

# Do copies made while browsing infringe?

Iona Silverman\*

The decisions of the High Court for England and Wales and then of the Court of Appeal in *Newspaper Licensing Agency Ltd and others v Meltwater Holding BV and others*<sup>1</sup> that local copies made on a computer screen and on a computer's hard drive when browsing can infringe copyright were bold and somewhat controversial.

The specific question of whether such local copies constitute temporary copies for the purposes of Article 5(1) of the Information Society Directive<sup>2</sup> was appealed to the Supreme Court.<sup>3</sup> In contrast to the Court of Appeal, the Supreme Court recognized the broad implications and therefore the importance of the question, acknowledging that a result which would make infringers of many millions of ordinary users of the internet was unacceptable.<sup>4</sup>

Given the transnational dimension of the issue, the Supreme Court referred the question of temporary copies to the Court of Justice of the European Union (CJEU) for a preliminary ruling on the basis that the issue was of such importance that it should be resolved uniformly across the EU. The Supreme Court was not without its own view, however. In his unanimously agreed decision of 17 April 2013, Lord Sumption sets out his conclusions on the effect of the Directive, as the CJEU has interpreted and applied it to date. In his view, both on-screen and cache copies made while browsing should fall within the temporary copying exception.

## The temporary copying exception

This case originated in the Copyright Tribunal when news aggregator Meltwater applied to the Tribunal to determine the reasonable terms of its licence with the Newspaper Licensing Agency (NLA). The NLA then sued Meltwater and its users (represented by the Public Relations Consultants Association Ltd (PRCA)) in the High Court for copyright infringement. Meltwater allegedly infringed by aggregating news content and distributing links with short headlines and snippets

## The author

- Iona Silverman is an IP lawyer currently based in the London office of international law firm Baker & McKenzie.

## This article

- The decisions of the High Court and then the Court of Appeal in *The Newspaper Licensing Agency Ltd and others v Meltwater Holding BV and others* that local copies made on a computer screen and on a computer's hard drive when browsing can infringe copyright was a bold and somewhat controversial one.
- This article analyses the Supreme Court's decision in the ensuing appeal, *Public Relations Consultants Association Ltd v The Newspaper Licensing Agency Ltd and others*, to refer the question to the Court of Justice of the European Union (CJEU).
- The article explores and considers the detailed opinion of Lord Sumption on the application of the temporary copying exception.

from articles; users allegedly infringed by receiving that content and by reading the news articles on the publishers' websites.

Since Meltwater had agreed to enter into a licence with the NLA, the High Court granted a stay in relation to the question of whether Meltwater infringed copyright by providing snippets of content to its users; only issues relating to users reading content provided by Meltwater proceeded. In particular, the PRCA disagreed that its members infringed copyright by making local on-screen and hard-drive copies of articles when reading them online. It argued that these copies fell under the temporary copying exception.

\* Email: [iona.silverman@bakermckenzie.com](mailto:iona.silverman@bakermckenzie.com). Disclaimer: Baker & McKenzie acts for Meltwater and PRCA in this case.

1 [2010] EWHC 3099 (Ch) and [2011] EWCA Civ 890.

2 Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society.

3 *Public Relations Consultants Association Ltd v The Newspaper Licensing Agency Ltd and others* [2013] UKSC 18.

4 Ibid, para 36.

Article 5(1) of the Information Society Directive<sup>5</sup> creates an exception to Article 2 (the reproduction right) for copies

which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary, or
- (b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance.

Recital 33 of the preamble to the Information Society Directive states that the temporary copying exception 'should include acts which enable browsing as well as acts of caching to take place' and that 'a use should be considered lawful where it is authorized by the right-holder or not restricted by law'.

At first instance in *NLA v Meltwater*, Proudman J said, however, that '[a] person making a copy of a webpage on his computer screen will not have a defence under s.28A Copyright, Designs and Patents Act 1988 simply because he has been browsing',<sup>6</sup> meaning that browsing is not allowed unless the person browsing has permission to do so from the owners of the content on the web pages which they are viewing. In her view, 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. Further, she held that the exception cannot have been intended to legitimize all copies made in the course of browsing, otherwise users would be permitted to watch pirated films and listen to pirated music. As the Supreme Court clarifies at para 36 of its decision, legitimizing browsing does not prevent rightsholders from taking action against those who upload unauthorized content.

The Court of Appeal agreed, saying:

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.<sup>7</sup>

The outcome was therefore that copies made when browsing were infringing copies: unless consent was given, internet users infringed copyright by reading material online.

It is a general principle of copyright law that consumption of a work (for example reading a book) is *permitted*, whereas reproduction (for example making a copy of the whole or a substantial part of that book) is *permissible*. Historically, restriction on consumption has been limited to secondary infringement by possessing illegal copies; a licence was not required in order to merely consume a work. However, in the digital world, local copies (including hard-drive and on-screen copies) must be created in order to allow a user to read a web page.

The Court of Appeal's decision in *NLA v Meltwater* (combined with the CJEU's judgment in *Infopaq*)<sup>8</sup> moved the law towards allowing consumption on the basis of permission,<sup>9</sup> without considering the wider impact that this might have on legitimate internet browsing.

The decisions in *NLA v Meltwater* have been controversial. Some found the Court of Appeal's decision disappointing, condemning it for failing to confront the difficult issues of law with which it was presented.<sup>10</sup> Others have observed that the real point of the decisions is to affirm that the internet is not a copyright-free space, and that technological inconvenience is no reason for ignoring the rights of copyright owners online.<sup>11</sup> The High Court and the Court of Appeal were keen to protect rightsholders from piracy, which continues to be a very real problem in the digital world where illegal downloading and peer-to-peer file sharing are commonplace. The Supreme Court was clear however that the application of the temporary copying exception to browsing is a distinct issue from that of online piracy.

## Proposed legislative reform

The issue of whether browsing should explicitly be made legal was considered in July last year by the House of Commons in a public committee meeting on the

<sup>5</sup> Applied in the UK by the Copyright Designs and Patents Act 1988, s 28A.

<sup>6</sup> [2010] EWHC 3099 (Ch), para 109.

<sup>7</sup> [2011] EWCA Civ 890, para 35.

<sup>8</sup> Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-06569.

<sup>9</sup> Iona Harding 'Is *NLA v Meltwater* the end of browsing?' (2012) *JIPLP* 525, 525.

<sup>10</sup> Jeremy Phillips 'Bently slams "very disappointing" ruling in *Meltwater* IPKat (27 July 2011). Available at <http://ipkitten.blogspot.fr/2011/07/bently-slams-very-disappointing-ruling.html> (accessed 21 June 2013).

<sup>11</sup> Justine Pila 'Copyright and Internet Browsing' (2012) 128 *Law Quarterly Review* XXX, 204–8.

Enterprise and Regulatory Reform Bill.<sup>12</sup> The following proposed new section was debated:

30A Sharing and viewing on the internet

Where work is made available to the public at a particular web address with the permission of the owner of the copyright in that work, copyright shall not be infringed by—

- (a) any circulation of that web address, or of its title, or of another web address that redirects to that web address;
- (b) the downloading of any data required to display that work at that address, and any subsequent processing of that data, including processing for display, provided that it does not result in any publication elsewhere of the work or an adaptation of the work.

This provision would have made it clear that browsing content which has been legitimately placed on a website does not infringe copyright.

Labour MP Fiona O'Donnell said that '[i]t is evident that the law has not caught up with new media and the worldwide web, and the Government must respond.' She then quoted Professor Lionel Bently, of Cambridge University, who takes the rational view that '[t]here is something fundamentally wrong with a legal regime which renders the innocent acts of many millions of citizens illegal'.<sup>13</sup>

Although Business Minister Norman Lamb had previously said that the copyright licensing system requires modernization in order to be fit for the 21st century, he did not support O'Donnell's argument in this instance, saying that the issue of browsing had been dealt with in *NLA v Meltwater* and that the Government should therefore await the outcome of the case in the Supreme Court before passing any further legislation.

Ultimately no action was taken (only 6 of the 17 Committee members voted to pass the proposed s 30A) as the Committee decided to wait for the Supreme Court's decision before passing any legislation. However, the fact that the issue was debated at such a high level confirms its importance.

## The Supreme Court's decision

The Supreme Court recognized the public interest in the question of whether copies made when browsing are temporary, saying:

The issue has reached this court because it affects the operation of a service which is being made available on a commercial basis. But the same question potentially affects millions of non-commercial users of the internet who may, no doubt unwittingly, be incurring civil liability by viewing copyright material on the internet without the authority of the rights owner, for example because it has been unlawfully uploaded by a third party.<sup>14</sup>

It was the far-reaching consequences, in particular the transnational dimension of the issue and the fact that the internet has become a basic technical facility used by millions,<sup>15</sup> which convinced the Supreme Court that any decision on temporary copying should be referred to the CJEU for a preliminary ruling so that the issue could be resolved uniformly across the EU.

Despite referring the question of whether copies made when browsing constitute copies which are (i) temporary, (ii) transient or incidental and (iii) an integral and essential part of the technological process, for the purposes of Article 5(1) of the Information Society Directive, the Supreme Court was not without its own opinion.

Before giving its view on each of the conditions of Article 5(1), which it said should be read together as they are overlapping and repetitive, as 'each of them colours the meaning of the others',<sup>16</sup> the CJEU gave a helpful summary of the EU case law on Article 5(1): namely *Infopaq I*,<sup>17</sup> *FAPL*<sup>18</sup> and *Infopaq II*.<sup>19</sup>

## CJEU case law

### *Infopaq I*

The Supreme Court first considered the CJEU's approach to the temporary copying exception in *Infopaq I*, a case referred by the Danish courts. *Infopaq* is a news aggregation service, which used a data capture process involving the creation of copies at four successive stages: (i) the creation of a scanned image of the original article, (ii) the conversion of that image into a searchable text file, (iii) the extraction of the keywords from that text file together with the five words on either side, and their storage as a text file, and (iv) the printing out and retention of copy (iii).

The issue in *Infopaq I* turned on the temporary or transient character of copies made as part of this data capture process. The CJEU held that Article 5(1) might

12 Public Bill Committee, Thursday 12 July 2012 (Afternoon), Graham Brady in the Chair, Enterprise and Regulatory Reform Bill.

13 Ibid.

14 [2013] UKSC 18, above, n 3, para 4.

15 Ibid, para 38.

16 Ibid, para 11.

17 Case C-5/08 *Infopaq*, above, n 8.

18 Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd v QC Leisure and Karen Murphy v Media Protection Services Ltd*, 4 October 2011.

19 Case C-302/10 *Infopaq International A/S v Danske Dagblades Forening*, 17 January 2012.

apply to scanned images, images converted into searchable text files and keywords extracted from that text file, if the Danish court was satisfied that these copies were deleted automatically when the technical need for them had passed. The CJEU held however that the printed copies were not ‘transient’: they were destroyed only on human intervention, i.e. when a person actively chose to destroy them. The CJEU was of the view that the requirement that the copying be an integral and essential part of a technological process meant that it could only be ‘temporary’ or ‘transient’ if it was inherent in the technological process that the copy would be deleted when that process was complete.

The CJEU also confirmed that the temporary copying exception applies to copies made for the sole purpose of enabling a lawful use, and that internet browsing could be a lawful use.<sup>20</sup>

## FAPL

The fourth and fifth conditions of Article 5(1) were analysed by the CJEU in *FAPL*. In this case the defendant, Mrs Murphy was the owner of a pub. She had subscribed to a television service in Greece, and used a Greek satellite decoder to show football matches in her pub in the UK. The temporary copies made in the memory of the decoder and on the television screen in the course of the streaming of the football matches were alleged to infringe copyright. Although the facts of *Infopaq I* and *NLA v Meltwater* are better aligned, because both cases relate to news aggregation, the Supreme Court noted in *NLA v Meltwater* that the decoder and screen copies in *FAPL* are, in technically speaking, very similar to the hard-drive and screen copies in issue in *NLA v Meltwater*. Another similarity between *NLA v Meltwater* and *FAPL* is that the infringement alleged was against consumption of a work—reading an extract from an article or against watching a football match. In *FAPL* the CJEU held that, while any exception from the right of the copyright owner to control reproduction must be strictly construed, that right must be balanced against the purpose of the exception, which was to encourage the development and operation of new technologies and the rights of users who wished to use those technologies.<sup>21</sup> It further held that the copies made

in the satellite decoder and on television screens fulfilled the conditions of Article 5(1).<sup>22</sup>

Regarding the question of lawful use, the CJEU held that a use is lawful, whether or not the copyright owner has authorized it, as long as it is consistent with EU legislation governing the reproduction right.<sup>23</sup>

The CJEU clarified that ‘independent economic significance’ does not have the same meaning as ‘commercial value’. A work can have commercial value and yet have no independent economic significance: for instance, in this case, news snippets have commercial value, and yet have no independent economic significance because no value is added by digitally transmitting or viewing the news snippets to that already inherent in them as physical newspaper clippings.<sup>24</sup>

Finally, the CJEU dealt with the requirement of Article 5(5) of the Information Society Directive which states that the temporary copying exception only applies in ‘special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder’. The CJEU held that, as it had found that Article 5(1) was satisfied, on the same considerations Article 5(5) must also be satisfied.

## Infopaq II

The CJEU further analysed the temporary copying exception in *Infopaq II*, a second reference in the same case as *Infopaq I*. In this case, the CJEU held that the making of copies is a ‘necessary’ part of a process if that copy enables the process to function ‘correctly and efficiently’.<sup>25</sup> The CJEU also reiterated what it had said in *Infopaq I* concerning internet browsing being a lawful use of a work,<sup>26</sup> and in *FAPL* that use of a work is not unlawful by reason only of the fact that it lacks the authorization of the copyright owner.<sup>27</sup>

As regards the economic significance of a work, the CJEU confirmed its findings in *FAPL*:

the economic advantage derived from their implementation must not be either distinct or separable from the economic advantage derived from the lawful use of the work concerned and it must not generate an additional economic advantage going beyond that derived from that use of the protected work.<sup>28</sup>

20 Case C-5/08, *Infopaq*, above, n 8, para 63.

21 Joined Cases C-403/08 and C-429/08, above, n 18, paras 162–64.

22 Ibid, para 182.

23 Ibid, paras 168–73.

24 Ibid, para 175.

25 Case C-302/10, above, n 19, paras 30, 37.

26 Ibid, para 49.

27 Ibid, para 42.

28 Ibid, para 50.



## Application of the temporary copying exception

Based on these cases, the Supreme Court gave a detailed opinion on how the temporary copying exception should, in its view, apply to local copies created by users when browsing, before referring the question to the CJEU.

### Temporary, transient and incidental

The Supreme Court ran the first and second conditions of Article 5(1) together, saying that ‘temporary’ has the same meaning as ‘transient’.

Referring to *Infopaq I*, the Supreme Court explained that the relevant requirements for a copy to be temporary or transient are (i) that the storage and deletion of the copyright material is automatic, as opposed to being dependent on ‘discretionary human intervention’, and (ii) that the duration of the copy is limited to what is ‘necessary for the completion of the technological processes in question’.

The question therefore arises: are on-screen and hard-drive copies stored and deleted automatically? The Supreme Court was of the view that when a user browses the internet the copies made on his hard-drive *are* made automatically, without ‘human intervention’ other than the decision to browse the internet. Similarly the Supreme Court explained that the deletion of those copies is automatic as it is caused by a lapse of time coupled with continuing use of the browsers, because hard-drive copies are automatically deleted when a cache becomes full.

The Supreme Court took a purposive approach: the object of restricting Article 5(1) to temporary or transient copies is to ensure that the exception does not apply to downloads or other more permanent copies which are ‘permanent’ in the sense that they remain until the user personally chooses to delete them. Although an internet user could adjust his cache settings and leave his computer switched on in order to preserve a cached copy, the Supreme Court said that this was irrelevant because these actions ‘do not involve a discretionary decision whether to retain the material in memory or not. They are merely rather artificial ways of extending the duration of the relevant “technological processes”’.<sup>29</sup> Again, the Supreme Court was pragmatic, saying that copies made when browsing must be judged in light of the normal operation of a computer or its browser, because the fact that it is possible to devise of a way of extending

the life of the copies does not prevent those copies from being temporary. The Supreme Court took the same view when considering whether deletion of hard-drive and on-screen copies is independent of human intervention, as required by *Infopaq I* if the copies are to be temporary; merely devising a way to extend the life of a copy is not sufficient to make deletion dependent on human intervention, as this would frustrate the purpose of Article 5(1).

The court continued that as the copies were transient it is ‘strictly speaking unnecessary to consider whether they are also “incidental”’;<sup>30</sup> however, it was clear that they were, as computer software puts a web-page on a screen and into a cache to enable the user to view that web-page therefore the creation of the copies is wholly incidental to the technological process involved.

### Lawful use

The Supreme Court considered the question of whether the exception applies only to copies made in the course of the transmission of material within a network, as the NLA argued was the case. Because browsing is not a ‘transmission’ and because recital 33 of the Information Society Directive is clear that the temporary copying exception applies to ‘acts which enable browsing as well as acts of caching to take place’, the Supreme Court said that it was an ‘impossible contention’ that the exception should apply only to acts of transmission. Because the acts of temporary reproduction which ‘enable’ browsing to occur include the making of temporary copies in the internet cache of the user’s hard drive and on his screen, the Supreme Court said that it follows that the recital ‘expressly envisages that the exception will apply to end-user viewing of web-pages’.<sup>31</sup>

In any event, the Supreme Court pointed out that the temporary copying exception does not just cover copies made in the course of the transmission of material within a network, but it also extends to copies the sole purpose of which is to enable a lawful use. The term ‘lawful use’ can be difficult to understand in this context: it is easy to jump to the conclusion that an unauthorized use cannot be lawful. However, it is clear that if the temporary copying exception applied only to authorized copies it would be rendered meaningless as authorized copies have no need for an exception. The Supreme Court was able to cut through this confusion, saying that Article 5(1) is an exception which necessarily operates to authorize certain copying which would otherwise be an infringement of the copyright owner’s rights.<sup>32</sup>

29 [2013] UKSC 18, above, n 3, para 32.

30 Ibid, para 33.

31 Ibid, para 27.

32 Ibid, para 36.

The question to ask when considering whether a use is lawful is not whether the rightsholder has authorized the use, but whether the use is restricted by legislation, as the Supreme Court clarified by referring to the CJEU's decisions in *FAPL* and *Infopaq II*. The Supreme Court was clear that 'this necessarily includes the use of the work by an end-user browsing the internet'.<sup>33</sup>

In the same way that it is lawful to read a book or a newspaper, it is lawful to browse the internet. The Supreme Court said that, once it is accepted that part of the purpose of Article 5(1) is to authorize the making of copies to enable users to view material on the internet, the conditions of Article 5(1) should be construed consistently with that purpose.

### Integral and essential part of a technological process

In considering the third condition of Article 5(1)—that a copy must be an integral and essential part of a technological process—the Supreme Court said that although it might be possible to design a computer which does not make local copies when browsing, computers today do make such copies when users browse the internet. Accordingly, on-screen and hard-drive copies are an integral and essential part of a technological process. It is difficult to see, even hypothetically, how an on-screen copy could be avoided any more than a copy made in the retina of the eye could be avoided when browsing, so it is reassuring that the Supreme Court has taken this approach.

### Independent economic significance

The Supreme Court was also satisfied that the final condition, namely that the copying should have no independent economic significance, was satisfied because, as in *FAPL*, the on-screen and hard-drive copies have no independent economic value *for users* when browsing.

### Article 5(5)

Article 5(5) of the Information Society Directive specifies that the temporary copying exception applies only in cases which do not conflict with a normal exploitation of the work or other subject-matter and which do not unreasonably prejudice the legitimate interests of the rightsholder. Although it did not make a ruling on whether copies made when browsing fall under the exception at Article 5(1), the Supreme Court was unequivocal that

Once it is accepted that article 5.1 extends in principle to temporary copies made for the purpose of browsing by an unlicensed end-user, much of the argument which the courts below accepted unravels.<sup>34</sup>

The Supreme Court added:

Once these matters are established, it follows that article 5.5 is also satisfied.<sup>35</sup>

The Supreme Court made no ruling on whether Article 5(1) applies to copies made when browsing as it felt that this was too important an issue not to be resolved uniformly across Europe. However, Lord Sumption was explicit in his unanimously accepted judgment that, in his view, based on recent CJEU case law (of which the High Court and Court of Appeal had not had the benefit), the copies made when browsing fulfil the conditions of Article 5(1). In particular, Lord Sumption was not persuaded by the argument that, if viewing content online does not require a licence, rightsholders would be exposed to large-scale piracy, and he said that the CJEU did not appear to have been persuaded of this either. He said that diminution in the rights of copyright owners must necessarily narrow the scope of their protection but that this should be kept in proportion. Rightsholders still have a right of action against pirates, against people who upload infringing content; indeed, the Information Society Directive contains important provisions enlarging the range of procedures and sanctions available against piracy.

Lord Sumption then considered the practical consequences which would ensue, should a decision to the contrary be made.

### Consequences

In considering the implications of the application of the temporary copying exception to on-screen and hard-drive copies, the Supreme Court referred to the EU's policy of maintaining a high level of protection of intellectual property but said that it was necessary to keep this concept in proportion. First, one should remember that Article 5(1) is an exception to the right to copy which, by its very nature as an exception, must operate to authorize copying which would otherwise be infringing. Secondly, the Supreme Court reminds us that it has never been an infringement merely to read an article. Article 5(1) simply seeks to equate the law, as it applies to the physical world, to the online world making it legal to read an article using a computer. Thirdly, the

<sup>33</sup> Ibid, para 27.

<sup>34</sup> Ibid, para 37.

<sup>35</sup> Ibid, para 34.

Supreme Court said that if it is an infringement to view copyright protected material online, then all those who browse the internet will likely commit infringements, which 'seems an unacceptable result, which would make infringers of many millions of ordinary users of the internet across the EU who use browsers and search engines for private as well as commercial purposes'.<sup>36</sup>

The Supreme Court next considered Meltwater's position: although Article 5(1) could permit users to view copyright material, it did not permit Meltwater to upload or make copies of that material. Thus Meltwater still required a licence from the NLA or the publishers, which it has.

### The quest for uniformity

The Supreme Court therefore referred the question of whether Article 5(1) of the Information Society Directive applies to local copies made when browsing the internet to the CJEU, in order that the issue be resolved uniformly across Europe. While the specific questions are yet to be drafted, in the meantime it is clear that the Supreme Court has provided the CJEU with a very detailed opinion on the matter.

The Supreme Court was clear that the aim of Article 5(1) was not to enable pirates to circumvent the law, and that rightsholders would still have a course of action against those who upload material without authorization. Article 5(1) does not negate any course of action against pirates, it simply forces rightsholders to seek those who are 'more obviously at fault'.<sup>37</sup>

Although, in the Supreme Court's view, users should not be required to enter into licences with rightsholders in order to view content, Meltwater must be authorized to use that content. Lord Sumption commented that it is likely that the licence fee chargeable to Meltwater will be substantially higher if the CJEU agrees that users do not need a licence. The NLA has lodged an alternative claim with the Copyright Tribunal who may need to review the licencing scheme between the NLA and news aggregators on that basis.

The CJEU's decision will not be available for 12 to 18 months but will be eagerly awaited by users and rightsholders alike seeking clarity as to what constitutes a temporary copy. The Supreme Court's decision is refreshingly pragmatic and demonstrates that the UK courts are able to balance the effects of our ever evolving technology with the demands of the law.

<sup>36</sup> Ibid, para 36.

<sup>37</sup> [2013] UKSC 18 at [36].