance by conduct, where it is asserted that if the landowner had a duty to speak to dispel a belief and he failed to speak, then such conduct is as good as making an assertion.⁴² However, the danger with regarding inaction as an assertion by conduct is that a court might take the assertion on its face value, whether it arose out of the action or inaction of the landowner, and ask no other question as to why there was such inaction. A duty to speak might still be imposed in cases where a landowner is not aware that he has such duty. This approach is called Thorner approach in Section 2.3 below while discussing copyright cases.

The above discussion on land law shows that proprietary estoppel arises under diverse circumstances, and yet the courts have supported a move towards unifying the requirements and losing nuance, especially in relation to the defendant's conduct. It might be that in modern times land law does not need the level of nuance provided in *Willmott*, particularly in relation to the defendant's realisation of her own rights. Indeed, if *Willmott* were to be decided today, Bowyer will not be able to assert that he was unaware of his rights arising from an agreement he had himself signed. The transactions in land have become more sophisticated over the years and more transparent due to the formality requirements and the registration system. Those with an interest in land are also better aware of their rights and are more likely to seek legal advice. In *Cobbe*, Lord

³⁹ Martin Dixon, 'Proprietary Estoppel and Formalities in Land Law and the Land Registration Act 2002: A theory of unconscionability' in Elizabeth Cooke (ed), *Modern Studies in Property Law* (vol 2, Hart Publishing, 2002).

⁴⁰ *Thorner v Major* [2009] UKHL 18 at [29].

⁴¹ [2009] UKHL 18 at [55].

⁴² Feltham *et al*, *Spencer Bower: Reliance Based Estoppel*, paras [1.88] - [1.89]; Cooke, *The Modern Law of Estoppel*, pp 76-80.

Walker noted that pure acquiescence cases were common in the 19th century,⁴³ implying perhaps that they are not so common now. Commentators also acknowledge that cases of true inaction on part of the defendant arise more rarely in land law.⁴⁴ However, in copyright it is quite essential that the courts pay attention to the copyright owner's state of mind and her circumstances, as discussed in the section below.

2. Proprietary estoppel as applied to copyright law

Copyright extends to among others, original literary, dramatic, musical and artistic works.⁴⁵ Copyright in literary, dramatic and musical works arises as soon as the work is recorded, either in writing or otherwise,⁴⁶ and for artistic works copyright arises upon creation. Copyright is an automatic right requiring no registration or formalities and regardless of whether its creator realises it. Literary, dramatic, musical and artistic works must be original to attract copyright protection. A work will be regarded original if it is the author's own intellectual creation.⁴⁷ Although the threshold for originality for copyright protection is low, it is still quite common for a person not versed in copyright law, not to realise that he or she has become entitled to copyright.

The author of a copyright work is its first owner.⁴⁸ Creative industries such as music industry, depend on the collaboration of multiple individuals contributing to the creation of a work. This brings its own challenges. A collaboration of two or more authors gives rise to a work of joint authorship, in which the contribution of one author is not distinct from that of the others.⁴⁹ The collaborator must make some contribution towards the creation of the work which is significant and original, but not necessarily to the same extent as the others.⁵⁰ However, copyright rules of authorship in general and joint authorship in particular, are complex and contentious. It is not surprising therefore, that a copyright owner does not realise that her actions have given rise to a copyright work. Even if a copyright owner does become aware of her copyright entitlement, she may not be able to assert her rights due to the lack of bargaining power as against other joint authors or against entrepreneurial intermediaries such as a record company.

Copyright protection entitles the copyright owner to a suite of exclusive rights, including right to reproduce, communicate to the public, adapt, and so on.⁵¹ Infringement of any of these exclusive rights occurs when a person exercises these rights 'without the licence of the copyright owner.'⁵² Where a copyright work is owned by more than one person jointly, any provision in the CDPA requiring a licence of the copyright owner requires the licence of all of them.⁵³ Therefore, if one joint author wants to grant a licence to a third party, she requires the licence of all the joint authors. Otherwise, she risks infringing the copyright of the joint authors who have not granted such licence. Such licence can be an express or an implied licence, and a bare or a contractual licence.

⁴³ *Cobb v Yeoman's Row Management Ltd* [2008] UKHL 55 at [51].

⁴⁴ Gray and Gray, *Elements of Land Law*, paras. [9.2.27], [9.2.29].

⁴⁵ Copyright, Designs and Patents Act, 1988 (CDPA), ss 1(1) and (2). Other copyright works that do not need originality are sound recordings, films, broadcasts and typographical arrangements of published editions.

⁴⁶ CDPA, s 3(2).

⁴⁷ Case C-05/08 *Infopaq International AS v Danske Dagblades Forening* [2009] ECDR 16 at para [37].

⁴⁸ CDPA, s 11(1).

⁴⁹ CDPA, s 10(1).

⁵⁰ Gillian Davies, *et al*, *Copinger and Skone Janes on Copyright* (17th edn, Sweet & Maxwell 2016), para [4.47].

⁵¹ CDPA, s 16.

⁵² CDPA, s 16(2).

⁵³ CDPA, s 173(2).

Most copyright cases on proprietary estoppel are a culmination of some of the most complex issues in copyright law. These cases are characterised by creative collaboration between many authors. In these cases, when a copyright owner claims infringement due to an unauthorised exercise of any of her exclusive rights by her collaborators, the defendant collaborators' first line of attack is to deny the claimant's authorship. Even if authorship is proved, the defendants claim in the alternative that they had an implied licence from the claimant copyright owner that helps them deny infringement. In most of these cases, the implied licence is a bare licence,⁵⁴ and the claimant can revoke it at any time upon reasonable notice. However, if the claimant has conducted herself in such a way as to make the copyright user rely detrimentally on the continuance of such licence, then it may be possible to hold the bare licence irrevocable. Such irrevocability enables the alleged infringer to continue to use the work without risking infringement in future.⁵⁵ Let us analyse each of these issues.

2.1 Complexity of authorship and joint ownership

Copyright cases have typically arisen in situations where it is not clear whether a copyright work has come into existence, either because of the nature of the work or the nature of collaboration. In *Godfrey v Lees*,⁵⁶ Godfrey, the claimant, was acquainted with the members of a band by name Barclay James Harvest, but was not part of the band himself. Godfrey participated in the rehearsals by sometimes playing the piano, or arranging or conducting the orchestra for the songs which the band recorded or played in concerts.⁵⁷ Arranging music involves writing orchestral sequences and passages that link various parts of the song and meets the minimum originality required under copyright law.⁵⁸ However, it is not necessarily intuitive to a lay person, or even the members of a band, that an arranger can be a joint author of a song with its composer and lyricist.

In some cases, it may be because the copyright owner is a background musician that he is not expected to create any original music, and therefore his copyright entitlement is not obvious to others in a band. In *Beckingham v Hodgens*,⁵⁹ the claimant Valentino was hired as a session violinist to record a song called 'Young At Heart' by a band called Bluebells. Valentino claimed that during the rehearsals and what are colloquially called in the music industry as jamming sessions, he had not only played the score that was given to him, but had also composed the solo violin part in the song.⁶⁰ He then went on to take part in recording the song, together with his solo violin part. Similarly, in *Fisher v Brooker*,⁶¹ Fisher, the claimant, who joined the band Procol Harum, rehearsed with them for the song called 'Whiter Shade Of Pale', had composed an original organ solo that he played as a prelude and interlude to the song.⁶² Fisher went on to play the organ solo in the

⁵⁴ If the implied licence is in the form of an offer of a contractual licence, such offer can be withdrawn before it is accepted. In *Confetti Records v Warner Music UK Ltd* [2003] EWCH 1274 (Ch), a similar scenario was labelled proprietary estoppel. However, this might be more appropriately regarded promissory estoppel. Contractual licences are not discussed further because they overlap with promissory estoppel rather than acquiescence.

⁵⁵ Unlike in land law, in the copyright cases discussed here, proprietary estoppel is claimed by the defendant against a claim of copyright infringement. In principle, nothing stops an alleged infringer from approaching the court first, for a declaration of non-infringement and asserting proprietary estoppel in support of it.

⁵⁶ [1995] EMLR 307.

⁵⁷ *ibid*, at p. 315-6. For a live recording of Barclay James Harvest's song Mocking Bird with Godfrey's arrangement of music, see <<https://www.youtube.com/watch?v=ziUCMrxFwgs>> accessed 26 October 2018.

⁵⁸ *Redwood Music Ltd v Chappell & Co Ltd* [1982] RPC 109.

⁵⁹ [2002] EWHC 2143 (Ch).

⁶⁰ *ibid*, para [5]. For an interview with Bobby Valentino as to how the violin piece came about, see <<https://www.youtube.com/watch?v=0S7soROyUKU>> accessed 26 October 2018.

⁶¹ [2006] EWHC 3239 (Ch).

⁶² *ibid*, para [32].

recording session.⁶³ In neither of these cases was there an expectation among the defendants that the claimant would create original music attracting copyright protection.

Outside the music industry, in *Brighton v Jones*,⁶⁴ Brighton, the claimant was going to direct a play called ‘Stones In His Pockets’, which Jones, the defendant, was going to write, for Brighton’s production company, Doublejoint. Apprehending that Jones was taking longer than expected to write the play, Brighton sent a draft to Jones consisting of about 11 pages of narrative of the opening scene, with the view to ‘kick-start’ Jones’ writing of the play.⁶⁵ That this narrative itself was capable of attracting copyright protection as a literary work was not within Brighton’s knowledge. Jones used the draft opening scene not only to write the original version of the play, but also to rewrite the play and release it later through a different production company and a different director, which became a bigger success throughout the English-speaking world.⁶⁶ Upon seeking legal advice, Brighton realised her copyright entitlement and brought an action for copyright infringement against Jones.

The court was tasked with ascertaining whether Godfrey, Valentino and Fisher were entitled to be recognised as joint authors of the works in dispute. A detailed discussion of joint authorship in these cases is beyond the scope of this article.⁶⁷ It suffices to state here that upon an extensive review of evidence, the courts in each of these cases concluded that Godfrey, Valentino and Fisher’s respective contributions had indeed been sufficiently original and significant for them to be recognised as joint authors.⁶⁸ In *Brighton*, the issue was slightly different. Here, the court had to consider whether Brighton’s draft of opening scene was a dramatic work in its own right and whether Jones’s play could be regarded as an adaptation of Brighton’s draft, to the extent that it incorporated the contents of that draft. With Jones admitting in her cross examination a number of places where the opening scene in her script relied on Brighton’s draft, the court held that to the extent of the opening scene, Jones’ work was an adaptation of Brighton’s work.

In all these cases, a substantial part of the judgment being devoted to establishing authorship and joint ownership is a testament to the complexity of the rules of originality and joint ownership. Even if it sounds simple that copyright is an automatic right it is anything but obvious when copyright comes into existence. As such, a copyright owner not realising her own rights is more common than a landowner not realising her own rights.

2.2 Implying a bare copyright licence

A distinction may be made here of cases where a licence had been expressly granted first, before it is held irrevocable, as in the land law case of *Inwards v Baker*.⁶⁹ In the copyright cases being discussed here, such express grant is absent, leaving it for the court to imply such licence from the copyright owner’s conduct and the surrounding circumstances, before considering the irrevocability of such licence. In other words, the court had to ascertain whether the copyright

⁶³ *ibid*, para [3]. The sentence was quoted again in his decision by Lord Neuberger when matter reached the House of Lords in *Fisher v Brooker* [2009] UKHL 41 (HL) at [29].

⁶⁴ [2004] EWHC 1157 (Ch).

⁶⁵ *ibid*, paras. [21], [60].

⁶⁶ *ibid*, para. [26].

⁶⁷ See generally, R Arnold, ‘Reflections on “The Triumph of Music”: copyrights and performers’ rights in Music’ [2010] IPQ 153, for a discussion on joint authorship in these cases.

⁶⁸ For an interview with Matthew Fisher on Channel 4 on the day he won at the High Court, see <<https://www.youtube.com/watch?v=8pLYW-9F8jI>> accessed 26 October 2018.

⁶⁹ [1965] 2 QB 29.

owner consented to his or her work being used by the defendants. There are no established principles governing the implication of a bare copyright licence.

However, based on certain recurring patterns of facts and circumstances in these cases which appear to have influenced the courts' decisions, this author has proposed elsewhere a framework for implying a bare copyright licence, separating the conduct signifying consent and the knowledge of the circumstances required for consent.⁷⁰ The conduct part includes the following. In all these cases, the copyright owner engaged in an initial action which gives access to her work to the defendants. It may manifest in the copyright owner voluntarily taking part in the recording or giving access to orchestral arrangement in the musicians' cases, or in sending the draft script in *Brighton*. Although the process of creating an original work is also a positive action, having created the work, if the creators had stopped short of actually performing in the recording or sending the work, no conclusion could have been arrived at as to their consent for their work to be used. Having engaged in such action, the copyright owner then allowed a period of time to lapse where he or she took no significant action when the copyright work was being used. Each of these cases is characterised by varying degrees of inaction. Godfrey allowed over fourteen years to pass before he made a claim for copyright infringement against the members of the band,⁷¹ whereas it took Valentino about nine years to bring a similar claim. Fisher took a surprising thirty-eight years before he brought his claim for copyright infringement against the members of the band. So long as the inaction continued, the licence continued, terminating when the copyright owner approached the court.

No one can consent without knowing what one is consenting to.⁷² Therefore, the knowledge of the copyright owner when he or she engaged in the conduct of the initial action and inaction becomes important to be assessed. The courts devote a substantial part of the judgment to discussing the copyright owner's knowledge, without providing guidelines as to how it should be assessed. In establishing whether the copyright owner gave away a bare licence for her work to be used in a particular manner, one must establish first that the copyright owner knew of her copyright entitlement, that the consent was gratuitous and the surrounding circumstances that point to what the particular use might be.

The realisation of authorship matters because, even if a person is regarded an author as a matter of law, unless she realises that she is an author, she will be unable to have the required state of mind to consent for her work to be used. In *Brighton*, the judge noted that although Brighton had not realised her copyright entitlement until she received legal advice, she had nevertheless, been 'hurt' by the way her 'contribution' to the play had not been recognised.⁷³ It is difficult to conjecture exactly what Brighton thought was her relationship with the draft script she sent to Jones. Being the director of the play Jones was going to write, Brighton may have thought she was sending some ideas to which she may have felt a proprietary attachment, like most lay persons do, to their original ideas. This may explain why she felt that she had contributed to the play beyond her role as a director, for which she expected to be acknowledged. Although Brighton did not articulate clearly in terms of copyright, she had a loose sense of proprietary attachment to her draft.

⁷⁰ See generally, P Mysoor, 'Implied Licences in Copyright Law' (DPhil Thesis, University of Oxford 2017).

⁷¹ [1995] EMLR 307, 312.

⁷² The importance of knowledge is discussed in relation to consent in medical law by S Lee, 'Towards a Jurisprudence of Consent' in J Eekelaar and J Bell (eds), *Oxford Essays in Jurisprudence Third Series* (Clarendon Press, 1987) 199, at 213. By analogy, the knowledge of a person as to what he is consenting to is necessary under any other circumstance.

⁷³ [2004] EWHC 1157 (Ch) at [28].

However, this issue was neither raised nor discussed in the judgment. The court only held that Brighton had impliedly licensed her work.

In *Godfrey*, based on the lifestyle of the band members, the court formed a view that both Godfrey and the band members were ignorant of Godfrey's copyright entitlement at the time they began using Godfrey's arrangements. Although Godfrey had been acknowledged on the albums as the 'resident musical director' or the 'conductor and musical director',⁷⁴ this did not in itself mean a recognition of Godfrey as a joint author together with the rest of the band. The court noted Godfrey's claim that there was an agreement to share the profits with him.⁷⁵ Although the court found the evidence too lean to support a concluded agreement with the members of the band,⁷⁶ it appears to have helped the court to come to the conclusion that Godfrey may have realised his entitlement in due course. Again, the court does not engage in a detailed discussion. It appears that however informal the articulation, if there was some realisation that the contribution is worth a profit-sharing arrangement, then the court may find it sufficient to support an implied licence.

Thus, the courts have generally tended to favour the view that the copyright owner does not need to articulate clearly that she has become entitled to copyright. It may be sufficient if the copyright owner has a sense of proprietary attachment to the work created. This could be as simple as knowingly creating something. This can prove problematic when an inchoate realisation of copyright entitlement also forms the basis of the implied licence being held irrevocable.

The realisation of the copyright owner as to the gratuitous nature of her consent also plays an important role in the ensuing inaction on their part. Being a gratuitous licence, it could have been revoked at any time. That it was not revoked for an extended period may be seen by a court as indicating to the defendants that it may never be revoked. But the truth in the musicians' cases at least, is quite different. In these cases, the part played by the chief composer or songwriter is generally uncontroversial. However, the part played by a performer who play an instrumental backing to a song or arrange the music for the song tends to be controversial. Such performer's lack of confidence as to his contribution to the creative process reduced his bargaining power, particularly for the young and inexperienced artists. This is reflected in the case of both Valentino and Fisher, as to how they were advised not to risk their career by asserting their copyright.⁷⁷ Even if it is bad advice from a copyright perspective, such lack of bargaining power did contribute to a significant delay on their part in asserting their rights going forward. If this is the inaction that is relied on by the defendants to claim that the implied licence is irrevocable, then it is clearly not inaction without a reason. Indeed, the musicians were forced into inaction.

The knowledge of the surrounding circumstances of the case normally determine the scope of the implied bare licence. In *Brighton*, it was the agreement Jones had signed with the production company, Doublejoint in which Jones was required to stage the play with Doublejoint for nine months, and if Jones chose to stage the play with any other production company afterwards, she had to acknowledge Doublejoint as the original production company and had to share a certain percentage of the profits for a period of five years.⁷⁸ Jones understood the agreement, rightly according to the court, to mean that she was a 'free agent' to do as she pleased

⁷⁴ [1995] EMLR 307, 330.

⁷⁵ *ibid.*, at p. 322-24.

⁷⁶ *ibid.*, at p. 325.

⁷⁷ [2002] EWHC 2143 (Ch) at [57]; [2006] EWHC 3239 (Ch) at [57].

⁷⁸ [2004] EWHC 1157 (Ch) at paras [16(ii)-(iv)].

with the play script after the initial staging with Doublejoint.⁷⁹ The court, therefore, held that the implied licence granted by Brighton to prepare the 1996 version of the script was still in existence and continued until Jones wrote the 1999 script.⁸⁰

In the musicians' cases the mere taking part in a recording knowing that a record will be produced of it, appears to make the implied licence granted by the musicians to extend to all reasonable exploitation by the person making the record. This appears to be the case in *Beckingham* and *Fisher*, in both of which the court uses the word 'exploit' in relation to the work impliedly licensed.⁸¹ In *Godfrey*, providing access to the arranged music not only resulted in records being created, but also for such music to be performed in live concerts and to be sold as sheet music.⁸² This was meant to hold what the defendants had been doing thus far as not infringing on the copyright owners' rights.

The above discussion shows the extent of analysis required to support the implication of a licence from the copyright owner. The next issue is whether the licence so implied has become irrevocable.

2.3 Irrevocability of implied licence due to proprietary estoppel

The precise question is, having conducted in such a way as to imply a bare licence for their work to be used, did the copyright owners further conduct themselves in such a way as to make the defendants detrimentally rely on such implied bare licence continuing and not being revoked. The discussion below first deals with the copyright owner's conduct and analyses whether it is the Thorner approach, Taylors approach or the Willmott approach, or something more that must be adopted as a guideline in copyright cases. A recap the approaches we saw in land law:

- Willmott approach: If there is an inaction on the copyright owner's part, then an assessment of his state of mind needs to be carried out according to the probanda identified in *Willmott*. If there is detrimental reliance on such inaction, proprietary estoppel is established.
- Taylors approach: Regardless of whether there is an action or an inaction, if upon an overall assessment, the copyright owner's assertion of his rights can be regarded unconscionable, proprietary estoppel is established. No other assessment as to the copyright owner's knowledge is necessary.
- Thorner approach: Regardless of whether there is an action or an inaction on part of the copyright owner, it will be regarded as a representation or an assurance. Upon an overall assessment of unconscionability, if there is detrimental reliance on such representation or assurance, proprietary estoppel is established.

The discussion then moves on to whether the appreciation of detrimental reliance is appropriate in copyright cases. Finally, with the significant role played by unconscionability, this section examines its impact on copyright cases.

⁷⁹ *ibid*, at [25].

⁸⁰ *ibid*, at [72].

⁸¹ [2002] EWHC 2143 (Ch) at [64]; and [2006] EWHC 3239 (Ch) at [94].

⁸² [1995] EMLR 307, 331.

2.3.1 Copyright owner's conduct and her circumstances

In none of the copyright cases is there a sufficiently clear discussion as to the conduct of the copyright owner that induced detrimental reliance. However, it must be possible to deduce it from the discussion in Section 2.2 above on implying a bare copyright licence. Since the detrimental reliance was on the continuance of the implied bare licence, the conduct that resulted in implying the licence must be the conduct to consider here. The discussion above reveals that the conduct on part of the copyright owner implying a bare copyright licence is an initial action and an inaction for a length of time. The initial action brings the licence into existence, and the inaction allows the implied licence to continue, until the copyright owner revokes it or approaches the court. The question is what conduct did the defendants rely on to their detriment?

It cannot be the positive action. The mere act of Valentino and Fisher recording in a studio or Godfrey providing his musical arrangement or Brighton sending her script cannot represent or assure the respective defendants that the licence that may be implied will not be revoked. If that were the case, then by these actions alone, the copyright owners would risk losing their powers to control the way their work is used. The inaction, on the other hand, appears to be the conduct to consider, because the longer the inaction, the greater the reliance on licence continuing, and not being revoked. It is such reliance that may cause the defendants the detriment they claim.

However, it is clear from the discussion in Section 2.2 above on implying a bare copyright licence, that the conduct of the copyright owner must be accompanied by the knowledge of the consequences of engaging in such action and inaction and of the surrounding circumstances. Without such knowledge, no consent can arise. If consent cannot arise, it cannot continue, and there would be nothing to revoke. Therefore, even if it is the copyright owner's inaction that is relevant as the conduct leading to proprietary estoppel, such inaction cannot be considered without assessing what is within the copyright owner's knowledge.

Based on the above analysis, what we need is an approach that captures the inaction of the copyright owner, and also requires the assessment of what is within the copyright owner's knowledge and the surrounding circumstances. Let us see which of the land law approaches might assist the best.

If Thorner approach were to be applied to any of the copyright cases discussed here, the copyright owners' inaction of not raising their copyright claim for several years can itself be relied on by the defendants as a representation or an assurance. If the defendants show detrimental reliance, then copyright owner will be estopped from revoking his licence. However, it is clear from the discussion in Section 2.2 above that it took a lot more than the mere inaction of the copyright owners, for the courts to imply a licence in the defendants' favour. The courts particularly assessed what was within the copyright owners' knowledge as to copyright entitlement, and the surrounding circumstances, based on which it concluded that a licence should be implied. If so much more is required to imply a copyright licence, it cannot be revoked relying on as little as the copyright owner's inaction, without asking why there was such inaction in the first place. Even if the assessment is as to whether the copyright owner had a duty to speak, it may not necessarily yield fair results. It is not always a pre-requisite for the imposition of the duty to speak that the property owner realises her own rights. Therefore, Thorner approach lacks sufficient nuance to support a proprietary estoppel claim in copyright cases above.

Taylor's approach is not the one to apply, not only because it makes no distinction between action and inaction on part of the copyright owner, but also because of its overemphasis on

unconscionability. Indeed, as discussed in the section below, *Godfrey* did apply Taylors approach leading to an unfair result.

For an inaction on part of the copyright owner to make him lose some of his ownership powers, Willmott approach may support a better analysis.⁸³ In none of the copyright cases, however, was any reference to *Willmott* made. Therefore, the following paragraphs provide this analysis. Willmott requires that the defendants be under a mistake, which the copyright owner is aware of, in addition to being aware of copyright owner's own rights. In the context of the copyright cases discussed here, these questions boil down to the following:

- whether the defendants were mistaken that the copyright owner was not entitled to copyright in his own work or that she will not assert it;
- whether the copyright owner knew that the defendants were so mistaken; and
- whether the copyright owner himself knew of his own copyright entitlement.

Unlike other approaches, this approach makes it necessary to discuss how copyright ownership arises in these cases and why it may be that the parties to a dispute often have no knowledge of such entitlement. The knowledge of the copyright owner as to her entitlement to copyright varies, beginning with only a sense of proprietary attachment to the work created, and then articulating it more fully as copyright, usually after receiving legal advice. Although *Willmott* does not specify this, there is subsequent authority interpreting *Willmott*, that the copyright owner must have the knowledge of his own rights at the time the defendants begin to act to their detriment.⁸⁴

Under Willmott approach *Brighton* could be analysed more clearly, since Brighton had not realised her copyright entitlement at the time of detrimental reliance by Jones. Although Brighton had a vague sense of proprietary attachment to her draft of opening scene, it was only sufficient to imply a copyright licence in Jones's favour, and not to render such implied licence irrevocable, as elaborated further in Section 2.4 below on reliefs. While the court reached the right conclusion, it could have been explained more clearly with this approach.

Willmott approach may also help a more careful analysis of *Godfrey*. In *Godfrey*, the court found that due to the 'free and easy' and 'somewhat "hippy"' lifestyle they led, and the informal nature of the relationship between the band members, it was unlikely that Godfrey or any member of the band realised at the time of using the music Godfrey had arranged, that Godfrey could be entitled to copyright.⁸⁵ Although Godfrey asserted that he had an agreement with the members of the band to share profits,⁸⁶ the court found the evidence too lean to support a concluded agreement.⁸⁷ Even if this was sufficient to support implying a licence from Godfrey, it is doubtful if such a loose understanding of his rights could support rendering the licence irrevocable. The court did find Godfrey's implied licence irrevocable. But if it had weighed more astutely how Godfrey's lack of knowledge as to copyright entitlement contributed to his inaction in asserting his rights, the court may have been slow in holding the licence irrevocable.

In *Fisher*, Fisher knew of his own rights, and that what the defendants were asserting was contrary to his own rights. Likewise, in *Beckingham*, Valentino had maintained from the start that

⁸³ A person cannot acquire copyright by adverse possession. *Fisher v Brooker* [2009] UKHL 41 at [78] (per Lord Neuberger).

⁸⁴ *Kammins Ballrooms Co Ltd v Zenith Investment (Torquay) Ltd* [1971] AC 850 (HL) 884 (per Lord Diplock).

⁸⁵ [1995] EMLR 307, at 313, 330-31.

⁸⁶ *ibid*, pp 322-24.

⁸⁷ *ibid*, pp 307, 325.

he knew he could assert his rights to the music, but he had refrained from doing so. Although in neither of these cases the copyright owners' knowledge of the copyright entitlement was an issue, it is not inconceivable for a copyright owner to not realise her copyright entitlement at all, even when the defendants go on to rely detrimentally - *Brighton* and *Godfrey* being good cases in point. If the court does not appreciate the nuance of the copyright owner's state of mind, it could lead to unjust results. Willmott approach can flesh out this requirement and make the analysis more reasonable.

However, Willmott approach can still fall short in supporting the analysis in some scenarios. As discussed above, Willmott does not incorporate the broader question of why there was an inaction on the property owner's part. It accommodates the lack of knowledge of the property owner's rights as the only reason for her inaction. Even if the copyright owners realise their entitlement to copyright ownership, they might not be able to assert their rights, simply because the band they work for is poorly managed, or because they inherently lack the bargaining power. This aspect is illustrated by the following cases.

When Godfrey did realise his copyright entitlement, he tried to have a conversation with the defendants. They insisted on believing that only the composer of the song becomes copyright owner, and not the arranger. Even when Godfrey tried to dispel the defendants' mistaken belief, defendants were unwilling to be convinced.⁸⁸ This led Godfrey not to assert his copyright claim. How is Godfrey to have the confidence that his version is correct unless he incurs the expense of legal advice? Since joint authorship is a mixed question of law and fact, it makes it harder for it to be asserted by a copyright owner who is not confident of his rights. There is no room in Willmott approach to accommodate this nuance. It seems unfair that when defendants have insisted on being mistaken even when Godfrey tried to correct them as to his rights, they can still estop Godfrey from asserting his rights.⁸⁹ In this sense, Willmott approach falls short in only attributing the copyright owner's inaction to the lack of knowledge of her own rights. Other reasons that prevent copyright owner from asserting her rights are not captured by Willmott approach.

In *Beckingham*, Valentino stated in his evidence that he had discussed with his manager the possibility of being regarded a co-author of the song, but was told that if he made such a claim 'he would get a reputation as a troublemaker when he was trying to make a career as a musician.'⁹⁰ Therefore, Valentino made no claim at that stage, letting the band members use his work gratuitously. In *Fisher*, when Fisher raised his claim for joint authorship in 1967 when the song had just been recorded, he was met with a rebuff,⁹¹ leaving him apprehending that if he persisted with the claim, he would be asked to 'say goodbye to a career in ... the number one pop group.'⁹² As such, Fisher made no claim at that stage, making the permission gratuitous. Although Valentino and Fisher held not to be estopped were not estopped eventually, it was not based on these factors, but because there was no detrimental reliance. Thus, it is not clear from the courts' reasoning in these cases how these factors were accommodated. If these factors are not appreciated, in a case where a court finds detrimental reliance, a lack of analysis as to the copyright owner's reasons for

⁸⁸ [1995] EMLR 307, 333-34.

⁸⁹ It may be that the principle in *Blue Haven Enterprises Limited v Dulcie Ermine Tully* [2006] UKPC 17 at [26] could have come to the rescue of Godfrey, which says that a reasonable effort to dispel a mistake is all that is expected of the property owner. But *Godfrey* predates this decision and the point was never raised.

⁹⁰ [2002] EWHC 2143 (Ch) at [57]. This fact was further confirmed by the Court of Appeal, where Parker LJ noted that the advice Valentino had received was to the effect that 'his share of such royalties would be eaten up by legal costs and that to make a claim might affect his developing career as a session musician.' [2003] EWCA Civ 143 at [28].

⁹¹ [2006] EWHC 3239 (Ch) at [57].

⁹² [2009] UKHL 41 (HL) at [35].

inaction could make her implied licence irrevocable, when the copyright owner is not to be blamed for her inaction.

The discussion above demonstrates that even the more elaborate Willmott approach falls short of capturing all the relevant considerations in copyright cases. As such, an additional nuance to the third probandum in the Willmott approach may be added such that it asks not only whether the property owner knows of her own rights, but also whether she is able to assert those rights. This may accommodate copyright cases where copyright owner's ability to assert her rights is constrained due to no fault of hers.

2.3.2 Detrimental reliance

Detrimental reliance is common to all types of proprietary estoppel. *Taylor's* held that detriment should be such that it owes its result directly to the reliance placed. The defendants must show that they would have acted differently had they not relied on the copyright owner's actions (or inaction). This may be demonstrated using the facts of *Brighton*, although the court did not spell out in this manner in relation to proprietary estoppel. The court found that had Brighton informed Jones at the time of sending her the draft opening scene, that Jones could only use it to write a script for Doublejoint, Jones might have completely ignored Brighton's script.⁹³ This way, Jones could have freed her script from Brighton's contribution altogether, or at least when rewriting the script for another production company. There was a causal relationship between Jones's reliance on Brighton's non-assertion of her rights in the opening scene, and Jones incurring detriment by relying on the opening scene to rewrite the play. Therefore, Jones detrimentally relied on Brighton's inaction.

However, in *Godfrey* the court erred in its assessment of the detrimental reliance. The court found that the songs were not an immediate success. After Godfrey left the band, it took the remaining members of the band many years to make the songs popular by giving many live performances, which the defendants claimed to be a loss making and an expensive affair.⁹⁴ Through the years of their hard work to earn popularity and recognition, the court found that Godfrey was completely absent. Therefore, the detriment that the judges were trying to find in Godfrey's case was the financial outlay and the physical efforts which the defendants had put in under the belief that they were the only ones entitled to copyright in the songs. Godfrey had allowed this belief to continue for fourteen years.

This assessment of detriment is problematic. In *Godfrey*, the remaining members of the band would have incurred the expenditure and invested efforts to promote the song regardless of whether they believed Godfrey might make a claim for his copyright. In other words, it is not their reliance on Godfrey not making a claim for his share in copyright that prompted them to incur expenditure to promote the songs. They would have incurred these expenses in any event, as that is what bands do – promote their songs. The court erred in coming to the conclusion that the defendants suffered detriment in reliance of Godfrey not making a copyright claim.

In *Beckingham*, *Godfrey* was distinguished based on the fact that the success of the song was not due to the efforts of the remaining members of the band labouring under the belief that Valentino would not make a claim. The success of the song was quite fortuitous in being featured in the automobile company, Volkswagen's advertisement in 1993.⁹⁵ Indeed, the band had broken

⁹³ [2004] EWHC 1157 (Ch) at [76].

⁹⁴ [1995] EMLR 307, 334-45.

⁹⁵ [2004] EWHC 1157 (Ch) at [66].

up long before this, and it could not be said that the defendants had laboured on their own to promote the song. There was also no reason for the defendants to believe that Valentino would make no claim, since Valentino had informed the band that he knew of his rights and was not going to assert it.⁹⁶ The court found that after the success of the song in 1993, it was fully open for Valentino to change his mind, and assert his ownership. Therefore, in the court's view, the defendants in *Beckingham* neither relied on Valentino's inaction, nor suffered detriment.

In *Fisher*, even with the lapse of thirty-eight years, the court found that the defendants could not have laboured under the mistaken belief that Fisher would never raise a claim to copyright in the song.⁹⁷ Fisher's contribution was significant, and the band members were aware of that. The song was an instant success having attained something approaching a cult status, according to the trial judge.⁹⁸ The first eight bars of music of which Fisher was the author, had been so successful that it was being independently exploited, such as for ringtones of mobile phones. This appears to be the reason why the court in *Fisher* believed that there was no detriment, but on the contrary the band members were financially very handsomely rewarded, including with what would otherwise have been Fisher's share. The court held that it was clear from the evidence that it was not solely because of the efforts put in by the other members of the band in promoting the song, that it became successful.⁹⁹ Since the other band members rode on the initial success of the song due largely to Fisher's contribution, the court held that the defendants were unable to establish detriment.¹⁰⁰

The commercial success of the song should not have been the criterion for the courts to consider whether there was a detrimental reliance, in both *Beckingham* and *Fisher*. It should have been the same reasoning here as argued in *Godfrey*, that the band members would have gone ahead to expend effort and money to promote the song anyway. Instead, the court went on to discuss how the song had become successful, and the band did not need to expend much effort or money to promote it. This has the potential of setting a precedent that in a joint authorship scenario, only if a joint author's contribution makes the work commercially successful, a court will hold that the remaining members of the band did not suffer detriment. If they needed to spend money and effort to promote the song, then the court is likely to hold that there is a detrimental reliance, despite the fact that they would have expended the money and effort anyway, and not in reliance of a co-author's lack of assertion of his copyright ownership.

2.3.3 Over-emphasis on unconscionability

In their assessment of detrimental reliance, sometimes the courts are coloured by a pre-conceived idea of unconscionability. In *Godfrey*, the court's conclusions were based entirely on unconscionability as expounded in *Taylors*. Although the way Godfrey had been treated by the band members unfairly (by ignoring his assertion of copyright entitlement and insisting on their mistaken belief), it did not become part of the court's assessment of unconscionability. The court gave three reasons for holding it unconscionable for Godfrey to assert his copyright against the defendants: firstly, his inaction for fourteen years; secondly, that he did not correct the defendants' mistaken belief that Godfrey did not own copyright in orchestral arrangements; and thirdly, that

⁹⁶ [2004] EWHC 1157 (Ch) at [65].

⁹⁷ [2006] EWHC 3239 (Ch) at [70].

⁹⁸ *ibid*, at [3].

⁹⁹ *ibid*, at [76].

¹⁰⁰ *ibid*, at [77].

Godfrey did not approach the court earlier because he had stated in his evidence that there was no point in going to the court until the songs were successful.¹⁰¹

None of these reasons should have been relevant for the court's conclusion. Inaction on Godfrey's part alone could not have been unconscionable, as addressed above. If Godfrey's insistence on his ownership rights did not dispel the defendants' mistaken belief, the only option Godfrey had was to incur legal expenses. Godfrey's pragmatic view of avoiding expensive copyright litigation could not have itself been unconscionable. In any event, as a person who arranged music for several songs, Godfrey could not have done more than writing those arrangements. He was not part of the band, and therefore, his efforts in making the song a success would necessarily have been different from those of the members of the band. When the songs did become a success, it would have been to some extent also because of Godfrey's arrangement of music, which the other members of the band had used, without having to pay anything to Godfrey. Given that the judge addressed none of these issues beneficial to Godfrey, the decision was influenced by the judge's subjective bias over who suffered greater unconscionability.

In *Beckingham* and *Fisher*, the courts' assessment of detrimental reliance was skewed, as discussed above. However, the scales of unconscionability appear to have tipped in favour of the copyright owners because the courts chose to focus on the copyright owners' spectacular contribution. This is exactly the danger commentators have warned of – the subjectivity in the assessment of unconscionability.

2.4 Remedy for proprietary estoppel

In the context of implied copyright licence, a successful claim of proprietary estoppel could lead to the following results:

- (a) to hold the copyright owner's implied licence irrevocable; or
- (b) to hold the copyright owner's implied licence only prospectively revocable

An example of (a) is *Godfrey*. Godfrey had asked for a declaration as a joint author of the works in issue, in addition to a share of profits. Although the court granted the declaration, the court simply dismissed the suit by ruling that Godfrey was estopped from asserting his rights against the defendants. This meant that Godfrey could not revoke the bare copyright licence which the court had implied in favour of the defendants. This order made the defendants benefit from Godfrey's contribution also in the future, without having to share with him any royalties. As argued above, clearly Godfrey had not behaved so unconscionably that he should lose his ability to revoke his licence and his future royalties. In the light of the arguments favourable to Godfrey highlighted above, an order allowing Godfrey to revoke the implied licence would have been just and appropriate. Godfrey therefore, represents a blind application of Taylors approach (with overemphasis on unconscionability) leading to an unjust result.

However, the court's declaration confirming Godfrey's copyright entitlement meant a silver lining in that if someone other than the defendants sought to licence the songs Godfrey had arranged retaining his arrangement, then Godfrey's consent would be necessary, for which he can charge a fee.

Option (b) happens in most of the other cases of implied licence. The implied licence being revocable only prospectively means that an act already performed while the implied licence was in

¹⁰¹ [1995] EMLR 307, 333-34.

force is protected.¹⁰² For example, in *Brighton*, it was held that it was not unconscionable for Brighton to revoke the implied licence she was held to have granted to Jones, but only prospectively.¹⁰³ This is because Jones relied on the implied licence from Brighton to enter into commitments like licensing Jones's script to other production houses. It would now cause Jones detriment to reopen all these licences, and to have to account for all the profits allegedly due to Brighton.¹⁰⁴ However, a declaration of ownership which Brighton had sought was granted, with Jones having to re-negotiate with Brighton, if Jones wished to exploit the play in future.¹⁰⁵ This was the case also with *Fisher* and *Beckingham* in that they were not allowed to reopen the licences already entered into, nor seek compensation for the exploitation of the work when their implied licence was still in force.

Simply because there are facts and circumstances to support implying a bare licence, does not mean that the same facts and circumstances can also be used to hold the bare licence irrevocable. Since proprietary estoppel can lead to more serious consequences than implying a bare licence, there must be more to support proprietary estoppel. If a low threshold of copyright owner's knowledge of his entitlement is held sufficient to imply a licence, such knowledge should not be sufficient to hold the licence irrevocable. Given the complexity not only of facts and circumstances in these cases, but also of the law on originality and joint authorship, in most cases, the implied licence should only be held to be revocable prospectively. In very rare cases, proprietary estoppel may make a licence irrevocable, but *Godfrey* was certainly not one such.

The ability of copyright owners to revoke their implied licence does affect the other members of the band and record companies. However, as suggested above, if such revocation is only prospective, the future exploitation of the work can be more inclusive. This gives an opportunity to the struggling copyright owners to end a gratuitous implied licence, and negotiate a contractual licence for future exploitation.

3. Conclusion

Copyright cases on proprietary estoppel have generally arisen in relation to the revocability of bare licences. In effect, the courts try to ascertain whether the copyright owner has behaved in such a way as to not only imply a licence to use her work, but also to render such implied licence irrevocable due to proprietary estoppel by acquiescence. Such conduct is simply long periods of inaction attributable to a combination of factors for most of which copyright owner is not to be blamed. Under these circumstances, if the inaction were to be taken on its face value to establish acquiescence it would lead to unfair results. A fairer approach is to ask why there was such an inaction.

Among the approaches adopted in land law, Willmott approach produced a more elaborate analysis of acquiescence cases. But even in Willmott approach, the only reason for inaction by the property owner that a court would tolerate is the lack of her knowledge as to her own rights (third probandum). If a property owner was aware of her own rights, but did not assert them due to her own fault, such as negligence or forgetfulness, then the law should not have a reason to look upon such property owner kindly. But if the property owner is aware of her rights but is unable to assert her rights due to circumstances beyond her control, such as her weaker bargaining position in the

¹⁰² This is sometimes also called a licence acted upon. See Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry and Wade The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 34-012.

¹⁰³ [2004] EWHC 1157 (Ch) at [79].

¹⁰⁴ *ibid*, at [77].

¹⁰⁵ *ibid*, at [60], [96].

industry, then it should factor within the reasons for inaction. This factor should not be left to the vagaries of unconscionability assessment under Taylors approach, which as argued in this article, can be unreasonable subjective. Therefore, Willmott approach is the more appropriate one, but the third probandum must be amended for copyright cases as follows:

the copyright owner must know of the existence of her own right which is inconsistent with the right claimed by the counter party *and must be capable of asserting such right.*

And the phrase ‘capable of asserting’ must only include circumstances that are beyond the control of the copyright owner. This is at the heart of the reversed power relationship in copyright cases. More than in land law, it matters in copyright law that the acquiescence exists and is analysed separately from other forms of proprietary estoppel. It is only when these considerations also become part of the assessment that a just outcome can be achieved.

Copyright cases must see no reason to loosen up on the need for causal link in establishing the connection between reliance and detriment. A more rigorous approach to this assessment could have made all the difference in *Godfrey*. In granting relief in case of acquiescence, courts should be slow in holding a copyright owner estopped from exercising her rights for the rest of the copyright term, which is an unreasonably harsh result in a case of inaction.



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