Meltwater and digital copyright
Where do we stand?

The Supreme Court has indicated that making temporary copies of a web page on screen (and in an internet cache) when a person browses the internet will not infringe the copyright in the material on the web page (Public Relations Consultants Association Ltd v The Newspaper Licensing Agency and others [2013] UKSC 18) (widely known as Meltwater).

However, given the potential consequences for internet users across the EU, while the Supreme Court made its views on the law clear, it decided to refer the matter to the European Court of Justice (ECJ) for a preliminary ruling before making a final order. Although firm conclusions must therefore await the ECJ’s decision, a number of potential implications are apparent and some of the issues addressed by the lower courts remain good law (see box “Small copyright works and linking”).

THE DISPUTE

The Meltwater group operates a news subscription service by monitoring newspaper websites and providing its subscribers with a collection of material from those websites, including headlines, opening words and extracts from articles, which form a “monitoring report”. The subscribers obtain the report by email or access it on Meltwater’s website. It was common ground that: Meltwater needed a licence from the publishers of the newspapers in order to provide this service without infringing their copyright; and Meltwater’s subscribers needed a licence from the publishers in order to receive the monitoring report by email.

At first instance, the High Court held that the subscribers also required a licence merely to view the monitoring report on Meltwater’s website, and the Court of Appeal unanimously rejected Meltwater’s appeal (see News brief “Copyright in headlines and hyperlinks: writing copyright wrongs”, www.practicallaw.com/8-507-8650). Meltwater appealed to the Supreme Court (see News brief “Digital copyright: seeking European resolution”, www.practicallaw.com/2-526-6499).

Small copyright works and linking

In the lower courts, Meltwater established a number of important issues concerning the limits of copyright protection. These remain good law notwithstanding the decision of the Supreme Court. In particular, the High Court held that:

- Newspaper headlines are capable of being literary copyright works attracting copyright protection in their own right.
- Copying short extracts from a longer copyright work is likely to satisfy the "substantial part" test and infringe the author’s copyright.

The dispute has also raised issues relating to hyperlinking. The High Court held that accessing the newspaper articles via hyperlinks was "more likely than not" to infringe copyright. Unfortunately, this aspect of the decision was not considered further by the Court of Appeal or the Supreme Court. The copyright implications of linking and framing are currently before the European Court of Justice in Svensson and others (C-466/12). Once heard, the references in Svensson and Meltwater should hopefully provide clearer guidance of the law in this area.
SUPREME COURT DECISION

The Supreme Court unanimously took the view that temporary copies of a web page made when browsing the internet should not usually infringe copyright. This was on the basis that the exception in Article S(1) of the Copyright Directive (2001/29/EC) (Article S(1)) applies, which exception provides that making temporary copies of a copyright work, provided certain conditions are satisfied, does not amount to copyright infringement.

In the earlier case of *Infopaq I*, the ECJ set out five conditions that must be satisfied for an act of temporary copying to fall within the Article S(1) exception (C-5/08). These are that the copying:

- Is temporary.
- Is transient or incidental.
- Is an integral and essential part of a technological process.
- Has the sole purpose of enabling a transmission in a network between third parties by an intermediary, or a lawful use, of a work or protected subject-matter.
- Has no independent economic significance.

The Supreme Court noted that this is a helpful formulation, but said that it is important to remember that it is a paraphrase of the legislation; these are not standalone conditions, but rather “overlapping and repetitive”, and should be read together to achieve the combined purpose.

Having said that, the court went on to assess whether each of the five conditions was satisfied on the facts, and took the view that they were. The court rejected a preliminary argument from the Newspaper Licensing Agency that Article S(1) did not apply to end user functions (such as browsing), and gave the view that the copies generated on screen and in an internet cache when a person browses the internet are both temporary and transient.

This is because the creation of such copies is the automatic result of browsing the internet, and they are deleted automatically by a lapse of time. The Article S(1) exception is limited to “temporary” and “transient” copies (which have the same meaning) so the exception does not apply to permanent copying; that is, downloading or other forms of copying which exist until the end user chooses to delete or destroy them.

What constitutes infringement?

If the European Court of Justice confirms the Supreme Court’s indication in *Meltwater* that the exception to infringement in Article S(1) of the Copyright Directive (2001/29/EC) applies to the making of temporary copies of a web page on screen and in an internet cache when a person browses the internet, then the following scenarios may be contrasted for the purposes of determining whether a person infringes copyright:

- If A sends B an email containing copyright material, B will infringe copyright unless B has a licence from the copyright owner.
- If B views copyright material on A’s website without a licence from the copyright owner, B will not infringe copyright.
- If B views copyright material on A’s website without a licence from the copyright owner, B will not infringe copyright.
The court also said that making of copies on screen and in an internet cache is an integral part of a technological process. This is a basic feature of modern computers and, while computers can be designed that do not cache material during internet browsing, the technological processes required to browse the internet could not function “correctly and efficiently” without these acts of copying.

The court noted that use of the copies by a person browsing the internet is lawful. This is because “lawful” in this context excludes any lack of authorisation by the copyright owner (as established by previous ECJ decisions in Football Association Premier League Ltd and others v QC Leisure and others; Karen Murphy v Media Protection Services Ltd (joined cases C-3403/08 and C-429/08) and Infopaq II (C-302/10) (see News brief “Pubs, football and decoders: the end of exclusive content licences?”; www.practicallaw.com/4-509-4992)).

It also confirmed that such on-screen and cached copies have no independent economic value. This is the case unless the internet user downloads or prints the material.

LARGE-SCALE PIRACY?

The Supreme Court rejected the notion that exempting web users from copyright infringement in this way would result in large-scale piracy. The court stressed that the decision has no impact on the copyright owner’s right to take action against those who unlawfully upload copyright material onto the internet in the first place; it makes more sense for the copyright owner’s remedy to lie against these parties, who are more obviously at fault.

However, it remains to be seen how far this approach will be taken. It is arguable, for example, that viewing a newspaper article online is akin to streaming a film, as in both cases the copies of the copyright work made by the user may be seen as “temporary” in the way that the court described.

A NEW BUSINESS MODEL?

It is noteworthy that the fee that Meltwater was required to pay to the publishers in order to upload their copyright material onto its website was fixed on the basis that Meltwater’s subscribers needed their own licences from the publishers. On the basis that the Supreme Court’s decision potentially removes an income stream from the publishers, it will be interesting to see whether this has an impact on the charging model for newspaper copyright in future.

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