

# Kluwer Copyright Blog

## UK Damages for Copyright Infringement: More than Flagrancy?

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A recent decision in the UK Intellectual Property and Enterprise Court (IPEC) provides some helpful guidance on the application of the ‘user principle’ and, more importantly, on the interplay between damages for flagrant infringement under s.97(2) of the [Copyright Designs and Patents Act 1988 \(CDPA\)](#) and damages under Article 13 of the [IP Enforcement Directive \(Directive 2004/48\)](#). The case is *Absolute Lofts South West London v Artisan Home Improvements* ([read the judgment in full.](#))

Both parties were engaged in roof loft conversions, although geographically they were not competitors. Artisan had admitted to using 21 photographs of loft conversions carried out by Absolute on its website. The copyright in those photographs was owned by Absolute. By the time of the hearing, Artisan had gone into liquidation. The question for the court was the level of compensatory and, if appropriate, additional damages to award under either the CDPA or the Directive (both were claimed).

### Compensatory Damages

To determine compensatory damages, the court applied the ‘user principle’, whereby damages are calculated based on the sum that a willing licensee would pay a willing licensor in a hypothetical negotiation. The court emphasised that any sum would be a bonus to Absolute since it was not in the business of selling photographs. On the other side, the court considered that there were obvious limits to the maximum Mr Ludbrook would pay given the availability of alternative ways to obtain the images, such as commissioning a photographer or using a stock image library. The court believed that Mr Ludbrook’s motivation would have been to find the cheapest possible photographs that he was happy to “pass off” as the work of Artisan. Indeed, upon receiving Absolute’s letter before action, Mr Ludbrook had had the images on the website substituted for stock images that he procured from an online stock image library for £300. The court went on to award £300 on the basis that it would have been what was paid as a result of a hypothetical negotiation.

### Additional Damages and the Potential Redundancy of the CDPA

The court then turned to the issue of additional damages. It found, as a matter of fact, that Mr

Ludbrook knew that the photographs were infringing copies or alternatively that he had reasonable grounds to know they were. Thus both s.97(2) CDPA and Article 13(1) of the Enforcement Directive were engaged, but the question was how they should be applied.

Regulation 3(3) of Intellectual Property (Enforcement, etc) Regulations 2006 (“the 2006 Regulations”), which implement the Enforcement Directive in the United Kingdom have the effect that where there is an inconsistency, the Directive is to take precedence over national law. This leads to the obvious conclusion that the court should just apply the Directive in either event; either it is the same, in which case it doesn’t matter, or it is different, in which case it must apply the Directive. However, a complication arose (as it often does) from Article 2 of the Directive, which expressly preserves national legislation which provides more favourable remedies to rightholders. A conflict thus arose: if the CDPA was preserved then the court was under a duty to consider the flagrancy of the infringement; however, flagrancy is nowhere to be found in Article 13 of the Directive.

Grappling with this dilemma, the court came to the conclusion that the rightholder should be entitled to whichever assessment, CDPA or Directive, provided the larger sum.

The final point of note was the court’s interpretation of Article 13, particularly in interpreting the two alternative options for assessing the “actual prejudice” suffered by the rightholder. One option (Article 13(1)(a)) is an assessment of economic factors, such as lost profits and unfair profits, together with moral prejudice. The second option (Article 13(1)(b)) is for the court to set the damages based on the amount of royalties or fees which would have been due, had the use been authorised.

The second option sounds a lot like compensatory damages, especially when read in accordance with the limitation in Article 13(1) that damages should be those “appropriate to the actual prejudice suffered”. That argument was run by Mr Ludbrook based on the wording of the implementing regulations which would mean damages were limited to £300. The court, upon going back to the Directive, noted that the second option should actually be an assessment based on elements including *at least* the amount of royalties or fees. Somehow, the *at least* had gotten lost on implementation in the UK.

In applying this test the court decided that this amounted to *at least* the damages which would result from the application of the user principle. It then read both Article 13(1)(a) and 13(1)(b) together as two parts of a consistent whole, effectively incorporating all of the factors therein into an assessment.

With a test in hand, the court briefly considered the overall limitation of damages under the Directive to the “actual prejudice suffered”. The court found no help in recital 26 to the Directive, which it thought was not “as clear as it might be”. It nevertheless concluded that the limitation ruled out punitive, but not restitutionary, damages as it felt that the Directive was imposing some limitation on damages but that there was a need, consistent with the Directive, to maintain a deterrent effect (which is simply not provided by compensatory damages only).

The court went on to assess both the prejudice suffered by Absolute (being that it had not enjoyed any part of the unfair profit accrued from exploiting the photographs) under the Directive and the damages due under the CDPA. Curiously (or perhaps not), the court believed both assessments would amount to the same, circa £6,000; thus it awarded £6,000.

## Comment

Eliding together Articles 13(1)(a) and 13(1)(b) might be the subject of future appellate argument in other cases as it does not sit well with the legislation. It was also unnecessary as the court could simply have relied upon Article 13(1)(a). However, the approach is an important one. It favours rightholders, as where the infringer knew he was infringing or displayed a “couldn’t care less” attitude, a rightholder may ask the court to consider both the economic impact, including unfair profits, as well as the flagrancy of the breach, netting damages from whichever provides the higher sum. There is an upper limit of the “actual prejudice suffered” (which must be more than compensatory damages else Article 13 would simply collapse in on itself) but any flexibility in litigation is a benefit to be considered. Though vexing to some copyright owners the reality is that the actual damage caused by an infringement of copyright can be minimal. However provisions like Article 13 enable national courts to award a more appropriate level of damages arising out of the wrong.

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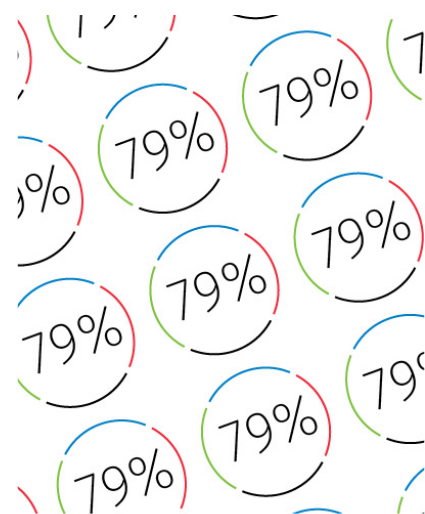
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