

Meltwater-v-The NLA – The end of internet browsing?

Summary

A landmark case in the Court of Appeal has created major uncertainty over when browsing the internet rather than explicitly copying content from it will constitute an infringement of copyright.

Newspaper headlines may now constitute a copyright work protectable in their own right and separate from the article to which they relate.

Business impact

Even short extracts of text may now qualify for copyright protection if they involve a significant amount of skill and creativity, which may include a 'Tweet' or short status update.

Any business making use of subscription content aggregators or news summary services may in the future need to enter into separate licence agreements with the creators of the original content to avoid a claim of copyright infringement.

Online content is treated in the same way as offline content for the purposes of copyright.

Legal detail

Meltwater provide a paid news media monitoring service to their clients called 'Meltwater News', where subscribers specify key words or phrases of interest and are directed to relevant content from major newspapers and media websites, either by receiving a digest email containing links to relevant articles containing these search terms or can access them through Meltwater's website. The service's updates usually contain a web link to the relevant article, the headline from that article, the opening words from the article and an extract showing how search terms appear in context.

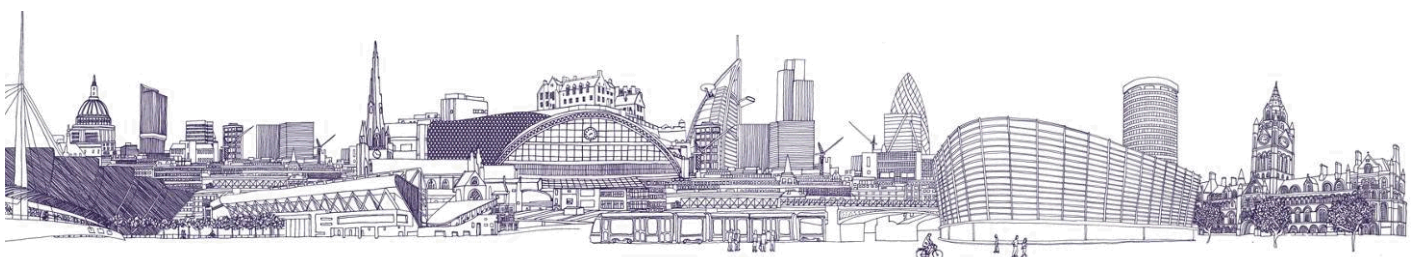
Several newspaper publishers along with the Newspaper Licensing Agency (NLA), responsible for licensing newspaper content and collecting royalties from licensees, issued proceedings for a declaration that both Meltwater and the users of Meltwater News infringed the copyright of the content which it summarised or linked to on the basis that, even though Meltwater had obtained a 'web database licence' from the NLA, its users would need to obtain a separate 'web end user licence' to receive and read the content it contained by clicking on the web links provided.

Meltwater and the PRCA (an industry body acting on behalf of the public relations sector, the major customer base of Meltwater News) referred the matter to the copyright tribunal on the basis that the terms of the web database licence (which require end users to take a web end user licence) were unreasonable and defended the NLA's claim on the basis that Meltwater did not need a licence to provide Meltwater News, nor did the members of the PRCA need a licence to use or receive it.

At the first hearing of the case, the court found that end users of Meltwater News did require a licence from NLA or the relevant publisher to receive and use the product lawfully, ruling that:

- The headlines of articles referred to in Meltwater News were capable of being 'literary works' in their own right and protected by copyright as well as the articles to which they refer; and
- Extracts from articles reproduced in Meltwater News could be 'substantial parts' of the article in question; meaning that using them would constitute copyright infringement.

End users who received e-mail alerts from Meltwater News, opened the message and clicking on a link to the Meltwater website would create copies of the original content on their computer, which is an infringement of the copyright in the original content and not one which is



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covered by the 'temporary copy' exemption under section 28A of the Copyright, Designs and Patents Act 1988 (as amended).

Meltwater appealed the decision, arguing again that Meltwater News did not infringe copyright, and that their users did not need a licence to receive it over and above their subscription to the service, which they referred to as 'double licensing'.

In a very controversial judgment, the Court of Appeal found against Meltwater and the PRCA, based mainly on the decision in *Infopaq* (Case C-5/08), which involved a similar news service to Meltwater where *Infopaq* would scan in newspaper pages and turn them into text then and, if that text contained a client-specified keyword, send an 11-word extract to their clients containing the search term and the five words on either side of it. *Infopaq* argued that this constituted 'temporary copying', although the ECJ disagreed, finding that printing out the 11-word extract rendered the copying permanent and that even the 11-word extract could be protected by copyright if it conveyed 'the expression of the intellectual creation' of the author.

Based on that background, the Court of Appeal made three main points:

- A headline (like an 11-word extract) can be protected by copyright as a free-standing 'literary work'.
- The text extracted from articles by Meltwater could constitute a 'substantial part' of the original and infringe copyright – the issue is the quality of what is taken rather than the quantity, and if the extract contains enough of the author's skill and creativity then using it may constitute infringement.
- Members of the PRCA and end-users of Meltwater News do need a separate licence from newspaper publishers and/or the NLA to lawfully use the service as viewing, downloading or accessing updates and a web page containing them involves the user choosing to click on a link rather than their computer making a copy as part of a technological process.

Unsurprisingly, the judgment has been greeted with anger by Meltwater's users, who may now potentially have to pay double to use Meltwater News. However, Meltwater and the PRCA have been given leave to appeal the decision in the House of Lords, who are expected to deliver their judgment in either late 2012 or early 2013.

It's important to remember that this case does not mean that every use of a headline or text from a newspaper website will constitute an infringement of copyright unless

the extract involves the author's 'skill and creativity'. Unhelpfully, the judgment gives no guidance on when infringement is likely to take place and has left this difficult question for the House of Lords to debate. Any business which involves the use of titles of books, films or other media content may be understandably nervous at the potential fallout.

Many commentators have already said that this case could mean the 'end of browsing as we know it'. The real issue here, and one which underpins the operation of the internet as a whole, is the scope of the 'temporary copies exemption', which was interpreted very narrowly in this case.

Copying of a copyright protected work will not constitute infringement under the temporary copying exemption when:

- The copying is temporary.
- It is transient and/or incidental.
- It is an integral part of a technological process.
- The sole purpose of the process is to enable lawful consumption of work or transmission over a network between third parties by an intermediary or lawful use of content.
- The act of copying has no economic significance.

Notably, 'consumptive use' of copyright material falls outside the exemption, and many have asked whether or not this properly describes browsing the web, when reading a book is not considered an infringement as it doesn't involve any act of copying.

Browsing in its own right is not an infringement or otherwise unlawful, and it is also arguable that it is exactly the kind of activity which the exemption is meant to cover. The *Infopaq* case and this judgment arguably move the law towards making electronic consumption of copyright material over the web permissible if a user has a relevant licence rather than permitted generally.

The argument at the House of Lords will revolve around the issue of whether or not browsing falls under the temporary copying exemption, which could have major recommendations for businesses operating in the online space and force some content aggregators to radically rethink their business models. Until then, the issue of whether or not copying and pasting headlines, extracts and links which contain them, arguably one of the major foundations of the web economy, is up in the air.

For now, clients should link with caution and remember that online content is protected by copyright in the same way as offline content - asking permission to use content may be far less expensive than asking for forgiveness.

Star Wars: Episode VII – designer wins right to sell Stormtrooper helmets

Summary

'Star Wars' creator George Lucas loses copyright battle to prevent Andrew Ainsworth, the original maker of the iconic 'Stormtrooper' helmet, from selling replicas.

Business impact

Production companies seeking to gain full copyright protection for their merchandise will have to prove that the article is a work of art or sculpture.

If the merchandise in question is not proved to be 'artistic', it will only benefit from a maximum 15 years' protection as an unregistered design before a third party can make and sell the article.

It is also now possible to take action in the UK for infringement of copyright and other unregistered rights which occurred in different territories provided the defendant is resident in the UK.

Legal detail

Lucasfilm won a \$20 million judgment for copyright infringement against Mr Ainsworth in the US over unauthorised sales of replica Stormtrooper helmets during 2006. As Mr Ainsworth held no assets in the US over which the judgment could be enforced, copyright infringement proceedings were issued in the UK, eventually reaching the Supreme Court.

The key argument in the case revolved around whether the Stormtrooper helmet could be classed as an 'artistic work' for the purposes of section 4 of the Copyright, Designs and Patents Act 1988. If it could, and specifically could be classified as a sculpture, it would be protected by UK copyright law for the life of its creator plus 70 years after his death.

The case also involved a design rights argument, with the Supreme Court finding that the helmets were 'mass produced utilitarian objects' and therefore that their design right protection had expired; 10 years had passed since the first marketing of articles to the original helmet design and 15 years since creation of the design. Under UK design right law, Ainsworth was freely able to make and sell the helmets.

However, the Supreme Court also ruled that Mr Ainsworth had breached Lucas's copyright in the US, and as such

he will no longer be able to export the Stormtrooper helmets to the US, where they are of considerable value to the collector market.

Of greater interest, however, is the fact that the court also found that the US-based claim for copyright infringement was 'justifiable' in the UK. This means that we could now see a much higher number of foreign claimants looking for redress in the UK Courts, especially from the US. However, it is not clear yet whether or not the UK court would apply US or UK law to such disputes in future.

Please click here for references.



The Sun and Daily Mirror fined for contempt of court over reporting of Joanna Yeates murder

Summary

Joanna Yeates' landlord, Christopher Jefferies, received a public apology and libel damages from eight newspapers over stories detailing his alleged involvement in the death of Joanna Yeates, but of more concern to content providers is the fact that The Sun and Daily Mirror were fined for contempt of court over their reporting of the incident and their coverage of Mr Jefferies himself.

Business impact

Any media business looking to report on a high-profile criminal trial should ensure that they do so in the most impartial manner possible to avoid a criminal prosecution for contempt of court.

Defences are available in respect of 'fair and accurate reports of legal proceedings held in public, published contemporaneously and in good faith', 'innocent publication or distribution' and publications made 'as or as

part of a discussion in good faith on public affairs or matters of public interest' that create an 'incidental risk'.

Online content can broaden the risk of contempt proceedings far beyond what may be expected as a result of reporting in the printed press and any archive content can reduce the possibility of relying on the 'fade factor' of the report in question being made well in advance of an arrest or court hearings and having less of an impact on the legal proceedings involved.

Legal detail

Whilst Mr Jefferies was under arrest, The Sun and Daily Mirror had published newspaper articles which were found to have posed a 'substantial risk to the course of justice' - conveying the impression that Mr Jefferies was a 'voyeur' with links to or suspected of involvement in serious criminal offences involving children and another unresolved murder case.

The Attorney General found that the vilification of Mr Jefferies may have deterred or discouraged witnesses from coming forward and providing useful information in support of the suspect - the articles were extreme and 'so exceptional, so memorable' to make a fair trial impossible.

The Sun and Daily Mirror's publication of the articles breached the 'strict liability' test for contempt under section 2(2) of the Contempt of Court (Act) 1981. Under this rule, no intention is necessary to prove guilt. They had created what the act describes as 'a substantial risk that the course of justice would be seriously prejudiced and impeded'. In some cases, it can be argued that the 'fade factor' involved in reporting on a case well before an arrest or court hearing may lessen its impact upon a jury, The Sun and Daily Mirror could not rely on any mitigation along these lines.

The vilification of Mr Jefferies created a 'very serious risk' that the preparation of his defence would be damaged and the articles had, at the time of publication, created substantial risks to the course of justice, constituting offences of contempt of court under the strict liability rule. The Daily Mirror was fined £50,000 and The Sun £18,000.

Please click [here](#) for references.

An Oscar and BAFTA tier of entry into the UK

Summary

The UK opened a new 'exceptional talent' category into Tier 1 of the Immigration system on 9 August 2011, allowing recognised leaders in the fields of arts and science to come to the UK to live and work from outside of Europe (either on an employed or self employed basis).

Business impact

Oscar and BAFTA winners and nominees may gain entry to film in the UK more easily from now on.

Legal detail

In 2008, the UK overhauled its immigration law and implemented a points-based system for non-European Union migrants wishing to come to the UK to work, study, and train.

The new immigration system is broken into five 'tiers' that replaced the previous 80 or so routes. Each tier has different conditions, entitlements, and entry requirements for migrants wishing to work in the UK.

This new category will enable the best and brightest people from around the world to work in the UK without the need for employers to sponsor individuals directly. Sponsorship is required for most other categories of entry to the UK to live and work and can be a long, complex and expensive process.

The introduction of this new category is good news for media employers and businesses who do not wish to take on the responsibilities of becoming a sponsor registered with the UK Border Agency (e.g. for filming).

In order for an application under this category to be successful, an individual must have the support of a Designated Competent Body (DCB). Current DCBs are:

- The Royal Society
- The Arts Council
- PACT for Film & TV
- The British Academy
- The Royal Academy of Engineering

There are 1,000 places available for entrants in this category until 31 March 2012. Once an individual has the support of a DCB, an application can be submitted to the UKBA for approval. For Film and TV, PACT will assist.

A successful application under this category will enable a migrant to live and work in the UK for an initial period of three years and four months, with the option of extending for a further two years. Permanent settlement in the UK may be available after five years' residence.

The category will be welcomed by acclaimed actors for filming and those who are internationally recognised in dance, music, and theatre and any business which employs them.

BAFTA award nominees or those who have received a nomination for an Academy Award, Golden Globe or Emmy Award must make an application under this category within five years of receiving that nomination. Winners of a BAFTA, Academy Award, Golden Globe or Emmy Award are able to apply without any restrictions on timeframe.

Can Marks & Spencer use the Interflora trade mark as a sponsored adword?

Summary

Interflora, the world's largest flower delivery network, claimed that M&S was infringing its registered trade marks by purchasing several keywords containing the mark Interflora from Google.

Business impact

Brand owners are in a better position to protect themselves against competitors bidding on their trade marks as keywords. However, there has not been a complete block on the use of trade marks in this way.

The use of a trade mark will not be prevented in advertisements displayed by competitors on the basis of keywords corresponding to that trade mark, as long as the use of the trade mark does not adversely affect its functions.

It remains extremely important for advertisers bidding on trade marks as keywords to make clear to the internet user that their advertisement originates not from the trade mark owner but from an independent third party.

Brand owners should try to monitor the use of their trade marks by conducting regular searches of keywords to establish whether their trade mark is being used by competitors.



Legal detail

Interflora brought an action against M&S for infringement of its Interflora trade marks. M&S had selected keywords which included the name 'Interflora' through Google's referencing service. Consequently, if an internet user entered the search term 'Interflora', the results returned would include an advertisement for M&S's flower delivery service. The M&S advertisement displayed did not, however, contain any visible use of the name 'Interflora'.

Questions were referred to the Court of Justice of the European Union (ECJ) to determine whether Interflora could prevent M&S from using 'Interflora' as a keyword in such circumstances and whether M&S's actions took unfair advantage of Interflora's reputation and diluted its distinctive brand. According to the ECJ:

Article 5 (i) (a) of European Directive 89/104 and Article 9(1) (a) of Commission Regulation No. 40/94, both of which harmonised the law relating to trade marks across Europe, had to be interpreted by the court as meaning that the proprietor of a trade mark was entitled to prevent a competitor from advertising on the basis of their using without consent a keyword identical with that trade mark in relation to goods or services identical with those for which that trade mark had been registered where such use was liable to adversely effect of the functions of the trade mark; and

Article 5(2) of Directive 89/104 and Article 9(1)(c) of Regulation No. 40/94 had to be interpreted as meaning that the owner of a trade mark with a reputation was entitled to prevent a competitor from advertising on the basis of a keyword corresponding to that trade mark without its consent where the competitors actions took 'unfair advantage' of the distinctive character or repute of the trade mark or where the advertising was 'detrimental to that distinctive character or to that repute'.

In summary, an advertiser may be found liable for infringing a competitor's trade mark if it uses an advertisement that contains it which does not enable internet users (or enables them only with difficulty) to ascertain whether or not the goods and services referred to in the advert originate from the owner of the trade mark or from an independent third party.

Please click [here](#) for references.

Ofcom fine broadcaster £75,000 over content of religious programming

Summary

Ofcom impose financial penalty of £75,000 on Al Ehya Digital Television Limited for breaching the broadcasting code.

Business impact

Ofcom has a statutory duty to require all broadcasting services to apply such standards that provide 'adequate protection to members of the public from the inclusion of offensive and harmful material'.

Broadcasters must ensure that generally accepted standards are applied to provide adequate protection for members of the public from the inclusion of harmful material. The rules for how those standards are applied are set out in the Ofcom broadcasting code, which provides that broadcasters must take particular care in exercising their responsibilities to the audience with respect to the content of religious programming and ensure that any such programmes do not involve any improper exploitation of any of the audience's 'susceptibilities'.

Legal detail

Noor TV, owned by Al Ehya Digital Television, is a general entertainment and Islamic education channel broadcast on Sky. Ofcom took action against Al Ehya after the channel's 'saturday night special' programme included the offer of a 'special gift' or prayer in return for a financial donation.

After receiving several complaints, Ofcom found that susceptible members of the audience may have been persuaded to donate money through Noor TV when they would not otherwise have done so based on the content of the programme and that vulnerable viewers, such as those experiencing financial or emotional difficulties, may have been unduly encouraged to give donations.

In particular, Ofcom considered it 'unacceptable' to persuade viewers to donate money on the basis of inducements such as offering a prayer for or on behalf of the donor, the promise of better health or that a religious figure would create further wealth for or take particular care of them.

Ofcom found the programme in breach of the following sections of the broadcasting code:

- Rule 2.1 (generally accepted standards).
- Rule 2.2 (materially misleading).
- Rule 4.6 (the exploitation of susceptibilities of the audience by religious programmes).
- Rule 10.3 (promotion of products and services) and
- Rule 10.15 (appeals for funds).

The breaches were found to be extremely serious and had the potential to cause financial harm to viewers, particularly those who were 'vulnerable'. As a result, Ofcom imposed a fine of £75,000 on Al Ehya Digital Television Limited.

Religious programming is regulated very strictly under the broadcasting code and broadcasters must be extremely careful to ensure that it is not seen to be exploitative or driven by commercial imperatives to avoid the risk of a fine.

Please click [here](#) for references.

Rebroadcasting? You may also need to renegotiate...

Summary

The Advocate General has ruled that satellite providers and broadcasters must obtain further clearances from the original rights holders before re-transmitting them over satellite services – any initial permission granted to broadcast a programme would not include the right to retransmit via satellite without negotiation of a separate deal.

Business impact

Broadcasters should ensure that their deals with content creators contain provisions which allow for the re-broadcast of that content over all appropriate distribution channels (including satellite, video on demand, mobile and catch-up TV) to ensure that they have the right to exploit it on the widest terms possible and across every available platform. Additional fees may be due to collecting societies in different territories.

Legal detail

The Advocate General gave an opinion on two linked cases brought by Belgian collecting societies - Agicoa and Sabam - against satellite operator Airfield NV and its technical partner (both of whom operated the satellite service TV Vlaanderen) as a result of their failure to obtain permission from copyright owners for the retransmission of programmes.

The programmes in dispute had originally been cleared for broadcast on free-to-air TV, but no separate deal was agreed in relation to retransmission and the ECJ was asked to rule on whether or not retransmission rights on other platforms were in fact included in the original deal.

The court found that satellite TV distributors would need to clear rights in programmes for retransmission over their services separately and agree new deals with content providers. By transmitting them over satellite and determining encryption keys and bundle composition for their viewers, Airfield and other satellite TV providers would carry out an act which exploited the copyright in the original programme, which would mean that retransmission would constitute 'a communication to the public by satellite' and need further permission.

In basic terms, any initial deal reached between a right holder or content creator and a broadcaster would not automatically permit retransmission via other platforms when the content in question is grouped with other programmes to meet specific subscriber demands that were not compatible with the demands of the initial audience under the original deal.

Broadcasters will need to review their existing agreements and compliance systems to ensure that they have full clearance to rebroadcast content.

References

Case C-431/09 Airfield NV-v-Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) and Case C-432/09 Airfield NV-v-Agicoa Belgium BVBA



The FA no longer in a 'league of its own' - ECJ rules that using foreign decoders to screen Premier League football is legal...for now

Summary

The EU's single market principles, which guarantee the free movement of goods and services throughout Europe, have been found, in limited circumstances, to take precedence over copyright protection of (and exclusive licences relating to) subscription TV broadcasts - in this case, Premier League football.

A ban on the use of satellite transmission decoders in the UK which were originally licensed for use in a foreign country would infringe these freedoms and breach competition law.

Although it does control the broadcasting rights of Premier League games, the FA Premier League does not own the copyright in a whole football match, although it will own copyright in certain elements of the broadcast, including the Premier League anthem, programme idents, logos and other peripheral material. Any use of these elements would potentially constitute copyright infringement – receiving a satellite feed of the unedited broadcast of a match may still be unlawful.

Business impact

The ECJ's decision in the Karen Murphy case has made waves across the broadcasting industry but will still return to the High Court for a final ruling. Given its potentially seismic effect on the business models of satellite broadcasters across Europe and on the FA Premier League and football clubs in particular.

Football clubs depend on broadcasting rights as a major source of income and they may now be considering new revenue streams as well as taking aggressive action against anyone who streams unauthorised and unedited feeds of matches which contain protected elements pending the final ruling in this case.

Any pub which does make use of a foreign decoder may still infringe the copyright of the FA Premier League as well as various clubs if they screen matches which contain opening video sequences, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches and various graphics without permission.

Legal detail

The Karen Murphy case has been going on for some time, with the Portsmouth-based landlady originally being

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convicted for dishonestly receiving Premier League football coverage with intent to avoid payment via the use of a Greek satellite decoder in January 2007.

The decision was at the time seen as a major victory for broadcasters and the football industry, although Murphy was not willing to simply roll over and accept the £8,000 fine. She appealed her conviction and eventually saw various issues referred to the European Court of Justice for guidance. The court's decision was a surprise to many as the court found that national laws which prevent the import, sale or use of foreign decoder cards are contrary to EU Competition law and its guarantee of the free movement of goods and services across Europe.

The decision could lead to a wholesale review of the Premier League's current exclusive agreements with Sky Sports and ESPN, and pave the way for cheaper viewing of foreign broadcasts of high-profile games. However, although the decision may allow individual subscribers to watch overseas broadcasts at home, it remains very much unclear whether games can be shown in pubs using foreign decoders and broadcasts due to several copyright issues.

The ECJ found that 'national legislation which prohibits the import, sale or use of foreign decoder cards is contrary to the freedom to provide services and cannot be justified either in light of the objective of protecting intellectual property rights or by...encouraging the public to attend football stadiums.'

If this wasn't bad enough for the industry, the ECJ then went on to find that, as performances of athletes are fundamentally different from performances by musicians, actors or artists, the FA Premier League cannot claim ownership of any copyright in matches as a whole.

They do, however, still own copyright in certain elements of how matches are presented for broadcast, including programme idents, logos, the Premier League anthem, video sequences and clips containing replays or highlights of other games. Even if they did not own the copyright in their matches, exclusive deals which outlawed the use of foreign decoders would be disproportionate to protect that copyright and anticompetitive and owning a foreign decoder was not in itself illegal.

This may seem like a huge blow to the industry, but it's worth remembering that any broadcast of the Premier League's feed without permission through a foreign decoder will still infringe unless all of the identifiable peripheral elements are edited out in their entirety, which is not an easy task either for a publican or a broadcaster.

For now, at least, it's a game of two halves – the headlines suggest a major change in football broadcasting revenue and a shift towards consumer power, but very significant elements of what may (for now) be free to use are still very much under the control of the Premier League.

Please click [here](#) for references.



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