

Kluwer Copyright Blog

Bitcoin's File Format protectable in copyright: a Wright decision?

Jeremy Blum, Dhara Reddy (Bristows LLP) · Monday, May 13th, 2024

In July 2023, the Court of Appeal in *Wright & Ors v BTC Core & Ors [2023] EWCA Civ 868*, overturned the High Court decision in which Mr Justice Mellor found that the Bitcoin File Format (the “BFF”) was not a protectable work in a copyright sense as it did not satisfy the fixation requirement under s.3(2) of the Copyright Designs and Patents Act 1988 (the “Act”). The Court of Appeal disagreed and considered that the BFF did satisfy the fixation requirement. The decision is an interesting reminder that there are two distinct questions to consider in establishing copyright subsistence: first, whether a work is a work for the purposes of copyright, and second, whether there has been fixation of that work.



A recap of the High Court's findings

See [here](#) for our previous comprehensive run down of Mr Justice Mellor's [High Court decision](#).

The High Court judgment followed the initiation of proceedings by Dr Wright along with two of his companies (the “**Claimants**”) who were seeking permission to serve their claim against multiple defendants outside of the jurisdiction for infringement of, amongst other things, copyright in the BFF. To obtain permission to serve out of the jurisdiction there needs to be a real prospect of success for the claim; this was the context of these decisions.

In the simplest of terms, the BFF is a description of the structure of each block (or file) within the Bitcoin blockchain system. Each block records information specific to transactions of the digital currency, Bitcoin. The information within each block must be recorded in a specific format and so the Claimants claimed that copyright existed in the format of those digital files, the BFF.

The Claimants argued that the BFF had been “fixed” for copyright purposes when the first block in the Bitcoin blockchain was written on 3 January 2009. It was from these files that the BFF was identifiable. The judge disagreed. He stated that “*no relevant work*” had been identified containing

content which defined the structure of the BFF, and that evidence was required to show that a block contains content indicating the structure, as opposed to simply reflecting it.

Mr Justice Mellor refused the Claimants' application for permission to serve the claim outside of the jurisdiction and so this became the topic of the subsequent appeal which was granted by the Court of Appeal.

The Court of Appeal & fixation

Following a thorough analysis of the law of copyright in software, the Court found several flaws in Mr Justice Mellor's reasoning.

- Mr Justice Mellor's statement that "*no relevant work*" had been identified containing content which defines the structure of the BFF conflated the concept of the work and fixation. The work that the Claimants relied upon, the BFF, had been clearly identified. How and when that work was fixed was a separate issue.
- Lord Justice Arnold agreed that it was correct that the work and its structure must be fixed for copyright to subsist, however, he did not necessarily agree that content defining the structure is required to fix it. The requirement is simply that the structure is "*completely and unambiguously recorded*".
- Mr Justice Mellor should have applied the test set out in *Levola Hengelo C-310/17*. The test is whether the fixation relied upon by the Claimants made the BFF identifiable with sufficient precision and objectivity. The Claimants argued that the fixation they relied on satisfied this test and Lord Justice Arnold agreed. He also agreed that evidence of third parties being able to deduce the structure of the BFF was relevant to this point, something Mr Justice Mellor had previously disregarded.
- Mr Justice Mellor had failed to consider the rationale for the requirement of fixation. It should serve two purposes: (i) to establish the existence of the work and (ii) to determine the scope of protection. The Claimants' position was that the fixation they were relying upon served these purposes. This was that the first block in the Bitcoin blockchain confirmed the existence of the BFF and enabled the scope of protection to be determined. Lord Justice Arnold agreed.
- The Claimants had prepared a schedule to the Particulars of Claim which described elements of the BFF. Lord Justice Arnold clarified that the Claimants did not need to show that this formed part of the "*causative change*" between the alleged copyright work and the alleged infringement. This was because copyright in literary works protects the work as an "*intangible abstraction*", not the tangible medium in which that work may be fixed. Therefore, a copyright owner would not need to prove that fixation relied upon for subsistence purposes has been copied, only that the work had been copied.

As a result of the flaws found in Mr Justice Mellor's reasoning, the Court of Appeal found that the BFF had, in fact, been "fixed" under s.3(2) of the Act.

The Court of Appeal & subsistence

Lord Justice Arnold went on to explore the requirements that the Claimants would need to establish to show that copyright subsisted in the BFF. These were clearly and helpfully set out as

follows:

- **Is it a work?** Lord Justice Arnold found no reason to depart from Mr Justice Mellor's consideration of whether the Claimants had a real prospect of successfully contending that the BFF was a work. However, interestingly, he did comment on whether the BFF might be considered something that enables the creation of works, rather than being a work itself.
- **Does the work fall within one of the categories of protectable works specified in the Act?** The BFF was clearly a literary work within s.3(1) of the Act.
- **Has the work been fixed?** The BFF had been fixed for the reasons set out above.
- **Is the work original?** Again, Lord Justice Arnold found no reason to depart from Mr Justice Mellor's position that the BFF was original. However, rather contrastingly, he did raise a scepticism as to whether the BFF was an intellectual creation.
- **Does the work qualify for copyright protection under the CDPA?** There was no problem satisfying this requirement.

Based on the above analysis, the Court of Appeal found that there was a real prospect of the fixation requirement being satisfied and, therefore, a real prospect of success in establishing that copyright subsists in the BFF. The Claimants were granted permission to serve their claim in this regard, outside the jurisdiction.

The overturning of Mr Justice Mellor's decision highlights the uncertainty in this area of law as precedents continue to be established. **The decision shows us that copyright protection is linked to the content or work itself, rather than the medium or recording in which it is fixed. So long as the literary work can be objectively and precisely identified, it ought to meet the fixation requirement for copyright purposes.**

The judgment also emphasises the idea that fixation need not be permanent, rather it needs to have been satisfied at some point in time between the creation of the work and its infringement. In this case, the first block in the Blockchain enabled the scope of protection to be determined, and the structure of the BFF was recorded by Dr Wright in an electronic form.

It is important to note that this decision was simply answering the question of whether there was a real prospect of the BFF copyright infringement claim succeeding, for the purposes of serving the proceedings outside the jurisdiction. It will be interesting to see whether the Claimants can establish a successful claim at trial for the subsistence of copyright in the BFF.

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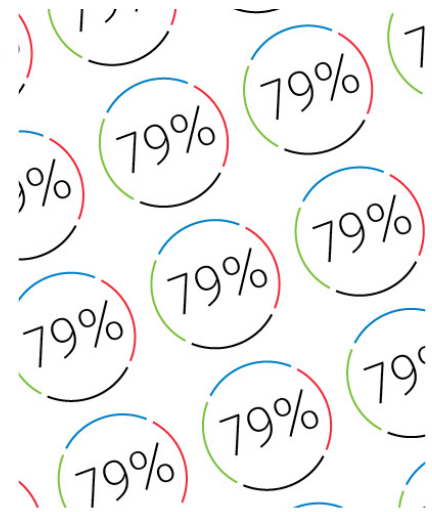
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