

# Kluwer Copyright Blog

## The UK Court considers whether a copyright work has been communicated to the public

Jeremy Blum (Bristows LLP) · Saturday, March 19th, 2016

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*Ultrasoft Technologies Limited v Hubcreate Limited [2016] EWHC 544 (IPEC)*

On 16th February 2016 the Intellectual Property Enterprise Court (Hacon HHJ) handed down judgment in the copyright and database right dispute between software competitors Ultrasoft and Hubcreate. The case does not cite a single other judgment regarding the law but instead focused on an evidential enquiry about the extent to which a copyright work had been communicated or issued to the public.

The case concerned the alleged copying by Hubcreate of computer programs protected by copyright and database rights owned by Ultrasoft. Prior to the commencement of the trial, Hubcreate admitted infringing acts of copying and retention of three of Ultrasoft's database files. Ultrasoft accepted those admissions but alleged that there were further infringements. These were addressed at trial.

In 2009, following a switch of its business from Ultrasoft to Hubcreate, a Hubcreate customer requested Hubcreate's assistance in transferring its accounts information from its existing Ultrasoft files on to Hubcreate's own billing software. After several failed attempts three Ultrasoft files were eventually transferred and stored on Hubcreate's server.

In 2014 Ultrasoft learned of the presence of Ultrasoft files on Hubcreate's server, following a request from one of Hubcreate's customers, UBC, to assist it with transferring its data to Ultrasoft. On reviewing the relevant files Ultrasoft discovered that UBC had erroneously been given access to all of the database files of Hubcreate's current and previous customers. Thanks to this privileged access Ultrasoft found copies of its own database programs stored on Hubcreate's server.

Not content with Hubcreate's admission of copying Ultrasoft's database files, the latter contended that Hubcreate's infringement extended beyond this in two ways. First, that Hubcreate had infringed Ultrasoft's copyright in the database files by allowing multiple customers (as opposed to only UBC) access to its files. At the heart of the dispute was whether Hubcreate's restoration and hosting of the files amounted to infringement of Ultrasoft's copyright in the database files by: (a) issuing copies of the files to the public, contrary to s.18 of the [Copyright, Designs and Patents Act 1988](#) (the "Act"); and (b) communicating files to the public, contrary to s.20 of the Act. Secondly,

the Court was asked to determine whether hosting the files amounted to infringement of Ultrasoft's database rights by: (a) extracting; and (b) re-utilising all or a substantial part of the contents of the databases contained in the files, contrary to Regulation 16 of the [Copyright and Rights in Databases Regulations 1997](#).

In relation to the issue of public access to the files, the central question was whether customers other than UBC had had access to the Ultrasoft files. Hubcreate asserted that no other customer would have had access to the files, a fact which the judge accepted. In his judgment he did not go into the law, but on the facts found that no customers apart from UBC had access to Ultrasoft's software. In doing so he concluded that there was no infringement of Ultrasoft's copyright or database rights beyond the infringement originally admitted.

This judgment has implications as to the meaning of "the public". Whilst there was general agreement that access by just one customer did not constitute public access, there was no consensus as to what scale of access would amount to this. This finding is of course in line with the CJEU in [SGAE v Rafael](#), which held that the term "public" "refers to an "indeterminate number", and that "[A]s a general rule, a fairly large number of persons are involved, so that they may be considered to be a public". In addition, Hacon HHJ noted that there was no evidence that UBC had even realised that its global access was available. This raises the possible future question as to whether a party, or indeed, parties, unknowingly having access would equate to issuing or communicating copies to the public.

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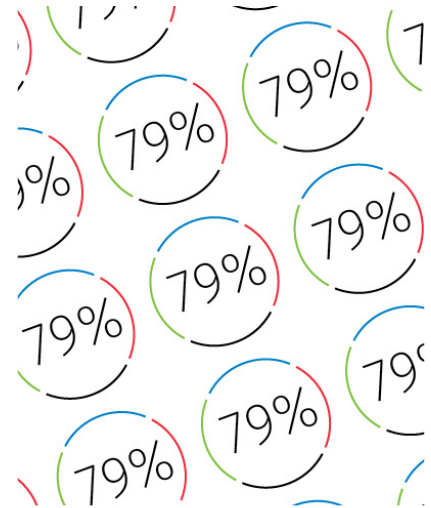
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