



United Kingdom Copyright Decisions 2021

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Accepted: 1 February 2022 / Published online: 7 March 2022
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Abstract This report highlights the main UK copyright decisions in 2021. Most of these decisions deal with the right to communicate the work to the public in the context of website blocking injunctions, and provide insight into the British courts' likely approach to EU-derived copyright principles following the end of the Brexit transition period. The report also discusses the high-profile case brought by the Duchess of Sussex against the operators of *The Mail on Sunday* and MailOnline for copyright infringement of a letter written by her to her father, which raised issues relating to originality and copyright exceptions.

Keywords Blocking orders · Brexit · Communication to the public · Copyright · Originality · Exceptions

Legislation Copyright, Designs and Patents Act 1988 (UK); European Union (Withdrawal) Act 2018 (UK); European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (UK)

Cases *1967 Ltd v. British Sky Broadcasting* [2014] EWHC 3444 (Ch); *Ashdown v. Telegraph Group Ltd* [2001] EWCA Civ 1142; *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury* C-393/09; *BY v. CX* C-637/19; *Capitol Records Ltd v. British Telecommunications plc* [2021] EWHC 409 (Ch); *Dramatico Entertainment Ltd v. British Sky Broadcasting* [2012] EWHC 268 (Ch); *EMI Records Ltd v. British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch); *Football Association Premier League Ltd v. British Sky Broadcasting* [2013] EWHC 2058 (Ch); *Football Association Premier League Limited v. British Telecommunications*

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Plc [2017] EWHC 480 (Ch); *HRH the Duchess of Sussex v. Associated Newspapers Ltd* [2021] EWHC 1245 (Ch); *HRH the Duchess of Sussex v. Associated Newspapers Ltd* [2021] EWCA Civ 1810; *Hyde Park Residence Ltd v. Yelland* [2001] Ch 143; *Infopaq International A/S v. Danske Dagblades Forening* C-5/08; *Land Nordrhein-Westfalen v. Renckhoff* C-161/17; *Matchroom Boxing Ltd v. British Telecommunications Plc* [2020] EWHC 2868 (Ch); *Nintendo Co Ltd v. Sky UK Ltd* [2019] EWHC 2376 (Ch); *Paramount Home Entertainment International Ltd v. British Sky Broadcasting* [2013] EWHC 3479 (Ch); *Peterson v. Google LLC and Elsevier Inc v. Cyando AG* C-682/18 and C-683/18; *R v. National Insurance Commissioner: ex parte Hudson* [1972] AC 944; *Stichting Brein v. Wullems (t/a Filmspeler)* C-527/15; *Stichting Brein v. Ziggo BV* C-610/15; *Svensson v. Retriever Sverige AB* C-466/12; *TuneIn Inc v. Warner Music UK Ltd* [2019] EWHC 3374 (Ch); *TuneIn Inc v. Warner Music UK Ltd* [2021] EWCA Civ 441; *Twentieth Century Fox Film Corp v. Sky UK Ltd* [2015] EWHC 1082 (Ch); *VG Bild-Kunst v. Stiftung Preußischer Kulturbesitz* C-392/19; *Young Turks Recordings Ltd v. British Telecommunications plc* [2021] EWHC 410 (Ch).

1 Judicial Decisions

This report highlights UK copyright decisions from the previous year that may be of interest to comparative lawyers. The most noteworthy of these decisions relate to the right to communicate the work to the public, and provide valuable insights into the national courts' continued engagement with European copyright law and their likely approach to EU-derived copyright principles following the end of the Brexit transition period.¹ While Court of Justice of the European Union (CJEU) decisions made prior to the end of the transition period are still binding on lower courts, the Supreme Court and certain designated appellate courts – including the Court of Appeal in England and Wales – have the power to depart from them,² based on the same test as the Supreme Court would apply in determining whether to depart from its own case law.³ CJEU decisions handed down after the end of the transition period, meanwhile, are not binding on any national courts,⁴ though national courts may still have regard to them insofar as they are relevant.⁵

¹ The Brexit transition period agreed in the UK-EU Withdrawal Agreement came to an end at 11pm on 31 December 2020. See Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019 (“Withdrawal Agreement”), Art. 126.

² European Union (Withdrawal) Act 2018, Sec. 6(4); European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, regulations 3 and 4.

³ European Union (Withdrawal) Act 2018, Sec. 6(5); European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, regulation 5. The relevant test is set out in the House of Lords Practice Statement of 26 July 1966 [1966] 1 WLR 1234.

⁴ Except in relation to the interpretation and application of certain aspects of the Withdrawal Agreement. See Withdrawal Agreement, Arts. 158 and 174.

⁵ European Union (Withdrawal) Act 2018, Sec. 6(2).

The case which provides perhaps the clearest statement on the national courts' approach to EU-derived copyright principles is the decision of the Court of Appeal in *TuneIn Inc v. Warner Music Ltd.*⁶ This was an appeal from the decision of the High Court,⁷ where Birss J had found the defendant – the operator of an online platform called TuneIn Radio, which provided UK-based users with hyperlinks to radio stations around the world – liable for communicating the sound recordings played by those radio stations to the public, except where the radio stations in question already held licences to play those recordings to audiences in the UK.

The Court of Appeal allowed the appeal in relation to a minor point, but upheld the remainder of the High Court's reasoning. The most interesting aspect of the Court of Appeal's judgment is that all three judges took the time to set out their view on how national courts should approach EU-derived copyright principles in future. This was prompted by the defendant's argument that the Court of Appeal should exercise its newfound power to depart from prior decisions of the CJEU on hyperlinking and the scope of the communication to the public right – a body of case law that has attracted a significant amount of academic criticism.⁸

All three judges – Sir Geoffrey Vos MR, Rose LJ and Arnold LJ – took the view that the Court of Appeal should not depart from the CJEU's jurisprudence in the present case. Arnold LJ, who gave the lead judgment, provided a comprehensive set of reasons why the present case should continue to be decided by reference to the CJEU's case law. First, he noted that there had been no change either in the national legislation or the international legislative framework on the scope of the communication to the public right. Next, he pointed out that the interpretation of the concept of "communication to the public" was a difficult task, and that the CJEU had unrivalled experience of dealing with this very issue, having developed and refined its approach over time. He considered that, if the concept were to be relitigated *ab initio*, it would result in a considerable amount of legal uncertainty. While acknowledging that there were academic criticisms of the CJEU's jurisprudence on hyperlinking, Arnold LJ also noted that there was also academic support for the principles laid down by it.⁹ Finally, Arnold LJ pointed out that, even if the court were to depart from the CJEU's jurisprudence and adopt the narrower definition of "communication to the public" proposed by the defendant, this would still not necessarily assist the defendant's case.

Arnold LJ also provided a useful indication of the national courts' probable approach towards copyright cases decided by the CJEU subsequent to the end of the Brexit transition period. This was prompted by a consideration of how much weight the Court of Appeal ought to give to *VG Bild-Kunst v. Stiftung Preußischer Kulturbesitz (VG Bild)*,¹⁰ a decision handed down by the CJEU after 31 December

⁶ [2021] EWCA Civ 441.

⁷ [2019] EWHC 3374 (Ch). For a summary and discussion of this case, see Lee (2020), pp. 364–366.

⁸ One of the earliest instances of such criticism even predates the handing down of the first CJEU judgment on hyperlinking and the right of communication to the public: see Bently et al (2013).

⁹ The sources specifically referred to by Arnold LJ are: Reinbothe and von Lewinski (2015), §§7.8.17 and 7.8.38; Ginsburg and Budiardjo (2018), pp. 155–160.

¹⁰ C-392/19.

2020. Arnold LJ acknowledged that the decision was not binding on any UK court or tribunal, but noted that it was permissible for such a court or tribunal to have regard to it. He took the view that *VG Bild* should be regarded as highly persuasive. This was because it built upon and refined the CJEU's existing jurisprudence on hyperlinking and the right of communication to the public, and the vast bulk of this jurisprudence constituted retained EU case law which His Lordship had already concluded should not be departed from. Also relevant were the facts that *VG Bild* had been decided by the Grand Chamber, that it dealt with hyperlinking and therefore shed light on the issues raised by the present case, and that it addressed the relationship between two of the CJEU's earlier decisions on hyperlinking, which the High Court had considered to be in conflict with each other.¹¹

The other two judges shared Arnold LJ's view that this was not a case in which the Court of Appeal should depart from the CJEU's jurisprudence. While Rose LJ agreed with Arnold LJ's reasoning on this particular point, she did sound an important cautionary note. In delivering the lead judgment, Arnold LJ – as has become his wont in such cases – had set out a comprehensive summary of the principles laid down by the CJEU on the right of communication to the public. Rose LJ was keen to emphasise that such restatements of the law, especially where they touched on areas that were not directly engaged by the case before the Court of Appeal, should not preclude other courts and tribunals from having regard to the future decisions of the CJEU, even though a decision of the Court of Appeal would generally be binding on that court or tribunal. Rose LJ gave the example of the CJEU's jurisprudence on graphic user interfaces and in particular its decision in *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury (BSA)*.¹² That jurisprudence was not directly engaged by the present case, but Arnold LJ had referred to *BSA* in passing when setting out his summary of the CJEU's jurisprudence. She noted that, while *BSA* might represent the CJEU's most up-to-date position on the issue of graphic user interfaces so far, it was entirely possible that its reasoning might be revisited by the CJEU in a future judgment. If that were the case, a national court or tribunal hearing a future case on graphic user interfaces should not be discouraged from having regard to that future judgment of the CJEU simply because the Court of Appeal had, in the present case, referred to *BSA* in its summary of the CJEU's case law.

Sir Geoffrey Vos MR, meanwhile, gave a much shorter list of reasons why the Court of Appeal should not depart from the CJEU's copyright jurisprudence in the present case. First, he pointed out that the communication to the public right originated from international treaties, and was a particularly difficult area of law that had impacts across national borders. It would therefore be undesirable for one nation to depart from the CJEU's jurisprudence without a good reason. Second, he noted that the Supreme Court's practice was to depart from its own earlier decisions only where they “were generally thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy”.¹³ In

¹¹ Namely *Svensson v. Retriever Sverige AB* C-466/12; *Land Nordrhein-Westfalen v. Renckhoff* C-161/17.

¹² C-393/09.

¹³ *R v. National Insurance Commissioner: ex parte Hudson* [1972] AC 944, p. 966.

his view, the CJEU's jurisprudence on the right of communication to the public neither impeded nor restricted the proper development of the law, nor did it lead to results which were unjust or contrary to public policy. In light of this, he considered that a departure from the CJEU's jurisprudence in the present case to be both unnecessary and undesirable, and would create legal uncertainty for no good reason.

Two noteworthy decisions on website blocking injunctions and the communication to the public right, which represent a further development in the UK's jurisprudence in this area, were handed down by the High Court. *Miles J* was the presiding judge in both of these cases. Both cases were brought against the six main retail internet service providers (ISPs) in the UK by record companies who were members of BPI Ltd (BPI) and Phonographic Performance Ltd (PPL), the British recorded music industry's trade association and collective management organisation respectively. Collectively, the members of BPI and PPL hold the rights for approximately 99% of the sound recordings legally consumed in the UK. It was the record companies' case that the copyrights in many of these sound recordings had been infringed by the users and operators of the websites targeted by the blocking injunctions.

In the first of these cases, *Capitol Records Ltd v. British Telecommunications plc (Capitol Records)*,¹⁴ Miles J granted an injunction requiring the ISPs to block their subscribers' access to a nitroflare.com, a "cyberlocker" site which allowed its users to upload and download unauthorised copies of copyright works to and from its servers. In arriving at his decision, Miles J referred to and applied the legal principles on website blocking injunctions as first set out by Arnold J (as he then was) in *Dramatico Entertainment Ltd v. British Sky Broadcasting (Dramatico)*¹⁵ and developed in subsequent cases.¹⁶ The most striking feature of this decision is the judge's conclusion that the site operators were not only liable for having authorised and/or having acted as joint tortfeasors in respect of the infringing acts committed by their users, but were also directly liable for having communicated the claimants' sound recordings to the public. In doing so, Miles J applied the principles set out by the CJEU in *Stichting Brein v. Ziggo BV (Ziggo)*.¹⁷ He took the view that the site operators had intervened to give their users access to the claimants' works, as without such intervention, their users would not have been able to enjoy those works or would have been able to do so only with difficulty. He also concluded that the intervention was not "passive", highlighting the fact that nitroflare.com had been set up to enable users to upload and download such works in an easy and

¹⁴ [2021] EWHC 409 (Ch).

¹⁵ [2012] EWHC 268 (Ch).

¹⁶ *EMI Records Ltd v. British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch); *Football Association Premier League Ltd v. British Sky Broadcasting* [2013] EWHC 2058 (Ch); *Paramount Home Entertainment International Ltd v. British Sky Broadcasting* [2013] EWHC 3479 (Ch); *1967 Ltd v. British Sky Broadcasting* [2014] EWHC 3444 (Ch); *Twentieth Century Fox Film Corp v. Sky UK Ltd* [2015] EWHC 1082 (Ch); *Football Association Premier League Limited v. British Telecommunications Plc* [2017] EWHC 480 (Ch); *Nintendo Co Ltd v. Sky UK Ltd* [2019] EWHC 2376 (Ch); *Maichroom Boxing Ltd v. British Telecommunications Plc* [2020] EWHC 2868 (Ch).

¹⁷ C-610/15.

convenient way. The site operators were also engaged in profitmaking activity, as nitroflare.com was monetised through advertising and subscriptions.

Miles J's attention was also drawn to Advocate General Saugmandsgaard Øe's opinion in *Peterson v. Google LLC and Elsevier Inc v. Cyando AG (YouTube/Cyando)*.¹⁸ Here, the Advocate General had taken the view that neither the operators of the video platform YouTube nor the operators of a cyberlocker site could be said to perform acts of communicating the works uploaded by their users to the public. This was because these site operators did not select the content transmitted, did not determine that content, and did not in some other way present that content as its own. However, Miles J considered that the Advocate General's opinion was unlikely to be adopted by the CJEU, particularly as it departed from three earlier copyright decisions of the CJEU on the communication to the public right, including *Ziggo*.¹⁹

In the second of these cases, *Young Turks Recordings Ltd v. British Telecommunications plc (Young Turks Recordings)*,²⁰ Miles J granted a blocking injunction requiring the six ISPs in question to block their subscribers' access to a number of "stream ripping" sites. These sites enabled their users to download permanent copies of works provided via various streaming services, most notably YouTube. In doing so, he once again applied the same principles as those adopted in *Capitol Records*. As with *Capitol Records*, Miles J also found the site operators to be directly liable for having communicated the claimants' sound recordings to the public, in addition to having authorised and/or acted as joint tortfeasors in respect of the infringing acts committed by their users. Applying the principles set out in *Ziggo* and *Stichting Brein v. Wullems (t/a Filmspelers)*,²¹ he considered that the site operators had intervened to give their users access to the claimants' works, as without such intervention the users would not have been able to download the works except in very limited circumstances. He also took the view that the intervention was "active", as the site had been set up to enable users to download such works in an easy and convenient way. The sites were also profitmaking in nature, as they carried advertising. Once again, Miles J declined to adopt the position taken by the Advocate General in *YouTube/Cyando*, for the same reasons as those he had set out in *Capitol Records*.

Both *Capitol Records* and *Young Turks Recordings* were decided prior to the judgment of the CJEU in *YouTube/Cyando*, which has since been handed down. In addressing the question of whether operators of video-sharing or file-hosting platforms could be said to carry out acts of communication to the public in relation to works unlawfully uploaded by their users, the CJEU began by observing that these platforms did make an indispensable intervention in giving their users access to these works, as the non-existence of these platforms would make such access either impossible or much more complex. The CJEU went on to hold, however, that

¹⁸ C-682/18 and C-683/18.

¹⁹ Subsequent to the release of the Advocate General's opinion in *YouTube/Cyando*, *Ziggo* was approved once again by the CJEU in *BY v. CX* C-637/19.

²⁰ [2021] EWHC 410 (Ch).

²¹ C-527/15.

this did not automatically mean that the operators of these platforms were necessarily engaging in acts of communication to the public. Instead, it was for national courts to assess on a case-by-case basis whether a particular platform had acted deliberately, that is to say, had intervened with the aim of giving the public access to protected works, in full knowledge of the consequences of doing so.

The CJEU then set out a non-exhaustive list of factors to be taken into account by national courts in making this assessment. These included: the fact that the platform operator, knowing or having reason to know in a general sense that its users were unlawfully communicating protected works via its platform, still refrained from putting in place appropriate technological measures that could be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively those copyright infringements; that the operator had participated in selecting protected content unlawfully communicated to the public; that the operator had provided tools specifically intended for the unlawful sharing of such content or knowingly promoted such sharing; and that the operator had adopted a financial model that encouraged its users to communicate protected content unlawfully to the public. The CJEU did caution, however, that the mere fact that an operator was aware, in a general sense, that protected works were being made available unlawfully through its platform and the fact that a platform was profit-making in nature were not, in themselves, sufficient to prove the deliberateness of an intervention.

To some extent, then, the judgments of Miles J in *Capitol Records* and *Young Turks Recordings* anticipated certain aspects of the CJEU's judgment in *YouTube/Cyando*, in particular the point that site operators cannot rely on the fact that it is their users who upload the unlawful content dissemination through their platforms in order to avoid direct liability for primary infringement.

Taken together, these cases suggest that the UK national courts will be slow to depart from the CJEU's jurisprudence on the right of communication to the public, and are likely to continue treating the CJEU's future decisions on this issue as being highly persuasive in nature. While this jurisprudence has been subject to a significant amount of academic criticism, this seems to be outweighed by the CJEU's wealth of experience in this area and the legal uncertainty that would ensue should the national courts decide to depart from the CJEU's case law and strike out on their own, at least for the time being.

One of the most high-profile cases of the previous year was perhaps *HRH the Duchess of Sussex v. Associated Newspapers Ltd.*²² a claim brought by Meghan Markle, the Duchess of Sussex, against the operators of *The Mail on Sunday* and MailOnline. This was in relation to the publication of extracts from a letter written by her to her father, Mr Markle, with whom she had a difficult relationship. The existence of the letter was first disclosed in an article published by the US magazine *People*, which also gave a summary of its contents. Mr Markle objected to the version of events put forward in the *People* article, namely that the letter represented an "olive branch" through which the claimant was seeking to mend their relationship. Subsequently, he reached out to the editor of *The Mail on Sunday* and

²² [2021] EWHC 273 (Ch); [2021] EWCA Civ 1810.

provided her with a copy of the letter. Large parts of the letter were later reproduced in five articles published in *The Mail on Sunday* and MailOnline.

The claimant relied on the following causes of action: the misuse of her private information, a breach of the defendant's duties under data protection law, and infringements of her copyright in the letter. She was granted summary judgment by the High Court on her claims relating to misuse of private information and copyright, and the summary judgment was upheld on appeal. While those aspects of the claim relating to misuse of private information have attracted the most attention from the press and the public, the High Court's reasoning on the copyright claim is also worthy of discussion.

A number of issues were raised by the defendant in response to the copyright claim. The two most substantive of these related, respectively, to originality and to the defences of fair dealing, public interest and freedom of expression.²³ In relation to originality, it was common ground between the parties that the applicable test was the harmonised approach developed by the CJEU, under which copyright protection would apply "only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation".²⁴ There was no attempt by the claimant to argue, whether at first instance or on appeal, that the national courts should revert to the pre-harmonised British standard of originality, namely whether a sufficient amount of "labour, skill and judgment" had been exercised.

The defendant argued that the letter did not satisfy the requirement of originality, as it was "primarily an admonishment" by the claimant of her father, and only "purport[ed] to recite pre-existing facts both past and present including the claimant's views of her father and his conduct". At the High Court, Warby J rejected this argument, describing it as "startling" and "a remarkable argument for a news publisher to want to advance". He drew an analogy between the present case and news reporting, noting that while there is no copyright in news as such, copyright has long been recognised as subsisting in the literary form of a news report, as there are many ways of using words to report the same facts. While he was inclined in principle to agree that statements about undisputed historical events might lack originality if expressed in their most abbreviated and abstract form (such as "the First World War began in 1914"), he also took the view that the argument could not stretch far beyond such examples, and pointed out that even short statements could be expressed in a variety of ways. Warby J also rejected the proposition that the letter was not eligible for copyright protection insofar as it constituted an "admonishment". He stated that, while a brief, curt rebuke consisting of a couple of commonplace expletives might not have the necessary originality, the claimant's letter was much more than that. It was a long-form document which used a variety of literary forms and reflected the exercise of expressive choice. On this basis, he was satisfied that the letter was the product of intellectual creativity which was sufficient to render it original.

²³ The defendant also raised issues relating to authorship and infringement, but these were dismissed after a very brief discussion.

²⁴ *Infopaq International A/S v. Danske Dagblades Forening* C-5/08.

The defendant also relied on three defences: the statutory defence of fair dealing for the purpose of reporting current events,²⁵ the public interest defence,²⁶ and freedom of expression. All of these were rejected by the court. In relation to the defence of fair dealing for the purpose of reporting current events, the defendant's case was that it had reproduced extracts from the claimant's letter for the purpose of reporting on the following: (i) the claimant's conduct towards, relationship with, and estrangement from her father; (ii) the article published in *People*, which disclosed the existence of the letter and gave a description of its contents; (iii) Mr Markle's reaction to and view of the *People* article; and (iv) his dispute with the version of events put forward in the *People* article, namely that the letter represented an "olive branch" through which the claimant was seeking to mend their relationship. Warby J was prepared to accept that, while the latter three topics could properly be described as "current events", being events that had come to pass recently, the first topic could not. In any event, however, he found that only one instance of reproduction fell within the scope of "fair dealing for the purpose of reporting current events". This was the publication of a single paragraph from the letter which supported Mr Markle's claim that its tone and contents had been misrepresented by the *People* article. The paragraph made it clear that the claimant had no intention of offering an "olive branch" to Mr Markle; rather, the main purpose of the letter was to take him to task for his conduct. All the other instances of reproduction were held to fall outside the scope of the defence, as their purpose was to report the actual contents of the letter itself, which was not a current event. Warby J also held that these other instances of reproduction were not "fair", as the letter was an unpublished work (a fact known to the defendant); the defendant had reproduced a large and important proportion of the letter's literary content; and the use of the letter involved an infringement of the claimant's privacy rights.

In response to the defendant's arguments on the public interest defence and freedom of expression, Warby J reiterated the principle, laid down in earlier cases,²⁷ that the CDPA does not create a public interest defence, but rather preserves the common law defence of public interest, which is a manifestation of the court's inherent jurisdiction to refuse to allow the use of its process for purposes that are contrary to the public interest. He also emphasised that, as laid down in earlier cases, protection of freedom of expression is one aspect of the public interest defence. He pointed out, however, that cases where freedom of expression will prevail over copyright are rare. This is for three reasons. First, copyright is, like freedom of expression, a right protected under the European Convention on Human Rights,²⁸ and the court must strike a balance between the two rights. Second, copyright protection only applies to the form in which a work is expressed, and not the ideas and information which it conveys, which remain free for the public to use. The public interest defence would therefore only need to be invoked in those few

²⁵ Copyright, Designs and Patents Act 1988 ("CDPA"), Sec. 30(2).

²⁶ CDPA, Sec. 171(3).

²⁷ *Hyde Park Residence Ltd v. Yelland* [2001] Ch 143; *Ashdown v. Telegraph Group Ltd* [2001] EWCA Civ 1142.

²⁸ European Convention on Human Rights ("ECHR"), Art. 10; Protocol No. 1 to the ECHR, Art. 1.

cases where it is necessary for the public to convey those ideas and that information in the same form in which they have originally been expressed. Third, the fair dealing defence for the purpose of reporting current events will normally give the court all the scope it needs to take account of the public interest in freedom of expression and, in particular, the freedom of the press. Ultimately, he held that this was not one of those rare cases where the public interest requires copyright to be overridden even though the reproduction of the work did not amount to fair dealing for the purpose of reporting current events, for the same grounds as those he had set out in relation to the fair dealing defence.

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