Copyright and Internet Browsing

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In *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890, the Court of Appeal affirmed a declaration by Proudman J. ([2010] EWHC 3099 Ch.; (2011) 128 R.P.C. 209) that lawful use of the Meltwater media monitoring service requires a licence from the owners of copyright in the contents of the websites it monitors. The reason was its acceptance that “scraping” websites for references to search terms provided by subscribers, and communicating those references to the subscribers with a hyperlink to, an excerpt from, and the headline and opening words of, the sources in which those references are contained, is potentially infringing of UK copyright. Does its decision represent the end of lawful online browsing, as some have claimed? The answer is no, due largely to the subsequent decision of the Court of Justice of the European Union (CJEU) in
Football Association Premier League Ltd v QC Leisure (C-403/08 and C-429/08) (October 4, 2011) (FAPL).

Three findings were central to Meltwater. The first is that newspaper headlines are capable of being original literary works protected by copyright. The second is that any service which involves the reproduction of a large number of extracts from a variety of publications—in some cases several extracts from the same article—will be prima facie infringing of UK copyright. And the third is that acts of reproduction occasioned by the voluntary human process of accessing a webpage are not excluded from copyright infringement under s.28A(b) or s.30(1) of the Copyright, Designs and Patents Act 1988 (CDPA). When combined with the principle that storing or displaying temporarily part of a copyright work in the memory or on the screen of a computer is a “reproduction” within the meaning of Directive 29/2001/EC art.2(a), and thus “copying” within the meaning of CDPA s.16(1)(a), these findings render the following acts potentially unlawful: (a) typing a string of words into an internet browser’s search window; (b) pressing “return” on a keypad to generate a browser’s search results; and (c) activating a link to a webpage included among those results.

Regarding (a) and (b), the appearance may be more alarming than the reality. For example, while headlines and other short strings of words may in principle be original literary works, and their unauthorised reproduction thus infringing of copyright, in practice this has been consistently denied by the courts. Indeed, that is the central point of the line of cases on which the Court of Appeal relied in confirming the possibility of headline copyright, which possibility was sufficient for the declaratory relief which the Newspaper Licensing Agency had sought. Further, while short strings of words may be protected as part of an article or other work, this is only if they are a qualitatively substantial part (see CDPA s.16(3)(a); Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 W.L.R. 273 (HL)); a requirement which, as the Meltwater Courts recognised, so far survives European law, including Directive 2001/29/EC art.2(a) and Infopaq International A/S v Danske Dagblades Forening (C-5/08) [2009] E.C.R. I-6569; [2009] E.C.D.R. 16. Similarly regarding (b), any copyright subsisting in the selection and arrangement of search results (as an original database within the meaning of CDPA s.3A) generated by pressing “return” on the keypad will almost certainly lie with the owner of the search engine’s algorithm (see CDPA s.9(3)), and thus be licensed for the user’s online browsing purposes.

That leaves (c), which raises the greatest difficulties for UK copyright. The main reason for the difficulties—and the issue on which the Supreme Court has agreed to hear an appeal—is the statement in Meltwater that reproducing a webpage by one’s own volition cannot be part of a technological process, and is otherwise outside the “transient or incidental” copying exception of CDPA s.28A(b). According to that exception:

“Copyright in a … work, other than a computer program or a database [or broadcast], is not infringed by the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable … a lawful use of the work; and which has no independent economic significance.”
It is submitted that the court’s interpretation of this provision in *Meltwater* as excluding any voluntarily reproduced webpage containing copyright material is incorrect. As European patent law teaches, a process does not cease to be technological by reason of its inclusion of a purposive human action; on the contrary, such action is constitutive of technology (see, e.g. G1/08 *Tomatoes* (EBA) (December 9, 2010) at 59–61). And more generally, the voluntary reproduction of a webpage: (i) is temporary in the sense of being limited in duration; (ii) is transient in the sense of being “automatically deleted at the end of the working session” (Institute for Information Law, Study on the Implementation and Effect in Member States’ Laws of Directive 2001/29/EC (February 2007)) and incidental to a lawful use of the material (viz., viewing it); (iii) is an integral and essential part of the technological process of online browsing; (iv) has the sole purpose of enabling the lawful use above (of viewing the material); and (v) has no economic significance beyond that of receiving the page in order to view it online. Given this, it ought to fulfill the five cumulative criteria of s.28A set out in *Infopaq*.

That is also the implication of *FAPL*. At issue in that case was the effect of exclusive licences granted by the FAPL to enable the transmission of live television broadcasts of football matches. The terms of the licences required licensees to undertake to prevent receipt of the broadcasts outside their licensed areas, raising the issue whether Ms Karen Murphy—a UK publican—could legally procure a decoder card to access the broadcasts from a non-UK licensee, and show the FAPL-licensed broadcasts on a television set to customers in her UK pub.

Among the issues considered by the CJEU in *FAPL* was whether the reproduction right contained in Directive 21/2009/EC art.2(a) covers the creation of transient sequential fragments of copyright works in the memory of a decoder and on the screen of a television set. If so, Ms Murphy’s receipt and showing of copyright works included in the football broadcasts would be prima facie infringing of European and UK copyright. The court’s view was that it does, notwithstanding that the works are reproduced by means of linear fragments which, being immediately efficaciously in the course of a technical process, have a purely ephemeral existence. It then considered whether Ms Murphy could nonetheless receive and show the broadcasts without FAPL permission by relying on the “transient or incidental” copying exception of Directive 21/2009/EC art.5(1), from which s.28A was derived. It decided that she could, as the acts in question: (i) were temporary, transient and an integral part of the technological process of broadcast transmission; (ii) were intended to enable reception of the broadcasts, which in private circles was not restricted by European or UK law; and (iii) had no economic significance beyond such reception.

The CJEU’s reasoning in respect of art.5(1) is not without its difficulties, especially on the issues of lawful use and independent economic significance (points (ii) and (iii)). Nonetheless, its logic and result support the analysis above concerning temporary reproductions of webpages to enable their contents to be viewed online. As a matter of policy, too, that analysis seems right. For one, and notwithstanding Recital 33 of Directive 2001/29/EC (which provides that “[a] use should be considered lawful where it is authorised by the rightholder or not restricted by law”), it cannot be the case, as *Meltwater* suggests, that s.28A(b) only covers acts in relation to a work which have been authorised by the owners of its
copyright (see at [32], quoting [2010] EWHC 3099 at [109]); for there would then be no need to rely on s.28A for such authorisation. In addition, the very fact that an issue of legality is before the courts suggests that authorisation will be absent. Thirdly, and as the CJEU in FAPL remarked, access to protected works will always have economic significance by virtue of the economic value of the works and their copyright. Thus, if the exception laid down in art.5(1) is not to be rendered redundant, that significance must also be independent in the sense of going beyond the economic advantage derived from mere reception of the protected works; which meant in FAPL, beyond the advantage derived from picking up the broadcast and its visual display (see also ITV Broadcasting Ltd v TVCatchup Ltd [2011] EWHC 2977 (Pat) at [29]–[30]). It follows that the conclusion of Proudman J. in Meltwater, which the Court of Appeal accepted, “that any copy which is ‘consumption of the work’, whether temporary or not, requires the permission of the copyright holder” is incorrect, whatever its provenance in the history of art.5(1) (see [2010] EWHC 3099 at [108]–[109]).

More difficult is whether a person ought to be able to rely on s.28A to avoid liability for reproducing a copyright film or musical work in order to view or listen to it online. On its face, and in light of the analysis above, the answer would seem to be yes: reading a literary work is analogous to viewing a film and listening to music, and all are beyond the proper reach of copyright. However, in Meltwater the Court of Appeal implicitly affirmed Proudman J.’s statement that s.28A does not permit users to watch pirated films and listen to pirated music. Can this be true, even after FAPL? On one hand, it ought to be no more legal to view a non-infringing film than an infringing one. On the other hand, the Court of Appeal has recently suggested, in Imerman v Imerman [2010] EWCA Civ 908, that looking at documents which one knows to be confidential is capable of constituting an actionable wrong (albeit perhaps only in equity), which might imply that viewing a film which one knows to be infringing of copyright is similarly capable. In addition, it is conceivable that future courts will distinguish between reproductions of different types of works, in reliance perhaps on the three-step test of Directive 2009/21/EC art.5(5). That test requires that exceptions to and limitations on copyright be read in light of the EU principle of proportionality, and might support a distinction between single acts of reproduction to read a literary work, and successive acts of reproduction to view a film or listen to music other than incidentally in the course of another act (such as receiving and showing a broadcast of a sporting spectacle). If this is true, then an end user will not be able to escape liability for watching films and listening to music online by relying on s.28A(b), and will likely need instead to rely on an implied licence granted by the owner of copyright on posting his or her work to the internet; at least until the UK Government introduces its much promised private copying exception (see HM Government, The Government Response to the Hargreaves Review of Intellectual Property and Growth (August 2011), p.8).

It follows from the above that Meltwater does not prohibit internet browsing, in part because it has been effectively and substantially qualified by the CJEU in FAPL. Nor, it is submitted, does it prohibit browser technologies which operate by “scraping” the web to find material of potential relevance to a search request, and compiling a selection of excerpts from that material with links to the sites
where it can be found, even if such activities remain outside the scope of s.28A. Rather, it confirms that such technologies must respect the rights of copyright owners by ensuring that any prima facie infringing use of copyright material is done with the express or implied permission of the copyright owners. More difficult is determining what this requires. It is likely to require that such use be confined to acts which are necessary to enable the public to view the material online, as they are the only acts approval of which can be reasonably implied from the fact of a work’s availability on the internet. It is also likely to require that any express restrictions on that permission sufficiently asserted by the copyright owner be complied with (see Thornton v Shoe Lane Parking [1971] 2 Q.B. 163), regardless of how technologically “inconvenient” such compliance may be (see [2010] EWHC 3099 at [144]; [2011] EWCA Civ 890 at [40], rejecting technological “inconvenience” as an excuse for disregard of the sufficient acknowledgement requirement of CDPA s.30(1)). Hence the real point of Meltwater, which is to affirm that the internet is not a copyright-free space, and that technological inconvenience is no reason for ignoring the rights of copyright owners online. For those concerned by the extent of technological determinism in copyright, this at least may be a welcome outcome, and one the Supreme Court would do well to support.

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