

Case No: A3/2010/2888/CHANF

Neutral Citation Number: [2011] EWCA Civ 890

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE CHANCERY DIVISION

Mrs Justice Proudman

[2010] EWHC 3099 (Ch)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 27/07/2011

Before :

THE CHANCELLOR OF THE HIGH COURT

LORD JUSTICE JACKSON

and

LORD JUSTICE ELIAS

Between :

- (1) THE NEWSPAPER LICENSING AGENCY LIMITED
- (2) MGN LIMITED
- (3) ASSOCIATED NEWSPAPERS LIMITED
- (4) EXPRESS NEWSPAPERS
- (5) GUARDIAN NEWS AND MEDIA LIMITED
- (6) TELEGRAPH MEDIA GROUP LIMITED
- (7) INDEPENDENT PRINT LIMITED

Claimant
Respondent

- and -

- (1) MELTWATER HOLDING BV
- (2) MELTWATER NEWS UK LIMITED
- (3) PUBLIC RELATIONS CONSULTANTS ASSOCIATION LIMITED

Defendant
Defendant
Appellant

(Transcript of the Handed Down Judgment of

WordWave International Limited

A Merrill Communications Company

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400, Fax No: 020 7404 1424

Official Shorthand Writers to the Court)

Robert Howe QC and Edmund Cullen (instructed by **Berwin Leighton Paisner LLP**) for the
Claimants / Respondents

Michael Silverleaf QC and Andrew Lykiardopoulos (instructed by **Baker & McKenzie LLP**) for
the **Defendants / Appellants**

Hearing dates : 15 - 16 June 2011

Judgment

The Chancellor :

Introduction

1.

The second to seventh claimants (“the Publishers”) are the publishers of national newspapers. They are members of the first claimant The Newspaper Licencing Agency Ltd (“NLA”). NLA is, as its name suggests, the manager of the intellectual property rights of its members and a licensing body for the purposes of s116(2) Copyright Designs and Patents Act 1988 (“CDPA”). From time to time, most recently in September and December 2009, it promulgates schemes authorising the use of its members’ online publications. The first defendant Meltwater Holdings BV is the Dutch holding company of a group of companies carrying on the business of a commercial media monitoring organisation (“MMO”) called Meltwater News. The second defendant, Meltwater News UK Ltd, is its UK subsidiary through which the group’s business is conducted in the UK. The third defendant, Public Relations Consultants Association Ltd (“PRCA”) is an association formed to represent the interests of public relations consultants carrying on business in the UK. Its members are subscribers to Meltwater News and users of the services of Meltwater.

2.

In broad terms the operations of Meltwater consist of monitoring media websites, including those of the Publishers, with a ‘spider’ computer programme so as to ‘scrape’ or read the contents of those sites. It creates an index of the position of every word in every article on all those sites. The purpose of this operation is to be able to identify for the benefit of its clients every reference within a defined period to a particular name, word or other search term, known as ‘an agent’, specified by its client. The result is then communicated to the client as Meltwater News by means of an email alert. The client may access its Meltwater News either by opening the email or visiting the Meltwater website. The relevant Meltwater News contains a reference to every use of the specified agent within the specified period and sets out (a) a hyperlink to each relevant article, (b) the headline from the article, (c) the opening words of the article after the headline and (d) an extract from the article showing the context in which the agent appears by reproducing the agent and some words immediately preceding and following it.

3.

NLA promulgated a scheme, with an effective date of 1st September 2009, for licensing MMOs, such as Meltwater, the use of its members’ websites by the grant of a Web Database Licence (“WDL”). It then promulgated another scheme, with an effective date of 1st January 2010 for licensing the use of its members’ websites by end-users of the services of MMOs such as public relations consultants. Under the latter scheme the end-user obtained a Web End User Licence (“WEUL”). The terms of a WDL require the clients of the MMO to hold a WEUL. Meltwater contended that it did not require a

WDL in order lawfully to carry on its business. In addition it maintained that the terms of the WDL were unreasonable and, on 16th December 2009, commenced a reference to the Copyright Tribunal under s.119 CDPA. On 28th January 2010 PRCA intervened therein on behalf of its members contending that its members do not require a WEUL in order lawfully to use Meltwater News.

4.

Thus both Meltwater and PRCA are contending before the Tribunal, inter alia, that no infringement of copyright is committed by either Meltwater or an end-user not holding a WDL or WEUL respectively. It is common ground that the Tribunal has no jurisdiction to determine those questions. Accordingly, on 24th May 2010, NLA and the Publishers issued the claim form in this action against Meltwater and PRCA. They claim declarations that (1) Meltwater requires a licence or consent from NLA or the Publishers in order lawfully to provide Meltwater News, and (2) the members of PRCA require such a licence or consent in order lawfully to receive and/or use Meltwater News. Meltwater had agreed to take a WDL at the conclusion of the Tribunal reference, whether or not it was necessary to do so, in order lawfully to continue its Meltwater News Service whilst maintaining its reference to the Tribunal in relation to the terms. Accordingly, on 5th July 2010 Newey J stayed the action against Meltwater and directed an expedited trial of the action against PRCA.

5.

That part of the action was heard by Proudman J on 9th, 10th and 12th November 2010. She gave judgment on 26th November 2010. For the reasons she then explained, which I shall describe in some detail later, she concluded that the members of PRCA require a licence from NLA or the Publishers in order lawfully to receive and/or use the Meltwater News Service provided by Meltwater. Her reasons for that conclusion may be summarised as follows:

(1) The headlines to the various articles reproduced in Meltwater News are capable of being literary works independently of the article to which they relate.

(2) The extracts from the articles reproduced in Meltwater News with or without the headline to that article are capable of being a substantial part of the literary work consisting of the article as a whole.

(3) Accordingly the copies made by the end-user's computer of (a) Meltwater News (i) on receipt of the email from Meltwater, (ii) opening that email, (iii) accessing the Meltwater website by clicking on the link to the article and (b) of the article itself when (iv) clicking on the link indicated by Meltwater News are and each of them is, prima facie, an infringement of the Publishers' copyright.

(4) No such copies are permitted (a) by s.28A CDPA dealing with temporary copies, or (b) as fair dealing within s.30 CDPA, or (c) by the Database Regulations.

(5) Accordingly, the end-user requires a licence from NLA or the Publishers, whether or not in the form of the WEUL in order lawfully to receive and use the Meltwater News Service.

PRCA, but not Meltwater, now appeals with the permission of the judge. It contends that the judge was wrong in relation to each of those issues.

6.

At the forefront of their appeal PRCA contend that the conclusion of the judge, summarised in paragraph 5(5) above, must be wrong in law because it necessitates what they describe as double-licensing. Their starting point is the press clippings agency; whilst the agency requires a licence from the Publishers to make the 'hard' copies they supply to their clients, the latter do not require a licence to receive and read them. PRCA contend that in an online environment a licence to the provider of a

service, Meltwater, must encompass the inevitable copies which will be made when that service is received and read by the end-user. In other words the provision and receipt of the service are but opposite sides of the same coin. They accept that one must be licensed but deny the right of the Publishers to insist that both are licensed. They contend that if that submission is accepted then it matters not if the judge correctly decided the issues I have summarised in paragraph 5(1) to (4) above. In addition PRCA maintain that if the double licensing contention is not well-founded then the judge was wrong in relation to each of those issues.

7.

I am satisfied that the double-licensing argument, though put at the forefront of the argument of PRCA on this appeal, should, logically, be considered after, not before, I have dealt with each of the issues summarised in paragraph 5(1)-(4) above. Accordingly, I will, in due course, deal with all the issues summarised in paragraph 5 in the order in which I have set them out. First, it is necessary to explain the facts and the course of the proceedings in greater detail and to set out the relevant provisions of the CDPA and other legislation.

The Facts

8.

I have sufficiently described the parties and the issues in the foregoing paragraphs. The appropriate starting point is the Publisher's website. Each Publisher has a website on which its publications may be found in digital form. It seeks to regulate the use to which those who access it put its publications by the terms and conditions it imposes and which are to be found on the website itself. The terms and conditions imposed by each Publisher state that (i) any end-user will be bound by such terms and conditions and (ii) an end-user is only permitted to access the website for personal and/or non-commercial use. There is no separate requirement to accept such terms and conditions as a condition of obtaining access to the website although access may be controlled by the use of pay or subscription walls.

9.

It is not disputed that the operation of the Internet Protocol is such that when an end-user, whether Meltwater or its client, accesses a Publisher's website and any particular document on it then copies are generated on the end-user's computer as described in paragraph 5(3) above. In the case of Meltwater, NLA claims that Meltwater requires a licence in the form of the WDL. That form grants to Meltwater a non-exclusive non-transferable licence to 'scrape' the works on the Publisher's website, to copy and index the 'scrapings' for Meltwater's use and to provide them to its clients. The WDL provides that the scrapings are not to exceed 256 characters excluding spaces. By means of involved definitions in the WDL this liberty is conditional on the client of Meltwater itself enjoying the benefit of a WEUL.

10.

It is accepted that such a contractual stipulation, if binding, necessitates the grant of such a licence to the members of PRCA. What is not accepted is that if there were no such stipulation the client of Meltwater would require a licence in order to avoid infringing the Publisher's copyright in the works on its website. Thus in paragraph 83 of Meltwater's statement of case to the Tribunal it asserted that:

"As a matter of law, no licence is required by a UK End User to receive Meltwater News, as the End User commits no act in receiving Meltwater News that infringes any NLA Publisher right."

The same assertion is made in paragraph 30a of PRCA's statement of case and is followed by the explanation that copyright does not subsist in the scrapings independent of the works from which they come or to which they relate. In the particulars of claim in the proceedings commenced by NLA and the Publishers on 24th May 2010 these assertions in the Tribunal proceedings were referred to in paragraphs 18.2 and 21 of the Particulars of Claim and denied in paragraphs 27 and 55 thereof. The Particulars of Claim then proceeded to make the necessary allegations to establish the need for an end-user to have a licence to avoid infringing the Publisher's copyright. As I have said, the claim against Meltwater was stayed by Newey J so that only the liability of an end-user for infringement of copyright is in issue.

11.

On 22nd September 2010 the parties' solicitors conducted searches on Meltwater's website against six agents or search terms, namely BP, Coalition Government, Banking Crisis, Deficit Reduction, Olympics and NLA. Each party then selected 10 search results and the full article from which the scrapings were taken so that the substantiality or otherwise of the part copied in the Meltwater News might be assessed. These were before the judge. In addition she had the benefit of a number of witness statements, on some of which the maker was cross-examined.

The Legislation

12.

The first issue summarised in paragraph 5 above concerns the existence of copyright in the parts of the articles on the Publishers' websites copied in Meltwater News. The basic provisions relating to that issue are contained ss.1, 2 and 3 of CDPA. So far as material they are in the following terms:

"1(1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work-

(a) original literary...works,

[(b) and (c)]

(2) In this Part "copyright work" means a work of any of those descriptions in which copyright subsists.

[(3)...]

2 (1) The owner of the copyright in a work of any description has the exclusive right to do the acts specified in Chapter II as the acts restricted by the copyright in a work of that description.

[(2)...]

3 (1) In this Part-

"literary work" means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes-

(a) a table or compilation, and

(b) a computer program;

[(2) and (3)]”

Thus, this issue relates to whether any part of the document on the publisher’s website which Meltwater has ‘scraped’ and incorporated in the version of Meltwater News sent to its client is itself an original literary work within s.1(1)(a) or a substantial part of a literary work on the Publisher’s website.

13.

Issues 2 and 3, summarised in paragraph 5 above, relate to the issues of infringement which depend on the proper application of provisions contained in ss.16 to 18 CDPA. So far as relevant those provisions are in the following terms:

“16 (1) The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom-

(a) to copy the work (see section 17);

(b) to issue copies of the work to the public (see section 18);

[(c) and (d)]

(e) to make an adaptation of the work or do any of the above in relation to an adaptation (see section 21);

and those acts are referred to in this Part as the "acts restricted by the copyright".

(2) Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.

(3) References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it-

(a) in relation to the work as a whole or any substantial part of it, and

(b) either directly or indirectly;

and it is immaterial whether any intervening acts themselves infringe copyright.

(4) This Chapter has effect subject to-

(a) the provisions of Chapter III (acts permitted in relation to copyright works), and

(b) the provisions of Chapter VII (provisions with respect to copyright licensing).

17(1) The copying of the work is an act restricted by the copyright in every description of copyright work; and references in this Part to copying and copies shall be construed as follows.

(2) Copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form.

This includes storing the work in any medium by electronic means.

[(3) and (4)]

(5) Copying in relation to the typographical arrangement of a published edition means making a facsimile copy of the arrangement.

(6) Copying in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work.

18 (1) The issue to the public of copies of the work is an act restricted by the copyright in every description of copyright work.

(2) References in this Part to the issue to the public of copies of a work are to -

(a) the act of putting into circulation in the EEA copies not previously put into circulation, in the EEA by or with the consent of the copyright owner

or

(b) the act of putting into circulation outside the EEA copies not previously put into circulation, in the EEA or elsewhere,..."

14.

The provisions relevant to the fourth issue, summarised in paragraph 5 above, on which Meltwater relies for a defence to any infringement it may commit are the following:

"28A Copyright in a literary work, other than a computer program or a database, or..., 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) a transmission of the work in a network between third parties by an intermediary; or
- (b) a lawful use of the work;

and which has no independent economic significance.”

“30 (1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.

(2) Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection (3)) it is accompanied by a sufficient acknowledgement.

(3) No acknowledgement is required in connection with the reporting of current events by means of a sound recording, film, broadcast or cable programme.”

The expression “sufficient acknowledgement” is defined in s.178 as meaning

“..an acknowledgement identifying the work in question by its title or other description, and identifying the author unless-

(a) in the case of a published work, it is published anonymously;

(b) in the case of an unpublished work, it is not possible for a person to ascertain the identity of the author by reasonable inquiry;”

15.

In addition Meltwater relies in relation to the act of copying described in paragraph 5(3)(b)(iv) above on the Copyright and Rights in Databases Regulations 1997 SI 3032/1997 and the Database Directive 96/9/EC which they were promulgated to implement. Article 8 of the Directive provides:

“The maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract and/or re-utilize only part of the database, this paragraph shall apply only to that part.”

This is enacted in regulation 19 of The Copyright and Rights in Databases Regulations 1996 SI 1997/3032 in the following form:

“19(1) A lawful user of a database which has been made available to the public in any manner shall be entitled to extract or re-utilise insubstantial parts of the contents of the database for any purpose.

(2) Where under an agreement a person has a right to use a database, or part of a

database, which has been made available to the public in any manner, any term or condition in the agreement shall be void in so far as it purports to prevent that person from extracting or re-utilising insubstantial parts of the contents of the database, or of that part of the database, for any purpose.”

Headlines as original literary works

16.

The evidence before Proudman J included a witness statement of Mr James Bromley, the Chief Operating Officer of the third claimant the publisher of the Daily Mail, on which he was cross-examined, as to how newspaper headlines are produced. The judge described what such evidence was asserted to establish in paragraph 58 of her judgment in these terms:

“The headlines are often striking and substantial, both in terms of content and in terms of length. They are not usually written by the journalists who write the underlying articles but by editorial staff whose specific functions include the composition of headlines. The ability to compose a headline is a valuable and discrete skill and courses exist to teach it. Headlines require skill in order to fulfil the objective of capturing the reader's attention and inducing them to read the article. Thus a headline frequently has some emotional or sentimental 'hook', it may contain a pun, it may summarise the content of the article to which it relates. The process of final selection of a headline is separate from the selection of the article. Often a number of options will be proposed and the decision will be taken by a senior editor. Occasionally the article will be tailored to fit the headline.”

It is clear from paragraph 70 of her judgment that she accepted this evidence at least to the extent that

“...headlines involve considerable skill in devising and they are specifically designed to entice by informing the reader of the content of the article in an entertaining manner.”

17.

The evidence before the judge also included the results of the searches I have referred to in paragraph 11 above. They include some vivid examples of what the evidence of Mr Bromley asserted. The conclusions of Proudman J in paragraphs 71 and 72 of her judgment were:

“71. In my opinion headlines are capable of being literary works, whether independently or as part of the articles to which they relate. Some of the headlines in the Daily Mail with which I have been provided are certainly independent literary works within the **Infopaq** test. However, I am unable to rule in the abstract, particularly as I do not know the precise process that went into creating any of them. I accept [counsel for NLA]'s submission that it is not the completed work as published but the process of creation and the identification of the skill and labour that has gone into it which falls to be assessed.

72. To the extent that the headlines are, as alleged by [counsel for PRCA], joint enterprises with the articles and part and parcel of those articles, the distinction is one without a difference since **Infopaq**. The only circumstances in which the distinction would make a difference are where the headline is totally distinct from the article

through being independently and separately produced by a different person. Only then might the headline fall into a third category in which it neither formed part of the article nor (if it were insufficiently original) would it constitute an independent literary work. However, as I have said, that is not [counsel for PRCA]'s case. I find that some of the headlines are independent literary works; those that are not form part of the articles to which they relate.”

18.

In their grounds of appeal PRCA submit that the conclusion of the judge was wrong in law. They contend that in all but the most exceptional cases headlines are not capable of being literary works separate from the works of which they are the headline. They contend that in reaching the conclusion I have quoted the judge failed to follow the line of authority which, they submit, clearly establishes the proposition on which they rely. In addition they submit that the evidence did not establish that any of the headlines in this case fell into the exceptional category so that there was no sufficient evidence to justify making the declaration the judge made based on the proposition that a headline may be a copyright work.

19.

The starting point for considering this submission must be s.1(1)(a) CDPA. To satisfy that subsection the headline must be “a work” and both “original” and “literary”. A headline is plainly literary as it consists of words. The word “original” does not connote novelty but that it originated with the author. This test was clearly established in the domestic law of England by the decision of Peterson J in **University of London Press Ltd v University Tutorial Press Ltd** [1916] 2 Ch 601 approved by the House of Lords in **Ladbroke (Football) Ltd v William Hill (Football) Ltd** [1964] 1 WLR 273.

20.

The decision of the European Court of Justice in C-5/08 **Infopaq International A/S v Danske Dagblades Forening** [2009] ECDR 16 related to questions of infringement but in paragraphs 33 to 37 the Court considered the conditions necessary to attract copyright protection. The Court said:

“33 Article 2(a) of Directive 2001/29 [the Information Society Directive] provides that authors have the exclusive right to authorise or prohibit reproduction, in whole or in part, of their works. It follows that protection of the author’s right to authorise or prohibit reproduction is intended to cover ‘work’.

34 It is, moreover, apparent from the general scheme of the Berne Convention, in particular Article 2(5) and (8), that the protection of certain subject-matters as artistic or literary works presupposes that they are intellectual creations.

35 Similarly, under Articles 1(3) of Directive 91/250, 3(1) of Directive 96/9 and 6 of Directive 2006/116, works such as computer programs, databases or photographs are protected by copyright only if they are original in the sense that they are their author’s own intellectual creation.

36 In establishing a harmonised legal framework for copyright, Directive 2001/29 is based on the same principle, as evidenced by recitals 4, 9 to 11 and 20 in the preamble thereto.

37 In those circumstances, copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation."

Although the Court refers to an 'intellectual creation' it does so in the context of paragraph 35 which clearly relates such creation to the question of origin not novelty or merit. Accordingly, I do not understand the decision of the European Court of Justice in **Infopaq** to have qualified the long standing test established by the authorities referred to in paragraph 19 above.

21.

In paragraphs 59 to 69 Proudman J considered at some length various authorities to which she had been referred in relation to claims for copyright protection for titles to books and similar matters. Amongst them was the decision of Bennett J in **Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd** [2010] FCA 984 which, as she pointed out in paragraph 62 of her judgment, is the only one in which a newspaper headline had been considered. But even in that case the court recognised that a headline may enjoy copyright protection, see paragraph 46. Similar recognition has frequently been accorded to the possibility that a headline or title may enjoy copyright protection by judges in England, see **Dicks v Yates** (1881) 18 Ch 76, 89; **Lamb v Evans** [1893] 1 Ch. 218, 224; **Francis Day & Hunter Ltd v Twentieth Century Fox Corpn** [1940] AC 112, 123; **Ladbroke (Football) Ltd v William Hill (Football) Ltd** [1964] 1 WLR 273, 286 and **Exxon Corporation v Exxon Insurance Consultants International Ltd** [1982] Ch 119, 138.

22.

In these circumstances, the conclusion of Proudman J in paragraph 71 of her judgment that newspaper headlines are capable of being original literary works is plainly correct; indeed at one stage in his argument counsel for PRCA conceded as much. It was not suggested that she was not entitled to accept the evidence of Mr Bromley as indicated in paragraph 70 of her judgment. In those circumstances the conclusion in the last sentence of paragraph 72 that "some of the headlines are independent literary works.." is, in my view, unassailable. I would reject the submissions of counsel for PRCA on this part of the case.

Extracts as a substantial part of an original literary work

23.

As I have indicated in paragraph 2 above the various editions of Meltwater News provided to clients of Meltwater contain extracts from, in addition to the headlines to, the articles. They are the opening words of the article after the headline and an extract from the article showing the context in which the agent appears by reproducing the agent and some words immediately preceding and following it. The whole must not exceed 256 characters, excluding spaces, in order to comply with the WDL granted to Meltwater. But this limitation does not preclude the inclusion in Meltwater News of as many extracts as there were uses of the search term or agent. The issue is whether those extracts, together with the headline if it is not a separate copyright work, constitute a substantial part, for the purposes of s.16(3)(a) CDPA, of the article on the Publisher's website. If it is then the various acts of copying summarised in paragraph 5(3)(a) above are infringements of the Publishers' copyright in the article on their website.

24.

It is well established that the test of substantiality is one of quality not quantity, see **Newspaper Licensing Agency Ltd v Marks & Spencer plc** [2003] 1 AC 551. In **Infopaq** the European Court of Justice was concerned with a data capturing process in which published articles were scanned as a

whole. Requests were made by reference to a particular search term or word. The response to the request reproduced passages from the article consisting of the search term and the five words immediately preceding and following it. The issue was whether those eleven words constituted a part, for the purposes of the Directive, of the article so as to constitute infringement of the copyright in the article as a whole.

25.

The court considered this issue in paragraphs 44 to 48 in the following terms:

“44 As regards newspaper articles, their author’s own intellectual creation, referred to in paragraph 37 of this judgment, is evidenced clearly from the form, the manner in which the subject is presented and the linguistic expression. In the main proceedings, moreover, it is common ground that newspaper articles, as such, are literary works covered by Directive 2001/29.

45 Regarding the elements of such works covered by the protection, it should be observed that they consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation.

46 Words as such do not, therefore, constitute elements covered by the protection.

47 That being so, given the requirement of a broad interpretation of the scope of the protection conferred by Article 2 of Directive 2001/29, the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article. Such sentences or parts of sentences are, therefore, liable to come within the scope of the protection provided for in Article 2(a) of that directive.

48 In the light of those considerations, the reproduction of an extract of a protected work which, like those at issue in the main proceedings, comprises 11 consecutive words thereof, is such as to constitute reproduction in part within the meaning of Article 2 of Directive 2001/29, if that extract contains an element of the work which, as such, expresses the author’s own intellectual creation; it is for the national court to make this determination.”

26.

Having referred to those passages, Proudman J concluded in paragraph 77 of her judgment that “a mere 11 word extract may now be sufficient in quantity provided it includes an expression of the intellectual creation of the author”. She rejected the rival submissions that it was necessary to consider whether the extract was itself novel or artistically worthwhile or that any 11 words would be enough. Her conclusions expressed in paragraphs 84 to 86 were:

“84. I was taken by both counsel to very many examples of text extracts with (in some cases) the article from which they were taken. In those cases where the headline is an independent literary work, communication of the headline is itself an infringement of the Publisher's copyright. In those cases where it is not, I see no basis for excluding the headline from the text extract. As I have said, [counsel for PRCA]'s case was put on the basis that the headline is part and parcel of the article and conceived as a joint enterprise with it. He sought to show that in many cases it was derived from or reflective of the underlying article. Accordingly the opening text and the headline together comprise significant and striking features of the article.

85. I cannot decide on all or even any of the individual examples given. However I have no doubt that in many (though not all) cases the text extracts, even leaving aside the headline, do contain elements which are the expression of the intellectual creation of the author of the article as a whole. That is so whether one is applying the test of whether there has been an unfair appropriation of the author's labour and skill which went into the creation of the original article or whether parts of sentences have been appropriated "which may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author." (**Infopaq** [47]). In most cases the text extracts (and in particular the headline and the opening text) are not merely isolated words or clauses which in themselves convey no meaning. They provide the tone of the article and generally have the special function of drawing the reader in to the work as a whole.

86. As the text extract comprises not only the hit extract but also the headline and opening text, it provides the End User with as clear an idea as possible of the subject-matter and content of the article, within the constraints affecting the permissible number of characters.”

27.

This conclusion was criticised by counsel for PRCA on the basis that a 256 character extract would be too short and factual to give a reader more than an idea of what the article is about but with no sense of the author's intellectual creation. He commented that if the judge could not decide whether all or indeed any of the extracts she considered would be a substantial part of the article how could she conclude that in many cases the extracts taken would be sufficiently substantial to constitute infringement.

28.

I do not accept these criticisms. Each time Meltwater produces an edition of its news for a client, depending on the search term or agent, a large number of extracts are taken from a variety of publications, in some cases several from the same article. Given the principles to be applied it seems to me to be inevitable that some of them will constitute a substantial part of the original so as, when copied by the client, prima facie, to amount to an infringement of copyright in the original literary work. What is in issue is not whether any particular extract is a substantial part of the original but whether the conduct of the business of Meltwater is such as, on a balance of probability, likely from time to time to cause its clients, prima facie, to infringe the copyright of the Publishers in the original work so as to justify the making of the declaration. The judge concluded that it was. I see no ground on which this court would be entitled to interfere with her conclusion.

29.

I have, as the judge did, considered the possibility of the extracts constituting substantial parts separate from the headlines. The proper question is whether the relevant part of Meltwater News comprising both the headline and the extracts is such as, when copied by the clients, prima facie, to infringe the Publishers' copyright in the original work. In my view the probability of that occurring on a regular basis and to a significant extent is substantial. Accordingly the activities of clients of Meltwater in receiving and using Meltwater News are sufficiently likely to constitute prima facie infringements of copyright to warrant the declaration the judge made. I turn then to the various defences on which PRCA relies.

Temporary Copies

30.

I have set out the terms of s.28A CDPA on which PRCA relies in paragraph 14 above. This defence, if applicable, could only apply to the acts of copying involved in accessing the Meltwater website to view the relevant edition of Meltwater News or the Publishers' website to view the article. The section was inserted by Copyright and Related Rights Regulation 2003 SI 2003/2498 to give effect to Article 5 of the Information Society Directive 2001/29/EC.

31.

The terms of that article were considered by the European Court of Justice in **Infopaq**. The Court pointed out in paragraph 54 that the article set out five cumulative conditions, namely:

- (a) the act is temporary;
- (b) it is transient or incidental;
- (c) it is an integral and essential part of a technological process;
- (d) the sole purpose of that process is to enable a transmission in a network between third parties by an intermediary or a lawful use of a work or protected subject-matter;
and
- (e) the act has no independent economic significance.

The Court amplified those conditions in paragraphs 63 and 64 in these terms:

“63. This finding is supported by recital 33 in the preamble to Directive 2001/29 which lists, as examples of the characteristics of the acts referred to in Article 5(1) thereof, acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently. Such acts are, by definition, created and deleted automatically and without human intervention.

64. In the light of the foregoing, the Court finds that an act can be held to be 'transient' within the meaning of the second condition laid down in Article 5(1) of Directive 2001/29 only if its duration is limited to what is necessary for the proper completion of the technological process in question, it being understood that that process must be

automated so that it deletes that act automatically, without human intervention, once its function of enabling the completion of such a process has come to an end.”

32.

This defence was rejected by Proudman J. As she explained in paragraph 109 of her judgment:

“Thus the temporary copies exception is solely concerned with incidental and intermediate copying so that any copy which is 'consumption of the work', whether temporary or not, requires the permission of the copyright holder. A person making a copy of a webpage on his computer screen will not have a defence under s. 28A CDPA simply because he has been browsing. He must first show that it was lawful for him to have made the copy. The copy is not part of the technological process; it is generated by his own volition. The whole point of the receipt and copying of Meltwater News is to enable the End User to receive and read it. Making the copy is not an essential and integral part of a technological process but the end which the process is designed to achieve. Storage of the copy and the duration of that storage are matters within the End User's control. It begs the question for decision whether making the copy is to enable a lawful use of the work. Moreover, making the copy does have an independent economic significance as the copy is the very product for which the End Users are paying Meltwater.”

In paragraphs 110 she pointed out the consequences if this were not so.

33.

Counsel for PRCA submits that the judge was wrong. He contends that the judge took too narrow a view of the scope of the section. His starting point is recital 33 to the Information Society Directive referred to by the European Court of Justice in paragraph 63 of its judgment in **Infopaq**. That recital is in the following terms:

“(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. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.”

34.

He relies on the reference to “browsing as well as acts of caching” for the proposition that the exception for which article 5 provides is to enable such a use, that is browsing, by making lawful the copies made in connection with it. Such copies then comply with the conditions referred to in **Infopaq**. I do not accept that submission for the reasons given by counsel for NLA.

35.

As is clear from a consideration of recital 33 as a whole, the reference to “browsing” is “to the extent that they meet these conditions”. ‘They’ refers to the acts of reproduction. The acts of reproduction are those occasioned by the voluntary human process of accessing that webpage. Accordingly, they fail to satisfy any of the conditions to which recital 33 refers. S.28A does not provide even a limited defence to the claims of infringement to which the business of Meltwater is likely to give rise.

Fair Dealing

36.

The defence of fair dealing is conferred by s.30 CDPA. I have quoted its terms in paragraph 14 above. For such a defence to succeed the relevant dealing with the work must be for either (1) the purpose of criticism or review, or (2) reporting current events, and in either event (3) is accompanied by a sufficient acknowledgement. PRCA contends that each of those conditions is satisfied. Proudman J disagreed. With regard to the first she said in paragraph 127:

“The End User does not apply his critical faculties at all to the work, whether the article or the text extracts. The purpose of Meltwater News is merely to enable the End User to decide whether he wants to see the content of the articles. However widely I interpret the expression "criticism or review", I do not see that the End User's activities are comprised within it.”

37.

Counsel for PRCA submits that the judge took too narrow a view of what is involved in the concept of criticism or review. He relies on the fact that the concept is a wide and indefinite one, see **Pro Sieben AG v Carlton UK TV Ltd** [1999] 1 WLR 605, 614 and is required by article 5(3)(d) of the Information Society Directive 2001/29/EC. I can only say that I disagree. No one is criticising the parts of the article which Meltwater has ‘scraped’. Nor is any one reviewing those parts of the article. Nor, generally, do they seek to criticise or review the article from which they are taken.

38.

Similarly the judge rejected the second condition. In paragraph 129 she said:

“Be that as it may, it seems tortuous to say that copying for the purpose of seeing mentions of the End Users' clients in the news and the stories with which they have been concerned is "reporting current events". As Lord Phillips of Worth Matravers MR said (in handing down the judgment of the Court of Appeal) in **Ashdown** at [65],

"The defence provided by section 30(2) is clearly intended to protect the role of the media in informing the public about matters of current concern to the public."

Meltwater News is not intended for public consumption; it is tailored, and addressed exclusively, to particular End Users for their clients' purposes.”

39.

Counsel for PRCA contended that the judge was wrong in relation to this condition too. He suggested that by means of Meltwater News Meltwater reports current events to its clients and the clients report current events to their end-users. This is, with respect, absurd. The underlying article may have nothing to do with current events. Even if it did the scraped extracts are not made for the

purpose of reporting current events but so that the end-user may see when, where and in what context the agent or search term was used.

40.

The judge also rejected the suggestion that there was a sufficient acknowledgement to satisfy s.178 in paragraphs 142 to 147 of her judgment. In essence she concluded that there was not because the names of the authors of either the extracts or the headlines were not given. It is not suggested on this appeal that the names are given. Complaint is made of the NLA and its members not giving the names by 'tagging' the article. The suggestion is made that the NLA and its members are somehow disabled from relying on this part of s.30 because they did not provide the names in the first place. I see no warrant for that submission. There is no obligation to give the names whether by tagging or otherwise. The statutory condition for the existence of the defence is explicit and has not been complied with.

41.

Finally I should refer to the fact that even if these conditions had been complied with Meltwater's dealings were not 'fair'. The judge rejected the fair dealing defence on the ground that the dealing was for commercial purposes and was encouraging end-users to infringe the Publishers' copyright. I agree, and the counter argument put forward by PRCA does not begin to suggest otherwise. I have dealt with the fair dealing defence somewhat cursorily as it was not considered by counsel for PRCA as sufficiently substantial to be advanced orally either in opening or reply. The counter submissions of counsel for NLA both in writing and orally are compelling.

The Database Regulation

42.

I have set out the relevant regulation in paragraph 15 above. PRCA contended in relation to the act of copying specified in paragraph 5(3)(3)(b)(iv) that, as the Publishers' websites were databases within the definition contained in s.3A CDPA, article 8 of the Directive and regulation 19 applied so as to prevent the Publishers from inhibiting the extraction and reutilization of the parts of its contents as are scraped by Meltwater. This was rejected by Proudman J in paragraph 91 of her judgment. She considered that:

“...all the acts of infringement relied on against PRCA's members relate to the contents of the articles. There is nothing suggesting infringement of the arrangement or structure of the website as a database. It is untenable on the case as presented by NLA to suggest that a text extract is a copy of a substantial part of the effort that went into the structure and arrangement of the articles within the website.”

43.

PRCA submit that the judge was wrong but on a rather different argument to the one she dealt with. The argument now put is to the effect that the conditions of use of the Publishers' websites prevent abstraction or reutilisation of both substantial and insubstantial parts of the website as a database. Accordingly, so it is submitted, the conditions of use go beyond what is permitted and are therefore wholly void. In my view this argument is misconceived. First the effect of regulation 19(2) is to invalidate the contractual condition only “insofar as” it precludes a person from extracting or re-utilising insubstantial parts of the contents of the database. Accordingly it could not be, as submitted, wholly void. The contractual condition must be valid insofar as it prevents the extraction and re-utilization of a substantial part. Second, the article and regulation are concerned only with what

would otherwise be an infringement of the database right. They do not cover acts which would be infringements of copyright in a literary work on the database. Third, in any event, they only apply in favour of a person who is a lawful user which, absent a WEUL, the end-user is not.

Double Licensing

44.

For the reasons I have endeavoured to explain in paragraphs 16 to 29, in my view, the receipt and use by an end-user of Meltwater News will constitute an infringement of the copyright of the Publishers in either or both the headlines or the articles on their websites. For the reasons I have given in paragraphs 30 to 43 I do not consider that any of the defences advanced by PRCA would absolve the end-user from liability for such infringements. It follows that subject to the fifth issue summarised in paragraph 5(5) above the end-user will for that reason alone require a WEUL to avoid such liability. That is the context in which PRCA's submission must be considered.

45.

The submission starts with the claim by NLA that as both the provider of the online news search service, that is Meltwater, and the users of that service, that is the end-user, undertake infringing acts they both need licences from NLA and the Publishers. PRCA then contends that in order to assess whether that submission is correct in relation to the end-user it is necessary to assume that the online news search service does have a licence. The conclusion PRCA invites this court to draw is that as the former is licensed to send, and the copies of which complaint is made are the inevitable consequence of doing so, therefore, by necessary implication, the act of receiving must be licensed. Counsel suggested that sending and receipt are two sides of the same coin. Before the judge this argument was put on the twin legal bases of derogation from grant and/or exhaustion of rights.

46.

Proudman J considered this argument, in all its forms, at some length in paragraphs 46 to 55 of her judgment. She neatly pointed out the fallacy in the argument in paragraph 50 where she said:

“However the issue is not to my mind one of derogation from grant or exhaustion. The outcome hinges on the answer to the very question which I am asked, namely whether the End Users need a separate licence for their activities in relation to Meltwater's services. It cannot be the answer to that question that a mere grant of a licence to Meltwater would obviate the need for a WEUL.”

She went on to point out in paragraphs 52 and 53 that PRCA admitted that on receipt of Meltwater News the recipient made further copies on his computer. She concluded in paragraph 54:

“Thus irrespective of whether or not End Users copy text extracts to their clients PRCA admits that receipt of Meltwater News involves copying by the End Users on their computers of material which has already been reproduced by Meltwater.”

47.

The same argument is put by PRCA on this appeal. They contend in paragraph 12(i) of their substantial written argument that “the NLA are attempting to licence twice the same acts of copying”. This contention is factually incorrect. The WDL does not authorise the end-user to make any of the copies made on his computer. Accordingly the acts and omissions of the end-user must be considered without regard to the terms of the licence authorising Meltwater to make the copies its activities

involve. The copies created on the end-user's computer are the consequence of the end-user opening the email containing Meltwater News, searching the Meltwater website or accessing the Publisher's website by clicking on the link provided by Meltwater. They are not the same copies as those sent by Meltwater. PRCA admitted as much in its defence and the agreed statement of facts. For these reasons I consider that the double licensing contention is unmaintainable.

Summary of conclusions

48.

I would dismiss this appeal for the reasons given by Proudman J in her clear, careful and comprehensive judgment. That said I consider that the declaration she made goes further than her findings or my conclusions warrant. It is not the case that every recipient and/or user of Meltwater News will inevitably infringe the copyright so as in all cases to require a licence or consent from the publisher. There may be some cases in which neither the headline nor the 'scrapings' constitute a copyright work or a substantial part of a copyright work. A licence would not be required in such a case but there cannot be many of them. Accordingly I consider that the form of declaration requires some modification such as the insertion of the words "most if not all" before the words "members of the PRCA".

49.

In that connection I would note an argument adduced by counsel for the NLA in support of the declaration made by the judge to the effect that the end-user is bound to obtain a licence by virtue of the terms and conditions imposed by the publishers on the use of their websites. This was disputed by counsel for PRCA on the grounds that until the article on the website is accessed the existence and terms of the conditions are not known so that the person accessing the article is not bound by them, cf **Thornton v Shoe Lane Parking** [1971] 2 WLR 585. I do not consider that it is necessary to enter into that controversy, the outcome of which might not be the same for each publisher. The purpose of these proceedings is to ascertain the rights of the parties in relation to copyright, not some independent contractual right of a publisher. Evidently this was the view of the judge, see paragraph 100 of her judgment. I agree with her.

Lord Justice Jackson

50. I agree.

Lord Justice Elias

51. I also agree.