



ICLG

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Copyright 2015

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Copyright in the Digital World

Bird & Bird LLP

Will Smith



Phil Sherrell



Introduction

Advances in technology in recent years mean that online and other digital content, including copyright-protected works, can be shared, linked to, downloaded and extracted in a multitude of different ways, more easily than ever before. This causes significant challenges to traditional copyright principles as the established rights which copyright protects – such as copying, distributing and communicating to the public – can have unforeseen consequences in the digital world. The lack of traditional jurisdictional boundaries on the internet also raises questions as to where an online infringer should or could be pursued.

The courts and legislators of England and Wales and the European Union are continuing to grapple with this area and whilst recent changes have brought clarity on some issues, the list of unanswered questions continues to grow.

A comprehensive account of the law in this area is beyond the scope of this chapter, but we hope to provide an insight into some of the key recent decisions and their implications.

A Cautionary Tale

Consider a day in the life of an ordinary internet user. He might: (i) search for a photo online to liven up a work presentation; (ii) read articles about his industry received as hyperlinks through an email update; (iii) take a screenshot of part of a website to send to a group of friends; or (iv) re-tweet a link to an interesting news story.

Where our every-day internet user does not have the authorisation of the copyright holder in the relevant content, there is a risk that any one of these acts could be a copyright infringement.

Infringement by Copying

Under s17 Copyright Designs and Patents Act 1988 (“CDPA”) the copying of a work protected by copyright is a restricted act i.e. the exclusive right of the copyright holder(s). The legislation is explicit that creating or storing digital copies of a work falls within the scope of protection.

Prima facie this causes great difficulty to internet users, as simply by accessing a website (which will inevitably contain some copyright works), copies will be made in the computer’s memory and on the screen. Within a network it is likely that there will be multiple temporary and permanent copies created that could theoretically form the basis for infringement proceedings.

In 2001, the European Parliament introduced Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (the “InfoSoc Directive”). The

InfoSoc Directive represented the first concerted effort to update copyright law for the digital age, as can be seen from the recitals:

“Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.”

One of the key changes introduced by the InfoSoc Directive is the so called “temporary copies exception” at Article 5(1)(a), which was introduced to UK law as s28A CDPA. This states that making temporary copies of a protected work, provided certain conditions are satisfied, does not amount to copyright infringement. This provision was intended to remove the risk of inadvertent copyright infringement through ordinary everyday internet use, as explained in recital 33:

“The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own ... A use should be considered lawful where it is authorised by the rightholder or not restricted by law.”

The recital also states that this exception should apply to browsing and caching, to the extent that they meet the necessary conditions.

The Meltwater Case

Meltwater provided an online media monitoring service called Meltwater News. Subscribers to the service were sent emails containing the headlines of online articles, hyperlinks to the original publishers’ websites and short extracts of the articles themselves. The Newspaper Licensing Agency (“NLA”) brought proceedings for copyright infringement against Meltwater and Public Relations Consultants Association (“PRCA”), who represented UK public relations providers who used Meltwater News. The NLA argued that the end users of the service required a licence to receive it as, through ordinary use of the service, copies of substantial parts of its members’ articles would be made.

Given the importance of this case to everyday internet users, it is worth recapping its passage through the courts.

*The High Court – The Newspaper Licensing Agency Limited and others v Meltwater Holding BV and others*¹

At first instance it was held that:

- i) when Meltwater News was received by email, or viewed on Meltwater’s website, a copy of the headlines and extracts

contained in it was made on the end user's computer. This amounted to a *prima facie* infringement of s17 CDPA, because the Court held that copyright in the articles would sometimes be infringed by copying of the headlines and extracts alone, and that copyright may subsist separately in some headlines;

- ii) when a user clicked on a hyperlink, a copy of the article on the publisher's website was made on the user's computer. This would infringe s17; and
- iii) the temporary copies exception did not apply. It was not intended to legitimise all copies made in the course of browsing, and here the copies could not be regarded as 'incidental' since they were required for the 'consumption' of the work.

In light of the above, it was held that users of Meltwater News needed a licence from the NLA in order to receive the Meltwater service.

The Court of Appeal – *The Newspaper Licensing Agency Limited v Meltwater Holding BV and others*ⁱⁱ

On appeal, the Court of Appeal upheld the findings of the High Court. In applying the temporary copies exception, the Court referred back to recital 33 to the InfoSoc Directive and held that the acts of reproduction involved in internet browsing are occasioned by the voluntary human process of accessing that website. It followed that the reproduction was not part of the technical process but generated by the user's volition and therefore the temporary copies exception could not apply.

The Supreme Court & CJEU – *PRCA v The Newspaper Licensing Agency and others*ⁱⁱⁱ

In contrast to the Courts below, the Supreme Court expressed the view that the temporary copies exception *should* apply to browsing internet sites. However, in light of the importance of the issue to millions of internet users, not only in the UK, but across the EU, the Court elected to refer the question to the Court of Justice of the EU for a preliminary ruling.

In its judgment in June 2014, the CJEU agreed with the Supreme Court and held that the temporary copies exception did apply to 'cached' and on-screen copies of works generated during the course of website browsing.

This case illustrates a trend of the courts seeking to resolve difficult digital copyright questions in a 'common sense' way. Indeed, the Supreme Court went back to principles of 'traditional' copyright infringement when explaining its findings:

"It has never been an infringement, in either English or EU law, for a person merely to view or read an infringing article in physical form... All that Article 5.1 of the Directive achieves is to treat the viewing of copyright material on the Internet in the same way as its viewing in physical form."

Infringement by Communication to the Public

Under s20 CDPA the communication of a copyright protected work to the public is a restricted act. Communication to the public includes the making available to the public of a work by electronic transmission. This clearly has the potential to cover a great deal of online activity, in particular in relation to social media where content is frequently 'shared' with a large (and usually indeterminate) number of people, often by way of sharing links.

Svensson and Others v Retriever Sverige AB^{iv}

Svensson and the other Claimants were journalists who wrote articles published in a newspaper and on the newspaper's website, where they were freely accessible. Retriever Sverige provided hyperlinks to these articles without the permission of their

respective authors, who subsequently sued for copyright infringement.

The question before the CJEU was essentially whether providing hyperlinks to articles which were already freely available online amounted to a 'communication to the public'; this requires both an 'act of communication' and a 'public'.

In its judgment, the CJEU held that: (i) the mere provision of hyperlinks to copyright protected works does constitute an act of communication, as the links must be considered to be making the works available; and (ii) the Defendants' (freely available) website was aimed at an indeterminate and large number of people sufficient to constitute a 'public'. However, referring to earlier law the CJEU also noted that to constitute an infringement of the authors' rights, where the technical means of communication used is the same as used for the original communication, the communication must be to a 'new public' not taken into account by the copyright holders when they authorised the original communication.

The CJEU held that the initial, authorised communication on the newspaper's website targeted potentially all internet users as there was no access restriction (such as a paywall). The claim therefore failed, as the communication sued on was not to a new public. The CJEU went on to say that had access to the original articles been restricted and the hyperlinks had allowed this restriction to be bypassed, there *would* have been communication to a new public.

This decision raises a number of questions about the extent to which online content is authorised and is freely available. For example, consider the situation where a work had been freely available online but was subsequently taken down, would that mean providing links to infringing copies of the original work which remained online would become a communication to a new public sufficient to form the basis of a claim for infringement?

The decisions in *Meltwater* and *Svensson* can be seen as an acceptance by the CJEU that a more purposive approach to the interpretation of the InfoSoc Directive is required in order to avoid copyright being brought into disrepute in the digital age. Nonetheless, these cases are confined to their facts and it remains the case that downloading or printing online content without permission could still be an infringement, and that forwarding a hyperlink is still a *prima facie* infringement. The courts will continue to face a series of complex questions as new applications test the boundaries of copyright as applied to digital content.

Jurisdiction and Territoriality

Internet use is inherently cross-border. Subject to some national (and notable) exceptions, websites originating from anywhere in the world can be accessed from anywhere else in the world. Where the content of a website appears to infringe copyright, issues of jurisdiction and applicable law arise, i.e. in which country can the infringing party be sued and which national law should be applied to determine whether infringement has occurred (effectively in which country(ies) did the infringing act occur).

Jurisdiction

Within the EU, there are well-developed principles governing jurisdiction for traditional copyright infringement. Under Article 5(3) of the Brussels I Regulation^v, a claim in tort (such as copyright infringement) should be brought in the place where the harmful event occurred or may occur. This is explained as being the place of the event giving rise to the damage, or the place where damage is suffered.

Shevill^{vi}

Shevill concerned defamation rather than copyright infringement however it has subsequently been applied to copyright infringement by the UK Court.^{vii}

The CJEU held that the place where the publisher was based and the place where the publication was circulated could both be described as the place where the harmful event occurred within the meaning of Article 5(3). The claimant therefore has a choice of jurisdictions in which to bring a claim. The court of the jurisdiction in which the publisher was based could award damages for all harm suffered everywhere, but a court in another jurisdiction where the claimant suffered harm could award damages only for the harm suffered within that jurisdiction.

Applying the principle of *Shevill* to online copyright infringement, the applicable jurisdiction could potentially be any of: (i) the place where the website is hosted; (ii) the place where website owner is based; or (iii) the place where the website is accessed (which could be almost anywhere).

Accordingly, the determination of jurisdiction in relation to online infringement is not straightforward, and this can be seen from the way in which the CJEU has attempted to deal with it.

Pinckney^{viii}

The case of *Pinckney* concerned the sale of CDs online by a UK website. The CDs were manufactured in Austria by a separate company called Mediatech. The Claimant, based in France, was able to purchase the CDs online through the UK website and commenced proceedings against Mediatech in the French courts (as the CD contained an unauthorised copy of his work).

The CJEU held that the French Court did have jurisdiction because, where infringing products are made available for purchase online, a claim can be brought in any EU Member State in which the products are available (on the basis that availability would cause damage). The CJEU went on to state that the national court would only be able to determine the damage caused within its own jurisdiction.

This decision has been heavily criticised as it fails to consider the actual act of infringement alleged against Mediatech in sufficient detail. The act is presumably unauthorised copying by making CDs, but this would seem to have taken place entirely in Austria and therefore be an infringement of Austrian copyright law. It is questionable whether this copying by Mediatech gave rise to any direct damage in France upon which the jurisdiction could be founded (it is established law that only direct damage can form the basis for seizing jurisdiction under the Brussels I Regulation).

Hi Hotel^{ix}

The Claimant, a German resident, took photographs for the Defendant, a French company called Hi Hotel, exclusively for use in their brochure and on their website. He subsequently discovered that his photographs had been published in a book published by a German company called Phaidon-Verlag and were available in a bookshop in Cologne. He sued Hi Hotel for copyright infringement in the German Court.

Hi Hotel submitted that because Phaidon-Verlag also has a place of business in France, the hotel manager could have passed the photographs to that publisher (the inference being that the French publisher then passed the photographs to its German sister company). Therefore the act complained of against Hi Hotel did not take place in Germany or cause direct damage there and accordingly the German Court did not have jurisdiction.

The CJEU confirmed that where the act complained of (i.e. Hi Hotel passing the photographs to Phaidon Verlag) took place in one country, this alone was not sufficient to form the basis for seizing

jurisdiction in another country. However, where the act complained of caused direct damage within the jurisdiction a claim could be brought, but only in respect of the damage caused in that jurisdiction. The acts of Hi Hotel complained of took place in France (i.e. outside the jurisdiction of the German Courts) however, the fact that damage may occur within Germany as a result of the act complained of followed from the fact that the book containing the copyright works could be obtained there. The German Court therefore did have jurisdiction, but only in respect of the damage caused within Germany. Again, availability was equated with damage.

Although these cases did not concern online infringements, their implication is that, due to the potential for an online infringement to cause damage in multiple countries, there will generally be multiple options for a potential claimant deciding in which jurisdiction to bring a claim.

Territoriality

By operation of the Berne Convention^x, if copyright exists under the law of one country, then corresponding rights automatically come into existence in most other countries. Importantly however, the rights remain separate within each country and therefore may differ in scope according to national laws – a national court will not give a work wider protection than is available under the laws of that jurisdiction. For example, the French Court may recognise that copyright existing under US law gives rise to corresponding rights in France, but these French rights may not have exactly the same scope. Even within the EU, copyright law is only partially harmonised between different jurisdictions.

When an act occurs online, it is possible that it amounts to a different type of infringement in different countries, or an infringement in some, but not in others. Furthermore, as we have seen above, it is possible for an online act by a business operating a website in one country to be deemed to have taken place in another country merely because the website is accessible there. To understand how to apply these increasingly complex concepts to a given set of facts, a careful focus is required on the acts of infringement alleged.

Distribution to the Public

In *Titus Donner*^{xi}, the CJEU considered the case of a German national who organised the delivery of replica furniture from Italy to customers in Germany. During the relevant period the furniture was protected by copyright in Germany, but not in Italy. The distributor paid the purchase price to the manufacturer upon collection in Italy and was then reimbursed upon delivering the goods to the end customer in Germany. From a legal perspective ownership transferred to the customer in Italy. The question arose whether there was a distribution to the public in Germany which amounted to an infringement of German copyright law. The Italian company had advertised the goods in Germany through leaflets and newspapers, and had a German language section on its website.

The Court held that where a trader directs his advertising at members of the public in a given EU Member State and creates or makes available to them a specific delivery system and payment method, or allows a third party to do so, thereby enabling those members of the public to receive delivery of copies of works protected by copyright in that same Member State, there is a distribution to the public within that Member State, regardless of the domicile of the trader.

This is an application of the ‘targeting’ test for territoriality. Where a particular public is targeted by a distributor, then a distribution to that public may be actionable under the copyright law of the territory targeted.

Making Available to the Public

Where a copyright work is made available online it may be accessible in a number of different jurisdictions. If the work is protected by copyright law in one country but not another, it is important to determine where the work is made available.

This issue is yet to be considered at a European level, however, in *EMI v Sky*^{xiii} the High Court summarised recent European and UK case law in relation to so called ‘site-blocking’. These are cases brought against internet service providers by rights holders in relation to websites which are alleged to facilitate unauthorised file-sharing. The Court confirmed that the question of whether the ISP host can be said to be making works available to the public in the UK requires that the act of communication is ‘targeted’ at the public in the UK.

So what does ‘targeting’ mean?

The leading judgment on targeting was given by the CJEU in *Pammer/Hotel Alpenhof*^{xiii}. The Court set out the following as being relevant factors evidencing an intent to target the public in a different Member State to the one in which the trader is based:

- i) the mention of offering goods in another Member State designated by name;
- ii) evidence of expenditure on keyword searches to facilitate access to the trader’s website from other Member States;
- iii) the mention of telephone numbers with an international code;
- iv) the use of a top-level domain name other than that of the country in which the trader is based;
- v) testimonials from international customers; and
- vi) the use of a language or currency different from that of the home state.

The conclusion from *Pammer/Alpenhof* is that the court will consider the factual circumstances in detail. It will not be sufficient for a company simply to state in its terms and conditions that it does not target customers in a Member State. The court will look at all of the circumstances to determine the true factual position.

There is a puzzling inconsistency between the approaches to jurisdiction and territoriality taken by the CJEU. In *Pinckney* the CJEU rejected the suggestion that the determination of jurisdiction under Article 5(3) of the Brussels Regulation (i.e. where the damage occurred) should be subject to a targeting requirement as has been applied to the question of territoriality (i.e. where the infringing act occurred). This apparent separation between jurisdiction and the substantive right is likely to give rise to some illogical consequences in cases to come.

Conclusion

Copyright law has its roots in attempts to protect authors and artists of hard copy, tangible works such as books and paintings. Adapting this regime to the online world is extremely complex as can be seen from the cases discussed in this article; the rapid rate of technological change can cause the unforeseen consequences of new laws and decisions to materialise very quickly. This leads to

uncertainty amongst national courts within the European Union, which is borne out by the fact that there have been over ten decisions from the CJEU on copyright cases in the past 12 months.

The protection of intellectual property rights is widely acknowledged as being a vital means to support creative industries. The proliferation of online content, and the uncertainty of the law’s application to it, poses rights holders real difficulty in protecting the value of their intellectual property rights. The system can also be seen to be flawed from a user perspective where individuals, such as our every-day internet user, are likely to be unwittingly infringing copyright on a daily basis and the intermediaries crucial to the functioning of digital networks are uncertain as to the extent of their potential liability.

Further, a system where a rights holder may have an incalculable number of potential claims against an indeterminate number of individuals across the world cannot be a satisfactory state for the law to be in.

The UK government’s approach following the Gowers and Hargreaves reviews is to focus on the one hand on educating the public through encouraging initiatives such as the Copyright Hub, and on the other to adopt small reforms where it can (consistently with EU law). Of these reforms, the most significant (to the everyday user) is the imminent introduction of a private copying exception (originally due to be implemented by 1 June 2014). At EU level, more fundamental changes are being considered, with a wide-ranging consultation on reform having closed recently, and a proposal for a new directive anticipated in the not too distant future. If one thing is certain, however, it is that any new legislation will very likely be quickly overtaken by further developments in technology.

Endnotes

- i. [2010] EWHC 3099 (Ch).
- ii. [2011] EWCA Civ 890.
- iii. [2013] UKSC 18.
- iv. C-466/12.
- v. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- vi. C-68/93.
- vii. *IBS Technologies (pvt) Ltd v APM Technologies SA* (Jurisdiction) Chancery Division – unreported.
- viii. C-170/12.
- ix. C-387/12.
- x. Berne Convention for the Protection of Literary and Artistic Works.
- xi. C-5/11.
- xii. [2013] EWHC 2058 (Ch).
- xiii. Joined cases C-585/08 and C-144/09.

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Phil is ranked as a leading individual for Media & Entertainment in the Chambers UK 2014 Guide, which notes that he is considered to be "very articulate and persuasive" and "instils confidence in his clients."

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