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**‘Headlines and hyperlinks: UK copyright law post-Infopaq - Newspaper Licensing Agency Ltd and others v Meltwater Holding BV and other companies’<sup>1</sup>**

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*Introduction*

At the time of the decision of the European Court of Justice in *Infopaq*<sup>2</sup>, a number of copyright lawyers wondered what the eventual impact of the decision would be on UK law under the Copyright, Designs and Patents Act 1988 (CDPA).<sup>3</sup> With the decision of the High Court in *Newspaper Licensing Agency v Meltwater*, we have the first indication of how the decision in *Infopaq* has the potential to influence decisions of the UK courts.

In this regard, the relevant points articulated in *Infopaq* must be recalled before the present case is examined. These points are as follows. Firstly, the originality standard for subsistence of all works is based around the idea of the author’s ‘intellectual creation’.<sup>4</sup> Secondly, even an extract of 11 words could amount to an example of copyright infringement, if these 11 words are a reflection of the intellectual creation of the author.<sup>5</sup> Thirdly, the European Court of Justice stressed that the ‘exceptions’ to copyright, as contained in the Information Society directive, must be interpreted narrowly.<sup>6</sup>

*The Facts of the case*

Meltwater offers its customers an online service for media monitoring. By utilising a search term mechanism, customers, or ‘end users’, are able receive reports from Meltwater of articles containing the search terms. Typically included within each report are the article’s headline (in the form of a hyperlink to the article itself), the article’s opening words, and a text extract or a number of extracts provided in order to illustrate the context of the particular search terms.

The primary issue of the case concerned whether the ‘end users’ - namely the Public Relations Consultants Association Limited - required a licence from the Newspaper Licensing Agency in order to receive the Meltwater reports.

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<sup>1</sup> [2010] EWHC 3099 (Ch).

<sup>2</sup> *Infopaq International v. Danske Dagblades Forening* (C-5/08) [2010] F.S.R. 495.

<sup>3</sup> E. Derclaye, ‘Wonderful or Worrisome? The Impact of the ECJ Ruling in *Infopaq* on UK Copyright Law,’ *European Intellectual Property Review* 32(5) (2010), 247 and C. Handig, ‘*Infopaq International A/S v Danske Dagblades Forening* (C-5/08): is the term "work" of the CDPA 1988 in line with the European Directives?’, *European Intellectual Property Review* 32(2) (2010), 53.

<sup>4</sup> *Infopaq International v. Danske Dagblades Forening* (C-5/08) [2010] F.S.R. 495 at [33]-[38], [42]-[47].

<sup>5</sup> *Infopaq International v. Danske Dagblades Forening* (C-5/08) [2010] F.S.R. 495 [38] and [48]-[49].

<sup>6</sup> *Infopaq International v. Danske Dagblades Forening* (C-5/08) [2010] F.S.R. 495 at [56].

### *The Subsistence Point*

Proudman J. stated that in light of *Infopaq*, a headline can amount to an original literary work in its own right provide that it is the author's intellectual creation. Proudman J. noted that although there was UK and Australian case law which arguably pointed to the contrary<sup>7</sup>, the court felt bound to make this ruling due to the *Infopaq* decision. The court also noted that even a headline that did not amount to an independent literary work in its own right could still be described as forming part of the article which it headed.

### *The Infringement Point*

According to Proudman J., a headline or a short extract from the text may amount to a 'substantial part' of a copyright work. Once again the court relied on *Infopaq* here by stating that the quality of the extracted part is what is crucial. In other words, if the part is a reflection of the author's intellectual creation, then it will probably amount to a 'substantial part'. However, on this point it was also noted that the decision is more or less in line with the dicta of Lord Hoffmann in *Newspaper Licensing Agency Limited v. Marks & Spencer plc*<sup>8</sup>. In this view, *Infopaq* merely confirmed the previous position under UK law, as stated by Lord Hoffmann.

Commenting on this issue, Proudman J. remarked:

"The effect of *Infopaq* is that even a very small part of the original may be protected by copyright if it demonstrates the stamp of individuality reflective of the creation of the author or authors of the article. Whether it does so remains a question of fact and degree in each case".<sup>9</sup>

In light of the facts, the court stated that without a licence, the 'end users' were infringing the publishers' copyright.

### *The Database Point*

The court also had to decide whether the newspapers' s. 3 CDPA database right was breached. It was held that any copying undertaken by the 'end users' was not copying of the arrangement of the database and therefore Proudman J. found no database infringement.

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<sup>7</sup> See Proudman J. at [61] (see also [62]-[67]). Proudman J. discusses *Lamb v. Evans* [1893] 1 Ch 218, *Francis Day & Hunter Limited v. Twentieth Century Fox Corp Limited* [1940] AC 112, *Ladbroke v. William Hill* [1964] 1 W.L.R. 273, *Exxon Corporation v. Exxon Insurance Consultants International Limited* [1982] Ch 119, *Shetland Times Limited v. Wills* [1997] F.S.R. 604 and *IceTV Pty Limited v. Nine Network Australia Pty Limited* (2009) 239 C.L.R. 458 and in particular the comments of Bennett J. in the Federal Court of Australia in *Fairfax Media Publications Pty Limited v. Reed International Books Australia Pty Limited* [2010] FCA 984 at [28]-[50].

<sup>8</sup> [2001] UKHL 38; [2003] 1 AC 551 at [19].

<sup>9</sup> *Newspaper Licensing Agency Ltd and others v. Meltwater Holding BV and other companies* [2010] EWHC 3099 (Ch) at [83].

### *The Temporary Copying Exception Point*

Under s. 28 CDPA there is an exception for temporary, transient and technological copying. In light of *Infopaq*, Proudman J. found that the temporary copying exception must be interpreted narrowly and that in the circumstances s. 28 could not justify the infringement.

### *The Fair Dealing Point*

Under s. 30 CDPA there is an exception for fair dealing in relation to either ‘criticism or review’ or for the purpose of ‘reporting current events’. Sufficient acknowledgement must be given in both cases. Proudman J. noted that in light of *Infopaq*, such exceptions must be interpreted narrowly. On the specific exceptions, Proudman J. ruled that he could not fit activities of the ‘end users’ within ‘criticism and review’ or ‘reporting current events’.<sup>10</sup>

### *Conclusion*

In *Newspaper Licensing Agency v Meltwater*, Proudman J. made three important points. Firstly, subsistence of copyright in requires a level of originality based upon the author’s intellectual creation. In this regard, the fact that even a headline may now be considered to be an original literary work begs the interesting question of whether there is any limit as to how small an original literary work can be. On this point, the law in the UK may have been altered by the decision in *Infopaq*. Certainly, it appears that Proudman J. felt bound by *Infopaq* in coming to this decision. Secondly, the idea of ‘substantial part’ depends upon a qualitative test which focuses upon whether the ‘stamp of individuality’ is present in the extracted part. Given the previous dicta of Lord Hoffman,<sup>11</sup> this probably does not amount to a change in UK law. Thirdly, it was reiterated that the exceptions to copyright must be interpreted narrowly, a point which may be of interest to the ongoing Hargreaves Review of Intellectual Property,<sup>12</sup> particularly in light of remarks by Prime Minister Cameron who recently argued in favour of expanding the copyright exceptions in the UK.<sup>13</sup>

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<sup>10</sup> *Newspaper Licensing Agency Ltd and others v. Meltwater Holding BV and other companies* [2010] EWHC 3099 (Ch) at [127]-[129].

<sup>11</sup> *Newspaper Licensing Agency Limited v. Marks & Spencer plc* [2001] UKHL 38; [2003] 1 AC 551 at [19].

<sup>12</sup> <http://www.ipo.gov.uk/about/press/press-release/press-release-2010/press-release-20101217.htm>

<sup>13</sup> <http://www.bbc.co.uk/news/uk-politics-11695416> and <http://www.taylorwessing.com/topical-issues/details/david-cameron-faces-european-constraints-in-introducing-a-us-fair-use-copyright-exception-2010-11-10.html>