Kluwer Copyright Blog

UK Supreme Court Asks CJEU Whether the Internet is Legal

Christina Angelopoulos (CIPIL, University of Cambridge) · Monday, July 8th, 2013

"Before finalising its decision however, it is seeking the CJEU's input on whether end users, who view web-pages on their computers without downloading or printing them, are committing infringements of copyright if they lack a licence from the rightholder."

On 29 June 2013 the UK Supreme Court referred a series of questions in Case C-360/13 Public Relations Consultants Association Limited v The Newspaper Licensing Agency Limited and others, otherwise known as the Meltwater case, to the Court of Justice of the EU. The case examines whether Meltwater News, an electronic media monitoring service, was implicating its subscribers in copyright infringement by distributing reports that included the headline, opening text and extracts from claimant Newspaper Licensing Agency (NLA)'s articles. It represents the UK branch of a debate over online aggregating services and search engines that has been unfurling across Europe in recent years. With this latest instalment, the issue has now expanded to examine fundamental questions regarding the application of copyright law to the technical processes involved in viewing material on the internet.

The case has been winding its way through the British judicial system since the Copyright Tribunal ruled in favour of the Meltwater Group in mid-March 2010. In November of the same year the High Court overturned, finding that news aggregators that access press-monitoring services require a special end-user licence to use copyrighted material, notwithstanding any licence held by the press-monitoring agency a license. In 2011 the Court of Appeal confirmed, largely on the grounds that making copies, however temporary, in the end-user's computer while browsing was not part of the technological process, but generated by the user's voluntary decision to access the web-page.

The Supreme Court handed down its judgement in the case in April. The UK Court seems poised for reversal. Before finalising its decision however, it is seeking the CJEU's input on whether end users, who view web-pages on their computers without downloading or printing them, are committing infringements of copyright if they lack a licence from the rightholder. In particular, the Supreme Court asks:

"In circumstances where:

(i) an end-user views a web – page without downloading, printing or otherwise setting out to make a copy of it;

(ii) copies of that web – page are automatically made on screen and in the internet "cache" on the end-user's hard disk;

(iii) the creation of those copies is indispensable to the technical processes involved in correct and efficient internet browsing;

(iv) the screen copy remains on screen until the end – user moves away from the relevant web – page, when it is automatically deleted by the normal operation of the computer;

(v) the cached copy remains in the cache until it is overwritten by other material as the end – user views further web – pages, when it is automatically deleted by the normal operation of the computer; and

(vi) the copies are retained for no longer than the ordinary processes associated with internet use referred to at (iv) and (v) above continue;

Are such copies (i) temporary, (ii) transient or incidental and (iii) an integral and essential part of the technological process within the meaning of Article 5(1) of Directive 2001/29/EC?"

In other words, the question concerns the interpretation of the requirements of Article 5(1) of the Copyright Directive, according to which in order to be exempted from the reproduction right provided for by Article 2, acts of reproduction must be (i) temporary, (ii) transient or incidental and (iii) an integral part of the technological process. The British judges have all but made up their own minds: Lord Sumption, writing for a unanimous Court, reviewed and summarised the effects of a series of CJEU decisions and rejected the idea that article 5(1) does not apply to temporary copies generated by an end-user of the internet. The judge elaborated: "It will be apparent that Proudman J and the Court of Appeal could not have arrived at these conclusions if they had had the benefit of the judgments in Premier League and Infopaq II. In particular, the far broader meaning given by the Court of Justice in these cases to the concept of "lawful use" makes it impossible to confine the scope of the exception to the internal plumbing of the internet. 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." In conclusion, the Court held that, subject to the CJEU's preliminary ruling, the acts of reproduction involved in the present case satisfy the above three requirements, as well as the remaining requirements of Articles 5(1) and 5(5) of the Directive. While quite clear on its own view of the matter, the Supreme Court acknowledged that the issues has a transnational dimension. As a result, Sumption J considered that a reference to the CJEU for a preliminary ruling would be useful to ensure the uniform application of European Union law across the EU on this critical question.

Pushing the point home, the referral, in a list of rather suggestive factual information points, notes that the ordinary use of the internet will involve the creation of copies, which is the automatic result of browsing the internet. Indeed, the making of such copies on the screen and in the internet cache is indispensable to correct and efficient web-browsing. Moreover, the end-user does not intentionally set out to make a copy of the image unless he/she chooses to download it or print it out, while, in the ordinary course, the copies made in the cache will be overwritten by other

material with no other human intervention after an interval no longer than the ordinary processes associated with internet use continue. The copies retained on the screen or the internet cache are merely the incidental consequence of the use of a computer to browse the internet.

Despite the Supreme Court contradicting the rulings of two lower courts, the case therefore seems to be relatively clear cut. Indeed, the Court's judgement echoes the opinion of a number of academics: Prof Lionel Bently heavily criticised the Court of Appeal's decision in a strongly-worded blogpost published on the IPKat, precisely observing that "[t]he Court seems to have missed the fundamental point that browsing — looking at a web-page — does not involve an infringement and is perfectly lawful". A much trickier issue concerning aggregation services is presented by Case C-466/12 Svensson, in which the CJEU has been asked to rule on whether providing a hyperlink to a copyright protected work amounts to "communication to the public" within the meaning of Article 3(1) of the Information Society Directive.

The IPKat reports that the UK Intellectual Property Office (IPO) is currently soliciting comments from interested parties on the referred questions. Obviously, submitted opinions will not influence the judgment of the CJEU, but they might affect any observations made by the UK government in the case.

CA

This entry was posted on Monday, July 8th, 2013 at 10:40 am and is filed under Case Law, European Union, Infringement, Jurisdiction, Reproduction (right of), United Kingdom
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.