

## Additional material for Chapter 29 – Copyright

*Section numbers from the book are used when relevant. Its content provides fuller explanations and context.*

### 29.7 The scope of copyright protection

#### Fixtures lists, databases, and tide tables

The 'skill, judgement and labour' and 'selection and arrangement' in compiling fixture lists - for example, of the Premier League football matches - meant the leagues which compiled them could claim copyright in them. Professional football leagues in the UK required the media to pay fees to reproduce the lists on sports pages, etc. But in 2012 after a long-running and complex legal dispute the European Court of Justice (ECJ) ruled that, in the circumstances of that case, there was no copyright in fixture lists, because there was insufficient 'originality' in their creation. The ruling - in *Football Dataco and others v Yahoo! UK Ltd and others*, C-604/10 - interpreted a European Union directive on copyright in databases. As 1.2.4 in *McNae's* explains, EU directives are a source of law, designed to 'harmonise' throughout the EU some field of law. The effect of this ECJ ruling is that the meaning of the term 'originality' in copyright law applying to databases is now linked more closely to the quality of 'creativity' than it had been in English and Welsh law.

But the complexities of EU law, and scope for each EU nation to apply it with some discretion, mean that a ruling in one case concerning copyright in compilation of data may not apply in the different circumstances of another. It depends on what may be ruled about the degree of 'originality'. Also, there is a separate 'sui generis' right protecting the investment made to create some types of database (but this does not apply to fixture lists).

Copyright continues to be asserted in tide tables by organisations which compute tide times. They licence councils and media organisations to reproduce them.

#### TV and radio listings

Section 176 of the Broadcasting Act 1990 says those who provide a broadcast service, and own the copyright in the programme listings, must make the listing information available, through a copyright licensing scheme, to any organisation wishing to publish it, but can charge.

#### Orphan works

The Enterprise and Regulatory Reform Act 2013 amended the Copyright, Designs and Patents Act 1988 to allow the introduction of schemes for the licensing of 'orphan works' - that is, works for which the copyright owner (for example, the creator) cannot be located or his/her identity is not known. The aim of this law is to help public and private bodies which hold such works make copies available to the public, including for commercial reasons. Under the Act regulations give the Secretary of State for Business, Energy and Industrial Strategy power to appoint appropriate bodies to license such copying of orphan works. The Intellectual Property Office (IPO) was appointed to this role. There is a requirement for a diligent search to be made to attempt to find the copyright owner before a work qualifies as an orphan work, and provision for any copyright owner who subsequently emerges to be able to claim a copyright fee from the licensing body.

When Parliament debated the detail of the Act organisations representing journalists and news agencies expressed concern that the search for the copyright owner might not be diligent enough. The fear was that, for example, a photographer could discover that one of his/her published photos was declared an orphan work after a copy was 'found' on the internet with information asserting his/her copyright stripped out. If the photo was deemed to be an orphan work it could be exploited without the photographer's permission. Critics of this change in the law said it would add to the financial burdens of news agencies and journalists because they would have to 'register' their photos and footage with a registry organisation to avoid them being deemed orphan works, and that the new law reflected the interests of multi-national organisations such as Google, which wanted to exploit 'orphan works', rather than safeguard creators' interests. The Government insisted the law contained sufficient safeguards to be fair, and that registration would not be necessary. See Useful Websites, below, for the regulations and Government guidance on orphan works.

### 29.3 Copying from the internet, including social networking sites

**Case study:** Commercial photographer Jason Sheldon sued Daybrook House Promotions Ltd, a company running Nottingham dance venue Rock City, after he discovered it used one of his pictures in a poster campaign for its events. The picture was of popstars Ke\$ha and LMFAO on their tour bus. Daybrook said the photo had been available on the Tumblr website, which it mistakenly believed meant the photograph was there to be freely used. Daybrook offered to pay Mr Sheldon £150 for its use. But in a preliminary ruling Judge Birss, in the Patents County Court, said that if the case proceeded and he found copyright had been breached, he would award Mr Sheldon £5,682.37 damages, noting that, for this particular photo, he had exclusive access to the pop stars (*Sheldon v Daybrook House Promotions Ltd* [2013] EWPC 26). It was later reported that Daybrook settled the case—see Useful Websites at the end of this chapter. The Patents County Court is now the Intellectual Property Enterprise Court.

### 29.6 'Private and domestic' photographs and films

When is a photograph commissioned? The Act does not define in section 85 what a 'commission' is.

**Case study:** In 2012 the High Court judge Mr Justice Tugendhat rejected argument that photos of a civil partnership ceremony taken by a male friend of one of the couple to be his (the photographer's) wedding present to them were 'commissioned'. The judge said that 'commissioning in section 85 means that there must be an obligation on the part of the commissioned party to produce the work and an obligation on the part of the commissioning party to pay money or money's worth' (*Trimingham v Associated Newspapers* [2012] EWHC 1296 QB).

#### 29.7.4 'Lifting stories'

**Case study:** The Solent News agency was paid an undisclosed sum by the Press Association to settle a dispute over a 237-word report of an interview Solent had obtained with a murder victim's father. Solent had supplied it to the *Southern Echo*, and said that PA had 'lifted it' from the Echo's website without permission. PA said it had acted 'in good faith' (*Press Gazette*, August 3, 2011).

## 29.10 Copying to report Parliament and the courts

**Case study:** The High Court of Judiciary in Scotland ruled in 2012 that the section 45 defence, the open justice principle and rights in Article 10 of the European Convention on Human Rights protected media publication of photos which featured as prosecution evidence in a Glasgow High Court murder trial, even though the copyright owner - the defendant - objected to their publication (*BBC (in the case of HM Advocate v Kimberley Mary Hainey) Petitioners*) [2012 S.C.C.R. 354]). The photos were family shots of the baby Declan Hainey, taken by his mother Kimberley. The High Court jury convicted her of murdering him, but in 2013 the Court of Criminal Appeal quashed the conviction.

## 29.12 Legal remedies for infringement of copyright

The level of damages awarded by a court may reflect its view that there has been a flagrant breach of copyright.

**Case study:** In 2002 *The Sun* was ordered to pay £10,000 damages for infringement of copyright in a photograph of a patient at Rampton secure hospital, who was convicted killer. *The Sun* had published a copy in a report about him being given rehabilitative day release from the hospital. The copy was leaked to the paper from the man's confidential, medical notes. The judge deemed the market value of the photo to have been £450 had the copyright owner wanted to sell it, but awarded £10,000 to that owner, the NHS trust responsible for the hospital, to reflect the 'flagrancy' of the infringement (*Nottinghamshire Healthcare NHS Trust v News Group Newspapers* [2002] EWHC 409).

### 29.13.1 What is 'substantial'?

The *Meltwater* case shows the impact of developments in European jurisprudence on what in copyright law can be considered to be a 'substantial part' of protected text.

**Case study:** The High Court in London ruled in 2010 that subscribers to Meltwater News, a commercial monitoring service, were infringing the copyright of UK national newspapers. The court heard that in response to chosen search terms, Meltwater would electronically 'scrape' the headlines of and short text extracts from articles, including extracts containing the terms, from newspapers' websites. It made copies of this material available to subscribers by email or through its own website, with a hyperlink to the relevant newspaper's webpage for the article to be read there in full. Mrs Justice Proudman ruled that some headlines could, in their own right, be protected by copyright, as were many of the text extracts copied by Meltwater

in a transmission process which meant its subscribers too made copies. She drew on a 2009 ruling in which the European Court of Justice ruled that a single extract of 11 consecutive words from a newspaper article could be protected by copyright if the work had sufficient originality (*Case C-5/08 Infopaq International A/S v Danske Dagblades Forening* [2010] FSR 495), and she noted that the 'capture' in Meltwater's system was copying many extracts. Mrs Justice Proudman said that the ECJ had made clear 'that originality rather than substantiality is the test to be applied to the part extracted. As a matter of principle this is the only real test.' Her ruling, which was upheld by the Court of Appeal, meant that the newspapers' bargaining power to charge Meltwater for its use of their headlines and text was improved. See also 29.7.1 and 29.13.1 in *McNae's* on what is 'original' and what is 'a substantial part'.

### 29.14.1 Defence of fair dealing for the purpose of reporting current events

**Case study:** In 2016 a High Court judge ruled that the creation (by copying) in an 'app' for mobile devices of video clips, lasting up to eight seconds, of highlights of cricket test matches, and the 'sharing' of these clips via the app and online had infringed the copyright held by the England and Wales Cricket Board Ltd and Sky UK Ltd in televised broadcasts of the matches and in the 'films' made by Sky in production of the broadcasts - in particular in films recording broadcast footage for action replays. The judge, Mr Justice Arnold said that Sky had paid 'hundreds of millions of pounds' to the Board, the governing body of cricket in England and Wales, for the right to televise these international matches. The disputed clips had been made (copied) from Sky's footage by members of the public using 'screen capture' technology and then uploaded (that is, copied again) to an app created by Fanatix Ltd to enable users to 'share' clips of sporting events. Fanatix encouraged users to upload the clips to various versions of the app, in what it was developing as a commercial venture. Employees and contractors of Fanatix also uploaded some of the clips to Fanatix's website. The clips could also be viewed on a Facebook page and Twitter feed run by Fanatix. The Board and Sky sued Fanatix and Tixdaq Ltd, a related company, for infringement of copyright. Mr Justice Arnold observed that, under the Copyright, Designs and Patents Act 1988, such clips are included in what are termed 'films' (which is the 'first fixation of films'). Copyright in films and in broadcasts exists inherently as 'signal rights'. He said these were 'entrepreneurial rights which protect the investment' of the producer and broadcaster respectively. The 'signal rights' means such clips – and raw footage, unedited audio and 'live transmissions' – are not required to be 'original' (see 29.7 in *McNae's*) in the sense of being intellectual creations, to be protected by copyright. This meant there was no need for Mr Justice Arnold to rule on whether the creative input of the director and others in televised sports coverage – for example, selection of camera angles, use of 'close ups' and slow motion – should be categorised under the 1988 Act as 'original, dramatic work', although possibly such input into many of the copied clips could be (and such input into TV dramas and cinema would be). Most of the clips constituted highlights of the matches – for example, wickets taken, appeals refused, centuries scored and the majority of the clips also involved 'action replays'. The Fanatix app enabled users to share and view such highlight clips, copied from the Sky broadcasts, on a 'near live' basis. The judge said that each clip substantially exploited the Board's and Sky's investment in producing the relevant broadcast and/or film. He ruled that

each 'highlight' clip showed 'something of interest, and hence value', and so constituted a substantial part of the relevant copyright works (the broadcast of and films from that session of match coverage). This ruling meant the Act's protection of copyright applied to these clips – see too 29.13.1 in *McNae's* on the Act's term 'substantial part'. Fanatix and Tixdaq sought to rely primarily upon the defence of fair dealing for the purpose of reporting current events. The judge noted that case law – see the case study in 29.14.1 in *McNae's* – was that the defence can cover the reporting of news 'of a sporting character'. Fanatix and Tixdaq argued that the defence's requirement that there be 'sufficient acknowledgement' of the copyright owner was met in the main in Fanatix's use of the clips – for example, in many instances Sky's logo was captured as part of the clip and was shown. They conceded there had not been 'sufficient acknowledgement' in some instances. But this did not turn out to be a key issue in the judge's ruling, because he ruled that Fanatix's use of the clips went beyond what was 'fair' in all versions of the app, and in what was 'shared' online, because – for example – the amount of clips which could be seen as 'near live' and repeatedly online meant the Fanatix usage conflicted with the Board's and Sky's commercial exploitation of copyrights in the footage. For example, Fanatix's venture could reduce the number of people who would pay subscriptions to Sky to view its coverage of sport and could reduce the value of the Board's ownership of television rights. Also, the judge ruled that the purpose of the copying facilitated or done by Fanatix, even in versions of the app in which it required users – in the main, member of the public – to add at least 70 characters (for example, letters) of commentary to upload a clip to the app, was not to provide 'reporting of a current event'. The judge did consider whether the showing of the copied clips facilitated by the app, and provision of such commentary by the app's users could be considered to be such 'reporting'. He noted that there was very little consideration in case law of what amounts to 'reporting current events', and that the commentary provided by Fanatix users 'was frequently of a fairly jejune nature'. The judge said that in law the defence must be given 'a "living" interpretation, at least in the sense that it must be interpreted in manner that takes into account recent developments in technology and the media.' He said, accordingly, that this fair dealing defence could cover more than the reporting output of 'traditional media' and that 'citizen journalism' can qualify as reporting current events. 'If a member of the public captures images and/or sound of a newsworthy event using their mobile phone and uploads it to a social media site like Twitter, then that may well qualify as reporting current events even if it is accompanied by relatively little in the way of commentary.' Thus, he added, such a person may well be covered by this fair dealing defence 'if the images and/or sound happen to include a substantial part of a copyright work.' But the judge said: 'In my judgment the fact that [Fanatix app] users were required to add at least 70 characters of comments did not alter the basic purpose of the reproduction and communication of the clips. ...The purpose of the use was not informative, but for consumption. It was not for reporting current events, but for sharing clips of footage of sporting events.' The judge said that clips were in the Fanatix venture 'reproduced and communicated to the public for the purposes of sharing the clips with other users and 'facilitating debate amongst users about the sporting events depicted'. He said: 'Of those two purposes, I think it is clear that the first is the primary or predominant purpose. Thus users add comments to the clips they are uploading, they do not create a report to which they add clips. Equally, the clips are presented to viewers accompanied by the comments, rather than

reports being presented to viewers illustrated by clips....The clips were not used in order to inform the audience about a current event, but presented for consumption because of their intrinsic interest and value.... Furthermore, although the fact that a news service is a commercial one funded by advertising revenue does not prevent its use from being for the purpose of reporting current events, I consider that the Defendants' objective was purely commercial rather than genuinely informative'. He concluded: 'The use was not for the purpose of reporting current events; and even if it was, it did not amount to fair dealing' (*England and Wales Cricket Board Ltd and Sky UK Ltd v Tixdaq Ltd and Fanatix Ltd* [2016] EWHC 575 (Ch)).

## Other cases involving fair dealing defences

**Case study:** In 2005 a news photo agency sued the BBC, alleging copyright infringement. A BBC programme had shown, without its consent, 14 of its photos of celebrities David Beckham and his wife Victoria, some including their children. The BBC succeeded with the defence of fair dealing for the purpose of criticism or review for 13 of the pictures, each of which appeared in the programme for a few seconds at most with 'sufficient acknowledgement' of the photographer's identity. The programme was an examination of tabloid journalism methods, and of celebrities who apparently contrived to pose for photographers by arrangement. The High Court judge accepted the BBC's argument that the defence allowed criticism of the 'ideas or philosophy' manifest in the copied photos, and agreed that the 14th photo, small and seen in a brief image as part of a newspaper page, was covered by the 'incidental infringement' defence (*Fraser-Woodward Ltd v BBC* [2005] EWHC 472 (Ch)). See below for the 'incidental infringement' defence.

**Case study:** In 2005 the *Mail on Sunday* published substantial extracts of a hand-written journal kept by Prince Charles, copies of which were leaked to it by one of his former employees. In these extracts, dating from 1993, the Prince's private thoughts about official events that year included his description of Chinese Communist officials as 'appalling old waxworks'. Charles regularly sent copies of the journals to friends, but they were not intended for publication. He sued the paper to stop further publication. It attempted to use the defence of fair dealing for the purpose of reporting current events. But the Court of Appeal said the defence failed because much of the *Mail's* quoting of the journals had no bearing on current events. The paper also tried to use the defence of fair dealing for the purpose of criticism or review. But the Court said this could not succeed because Prince had not chosen to make the extracts available to the public (*HRH Prince of Wales v Associated Newspapers Ltd* [2006] All ER (D) 335 (Dec)). Another factor in the paper losing the case was that the leaking of the journals by the ex-employee was a breach of confidence. *McNae's* ch. 26 explains the law on confidentiality.

**Case study:** Paddy Ashdown, when leader of the Liberal Democrats, kept a private diary. After stepping down as leader he decided to publish it. But before he did, in 1999 *The Sunday Telegraph* published, from a leaked copy, verbatim quotes from a confidential minute he made of a discussion in 1997 with Labour Prime Minister Tony Blair and two other senior

politicians on the idea of a coalition Cabinet. Lord Ashdown sued for breach of copyright. *The Sunday Telegraph*, which had quoted verbatim or nearly verbatim some 20 per cent of the nine-page minute, attempted to use both fair dealing defences. The Court of Appeal rejected both defences, ruling that there was no criticism or review of the minute as a literary work – the criticism was of the actions of Blair and Ashdown. It also ruled that arguably the 1997 meeting could be regarded in 1999 as a current event, but that ‘one or two short extracts’ of verbatim quotes from the minute would have sufficed to make the paper’s account authoritative. But the newspaper had extensively ‘filleted’ the minute, in furtherance of its commercial interests, which competed with Ashdown’s plan to sell his memoirs, the Court said. It was also material that the minutes were leaked in breach of confidence (*Ashdown v Telegraph Group Ltd* [2001] All ER (D) 233 (Jul)).

**Case study:** In 1998 Carlton TV, part of the ITV network, successfully used both fair dealing defences after being sued for copyright infringement by a German TV channel. Carlton had in 1996 broadcast a programme examining chequebook journalism. This featured a British woman who that year, when pregnant with eight live embryos after fertility treatment, sold exclusive interview rights to the German channel for about £30,000. The Court of Appeal said Carlton’s use of a 30-second clip of an interview with her, copied from a nine-minute item broadcast by the German channel, was not unfair. Carlton had shown the German channel’s logo and the name of the relevant German programme, which was ‘sufficient acknowledgement’ of the work and author. Carlton’s use of the clip was therefore protected by the defence of fair dealing for the purpose of criticism, in that its programme as a whole was made for the purpose of criticism of works of chequebook journalism in general. The Court added that the use of the clip was also protected by the defence of fair dealing for the purpose of a reporting a current event, which was the fact that the woman had sold the interview rights (*Pro Sieben Media AG v Carlton Television Ltd* [1998] All ER (D) 751).

### 29.15 Public interest defence

As explained above, in *BBC (in the case of HM Advocate v Kimberley Mary Hainey) Petitioners* the High Court of Judiciary in Scotland ruled that section 45 of the 1988 Act meant that the media could publish photos which had been prosecution evidence in a murder trial. The judge, Lord Woolman, added the view that ‘the public interest in the proper and full reporting of this case is sufficient to “trump” any right of the copyright owner’.

In *Lion Intoximeters v Evans* [1985] QB 526 the Court of Appeal ruled that the *Daily Express*’s publication of the breathalyser company’s internal memo would be in the public interest, and so should not be constrained because the company claimed breach of copyright or because it claimed breach of confidence. For more detail of this case, see 26.6.2 in *McNae’s*.

### Incidental infringement and publicly displayed artworks

Section 31 of the Act says copyright in a work is not infringed by its incidental inclusion in a photo, sound recording, film or a broadcast. So there is no infringement if a TV news report incidentally shows, in the background, a work of art, or its sound track of coverage of a wider event incidentally

includes a band playing, although deliberately including music would need to be covered by another defence or exception—for example, fair dealing.

### **Innocent infringement**

If an infringer did not know and had no reason to believe the copied work was subject to copyright—for example, he/she genuinely believed the copyright had run out—the copyright owner would be entitled to an account of profits but not to damages. See in 29.12.1 in *McNae's* for what 'account of profits' means.

### **Other exceptions, and the Act's complexity**

The 1988 Act allows some types of copying for private research, education, by libraries and in domestic use - for example, a household copying TV broadcasts for viewing later. A specialist book is needed to understand some of the Act's provisions, including the rights of live performers to restrict broadcast of their performances. See the Book List in *McNae's*, p. 465.

### **Moral rights for creators**

The 1988 Act, to comply with an international convention, gives 'moral rights' to authors (creators) of some categories of copyright work, including literary and artistic work—for example, a photo—and to the director of a film. He/she can assert the right to be identified when his/her work is published and has the right not to have it subjected to 'derogatory'—for example, distortive—treatment. A person has a moral right not to have a work falsely attributed to him/her. This law is in sections 77–84 of the Act. The rights to be identified and not to have the work subject to derogatory treatment do not apply to work created in the course of employment, or for reporting current events, or to other types of content in a newspaper, magazine or periodical. But a freelance with sufficient bargaining clout – for example, based on the exclusivity of the journalism and/or their renown as a journalist - can insist, as a term of the copyright licence, on being identified by a media publisher as the work's author.

### **'Passing off' and trade marks**

Other civil law provides remedies against someone who, to gain profit, falsely 'passes off' their products or services as being retailed by a more prestigious organisation. Also, a celebrity could use this law to stop his/her name or image being falsely used to endorse a product. The system of registration of trademarks gives similar protection in the retail of goods and services.

### **29.17 Do hyperlinks breach the copyright in the material linked to**

The European Court of Justice (ECJ) ruled in 2014 that a news-monitoring website's use of embedded hyperlinks to direct its client readers to items on a newspaper's website had not infringed copyright in that material because it had already been made freely available online by the newspaper (*Svensson and others v Retriever Sverige AB*, C-466/12). In that case, the newspaper owned the copyright of this linked-to material.

In this judgment, which remains a landmark in the law on copyright and hyperlinking, the ECJ, referring to the European Union copyright Directive 2001/29, ruled that by making the material freely available online the newspaper had, in effect, consented to other sites hyperlinking to it. The fact that the newspaper had made it freely available meant that the hyperlinking had not been a communication to any 'new public', the ECJ ruled.

Had the hyperlinking breached a paywall there *would* have been communication of the material to a 'new public' – people who had not paid to see it - and that would have meant that the hyperlinking breached copyright (if no defence under copyright law applied – see 29.13 in *McNae's* and above, in this Additional Material, about defences).

In ECJ case law a 'new public' is 'a public that was not already taken into account by the copyright holders [copyright owners] when they authorised the initial communication to the public of their work.'

### **Embedding by 'framing'**

In a judgment later in 2014 (*BestWater International GmbH v Michael Mebes and Stefan Potsch, C-348/13*) the ECJ considered whether 'framing', which is another form of 'embedding' a link from one website to another, in itself breached copyright.

'Framing' can mean that readers/viewers visiting a website - for example, that of a news organisation - are through a 'frame' created by software directed to a video on another website run by another publisher - for example, Youtube. The design of the 'framing' may mean that the readers/viewers may not even realise that the video they cause to be played in the 'frame' is hosted on that other site.

In *BestWater* the ECJ followed the principles set out in its *Svensson* judgment – that is, if the 'framed' material, such as a video, is already freely available to all internet users on that other website with the authorisation of the copyright owners, the 'framing' link does not breach copyright law.

### **If linked-to material has been uploaded to the internet in breach of copyright**

In September 2016 the ECJ ruled on whether copyright is breached by the act of one website hyperlinking to another when the linked-to material has been uploaded to the internet on that second website without the copyright owner's permission (*GS Media BV v Sanoma Media Netherlands BV and Others, C-160/15*).

The case concerned photographs commissioned in 2011 by Sanoma, the publishers of Playboy magazine, which showed a TV personality Britt Geertruida Dekker posing nude. The photographer retained copyright in them but gave Sanoma the legal power to act to protect that copyright.

GS Media operates the Dutch website *GeenStijl*. This aims to provide 'news, scandalous revelations and investigative journalism with lighthearted items and wacky nonsense'. The ECJ noted that

GeenStijl was being viewed daily by more than 230,000 visitors, making it one of the 10 'most visited' news websites in the Netherlands.

In articles about the Dekker photos the GeenStijl site in October and November 2011 provided links to other websites which showed copies of these photos. They had been uploaded on those websites without the photographer's permission, breaching his copyright in them. One of these sites was Filefactory.com based in Australia. The photos appeared on Filefactory.com before publication in Playboy magazine. GS Media did not remove the GeenStijl hyperlink to Filefactory.com despite Sanoma demanding this.

Sanoma sued GS Media, claiming that the hyperlinking itself was a breach of the photographer's copyright and unlawfully affected Sanoma's exclusive right to commercial use of the photos. The case was fought up through the Dutch courts until in 2015 the nation's Supreme Court referred the case to the ECJ for a ruling on the hyperlinking issue.

The ECJ ruling in *GS Media* said that the fact that many works on the internet are being communicated to the public without the copyright owner's consent must be taken into account. 'For the operator of a website it will not always be easy to check, if he intends to post a hyperlink to a website on which a work appears, that the rightholder [copyright owner] has consented to the earlier posting of that work.'

The ECJ ruling said that it is necessary - when the posting of a hyperlink to a work freely available on another website is carried out by a person who, in so doing, does not pursue a profit – for a court to presume that such a person does not know and cannot reasonably know that the linked-to work had been published on the internet without the consent of the copyright holder.

But, the ECJ said, when the posting of hyperlinks is carried out for profit 'it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead'. This means, the ECJ said, that it must be presumed in law that such a hyperlink was created 'with the full knowledge of the [copyright] protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder'. Therefore the act of posting on a website run for profit a hyperlink to a work placed on the internet in breach of copyright (as was the case with the photos of Ms Dekker) can be ruled to constitute a 'communication to the public' within the meaning of the Directive, and so the hyperlinking itself can be ruled to be a breach of copyright, the ECJ ruled.

The ECJ ruling does not specify what 'the necessary checks' should be.

### **Guidance on hyperlinking and framing**

From the judgments of the ECJ, the following guidance can be given in respect of website A hyperlinking to material on website B:

- Website B will not be able to successfully sue website A for breach of copyright in respect of the hyperlinking if website B has already made the material freely available to the public (the *Svensson* ruling).
- But website A's hyperlinking could be ruled to breach any copyright website B owns in the material if the hyperlinking breaches a 'paywall' and so enables 'a new public' to see the material (the *Svensson* ruling).
- If the linked-to material has been published by website B without the copyright owner's permission, that owner may in some circumstances be able to successfully sue website A for breach of copyright in respect of the hyperlinking (as well as potentially being able to successfully sue website B for publication in breach of copyright) (the *GS Media* ruling).
  - Those circumstances include when website A is run for profit, because if it is, the law will expect that website A made 'the necessary checks' to establish if website B had permission from the copyright owner to publish the material, and if those checks were not made the hyperlinking is more likely to be ruled to be a breach of copyright.
  - However, if website A is not run for profit, the law will presume – in the absence of proof to the contrary - that anyone running it did not know that the material had been posted on website B without the permission of the copyright owner, and so the copyright owner will not be able to successfully sue website A in respect of its hyperlinking to website B. If not run for profit, website A is not expected in law to check whether website B has the copyright owner's consent to publish the linked-to material.
  - This case law means, for example, that someone who on their personal Facebook page or on a not-for-profit blog creates a hyperlink to website B cannot normally be successfully sued in copyright law for that act, even if it turns out that the linked-to material was uploaded to website B in breach of copyright, but that a news organisation run for profit which hyperlinks to the same material on website B could be successfully sued for breach of copyright by the material's copyright owner, unless the news organisation has a defence in copyright law or can prove it could not have reasonably known that the work was uploaded to website B without the copyright owner's consent.
  - If the news organisation does not make 'the necessary checks' before that hyperlinking or does not keep a good record of them it will face an uphill task to prove that it could not have reasonably known that the linked-to work was uploaded to website B without the copyright owner's consent.
  - Even if website A is not run for profit, it could be successfully sued by the copyright owner for breach of copyright in respect of the hyperlinking if it is proved that the person or organisation running website A knew or ought to have known that website B had published the material without the copyright owner's permission – for example, if that copyright owner notifies website A of that situation but website A does not delete the hyperlink it could be successfully sued in respect of the period after the notification.

So, whether a website is run for profit or not, if it is warned that it has hyperlinked to a work being published elsewhere on the internet in breach of copyright, the safest course is to delete the link

immediately and not restore it unless and until thorough checks give assurance that this would be safe in copyright law.

The *GS Media* ruling concerned hyperlinking but this case law would also apply to 'framing'. This means that if a news organisation run for profit 'frames' on its website material uploaded (published) elsewhere to the internet, and if that uploading (whoever did it) was in breach of copyright, the 'framing' itself could be ruled to be breach of copyright, unless the news organisation has a defence in copyright law or can prove that it could not have reasonably known that the material was uploaded in breach of copyright. The *GS Media* ruling means that proving this may be very difficult if it did not make 'the necessary checks' before activating the 'frame'.

The *GS Media* judgment also means that 'framing' used in a not-for-profit site will not be ruled to be a breach of copyright unless it can be proved that the person running that site knew or ought to have known that the 'framed' material had been uploaded to the internet without the copyright owner's consent.

Some lawyers have interpreted the *GS Media* ruling as meaning that if the copyright owner has, prior to the material appearing on website B, already made the material freely available on the internet elsewhere, that owner cannot successfully sue any website for hyperlinking to or 'framing' that material, even if the link is to website B and the material was uploaded on B without the copyright owner's consent. This interpretation relies on the fact that in such circumstances the hyperlinking or 'framing' does not create a 'new public' (new audience).

**Remember! Actual copying without consent could be costly!**

It should be remembered that the above case law is mainly about mere hyperlinking or mere 'framing'.

Publishing on your website without permission a copy of any photograph or footage or of a lengthy extract of text after downloading it from elsewhere on the internet will breach copyright, unless a defence or exception applies.

In 2016 the Newsquest group, which runs regional newspapers in the UK, warned its journalists that claims against it for breach of copyright - because staff were using in articles photographs copied from the internet - were 'growing exponentially and are bringing real cost to the business in every region' (see Useful Websites, below, for an article about this, published on 27 July 2016 in *The Guardian*)

**'Technical means'**

It is the settled case law of the ECJ that copyright may be infringed if material is communicated to the public, without the consent of the copyright owner, by a technical means which is different from how it was communicated to the public with that consent.

This is why there is a breach of copyright if a website operator, without permission and without any defence in copyright law, 'streams' on the website images taken from a TV channel's broadcast - for example live coverage of a football game. If the copyright breach occurs because of different 'technical means' it is irrelevant whether the communication was to a 'new public'.

In the *Svensson*, *Bestwater* and *GS Media* cases, the hyperlinking or 'framing' was not ruled to involve any different 'technical means', because both the linking and linked-to sites communicated to the public by means of the internet.

## Useful Websites

**[www.epuk.org/News/1039/infringer-who-originally-offered-150-forced-to-pay-20000-in-settlement](http://www.epuk.org/News/1039/infringer-who-originally-offered-150-forced-to-pay-20000-in-settlement)**

Editorial Photographers article on the Sheldon case

**<https://www.gov.uk/government/collections/orphan-works-guidance>**

Government guidance on 'orphan works'

**<http://www.legislation.gov.uk/uksi/2014/2863/introduction/made>**

The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014

**[http://www.legislation.gov.uk/uksi/2014/2863/pdfs/uksiem\\_20142863\\_en.pdf](http://www.legislation.gov.uk/uksi/2014/2863/pdfs/uksiem_20142863_en.pdf)**

'Explanatory Notes' for the 2014 regulations

**<https://www.theguardian.com/media/greenslade/2016/jul/27/newsquest-hit-by-growing-copyright-claims-over-use-of-photographs>**

Roy Greenslade's article about Newsquest's concern over copyright breach