



**Easter Term  
[2013] UKSC 18**

*On appeal from: [2011] EWCA Civ 890*

## **JUDGMENT**

### **Public Relations Consultants Association Limited (Appellant) v The Newspaper Licensing Agency Limited and others (Respondents)**

before

**Lord Neuberger, President**

**Lord Kerr**

**Lord Clarke**

**Lord Sumption**

**Lord Carnwath**

**JUDGMENT GIVEN ON**

**17 April 2013**

**Heard on 11 and 12 February 2013**

*Appellant*  
Henry Carr QC  
Andrew Lykiardopoulos  
(Instructed by Baker &  
McKenzie LLP)

*Respondent*  
Robert Howe QC  
Edmund Cullen QC  
(Instructed by Berwin  
Leighton Paisner LLP)

**LORD SUMPTION (with whom Lord Neuberger, Lord Kerr, Lord Clarke and Lord Carnwath agree)**

*The issue*

1. This appeal raises an important question about the application of copyright law to the technical processes involved in viewing copyright material on the internet. The owner of a copyright has the exclusive right to do or to authorise a number of acts defined in sections 16 to 26 of the Copyright, Designs and Patents Act 1988. Broadly speaking, it is an infringement to make or distribute copies or adaptations of a protected work. Merely viewing or reading it is not an infringement. A person who reads a pirated copy of a protected book or views a forgery of a protected painting commits no infringement although the person who sold him the book or forged the painting may do.

2. The ordinary use of the internet will involve the creation of temporary copies at several stages. Copies will be created in the course of transmission in internet routers and proxy servers. Where a web-page is viewed by an end-user on his computer, without being downloaded, the technical processes involved will require temporary copies to be made on screen and also in the internet “cache” on the hard disk. The screen copy is self-evidently an essential part of the technology involved, without which the web-page cannot be viewed by the user. It will remain on screen until the user moves away from the relevant web-page. The function of the internet cache is somewhat more complex. It is a universal feature of current internet browsing technology. It would be possible to design browsing software without an internet cache, but in the present state of technology the result would be that the internet would be unable to cope with current volumes of traffic and would not function properly. The cache may be deliberately cleared by the end-user, but otherwise it will in the ordinary course be overwritten by other material after an interval which will depend on its capacity and on the volume and timing of the end-user’s internet usage. The above is a crude, but for present purposes sufficient, description of the technical processes. Like most things in the digital world, their operation is capable of being modified. The capacity of the internet cache may within limits be modified by altering the browser settings on the user’s computer. Deleted material can sometimes be retrieved by special software or highly proficient technicians. But this refinement is not characteristic of the ordinary use of the internet and can for present purposes be ignored. The important point is that in none of these cases does the end-user set out to make a copy of the web-page unless he chooses to download it or print it out. His object is to view the material. The copies temporarily retained on the screen or the internet cache are merely the incidental consequence of his use of a computer to do that. The question which

arises on this appeal is whether they are nonetheless infringing copies unless licensed by the rights owner.

3. The appellant is a professional association of public relations professionals who, among other things, monitor news coverage on behalf of clients. One way of doing this is to use on-line monitoring or search services. This appeal is about the services provided to members of the association by the Meltwater group of companies. The Meltwater companies use automated software programmes to create an index of words appearing on newspaper websites. Meltwater's customers provide them with search terms of interest to them, and Meltwater produces a monitoring report listing the results of a search of the index for those keywords. For each search hit, the monitoring report will present the opening words of the article, the keyword together with several words on either side of it, and a hyperlink (in the form of a reproduction of the headline) which enables the user to access the article on the relevant source website. It should, however, be noted that if that website has a paywall, the link will not enable the user to avoid it. He will have to pay for access to the material behind the paywall on the same terms as anyone else. Meltwater sends the monitoring report to the customer by email or the customer accesses it on the Meltwater website.

4. A number of points are common ground. It is common ground that Meltwater agreed to take a licence from the publishers of the newspapers to provide their service on terms which have been settled by the Copyright Tribunal. It is also common ground, and has been from an early stage of these proceedings, that Meltwater's customers require a licence to receive the service in its present form. This is because in its present form the service automatically involves the transmission of the monitoring report by e-mail. The email copy is not temporary. It is stored on the recipient's hard drive until the end-user chooses to delete it. The real question on this appeal is whether Meltwater's customers would need a licence to receive its service if the monitoring report were made available only on Meltwater's website. Obviously, to the extent that the customer downloads the report from the website he is making a copy that will infringe the newspaper's copyright unless he is licensed. But what if he merely views the material on the website? Proudman J held that he also needed a licence for that, and the Court of Appeal agreed with her. 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. Similar issues arise when viewers watch a broadcast on a digital television or a subscription television programme via a set-top box.

## *Directive 2001/29/EC*

5. Temporary copies created as part of the technical processes involved in viewing copyright material on a computer are dealt with by section 28A of the Copyright, Designs and Patents Act 1988. Section 28A was added to the Act by regulation in 2003 to give effect to Directive 2001/29/EC of 22 May 2001 on “the harmonisation of certain aspects of copyright and related rights in the information society.” It is not disputed that the effect of the Directive and the English statutory provision is the same, and it is convenient to refer to the terms of the Directive.

6. Directive 2001/29/EC originated in Commission Green Paper on Copyright and Related Rights in the Information Society, published in July 1995, which identified as an issue the use of data processing systems to reproduce copyright material “in a form which cannot be apprehended directly by the human senses”, i.e. as digital code. This would make it necessary to decide, among other things, whether the right of a copyright owner to control the reproduction of his work “should come into play in the ordinary use (digitization, intermediate copies, downloading into main memory) of the computers and other equipment which characterize the information society.” This was followed, after a period for consultation, by a proposal of the EC Commission issued in its final form in December 1997, which identified very clearly the problem which has arisen on this appeal. It addressed the prospect of the commercial transmission from digital databases of music, films or other copyright material as digital signals over the internet or other high-speed networks for display or downloading, which would dispense with the need for physical media of transmission and storage such as books, disks, tapes, and the like. On the one hand the EU has traditionally afforded, as a matter of policy, a high level of protection for intellectual property rights, and the widespread use of these technologies was likely to facilitate piracy. On the other, it is clear that there was concern that the over-rigid application of copyright law devised for physical media of transmission or storage would retard the commercial development of the internet and other form of electronic media technology. In particular, there was uncertainty about the status of “temporary or incidental reproductions in the electronic environment.”

7. Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works authorised signatory states to legislate for limited exceptions to the author’s exclusive right to authorise the reproduction of his work:

“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

The problem, as the Commission saw it in 1997, was that different member states had made use of the liberty conferred by article 9(2) to legislate in different ways for the treatment of copyright works made available in digital form and these differences were liable to impede the development of the internal market. The purpose of the Directive, a draft of which was annexed to the proposal, was to harmonise the rules across the EU.

8. Directive 2001/29/EC was an internal market measure designed to “adapt and supplement” existing copyright law to “respond adequately to economic realities such as new forms of exploitation” (Recital 5). Its object was to ensure a “high level of protection for copyrights”, while modifying those rights to allow the ordinary use of the internet. Recital 31 declared:

“A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment.”

Recital 33 referred directly to the problem of temporary copies in the following terms:

“The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.”

9. Chapter II of the Directive deals with “Rights and Exceptions”. The rights of the copyright owner are dealt with separately in articles 2, 3 and 4 under three heads: reproduction rights, communication rights and distribution rights respectively. Article 5 then qualifies these rights. Article 5.1 creates an exception for temporary copies which applies only to the reproduction right defined by article 2. It provides:

“1. Temporary acts of reproduction referred to in Article 2, 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, shall be exempted from the reproduction right provided for in Article 2.

...

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain 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.”

Chapters III and IV then make extensive provision for the enforcement of copyright owners’ rights in the digital world.

### *The case law of the Court of Justice*

10. The Court of Justice of the European Union has considered article 5.1 in three recent cases which have laid down broad principles for application by national courts. They are, in the order in which they were decided, (Case C-5/08) *Infopaq International A/S v. Danske Dagblades Forening* (“*Infopaq I*”) [2010] F.S.R. 495; (Case C-403/08) *Football Association Premier League Ltd v QC Leisure and Others* and (Case C-429/08) *Karen Murphy v Media Protection*

*Services Ltd* (“*Premier League*”) [2012] 1 CMLR 769; and (Case C-302/10) *Infopaq International A/S v. Danske Dagblades Forening* (“*Infopaq II*”), 17 January 2012. It should be noted that only the first of these cases was cited to Proudman J or the Court of Appeal. Neither the *Premier League* case or *Infopaq II* had been decided at the time when they gave judgment.

### *Infopaq I*

11. In *Infopaq I* [2010] F.S.R. 495, at [54], the Court of Justice paraphrased article 5.1 as making the exemption for an “act of reproduction” dependent on five conditions being fulfilled:

- “— the act is temporary;
  
- it is transient or incidental;
  
- it is an integral and essential part of a technological process;
  
- the sole purpose of that process is to enable a transmission in a network between third parties by an intermediary of a lawful use of a work or protected subject-matter; and
  
- the act has no independent economic significance.”

This formulation has been repeated in this form in the subsequent case-law, and it is undoubtedly convenient. It is, however, important to remember that it is a paraphrase. Notwithstanding that the five conditions are laid out in five separate sub-paragraphs, they are not free-standing requirements. They are overlapping and repetitive, and each of them colours the meaning of the others. They have to be read together so as to achieve the combined purpose of all of them. This is, as the case-law demonstrates, what the Court of Justice has always done.

12. In particular, it was the approach of the Court of Justice in *Infopaq I* itself, which was a reference from Denmark concerning commercial media monitoring service, *Infopaq*, which was not unlike *Meltwater*'s. The issue was about *Infopaq*'s “data capture process”, i.e. the electronic search process by which it identified relevant newspaper extracts. It was not, as the present case is, about the method by which the result of the search was communicated to *Infopaq*'s clients. However, *Infopaq*'s methods did make it necessary to consider generally how article 5.1



applied to the storage and viewing of digital data. They involved 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 turned on the temporary or transient character of copies made in the course of this procedure. It was held that article 5.1 might apply to (i), (ii) and (iii), if the national court was satisfied that these copies were deleted automatically, i.e. without any discretionary human intervention, when the technical need for them had passed. On the other hand, (iv) was not “transient” because the print-outs were destroyed only when a human agent decided to destroy them.

13. Although the Court of Justice was directly concerned only with the first two conditions, it construed them in the light of the third. In substance what the court held was that the requirement of the third condition that the copying should be an “integral and essential part of a technological process” meant that it could only be regarded as “temporary” or “transient” if it was inherent in the technological process that the copy would be deleted when that process was complete. The court’s analysis began by drawing attention to the fact that the exception in article 5.1 was a derogation from the rights conferred on copyright owners:

“56 For the interpretation of each of those conditions in turn, it should be borne in mind that, according to settled case-law, the provisions of a Directive which derogate from a general principle established by that Directive must be interpreted strictly (*Criminal Proceedings against Kapper* (C-476/01) [2004] E.C.R. 1-5205, ECJ at [72], and *Commission of the European Communities v Spain* (C-36/05) [2006] E.C.R. 1-10313 ECJ at [31]).

57 This holds true for the exemption provided for in art.5(1) of Directive 2001/29, which is a derogation from the general principle established by that Directive, namely the requirement of authorisation from the rightholder for any reproduction of a protected work.

58 This is all the more so given that the exemption must be interpreted in the light of art.5(5) of Directive 2001/29, under which that exemption is to be applied only in certain 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.”

At paras 61-64 the court summarised the position in this way:

“61 The court finds, in the light of the third condition referred to in [54] of this judgment, that a temporary and transient act of reproduction is intended to enable the completion of a technological process of which it forms an integral and essential part. In those circumstances, given the principles set out in [57] and [58] of this judgment, those acts of reproduction must not exceed what is necessary for the proper completion of that technological process.

62 Legal certainty for rightholders further requires that the storage and deletion of the reproduction not be dependent on discretionary human intervention, particularly by the user of protected works. There is no guarantee that in such cases the person concerned will actually delete the reproduction created or, in any event, that he will delete it once its existence is no longer justified by its function of enabling the completion of a technological process.

63 This finding is supported by recital 33 in the preamble to Directive 2001/29 which lists, as examples of the characteristics of the acts referred to in art.5(1) thereof, acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently. Such acts are, by definition, created and deleted automatically and without human intervention.

64 In the light of the foregoing, the court finds that an act can be held to be ‘transient’ within the meaning of the second condition laid down in art.5(1) of Directive 2001/29 only if its duration is limited to what is necessary for the proper completion of the technological process in question, it being understood that that process must be automated so that it deletes that act automatically, without human intervention, once its function of enabling the completion of such a process has come to an end.”

Addressing the question of copy (iii) (the text file containing the keyword extracts), the court added,

“66 ... It is for the national court to ascertain whether the deletion of that file is dependent on the will of the user of the reproduction and whether there is a risk that the file might remain stored once the

function of enabling completion of the technological process has come to an end.”

*The Premier League case*

14. In the important case of *Football Association Premier League Ltd v QC Leisure and Karen Murphy v Media Protection Services Ltd* [2012] 1 CMLR 769, the ambit of article 5.1 arose in the context of a dispute about the fourth and fifth conditions, which had not been considered in *Infopaq I*. It was, however, impossible to form a view about the effect of those conditions without construing article 5.1 as a whole, and examining the function of each of the five conditions. This is what the Court of Justice did.

15. The facts were that Mrs. Murphy had subscribed to a pay TV service in Greece and acquired a Greek satellite decoder, but used it without the authority of the rights owner to receive broadcasts of football matches in her pub in the United Kingdom, where they were viewed by her customers. The copies said to infringe were the temporary copies made in the memory of the decoder and on the television screen in the course of the streaming of the material. Functionally, these were similar to the copies made in the internet cache and on the screen of a personal computer. On any view, the infringement alleged was against the “consumption” of the copyright material by Mrs Murphy and the customers in her pub as end-users. At paras 162-164, the court reminded itself that while any exception from the prima facie right of the copyright owner to control reproduction must be strictly construed, that right had to 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. It was held that Mrs. Murphy was protected by article 5(1).

16. The first question was whether the allegedly infringing copies made in the cache of Mrs Murphy’s decoder were made for one of the two purposes specified in sub-paragraphs (a) and (b) of article 5.1. Since they were not made for the purpose of the transmission of the material through a network, it was necessary for Mrs Murphy to rely on sub-paragraph (b). This required her to establish that the copies were made to enable some other use which was lawful. The court held that they were. It put the matter in this way:

“168 As is apparent from recital 33 in the preamble to the Copyright Directive, a use should be considered lawful where it is authorised by the right holder or where it is not restricted by the applicable legislation.

169 Since in the main proceedings the use of the works at issue is not authorised by the copyright holders, it must be determined whether the acts in question are intended to enable a use of works which is not restricted by the applicable legislation.

170 In this regard, it is undisputed that those ephemeral acts of reproduction enable the satellite decoder and the television screen to function correctly. From the television viewers' standpoint, they enable the broadcasts containing protected works to be received.

171 Mere reception as such of those broadcasts—that is to say, the picking up of the broadcasts and their visual display—in private circles does not reveal an act restricted by EU legislation or by that of the United Kingdom, as indeed follows from the wording of Question 5 in Case C-403/08, and that act is therefore lawful. Furthermore, it follows from [77]–[132] of the present judgment that such reception of the broadcasts must be considered lawful in the case of broadcasts from a Member State other than the United Kingdom when it is brought about by means of a foreign decoding device.

172 Accordingly, the acts of reproduction have the sole purpose of enabling a ‘lawful use’ of the works within the meaning of art.5(1)(b) of the Copyright Directive.

173 Acts of reproduction such as those at issue in the main proceedings thus satisfy the fourth condition laid down by that provision.”

17. This section of the judgment is critical to an understanding of the current issue and to the whole of the jurisprudence of the court upon it. EU law might have treated any use of copyright material apart from its transmission through a network as unlawful, if it lacked the authority of the copyright owner. A suggestion was in fact made by the Economic and Social Committee that the Commission’s original proposal should be amended (“expanded and clarified”) so that “[a]ny reproduction that in effect is consumption of the work” should be unlawful if it occurred without the copyright owner’s authority: see OJ C 407/32, 28.12.98, at paragraph 3.7.1.2. The suggestion was not, however, adopted, and in the *Premier League* case the Court of Justice decisively rejected an attempt to arrive at the same result on the construction of article 5.1 as issued. Because Mrs. Murphy’s use of the material was not contrary to the “applicable legislation”, it was held to be lawful for the purpose of article 5.1(b) even though it was not authorised by the

rights owner. In a later section of its judgment, the court went on to hold that Mrs Murphy's use of the material infringed the separate communication right defined by article 3 of the Directive, and was to that extent unlawful. That did not, however, affect its conclusion that her use of the material was lawful for the purpose of article 5.1(b). This was because article 5.1 was concerned only with the ambit of the reproduction right defined in article 2. The only requirement was therefore that the relevant use should be consistent with EU legislation governing the reproduction right, including article 5.1 itself.

18. The court then turned to the fifth condition, which is concerned with the "economic significance" of the use made of the material. The Court interpreted this condition as meaning that the use made of the material by the alleged infringer must not have any economic value other than that which was inherent in its mere reception and viewing:

"174 So far as concerns, finally, the fifth condition laid down by that provision, these acts of reproduction carried out in the course of a technological process make access to the protected works possible. Since the latter have an economic value, access to them necessarily has economic significance.

175 However, if the exception laid down in art.5(1) of the Copyright Directive is not to be rendered redundant, that significance must also be independent in the sense that it goes beyond the economic advantage derived from mere reception of a broadcast containing protected works, that is to say, beyond the advantage derived from the mere picking up of the broadcast and its visual display.

176 In the main proceedings, the temporary acts of reproduction, carried out within the memory of the satellite decoder and on the television screen, form an inseparable and non-autonomous part of the process of reception of the broadcasts transmitted containing the works in question. Furthermore, they are performed without influence, or even awareness, on the part of the persons thereby having access to the protected works.

177 Consequently, those temporary acts of reproduction are not capable of generating an additional economic advantage going beyond the advantage derived from mere reception of the broadcasts at issue.

178 It follows that the acts of reproduction at issue in the main proceedings cannot be regarded as having independent economic significance. Consequently, they fulfil the fifth condition laid down in art.5(1) of the Copyright Directive.

179 This finding, and the finding set out in [172] of the present judgment [that the copying had the purpose of enabling a lawful use], are moreover borne out by the objective of that provision, which is intended to ensure the development and operation of new technologies. If the acts at issue were not considered to comply with the conditions set by art.5(1) of the Copyright Directive, all television viewers using modern sets which, in order to work, need those acts of reproduction to be carried out would be prevented from receiving broadcasts containing broadcast works, in the absence of an authorisation from copyright holders. That would impede, and even paralyse, the actual spread and contribution of new technologies, in disregard of the will of the EU legislature as expressed in recital 31 in the preamble to the Copyright Directive.”

19. Finally, the court dealt briefly with the requirement of article 5.5 that the exception should be applied only 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.” It held that in view of the considerations which had led it to hold that article 5.1 applied, article 5.5 must be regarded as satisfied also. I shall return to this point in the context of *Infopaq II*, where the reasoning is repeated in expanded form.

### *Infopaq II*

20. *Infopaq II* was a second reference in the same case as *Infopaq I*. It concerned the third, fourth and fifth conditions, which had not been directly in issue on the previous reference. The court substantially repeated what it had said in the *Premier League* case about the test of “lawfulness” under article 5.1(b) and it decided on that basis that the fourth condition was satisfied. No further discussion of that point is called for here. The other issues related to the third condition (“integral and essential part of a technological process”), the fifth condition (no “independent economic significance”), and the effect of article 5.5.

21. The Danish court’s problem with the third condition was that the court’s previous emphasis on the absence of human intervention appeared to rule out the application of article 5.1 to the scanned copy which initiated the process, since the original article had to be manually inserted into the scanner. In dealing with this

question, the court pointed out that in *Infopaq 1* it had been concerned to emphasise that it was the *deletion* of a temporary copy which must not depend on human intervention. It had not said that there must be no human intervention at any stage: see para 32. It followed from this that the discretionary nature of the user's decision to initiate the process (for example by switching on his computer or accessing a particular web-page) was irrelevant.

22. Having dealt with this point, the court took the opportunity to deal more generally with the requirement that the copying should be an “integral and essential part of a technological process”:

“30 The concept of the ‘integral and essential part of a technological process’ requires the temporary acts of reproduction to be carried out entirely in the context of the implementation of the technological process and, therefore, not to be carried out, fully or partially, outside of such a process. This concept also assumes that the completion of the temporary act of reproduction is necessary, in that the technological process concerned could not function correctly and efficiently without that act (see, to that effect, *Infopaq International*, paragraph 61).

...

37 Finally, it should be noted that the technological process in question could not function correctly and efficiently without the acts of reproduction concerned. That technological process aims at identifying predefined key words in newspaper articles and extracting them on a digital medium. Such electronic research thus requires a transformation of those articles, from a paper-based medium, into digital data, since that transformation is necessary in order to recognise that data, to identify the key words and to extract those key words.”

23. The court returned to this theme in dealing with the fifth condition about the absence of “independent economic significance”:

“48 In that regard, it should be recalled that the acts of temporary reproduction, within the meaning of Article 5(1), aim to make access to the protected works and their use possible. Since those works have a specific economic value, access to them and their use necessarily

has economic significance (see, to that effect, *Football Association Premier League* [2012] 1 CMLR 769, paragraph 174).

49 Furthermore, as is apparent from Recital 33 in the preamble to Directive 2001/29, the acts of temporary reproduction — like the acts enabling ‘browsing’ and ‘caching’ — have the purpose of facilitating the use of a work or making that use more efficient. Thus, an inherent feature of those acts is to enable the achievement of efficiency gains in the context of such use and, consequently, to lead to increased profits or a reduction in production costs.

50 However, those acts must not have independent economic significance, in that 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 (see, to that effect, *Football Association Premier League and Others*, paragraph 175).

51 The efficiency gains resulting from the implementation of the acts of temporary reproduction, such as those in issue in the main proceedings, have no such independent economic significance, inasmuch as the economic advantages derived from their application only materialise during the use of the reproduced subject matter, so that they are neither distinct nor separable from the advantages derived from its use.

52 On the other hand, an advantage derived from an act of temporary reproduction is distinct and separable if the author of that act is likely to make a profit due to the economic exploitation of the temporary reproductions themselves.”

24. Finally, the court in *Infopaq II* expanded on what it had said in the *Premier League* case about article 5.5:

“56 In that regard, suffice it to note that if those acts of reproduction fulfil all the conditions of Article 5(1) of Directive 2001/29, as interpreted by the case-law of the Court, it must be held that they do not conflict with the normal exploitation of the work or unreasonably



prejudice the legitimate interests of the rightholder (*Football Association Premier League and Others*, paragraph 181).

57 Consequently, the answer to the seventh question is that Article 5(5) of Directive 2001/29 must be interpreted as meaning that, if they fulfil all the conditions laid down in Article 5(1) of that directive, the acts of temporary reproduction carried out during a 'data capture' process, such as those in issue in the main proceedings, must be regarded as fulfilling the condition that the acts of reproduction may not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the rightholder."

25. This last conclusion may at first sight seem odd, since it means that article 5.5 adds nothing to article 5.1. But the apparent oddity disappears when one appreciates that article 5.5 reflects the terms of article 9(2) of the Berne Convention by which both the EU and its member states are bound. Under that article, signatories have a right to authorise by legislation copying which would otherwise be an infringement, in "special cases" provided that this does not conflict with the "normal" exploitation of the work and does not "unreasonably" prejudice the "legitimate" interests of the author. Article 5.1 is the legislation in question. The Court of Justice is pointing out that it has been drafted so as to determine legislatively what exploitation is to be regarded as normal, and what derogations from the author's exclusive rights are to be regarded as reasonable and legitimate. This does not make article 5.5 redundant. Its effect is to require article 5.1 to be as narrowly construed as is consistent with its purpose: see *Infopaq I* at para 58. But its purpose must nevertheless be at the forefront of any attempt to construe it.

#### *The effect of the CJEU decisions*

26. The effect of this body of authority can be summarised as follows:

- (1) Subject to the limitations which I shall summarise in the following sub-paragraphs, the exception in article 5.1 applies to copies made as an integral and necessary part of a "technological process", in particular the digital processing of data. For this purpose, the making of copies is a "necessary" part of the process if it enables it to function "correctly and efficiently": *Infopaq II*, at paras 30, 37.
- (2) These copies must be temporary. This requirement is explained and defined by the words which follow, namely that the making of the copies must be "transient or incidental and an integral and essential

part of a technological process”. It means (i) that the storage and deletion of the copyright material must be the automatic consequence of the user’s decision to initiate or terminate the relevant technological process, as opposed to being dependent on some further discretionary human intervention, and (ii) that the duration of the copy should be limited to what is necessary for the completion of the relevant technological process: see *Infopaq I*, at paras 62 and 64.

- (3) The exception is not limited to copies made in order to enable the transmission of material through intermediaries in a network. It also applies to copies made for the sole purpose of enabling other uses, provided that these uses are lawful. These other uses include internet browsing: *Infopaq I*, at para 63 and *Infopaq II*, at para 49.
- (4) For the purpose of article 5.1, a use of the material is lawful, whether or not the copyright owner has authorised it, if it is consistent with EU legislation governing the reproduction right, including article 5.1 itself: *Premier League*, at paras 168-173, *Infopaq II*, at para 42. The use of the material is not unlawful by reason only of the fact that it lacks the authorisation of the copyright owner.
- (5) The making of the temporary copy must have no “independent economic significance”. This does not mean that it must have no commercial value. It may well have. What it means is that it must have no *independent* commercial value, i.e. no value additional to that which is derived from the mere act of digitally transmitting or viewing the material: *Premier League*, at para 175, *Infopaq II*, at para 50.
- (6) If these conditions are satisfied no additional restrictions can be derived from article 5.5.

#### *Application to the present case*

27. The first and fundamental question is whether article 5.1 applies at all to temporary copies generated by an end-user’s use of the internet. Mr. Howe QC, who appeared for the Newspaper Licensing Agency, submitted that it did not. He argued that it applied only to copies made in the course of the transmission of the material within a network, for example in the caches of intermediate routers and proxy servers. In my opinion, this is an impossible contention. In the first place, it is clear from the Directive’s recitals, and in particular from recital 33, that it was intended that the exception should “include acts which enable browsing as well as acts of caching to take place.” Browsing is not part of the process of transmission.

It is the use of an internet browser by an end-user to view web pages. It is by its very nature an end-user function. The “acts” referred to are the “acts of temporary reproduction” referred to at the outset of the recital, with which the whole recital is concerned. The acts of temporary reproduction which “enable” browsing to occur are accordingly the making of temporary copies in the internet cache of the end-user’s hard drive and on his screen. It follows that the recital expressly envisages that the exception will apply to end-user viewing of web-pages. Secondly, if Mr Howe is right the scope of the exception corresponds only to that part of the process which is covered by article 5.1(a) (“transmission in a network between third parties by an intermediary”). In fact, caching is concerned with the transmission of material in a network, because its purpose is to make the operation of the internet more efficient by easing constraints on its capacity: see paragraph 2 above. But the exception in any event is wider than that, for it also extends to operations covered by article 5.1(b) (“lawful use”). Lawful “use” refers to the use of the work which is the subject of the copyright. It extends to use, as the Court of Justice made clear in the *Premier League* case and *Infopaq II*, whether or not authorised by the copyright owner, which is “not restricted by the applicable legislation”. This necessarily includes the use of the work by an end-user browsing the internet. Third, Mr. Howe’s submission is directly contradicted by the judgment in the *Premier League* case, where article 5 was applied to Mrs Murphy’s use of the copyright material by displaying it on her television. She was the end-user. She and her customers were consuming the product. In the context of the fifth condition, that the copy should have no independent economic significance, the court considered at para 176 the status of the copy made on the television screen, because it had been suggested by the Advocate-General (at AG95) that the screen copy might have an independent economic significance that the cached copy lacked. At para 179, the court pointed out that if article 5.1 did not apply to the viewing of copyright material by a television end-user, such viewers “would be prevented from receiving broadcasts... in the absence of an authorisation from copyright holders”, which would “impede and even paralyse the actual spread and contribution of new technologies in disregard of the will of the EU legislature as expressed in recital 31.” For this purpose, there is no rational distinction to be made between viewing copyright material on a television screen and viewing the same material on a computer.

28. Once it is accepted that part of the purpose of article 5.1 is to authorise the making of copies to enable the end-user to view copyright material on the internet, the various conditions laid down by that article must be construed so far as possible in a manner consistent with that purpose. It must, if the exception is to be coherent, apply to the ordinary technical processes associated with internet browsing.

29. There is, to my mind, no room for argument on the facts of this case about the third, fourth and fifth conditions in article 5.1. The third condition is that the

making of copies in the internet cache and on screen should be an integral and essential part of a technological process. Manifestly it is. These were at the time of the Directive and remain today basic features of the design of modern computers. It would no doubt be possible to design computers that did not cache material in the course of internet browsing, but in the words of the judgment in *Infopaq II*, the technological processes required to browse the internet could not function “correctly and efficiently” without the acts of reproduction concerned: see paras 30 and 37. The fourth condition, as applied to end-users like Meltwater’s customers, is that its use should be lawful. Once it is established, as it is by the decisions in the *Premier League* case and *Infopaq II*, that this means lawful apart from any lack of authorisation by the copyright owner, it is equally clear that this condition is satisfied. The fifth condition, that the copying should have no independent economic significance, is satisfied for the same reason as it was satisfied in the *Premier League* case, namely that it has no *independent* economic value to Meltwater’s customers. This is because unless they download or print out the material (in which case it is not disputed that they require a licence), the sole economic value which they derive from accessing information on Meltwater’s website is derived from the mere fact of reading it on screen.

30. These considerations no doubt explain why Mr. Howe’s submissions were addressed mainly to the first two conditions, that the copies generated by the technical processes involved in browsing should be “temporary” and “transient or incidental”. It is not suggested that “transient” means anything different from “temporary”, and in my view they are the same. “Transience” is simply part of the elaborate explanation of “temporary” which follows that word.

31. If, as the Court of Justice has accepted, browsing copyright material on the internet is a method of using it which is within the scope of article 5.1, and if the making of copies in the internet cache or on screen is indispensable to the correct and efficient operation of the technical processes involved in browsing, it would be strange if the law said that the period of time for which these copies will exist in the ordinary course of that operation was insufficiently “temporary” or “transient” to qualify. As I have explained above by reference to the judgment in *Infopaq I*, the relevant requirements are (i) that the storage and deletion of the copyright material should be automatic, as opposed to being dependent on “discretionary human intervention”, and (ii) that the duration of the copy should be limited to what is “necessary for the completion of the technological processes in question”: see paras 62 and 64. The “storage” of the material, i.e. the creation of copies in the cache or on screen, is the automatic result of browsing the internet. It requires no other human intervention than the decision to access the relevant web-page. Its deletion is the equally automatic result of the lapse of time coupled with the continuing use of the browser. The “technological processes in question” are those necessarily associated with web browsing, including the retention of material in the cache. It is retained there for no longer than the ordinary processes associated

with internet use continue. Standing back for a moment from this fine verbal analysis of the language of the court, the purpose of these formulations is plain. It is to distinguish between the use of a computer or other equipment simply to view the relevant material, and its use to record it. The object of the restriction to “temporary” or “transient” copies is to ensure that the exception does not apply to protect downloading or other forms of digital or physical copying which will remain in existence until the user chooses to delete or destroy them and are therefore as permanent as he chooses to make them.

32. Mr Howe’s argument was that cached material was not “temporary” or “transient” because the user could make a discretionary decision to close down the computer, thereby leaving the material in the cache indefinitely until the browser was used again. Or he could adjust the settings so as to enlarge the cache, thereby extending the period for which material might remain in it even while the browser was in use. He could also access a web page and leave his computer on with the web page on screen indefinitely. These are certainly examples of discretionary human intervention, but they are irrelevant because they 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”. They call for three comments in the present context. The first is that the effect of creating copies in the internet cache or on screen in the course of browsing, must be judged in the light of the normal operation of a computer or its browser. It is not enough that forensic ingenuity can devise a method of extending to some extent the life of copies which are by their nature temporary. Secondly, the question is whether human intervention is required to delete the material: see *Infopaq I* at para 66. There is a difference, which is fundamental to the object of article 5.1, between a discretionary decision to extend the duration of what remains an automatic process, and the storage of a copy of material in the course of the browsing in a manner which will ensure that it is permanent unless and until a discretionary decision is made to delete or destroy it. The decisions of the Court of Justice show that in principle the former satisfies the first two conditions in article 5.1 whereas the latter does not. Third, the Respondents’ examples, as examples go, prove too much. If the mere fact that it is in principle possible to close down a computer, alter the browser settings to enlarge the internet cache or leave an image on screen indefinitely were enough to prevent article 5.1 from applying, then it would never apply to internet browsing. This would frustrate the purpose of the legislation.

33. If, as I consider, the copies made in the internet cache or on screen are “transient”, it is strictly speaking unnecessary to consider whether they are also “incidental”. But I think it clear that they are. The software puts a web-page on screen and into the cache for the purpose of enabling a lawful use of the copyright material, i.e. viewing it. The creation of the copies is wholly incidental to the technological process involved.

34. Once these matters are established, it follows that article 5.5 is also satisfied.

### *Consequences*

35. It is the policy of the EU to maintain a “high level of protection of intellectual property”. That policy is acknowledged both in the Directive itself (see recitals 4 and 9), and in the case law (for example, *Premier League* at para 186). We were pressed with the argument that if the viewing of copyright material on a web-page did not require a licence from the copyright owner, he would be exposed to large-scale piracy of a kind which would be difficult to detect or prevent.

36. I am not persuaded by this argument and nor, it is clear, was the Court of Justice on the successive occasions when it has dealt with this issue. Of course, any diminution in the rights of copyright owners necessarily narrows the scope of the protection which they enjoy for their works. But we need to keep this point in proportion. In the first place, article 5.1 is an exception to the copyright owner’s right to control the reproduction of his work. It necessarily operates to authorise certain copying which would otherwise be an infringement of the copyright owner’s rights. Secondly, it has never been an infringement, in either English or EU law, for a person merely to view or read an infringing article in physical form. This state of affairs, which is recognised in the enumeration of the copyright owner’s rights in articles 2, 3 and 4 of the Directive, has never been thought inconsistent with a high level of protection for intellectual property. All that article 5.1 of the Directive achieves is to treat the viewing of copyright material on the internet in the same way as its viewing in physical form, notwithstanding that the technical processes involved incidentally include the making of temporary copies within the electronic equipment employed. Third, if it is an infringement merely to view copyright material, without downloading or printing out, then those who browse the internet are likely unintentionally to incur civil liability, at least in principle, by merely coming upon a web-page containing copyright material in the course of browsing. This 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. Fourth, nothing in article 5.1 affects the obligation of Meltwater to be licensed in order to upload copyright material onto their website or make non-temporary copies of it in some other way. At the moment, the licence fee payable by Meltwater is fixed on the basis that its customers need a licence of their own from the publishers and that the service will be supplied only to end-users who have one. It seems very likely (although I am not deciding the point) that the licence fee chargeable to Meltwater will be substantially higher if end-users do not need a licence because on that footing the value of the rights for which Meltwater is licensed will be significantly higher. The respondents have lodged an alternative claim with the Copyright Tribunal on that basis. In my view it is altogether more satisfactory that a single

large licence fee should be payable representing the value to the person who puts the material onto the internet, than that tiny sums should be separately collectable from hundreds (in other cases it may be millions) of internet viewers. Fifth, if merely viewing a web-page is not an infringement, that does not leave the copyright owner without effective remedies against pirates. It simply means that his remedy must be found against others who on the face of it are more obviously at fault. Nothing in article 5.1 impairs the copyright owner's right to proceed against those who unlawfully upload copyright material onto the internet, just as the copyright owner has always been entitled to proceed against those who make or distribute pirated copies of books, films, music or other protected works. The Directive itself contains in Chapters III and IV important provisions enlarging the range of procedures and sanctions available against piracy.

### *The decisions below*

37. Proudman J decided that Meltwater's customers needed a licence both to receive the monitoring reports by email and to access them on Meltwater's website. Her reasons were (i) that the making of copies, however temporary, in the end-user's computer in the course of browsing was not part of the technological process because it was "generated by his own volition", i.e. by his voluntary decision to access the web-page; (ii) that it was outside the scope of the technological process for the additional reason that it was in reality the end result of that process since it was what the end-user viewed; and (iii) that the viewing of these copies did not constitute "lawful use" because they were not authorised by the copyright owner: see para 109. These reasons are of course related, and all three of them lead to the conclusion that, in the judge's words, the "kind of circumstance where the defence may be available is where the purpose of the copying is to enable efficient transmission in a network between third parties by an intermediary, typically an internet service provider" para 110. The Court of Appeal agreed with her, essentially on her ground (i). In their view the "acts of reproduction are those occasioned by the voluntary human process of accessing that web-page" para 35. For practical purposes, this amounted to an endorsement of Proudman J's view that unlicensed internet browsing could never satisfy the conditions in article 5.1. 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.

### *Reference*

38. In its recent recommendations in relation to references, OJ C338, 6.11.2012, the Court of Justice of the European Union has observed that while a national court may consider that sufficient guidance is available in the existing case-law of the Court of Justice to enable a case to be decided, a reference may be useful where there is a new question of interpretation of general interest for the uniform application of European Union law or where the existing case-law does not appear to be applicable to a new set of facts. I have set out in this judgment the conclusions that I have reached on the effect of the Directive, as the Court of Justice has interpreted and applied it to date. However, I recognise the issue has a transnational dimension and that the application of copyright law to internet use has important implications for many millions of people across the EU making use of what has become a basic technical facility. These considerations make it desirable that any decision on the point should be referred to the Court of Justice for a preliminary ruling, so that the critical point may be resolved in a manner which will apply uniformly across the European Union. In my view, before making any order on this appeal, this court should refer to the Court of Justice the question whether the requirements of article 5.1 of the Directive that acts of reproduction should be (i) temporary, (ii) transient or incidental and (iii) an integral and essential part of the technological process, are satisfied by the technical features described at paragraphs 2 and 31-32 of this judgment, having regard in particular to the fact that a copy of protected material may in the ordinary course of internet usage remain in the cache for a period of time after the browsing session which has generated that copy is completed until it is overlaid by other material, and a screen copy will remain on screen until the browsing session is terminated by the user.

39. I would invite Counsel to comment on the proposed issue to be referred and to prepare and if possible agree a draft reference for consideration by this court.