**NLA v Meltwater**: The Supreme Court makes a reference to CJEU on the issue of temporary copies

Intellectual Property Update

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The UK Supreme Court has handed down its judgment in the case of *Public Relations Consultants Association Limited (PRCA) and the Newspaper Licensing Agency (NLA) & Others*. Whilst expressing the view that merely viewing copyright material online (as opposed to downloading or printing that material) does not amount to copyright infringement, it has nevertheless made a reference to the Court of Justice of the European Union for clarification of its understanding of European law, given that the judgment will have important implications for many millions of people across the European Union.

**The issues**

Meltwater operates an online monitoring and search service, enabling its customers to have easy access to relevant news stories. Currently, the service is made available to its end users by email. The Supreme Court was asked to consider whether, if the same service was made available to view online, and merely viewed by end users, there would still be an infringement of copyright.

PRCA (a trade body of which Meltwater is a member) argued that end users could rely upon the defence available under section 28A of the Copyright Designs & Patents Act, which was introduced to give effect to Article 5(1) of Directive 2001/29/EC of 22 May 2011 on the harmonisation of certain aspects of copyright and related rights in the information society. Section 28A provides that "copyright … is not infringed by the making of a temporary copy which is transient or incidental, which is an integral part of a technological process and the sole purpose of which is to enable:

- A transmission of the work in a network between third parties by an intermediary, or
- A lawful use of the work

and which has no independent significance".

Where a web page is viewed by an end-user on their computer, without being copied or downloaded, the technical process involved will require temporary copies to be made on screen and in the internet "cache" on the hard disk of the computer. In the ordinary course, these cached copies will be over-written.
The NLA sought to argue that this cached material was not "temporary" or "transient" because it is possible for the user to make a discretionary decision to close down the computer, thereby leaving the material in the cache indefinitely until the browser was used again. Lord Sumption was not persuaded by this argument.

The CJEU reference question

Before making any final order on the appeal, the Supreme Court has asked the Court of Justice "whether the requirement of article 5.1 of the Directive that acts of reproduction should be

- Temporary
- Transient or incidental, and
- An integral and essential part of the technological process, are satisfied by the technical features described at paragraphs 2 and 31-32 of this judgment”.

A final decision on this issue will therefore not be determined for some time.

As Lord Sumption recognises, the appeal raises an important question about the application of copyright law to the technical processes involved in viewing copyright material on the internet and the case will be watched with interest.

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