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International Review of Intellectual Property and Competition Law 2014
Case Comment
United Kingdom Copyright Decisions 2013
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Abstract: This comment highlights seven copyright cases from the UK in 2013 concerning the legality of temporary copies created while browsing the Internet, the scope of copyright protection for computer programs, the scope of the *sui generis* database right, blocking orders, and the scope of the right of communication to the public in the context of peer-to-peer file-sharing websites and streaming media.

Subject: Intellectual property.

Keywords: Blocking Orders; Communication to the Public Right; Computer Programs; Copyright; Databases; Temporary Copies.

Legislation: Copyright, Designs and Patents Act 1988 (UK); Copyright and Rights in Databases Regulations 1997 (UK); European Computer Programs Directive 91/250/EEC; European Database Directive 96/9/EC; European Information Society Directive 2001/29/EC.

Cases: *British Horseracing Board Ltd v William Hill Organisation Ltd* C-203/02; *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch); *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd (No 2)* [2012] EWHC 1152 (Ch); *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch); *Football Association Premier League Ltd v British Sky Broadcasting Ltd* [2013] EWHC 2058 (Ch); *Football Association Premier League Ltd v QC Leisure* C-403/08 and *Murphy v Media Protection Services Ltd* C-429/08; *Football Dataco Ltd v Stan James plc and Sportradar GmbH* [2013] EWCA Civ 27; *Infopaq International A/S v Danske Dagblades Forening* C-5/08; *Infopaq International A/S v Danske Dagblades Forening* C-302/10; *Navitaire Inc v easyJet Airline Co Ltd* [2004] EWHC 1725; *Newspaper Licensing Agency Ltd v Public Relations Consultants Association* [2013] UKSC 18; *Nova Productions Ltd v Mazooma Games Ltd* [2006] EWHC 24 (Ch); *Nova Productions Ltd v Mazooma Games Ltd* [2007] EWCA Civ 25; *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch); *SAS Institute Inc v World Programming Ltd* C-406/10; *SAS Institute Inc v World Programming Ltd* [2013] EWHC 69 (Ch); *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482; *Svensson* C-466/12; *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011] EWHC 1981 (Ch); *Twentieth Century Fox Film Corp v British Telecommunications plc (No 2)* [2011] EWHC 2714 (Ch); *UPC Telekabel Wien* C-314/12.

This comment highlights a number of UK copyright decisions from the past year that may be of interest to comparative lawyers. Most notably, the question of whether temporary copies of webpages created while browsing the Internet fell within the scope of the 'temporary copying' exception was referred by the Supreme Court to the CJEU; in doing so, however, the Supreme Court also set out its own conclusion to the question. In addition, the guidance given by the CJEU on the scope of

copyright protection for computer programs was applied by the High Court and the Court of Appeal. The Court of Appeal also decided a case involving the *sui generis* database right, and the High Court ruled on three cases involving applications by copyright owners for injunctions to compel major Internet service providers ('ISPs') to block their subscribers' access to websites that allowed them to access infringing material.

In *Newspaper Licensing Agency Ltd v Public Relations Consultants Association* [2013] UKSC 18, the question of whether temporary copies of webpages created during browsing fell within the scope of the 'temporary copying' exception contained in section 28A of the Copyright, Designs and Patents Act 1988 (which implements article 5(1) of the Information Society Directive) was raised before the Supreme Court. Recognising the question's transnational dimension and its implications for Internet users across the EU, the Supreme Court elected to refer the matter to the CJEU for a preliminary ruling, 'so that the critical point may be resolved in a manner which will apply uniformly across the European Union'. The Supreme Court did, however, also set out its own conclusion on the question: it reviewed, summarised, and synthesised the case law of the CJEU as set out in *Infopaq International A/S v Danske Dagblades Forening* C-5/08, *Football Association Premier League v QC Leisure* C-403/08 and *Murphy v Media Protection Services Ltd* C-429/08, and *Infopaq International A/S v Danske Dagblades Forening* C-302/10, and concluded that the 'temporary copying' exception did apply to copies generated by an Internet user in the course of browsing. In particular, the court noted that it was clear from the recitals to the Information Society Directive, in particular recital 33, that it was intended that the 'temporary copying' exception should 'include acts which enable browsing as well as acts of caching to take place', and that it therefore followed that 'the recital expressly envisages that the exception will apply to end-user viewing of web-pages'. The Supreme Court also considered the implications of deciding otherwise for ordinary Internet users, observing that '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 ... by merely coming upon a web-page containing copyright material in the course of browsing', an outcome which it described as 'unacceptable'. While the approach of the Supreme Court has met with approval from a number of commentators, it remains to be seen whether its reasoning will be adopted by the CJEU.

The CJEU had, in 2012, handed down an important judgment on the scope of copyright protection for computer programs, namely *SAS Institute Inc v World Programming Ltd* C-406/10. In that decision, the CJEU had made it clear that the copyright subsisting in a computer program protects neither its functionality, the programming language in which it is written, nor the format of data files used in it, as these do not constitute a form of expression of that computer program. The CJEU did, however, leave open the possibility that the programming language and the format of data files might still be protected as copyright works generally provided that they are their author's own intellectual creation. The guidance given by the CJEU was applied by the High Court in the very same case from which it had been referred. In *SAS Institute Inc v World Programming Ltd* [2013] EWHC 69 (Ch), the High Court held that the defendant had not infringed the copyright in the claimant's computer program merely by creating an alternative program which emulated the functionality of the claimant's computer program, contained elements of the

claimant's programming language, and was capable of reading and writing files in the data file format used by the claimant's program. This was largely consistent with the approach that had previously been taken by the English courts in *Navitaire Inc v easyJet Airline Co Ltd* [2004] EWHC 1725 and *Nova Productions Ltd v Mazooma Games Ltd* [2006] EWHC 24 (Ch); [2007] EWCA Civ 25. The decision of the High Court was largely affirmed by the Court of Appeal in *SAS Institute Inc v World Programming Ltd* [2013] EWCA Civ 1482. Though the Court of Appeal disagreed somewhat with certain aspects of the High Court's reasoning, these disagreements did not affect the ultimate result.

It is worth noting that the High Court also held that it would be unjustified, at this late stage, for the claimant to be given permission to amend its particulars of claim so as to advance the case that the programming language and data file format in question amounted to distinct copyright works in their own right. While these issues could not, for this reason, be fully ventilated, the High Court did express the provisional view that a programming language (and languages more generally) are not capable of being copyright works, being rather material from which works may be created; it also added that this view was not precluded by the possibility that such languages may be intellectual creations, as 'there are many intellectual creations which are not works, such as scientific theories'. The High Court also expressed some doubt as to whether data file formats such as the one used by the claimant's computer program would be able to satisfy the requirement of 'author's own intellectual creation', noting that this requires the author to have stamped his personal touch on the work through the making of personal choices, and that elements dictated purely by technical function be disregarded.

In *Football Dataco Ltd v Stan James plc and Sportradar GmbH* [2013] EWCA Civ 27, the Court of Appeal held that a *sui generis* database right subsisted in a database consisting of information gathered 'live' by the claimant's agents from football matches as those matches proceeded (covering a whole range of events on the field as soon as they occurred, including goals and their times, scorers, types of shot, misses, fouls, saves, substitutions) and then entered into the claimant's computers. In doing so, the Court of Appeal rejected the argument that the process of recording factual events occurring at a football match did not amount to the obtaining of pre-existing data, but only to the creation of new data; had it held otherwise, the database in question would not have qualified for the *sui generis* database right, as such a right only arises 'if there has been a substantial investment in obtaining, verifying or presenting the contents of the database' (regulation 13(1) of the Copyright and Rights in Databases Regulations 1997, implementing article 7(1) of the Database Directive). Effectively, it distinguished the present case from *British Horseracing Board Ltd v William Hill Organisation Ltd* C-203/02, where the CJEU had held that the resources used to draw up a list of horses in a race and to carry out checks in that connection amounted to investment in the creation of data and did not represent investment in the obtaining and verification of the contents of the database in which that list appeared. The Court of Appeal also held that the defendants, Stan James and Sportradar, were liable as joint tortfeasors for the acts of UK punters who accessed Sportradar's own database of sports statistics via a link provided on Stan James' betting website. This was because Sportradar, in constructing its own database, had extracted a substantial part of the information contained in the claimant's database in breach of the latter's database right, and the entirety of

Sportradar's database was downloaded into each punter's computer each time the link was accessed.

Finally, the three decisions involving applications by copyright owners for injunctions against the six main retail ISPs in the UK (pursuant to section 97A of the Copyright, Designs and Patents Act 1988, which implements article 8(3) of the Information Society Directive) requiring the ISPs to block access by the subscribers to websites that enable them to access infringing copies of copyright-protected material (whether by way of downloading or streaming) illustrate both the growing number of cases in this area as well as the increasingly standardised approach which the English courts have developed in dealing with them. All three of these cases – *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch), *Football Association Premier League Ltd v British Sky Broadcasting Ltd* [2013] EWHC 2058 (Ch), and *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch) – were decided at the level of the High Court by Arnold J. In all three of these cases, his Lordship referred to principles applicable to cases of this kind as established by himself in his earlier judgments in *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011] EWHC 1981 (Ch), *Twentieth Century Fox Film Corp v British Telecommunications plc (No 2)* [2011] EWHC 2714 (Ch), *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch), *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd (No 2)* [2012] EWHC 1152 (Ch). In all three cases, the operators and users of the websites concerned were held to have infringed the claimants' copyrights by communicating the claimants' works to the public, even where the websites in question did not host the works themselves, but only facilitated the public's access to these works by functioning as an indexing and aggregation portal. As the High Court itself indicated, however, this aspect of its decision may well be affected by the outcome of the reference in *Svensson C-466/12*, which is currently pending before the CJEU, in which the referring court asks, *inter alia*, whether the provision of a clickable hyperlink to a work by anyone other than the owner of the copyright in that work constitutes communication to the public within the meaning of article 3(1) of the Information Society Directive.

Additionally, the High Court also held that the operators of the websites in *EMI Records* and *Paramount Home Entertainment* were liable for authorising the infringing acts of the users of their websites, taking into account factors such as the design of the websites concerned, which provided users with a sophisticated and user-friendly environment for locating copyright-protected content; the fact that the enabling of mass online copyright infringement was the cornerstone of each website's business model; the high degree of control which the operators retained over their websites; and the operators' failure to take meaningful steps to prevent widespread infringement. In each of these three cases, the High Court noted that the users and operators of the websites concerned had used the ISPs' services to infringe the claimants' copyrights, and that the ISPs had actual knowledge of such infringement, having received notifications from the claimants' representatives containing evidence of these infringements. In all three cases, the blocking orders sought by the claimants were granted, the High Court being satisfied that the orders in question were necessary and appropriate to protect the claimants' intellectual property rights, and were proportionate on the facts of the case, given that the claimants' intellectual property rights outweighed the right to freedom of expression

and information of the websites' users (as they could obtain the works from many lawful sources) and operators (as they were profiting from infringement on an industrial scale); that the orders were narrow and targeted in form, and contained safeguards in the event of change of circumstances; and that the cost of implementation to the ISPs would be modest and proportionate. Again, however, position may also have to be revisited subsequent to any decision handed down by the CJEU in relation to *UPC Telekabel Wien* C-314/12, which is also currently pending before it, in which the referring court asks, *inter alia*, whether blocking injunctions against ISPs is compatible with EU law, in particular the necessary balance between the parties' fundamental rights.