



United Kingdom Copyright Decisions 2022

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Abstract This report highlights the most significant UK copyright decisions in 2022. Most of these relate to the issue of copyright subject matter, which remains the focus of much academic debate. Some of these cases also raise issues relating to infringement and the scope and application of certain exceptions and limitations. The report also discusses the latest decision on website blocking injunctions.

Keywords Blocking orders · Copyright · Infringement · Parody · Pastiche · Subject matter

Legislation Copyright, Designs and Patents Act 1988 (UK); European Information Society Directive 2001/29/EC; 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); *Bonz Group (Pty) Ltd v. Cooke* [1994] 3 NZLR 216; *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV C-683/17*; *Columbia Pictures Industries, Inc v. British Telecommunications plc* [2021] EWHC 2799 (Ch); *Columbia Pictures Industries, Inc v. British Telecommunications plc* [2022] EWHC 2403 (Ch); *Creation Records Ltd v. News Group Newspapers Ltd* [1997] EMLR 444; *Deckmyn v. Vandersteen C-201/13*; *Dramatico Entertainment Ltd v. British Sky Broadcasting* [2012] EWHC 268 (Ch); *EMI Records Ltd v. British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch); *England and Wales Cricket Board v. Tixdaq Ltd* [2016] EWHC 575 (Ch); *Football Association Premier League Ltd v. British Sky Broadcasting* [2013] EWHC 2058

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(Ch); *Football Association Premier League Limited v. British Telecommunications Plc* [2017] EWHC 480 (Ch); *George Hensher Ltd v. Restawile Upholstery (Lancs) Ltd* [1976] AC 64; *Infopaq International A/S v. Danske Dagblades Forening* C-5/08; *Kelly v. Cinema Houses Ltd* [1928 – 35] MacG CC 362; *Levola Hengelo BV v. Smilde Foods BV* C-310/17; *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); *Pasternak v. Prescott* [2022] EWHC 2695 (Ch); *Response Clothing Ltd v. Edinburgh Woollen Mill Ltd* [2020] EWHC 148 (IPEC); *Shazam Productions Ltd v. Only Fools the Dining Experience Ltd* [2022] EWHC 1379 (IPEC); *Waterrower (UK) Ltd v. Liking Ltd (t/a Topiom)* [2022] EWHC 2084 (IPEC); *Sheeran v. Chokri* [2022] EWHC 827 (Ch); *Twentieth Century Fox Film Corp v. Sky UK Ltd* [2015] EWHC 1082 (Ch).

1 Judicial Decisions

This report highlights UK copyright decisions from the previous year that are likely to be of particular interest to comparative lawyers. Many of these deal with the issue of copyright subject matter, a topic that remains the focus of much academic debate given the perceived mismatch between the UK’s “closed list” of subject matter categories and the “open-ended” approach taken by the CJEU in its key decisions on the topic.

For a work to be protected by copyright under the UK Copyright, Designs and Patents Act 1988 (“CDPA”), it must fall within one of the eight categories of subject matter set out in the statute, namely: (i) literary works, (ii) dramatic works, (iii) musical works, (iv) artistic works, (v) films, (vi) sound recordings, (vii) broadcasts, and (viii) the typographical arrangement of published editions.¹ This has traditionally been understood to be an exhaustive list, meaning that a work that cannot be brought within at least one of these categories will be excluded from copyright protection.² In recent years, however, the position that the list is exhaustive has come under challenge. This is due to a line of decisions from the CJEU interpreting various European Directives on copyright, in particular the Information Society Directive. Within this body of jurisprudence the CJEU has effectively laid down two requirements that must be fulfilled for something to be regarded as a “work” in the copyright sense.³ The first is that it must be original in the sense that it is the author’s own intellectual creation; and the second is that it must be the “expression” of this intellectual creation. The CJEU has stated that this latter requirement entails the existence of subject matter which is identifiable with sufficient precision and objectivity. The CJEU has indicated that any subject matter which fulfils all these requirements *must* be protected by copyright as a work.

¹ CDPA, Sec. 1(1).

² *Creation Records Ltd v. News Group Newspapers Ltd* [1997] EMLR 444.

³ *Levola Hengelo BV v. Smilde Foods BV* C-310/17.

In *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV*,⁴ the CJEU held that the Information Society Directive must be interpreted as precluding national legislation from imposing the additional requirement that clothing designs must generate an aesthetically significant visual effect in order to be protected by copyright. The clear implication is that Member States are not permitted to impose any additional criteria for the conferral of copyright protection, including – in the UK’s case – the requirement that the subject matter must fall within a statutorily defined category. As these decisions were handed down prior to the end of the Brexit transition period,⁵ the principles set out in them remain effectively binding on courts in the UK.⁶

The tension between the UK’s statutory “closed list” and the European definition of “work” is particularly marked in the case of works of artistic craftsmanship, one of the subcategories of “artistic work”. This is because courts in the UK have previously held that for something to qualify as a work of artistic craftsmanship, it must have some degree of artistic quality or aesthetic appeal.⁷ This issue arose two years ago in *Response Clothing Ltd v. The Edinburgh Woollen Mill Ltd*,⁸ a decision of the Intellectual Property Enterprise Court (“IPEC”). The question here was whether a jacquard fabric with a distinctive wave design was protected as a work of artistic craftsmanship. In the course of his reasoning, HHJ Hacon expressly acknowledged the tension between *Cofemel* and UK case law on works of artistic craftsmanship, observing that complete conformity with the CJEU’s case law would exclude any requirement that the fabric should have aesthetic appeal, and would thus be inconsistent with the established definition of “works of artistic craftsmanship”. As he had found as a fact that the fabric did have aesthetic appeal, he did not have to go so far as to alter the definition of “works of artistic craftsmanship” completely by excising the requirement of artistic quality or aesthetic appeal. Instead, HHJ Hacon was able to take an intermediate position by adopting a broader interpretation of “works of artistic craftsmanship” that still contained a requirement of aesthetic appeal.⁹ Under this interpretation the fabric in question was held to be a work of artistic craftsmanship within the meaning of the CDPA and was thus protected by copyright as required by the CJEU’s case law.

⁴ C-683/17

⁵ 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.

⁶ CJEU decisions made prior to the end of the transition period are 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, based on the same test as the Supreme Court would apply in determining whether to depart from its own case law: European Union (Withdrawal) Act 2018, Sec. 6(4) and 6(5); European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, Regulations 3 to 5.

⁷ *George Hensher Ltd v. Restawile Upholstery (Lancs) Ltd* [1976] AC 64.

⁸ [2020] EWHC 148 (IPEC). For a summary and discussion of this case, see Lee (2021), pp. 321–324.

⁹ *Bonz Group (Pty) Ltd v. Cooke* [1994] 3 NZLR 216.

The very same issue arose again this year in *Waterrower (UK) Ltd v. Liking Ltd (t/a Topiom)*, in the context of a striking-out application before the IPEC.¹⁰ The claimant was a company which sold exercise equipment, including a water resistance rowing machine called the WaterRower. The WaterRower had been designed by John Duke, a former member of the USA National Rowing Team. He had also studied naval architecture and had previously designed and built several boats. He was said to have taken design inspiration for the WaterRower from the sparse elegance of Shaker furniture. He had constructed the initial WaterRower entirely by hand, and certain aspects of the WaterRower machines continued to be made by hand even after their construction had been outsourced to industrial manufacturers. The WaterRower had been recognised as an “iconic design” by design magazines and museums such as the Museum of Modern Art in New York and the Design Museum in London. The claimant brought an action for copyright infringement against the defendant, claiming that the latter had copied the WaterRower in creating its own TOPIOM rowing machine. Subsequently, the defendant filed an application seeking to strike out the claim, arguing first, that the WaterRower did not qualify as a work of artistic craftsmanship under UK case law; and second, that it did not qualify as a copyright work under the CJEU’s case law as its creation was mainly dictated by technical considerations. Accordingly, the IPEC had to determine whether the claimant “had no reasonable grounds” to claim that the WaterRower was a work of artistic craftsmanship and/or that it had no real prospect of success in relation to that claim.

Mr David Stone, sitting as a Deputy High Court Judge, adopted essentially the same approach as that taken by HHJ Hacon in *Response Clothing*, with which he expressed agreement. He took the view that the claimant had a real prospect of successfully demonstrating at trial that the WaterRower did fall within the definition of “works of artistic craftsmanship” as established in UK case law. First, there was already some evidence that Duke, the WaterRower’s designer, had approached the project with artistic intention. Second, the defendant itself had conceded that the WaterRower was pleasing to the eye (although it also argued that mere eye appeal was insufficient), and the artistic quality of the WaterRower had been recognised in design magazines and museums focusing on modern art and design. Third, the WaterRower did not appear markedly less artistic in its conception or appearance than the examples of works of artistic craftsmanship – hand-painted tiles, stained-glass windows, wrought-iron gates and the like – set out in the case law. Mr Stone was also of the view that, if the requirements set out in the CJEU’s case law were to be applied instead, the claimant would still have a real prospect of demonstrating that the WaterRower was a “work” entitled to copyright protection. While some aspects of the WaterRower were technically constrained, the judge did not consider these constraints to be of the type which forced the designer to a single, pre-defined outcome. Instead, he found it likely that the claimant could demonstrate that the designer still had room to exercise his free and creative choices within those constraints, such as the choice of materials, how the different types of materials were to be treated, the shape and dimensions of various features, and so forth. While

¹⁰ [2022] EWHC 2084 (IPEC).

he acknowledged that there were apparent inconsistencies between the CDPA's closed list of subject matter categories on the one hand and the CJEU's case law on the other, he considered that the facts of the case meant that there was no need for him to resolve these inconsistencies at this stage.

Another case before the IPEC, *Shazam Productions Ltd v. Only Fools the Dining Experience Ltd*,¹¹ also focused on the issue of subject matter. The claimant was the rightholder in the well-known television comedy *Only Fools and Horses* ("OFAH"), which was authored by the late John Sullivan OBE. The defendants were the producers of an interactive dining show which was marketed under the name "Only Fools the (cushty) Dining Experience" ("OFDE"). The actors in OFDE used the appearance, mannerisms, voices and catchphrases of eight main characters from OFAH, and the backstories of those characters and their relationship to each other was carried over into OFDE. OFDE, however, presented these characters in the context of an interactive pub quiz, which had not appeared in OFAH itself. The claimant brought an action against the defendants for copyright infringement, relying on *inter alia* the following works: each script for an episode of OFAH; the body of scripts for OFAH taken as a whole; and the eight main characters from OFAH who appeared in OFDE.

John Kimbell QC, sitting as a Deputy High Court judge, had no difficulty holding that each individual OFAH script was protected as a dramatic work within the meaning of the CDPA. In doing so, he applied the decision in *Martin v. Kogan*,¹² where the Court of Appeal had held that a screenplay was a dramatic work. From there, it was only a small step to the conclusion that a script for a television show was also a dramatic work. He rejected the submission that the body of OFAH scripts taken as a whole were a dramatic or literary work in their own right, as each series of the show had been commissioned separately and there was no evidence that Sullivan had any prior idea of where or when the show would end, and no evidence that the scripts were intended to be treated as a unitary whole.

Perhaps the most controversial aspect of this decision was the judge's ruling that the main character of Del Boy was protected by copyright as a work in its own right. Courts in the UK have historically been equivocal on the question of whether copyright might subsist in a character from a literary or dramatic work. The judgment of Maugham J in the early twentieth century case of *Kelly v. Cinema Houses Ltd*¹³ illustrates this. An oft-cited passage from that case runs as follows:

If, for instance, we found a modern playwright creating a character as distinctive and remarkable as Falstaff ... or as Sherlock Holmes would it be an infringement if another writer, one of the servile flock of imitators, were to borrow the idea and to make use of an obvious copy of the original? I should hesitate a long time before I came to such a conclusion.¹⁴

¹¹ [2022] EWHC 1379 (IPEC).

¹² [2019] EWCA Civ 1645.

¹³ [1928 – 35] MacG CC 362.

¹⁴ [1928 – 35] MacG CC 362, p 368.

This passage was cited to the court by counsel for the defendant in support of the proposition that copyright cannot subsist in a character as a work in its own right under UK copyright law. However, the judge was unpersuaded, on the grounds that it was plainly *obiter dicta*; that it was expressed as a query to which no firm answer was given; and that, read in context, it merely reiterated the broader point that copyright law does not protect mere ideas.

The judge turned next to EU law, and noted that it was common ground between the parties that the appropriate starting point was to ask whether the putative work qualified as a work under EU copyright law, before asking whether it could be accommodated within one of the CDPA's subject matter categories. He then proceeded to apply the requirements of originality and identifiability laid down in *Cofemel*. In relation to originality, the judge held that the character of Del Boy was the product of Sullivan's free and creative choices, finding that Del Boy was not a stock character or cliché of a working-class market trader, but rather a fully rounded character with complex motivations and a full backstory. In relation to identifiability, the judge also found that the features of Del Boy as relied upon by the claimant in constituting his character – including his use of sales patter with replicated phrases, his use of mangled French to try and convey an air of sophistication, his eternal optimism and involvement in dodgy schemes, his making sacrifices for his younger brother Rodney – were precisely and objectively discernible from the OFAH scripts. On this basis, he concluded that the character of Del Boy was protected as a literary work. The judge also noted that the proposition that characters are eligible for copyright protection as works in their own right is in line with the position under both German and US copyright law, both of which recognise that copyright can subsist in fictional characters that are sufficiently complex and distinctive.

Several aspects of this ruling are open to critique. First, there is a real debate to be had about whether a fictional character can properly be regarded as a work in its own right, or whether it is more appropriately regarded merely as a part of or element in the literary or dramatic work in which it is found. This, however, was not considered by the judge. Second, it was not necessary for the judge to hold that the Del Boy character was protected as a copyright work in order to find that the defendants had infringed the claimant's copyright at all. The same conclusion could have been reached in a much more orthodox fashion by holding that the elements which the defendants had copied from OFAH amounted to a "substantial part" of the OFAH scripts. Indeed, this very finding was made by the judge on the facts of the case. This aspect of the *Shazam* judgment thus contrasts sharply with the approach taken in *Waterrower* and previously in *Response Clothing*, where the judges demonstrated much more caution and restraint in departing from existing UK case law. Third, while the judge found "some reassurance" in the fact that the conclusion he had reached was in line with, *inter alia*, the position under US copyright law, it should be noted that the US position on character copyright is open to criticism for being overly expansive. Fourth, the judge may have been too quick to dismiss the passage from *Kelly v. Cinema Houses Ltd* as adding little to the discussion. The passage discloses a reluctance on the part of the court to expressly hold that the reuse of a character – even one "as distinctive and remarkable as

Falstaff ... or as Sherlock Holmes” – could amount to copyright infringement. In holding unequivocally that copyright can subsist in a fictional character as a work in its own right, the judgment in *Shazam* only *increases* the likelihood that the reuse of such a character in another work will be found to be infringement, and dismisses the concern implicit in *Kelly v. Cinema Houses Ltd* that this would result in over-protection. This is especially the case as the judge had not set out any clear principles for distinguishing between stock characters and those who were sufficiently well-rounded to attract copyright protection. Fifth, the judge’s finding that the features of Del Boy relied upon as constituting his character were identifiable with sufficient objectivity and precision is open to challenge. One might equally argue that there is inevitably an element of subjectivity in how someone perceives and describes the supposed key features of a fictional character, and that no two persons would come up with an identical list of features. In addition, the features themselves were framed at a very high level of generality. Finally, it is unclear why the judge had chosen to categorise the character of Del Boy as a *literary* work, as he had previously classified the scripts through which the character had been developed as *dramatic* works.

In addition to the issue of subject matter, the case of *Shazam* also dealt with the fair dealing exceptions for parody and pastiche, which the defendant sought to rely on. The statutory basis for these exceptions is Sec. 30A of the CDPA, which provides that fair dealing with a work for the purposes of caricature, parody or pastiche will not infringe copyright in the work. Both exceptions were ultimately held to be inapplicable. In relation to the parody exception, the judge began with the definition of “parody” set out by the CJEU in *Deckmyn v. Vandersteen*,¹⁵ namely that it must evoke an existing work while being noticeably different from it, and that it must constitute an expression of humour or mockery. He acknowledged that this definition was potentially very broad, especially where the work said to be parodied was itself of a humorous or comical nature. This, in turn, might potentially lead to a situation where every imitation or reproduction of a humorous work would constitute a parody (provided it was noticeably different from the original work). The judge took the view that this could not be what the CJEU had intended in *Deckmyn*. Accordingly, he held that for something to amount to a parody, it had to target or express an opinion about either the original work or something outside it – or, in other words, there must be a critical distance between it and the original work. In doing so, the judge relied on the academic work of Professor Jonathan Griffiths¹⁶ and Dr Sabine Jacques.¹⁷ On the facts of the case the defendant’s attempt to avail itself of the parody exception could not succeed because OFDE did not target OFAH or use OFAH to express humour or mockery about either OFAH or anything else.

In relation to the pastiche exception, counsel for the defence invited the judge to adopt the broad interpretation of “pastiche” advocated by Professor Emily Hudson in her ground-breaking 2017 article on the topic.¹⁸ Having expressed agreement

¹⁵ C-201/13.

¹⁶ Griffiths (2017).

¹⁷ Jacques (2019).

¹⁸ Hudson (2017).

with the views advanced by Professor Hudson, the judge then used them as the basis for formulating the following definition of “pastiche”: the use must either imitate the style of another work *or* be an assemblage (medley) of a number of pre-existing works, *and* (as with parody) the product must be noticeably different from the original work. On this basis, it was held that OFDE was not a pastiche of OFAH, as it did not merely imitate the style of OFAH, nor were the elements taken from OFAH arranged in any sort of medley or assemblage. The judge also went on to hold that the use of elements from OFAH in OFDE did not amount to fair dealing, for a number of reasons. First, OFDE had copied extensively from OFAH both in terms of the quantity of material taken and its quality. Second, OFDE was not a type of expression which attracted particular protection from a fundamental rights perspective, as it made no attempt to express any political views or seek to engage in an artistic dialogue with or aesthetic criticism of OFAH. Third, OFDE competed with the commercial exploitation of OFAH, as the claimant was active in licensing OFAH spin-offs and merchandise and was also in the midst of producing a live OFAH experience in the form of a musical.

Notwithstanding the judge’s stated agreement with Professor Hudson’s views, and despite his use of language similar to that found in her article, the definition of “pastiche” set out in the judgment is significantly narrower than the one originally put forward. Crucially, Professor Hudson’s article includes within the concept of pastiche the *utilisation* of pre-existing works in new works, and not merely the (much more limited) *assemblage* of pre-existing works in the form of medley. The article also emphasizes that this broad interpretation of pastiche means that mash-ups, fan fiction, music sampling, collage, appropriation art, medleys, and many other forms of homage and compilation could fall within its scope, while the judge in *Shazam* was far more equivocal on that point. The reason for the judge’s adoption of this narrower interpretation is apparent from the judgment itself. In formulating the definition of pastiche, he had observed that an overly broad interpretation of pastiche which would cover all forms of appropriation and imitation would run counter to the three-step test set out in the Berne Convention, namely that states parties may create exceptions to the reproduction right only in “certain special cases”. Such an approach is not only overly cautious, it also misses a key point made in Professor Hudson’s article, namely that pastiche ought to be given a very broad interpretation, with constraints imposed through the assessment of whether the use amounts to fair dealing. Given that the judge had also found on the facts that OFDE’s use of elements taken from OFAH was unfair – meaning that the pastiche exception would have been inapplicable in any event – it is unclear that he needed to shut the door so decisively on a broader interpretation of pastiche as a concept.

A positive development, however, is the judge’s incorporation of fundamental rights balancing into the assessment of fair dealing. In *Deckmyn*, the CJEU had indicated that the copyright exceptions should be applied in a way that strikes a “fair balance” between the fundamental rights of authors on the one hand and those of users of copyright-protected works on the other. This has left the precise relationship between the assessment of “fair dealing” required by the CDPA and the

consideration of “fair balance” laid down in *Deckmyn* somewhat uncertain.¹⁹ The judgment in *Shazam* points the way towards a fairly elegant solution. It also addresses the long-standing criticism that the traditional fair dealing assessment does not take adequate account of freedom of expression considerations, as it generally does not consider whether the allegedly infringing work is a form of expression – such as political or artistic expression – which is afforded greater protection under the laws relating to freedom of expression.²⁰

The quotation exception, meanwhile, was considered in *Pasternak v. Prescott*, a case decided by the High Court.²¹ The claimant in this case was the journalist Anna Pasternak, the great-niece of the Russian poet and novelist Boris Pasternak. She was the author of a book entitled *Lara: The Untold Love Story that Inspired Doctor Zhivago*, a non-fictional, historical work which recounted the relationship between Boris Pasternak and Olga Ivinskaya. Olga Ivinskaya was the inspiration for the character of Lara in Boris Pasternak’s world-famous novel *Doctor Zhivago*. The defendant, Lara Prescott, was the author of the novel *The Secrets We Kept*, a fictionalised account of a real-life CIA operation to disseminate Russian language copies of *Doctor Zhivago* throughout the USSR during the Cold War as a propaganda weapon. Half of the novel was focused on a group of female typists and intelligence agents working for the CIA, and the other half on the relationship between Boris Pasternak and Olga Ivinskaya. It was the claimant’s case that the defendant’s novel had infringed the copyright in her own book, relying principally on alleged similarities in the selection, structure and arrangement of facts and incidents.

The claimant also advanced an infringement claim based on an English translation of selected extracts from *Légendes de la rue Potapov* (“*Légendes*”), which was itself the French translation of a book originally written in Russian by Irina Emélianova, the daughter of Olga Ivinskaya. The English translation was the work of Marlene Hervey, who had been commissioned to produce it by the claimant. The claimant had taken an assignment of the copyright in the translation from Hervey. The defendant was said to have copied an extract of some 50 words (with minor changes), consisting of the statement of the political crimes with which Olga Ivinskaya had been charged and for which she was sentenced. It should be noted here that the defendant had never had sight of the full English translation of *Légendes* produced by Hervey, which was never published nor made publicly available. Instead, she had copied the extract in question from the claimant’s own book, where it had first appeared. In her own book, the claimant had acknowledged the source of the extract as *Légendes de la rue Potapov*, with Irina Emélianova as the author. There was no mention of Hervey.

The main part of the claim turned primarily on its facts. After engaging in a careful and detailed comparison of both books, Edwin Johnson J held that the defendant’s *The Secrets We Kept* did not infringe the copyright in the claimant’s *Lara*. He found as a fact that the two works were written with very different styles,

¹⁹ See e.g. *England and Wales Cricket Board v. Tixdaq Ltd* [2016] EWHC 575 (Ch).

²⁰ Macmillan Patfield (1996), pp. 229–231.

²¹ [2022] EWHC 2695 (Ch).

with different content and different arrangement. While both books made use of the same basic chronology and historical facts, this was because they were concerned with the same historical events, and both authors had made use of the same source materials. The most that the defendant could be said to have taken from the claimant's book were odd historical details which were not protected by copyright.

The aspect of the claim which related to the defendant's use of the translation, while much more minor, yielded more interesting observations from the point of view of legal principle, and specifically on the requirement of "sufficient acknowledgement" present in many of the exceptions provided for by the CDPA. The judge held that, as the translation was protected by copyright, the defendant's unauthorized copying of an extract was *prima facie* infringing despite being a quantitatively small part of the whole. In doing so, he applied the test set out in *Infopaq International A/S v. Danske Dagblades Forening*,²² namely that the copying of an extract from a work will amount to an infringement of the rightholder's exclusive right of reproduction if that extract contains an element of the work which expresses the author's own intellectual creation. The defendant then sought to rely on the quotation exception set out in Sec. 30(1ZA) of the CDPA. This provides that the use of a quotation from a work (whether for criticism or review or otherwise) will not amount to infringement provided that: (a) the work has been made available to the public; (b) the use of the quotation is fair dealing with the work; (c) the extent of the quotation is no more than is required by the specific purpose for which it is used; and (d) the quotation is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise). The claimant had admitted that conditions (a) and (c) were satisfied, and the judge found on the facts that condition (b) was also satisfied. The applicability of the defence thus turned on whether the defendant had satisfied condition (d). Of relevance was Sec. 178 of the CDPA, which defines "sufficient acknowledgement" as "an acknowledgement identifying the work in question by its title or other description, and identifying the author unless: (a) in the case of a published work, it is published anonymously; (b) in the case of an unpublished work, it is not possible for a person to ascertain the identity of the author by reasonable inquiry".

As the defendant's book contained no acknowledgement identifying the English translation of *Légendes* nor Hervey as its author, the judge held that this fell well short of what was required to satisfy the criterion of "sufficient acknowledgement". He then went on to consider whether the exemptions set out in Secs. 178(a) or (b) of the CDPA applied. In relation to Sec. 178(a), the judge held that the English translation of *Légendes* was not a published work. In particular, the publication of relevant extract in the claimant's book was held not to amount to the publication of the translation as a whole work. In relation to Sec. 178(b), the judge found that neither the defendant nor her publishers or literary agents had made any inquiries of the claimant to ascertain the identity of the author of the translation, which would have been reasonable for her to do in the circumstances. The judge's reasoning ran as follows. Having looked at the information in the claimant's book, the defendant ought to have realised that the source of the extract was indicated as a work entitled

²² C-5/08.

Légendes de la rue Potapov, written by Irina Emélianova. The defendant ought then to have appreciated that this source, being a work with a French title and a Russian author, had probably not been written in English. As the extract in the claimant's book was written in English, this ought to have alerted to the defendant to the possibility that she was dealing with a translation, which might be the subject of its own copyright, and that this issue could be resolved by making appropriate inquiries of the claimant or the claimant's publishers. The judge did acknowledge that it might, at first glance, appear unreasonable to require an author to carry out detective work of this kind. Ultimately, however, he took the view that, where an author wished to use a quotation from a protected work and to take advantage of the relevant exception, it was fair for them to assume the burden of making sure that there was proper identification of the authorship of the quotation.

The most high-profile copyright case of the previous year was undoubtedly *Sheeran v. Chokri*.²³ This arose from claims made by Sami Chokri, a grime artist who performed under the name Sami Switch, that the "Oh I" hook in singer-songwriter Ed Sheeran's the best-selling song "Shape of You" had been copied from a very similar hook in Chokri's own earlier song, "Oh Why". Sheeran sought a declaration from the High Court that he had not infringed the copyright in "Oh Why", and was ultimately successful. Zacaroli J found on the facts that Sheeran had never heard "Oh Why", that any similarities in Sheeran's "Oh I" hook had originated from sources other than "Oh Why", and that in any event the elements said to be similar were common building blocks in many genres of popular music. While this was a case that, once again, turned primarily on its facts, the court did set out a point of principle which should be noted here.

For infringement to be established, it must be shown that the defendant's work was derived from the claimant's work – or to put in another way, that there must be a causal link between the defendant's work and the claimant's work. Direct evidence of such derivation is usually unavailable, so a claimant will typically persuade the court to infer derivation by pointing to similarities between the works and by demonstrating that the defendant had access to the claimant's work. If the claimant is successful in doing so, the onus will then shift to the defendant to prove that they created their work independently. In relation to the question of access, the court in this case held that the mere fact that a song was uploaded to the internet – as Chokri's was – thus giving the alleged infringer the means of accessing it, was not enough to shift the evidential burden. Instead, it was a question of fact and degree whether the extent of the alleged infringer's access to the work, combined with the extent of the similarities between the two works, raised a sufficient possibility of derivation to shift the burden from the claimant to the defendant. The court further noted that where the claimant's work was highly individual or intricate, and the defendant's work was very similar to it, then only limited evidence of access might be sufficient to shift the burden. Conversely, where the claimant's work was simple and consisted of common elements, then such limited evidence of access would be insufficient. In this case, the similarities between the two songs were not great. While Chokri's team had made attempts to bring "Oh Why" to the attention of

²³ [2022] EWHC 827 (Ch).

Sheeran via mutual industry acquaintances, there was no evidence that these had succeeded. While Sheeran had been actively following the UK music scene for part of the relevant time, the court found that this did not mean he would necessarily come across Chokri's music. Accordingly, Chokri had failed to shift the evidential burden of proving derivation.

Finally, mention should be made of *Columbia Pictures Industries, Inc v. British Telecommunications plc*,²⁴ in which the High Court granted what effectively amounted to an extension of a prior blocking website blocking injunction. The claimants in this case were several well-known motion picture and television production studios, who had previously been successful in obtaining a website blocking injunction against the six major retail internet service providers ("ISPs") in the UK under Sec. 97A of the CDPA. It directed the latter to block their subscribers' access to five websites which made available large numbers of copyright-protected films and television programmes – including those whose copyright vested in the claimants and their affiliates – for unauthorized streaming.²⁵ These five websites did not host the relevant works themselves. Instead, they provided links to third-party websites on which those works were hosted, and also indexed and categorized the links in a way which enabled users to search for, select and access those works easily. Subsequently, new websites with domain names different from but very similar to those which had been blocked had sprung up to fill the void, and received a significant amount of traffic. Accordingly, the claimants sought an extension of the previous blocking injunction to websites with similar though not identical names.

Meade J granted the order sought by the claimants, subject to the conditions that the websites targeted were used solely for infringement, that they had the same mode of operation as the five websites targeted by the prior version of the blocking injunction, and that the websites targeted involved infringement of the claimants' copyrights. In doing so, Meade J applied the usual principles on website blocking injunctions that have been developed by courts in the UK,²⁶ namely that such an injunction must be necessary, effective, dissuasive, not unduly costly or complicated, avoid barriers to legitimate trade and strike a fair balance between competing fundamental rights, proportionate, and safeguarded against abuse. On the facts, it was held that the extension of the blocking injunction was necessary to prevent or reduce damage to the claimants, given that the terms of the prior injunction were not capable of capturing the new websites that had appeared. It was also held to be effective because it struck directly at the new websites. The judge also held the

²⁴ [2022] EWHC 2403 (Ch).

²⁵ [2021] EWHC 2799 (Ch).

²⁶ *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); *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).

extension of the blocking injunction to be dissuasive, as the ISPs were required to display information about the block to subscribers seeking to access the websites in question, and proportionate, as it would not be difficult for the ISPs to implement. Finally, the judge concluded that it would not have an impact on legitimate trade as the injunction was targeted only at websites that were used solely for infringement, and was therefore held to strike an overall fair balance between competing fundamental rights.

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