

# Client Alert

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## Copyright: Europe Explores its Boundaries Part 3: “Meltwater” - EU rules that browsing does not need a licence - a victory for common sense (or for pirates)?

By Sue McLean and Chris Coulter

On 5 June 2014 the European Court of Justice (CJEU) published its decision in the “Meltwater” Case C-360/13, (*Public Relations Consultations Association Ltd (PRCA) v Newspaper Licensing Agency Ltd (NLA) and Others*). In a ruling that some have hailed as a victory for common sense, the CJEU declared that browsing freely accessible copyrighted material on the Internet does not constitute a copyright infringement, and on-screen and cached copies will constitute temporary copies for the purposes of Article 5(1) of the InfoSoc Directive<sup>1</sup>.

### BACKGROUND

The case concerns the PRCA, which is an association of public relations professionals, and the NLA, which is a body set up by UK newspaper publishers for the purpose of collective licensing of newspaper content. The PRCA’s members use a media monitoring service offered by Meltwater which involves Meltwater sending emails to users containing headlines of articles which are then linked to the rights holder’s website. Users can also access search results on Meltwater’s website. (It should be noted that if a website has a paywall, the user will have to pay for access to the material on the same terms as everyone else – the link does not enable the user to avoid the paywall.)

The NLA argued that Meltwater’s customers needed various licences to access the rights holder’s material, including: (i) a licence to use the temporary on-screen and cached copies of search results created when the user viewed search results on Meltwater’s website and (ii) a licence to use the temporary on-screen and cached copies of an article created when the user clicked on a link and viewed an article on the rights holder’s website. The PRCA claimed that these temporary copies fell within the copyright exemption detailed in Article 5(1) (as transposed into UK law by Section 28A of the Copyright, Designs and Patents Act 1988).

Article 5(1) provides an exemption from copyright infringement based on the following cumulative conditions where:

- Copying is *temporary*.
- Copying is *transient or incidental*.
- Copying is an *integral and essential* part of a technological process (*i.e.*, (1) *the acts of reproduction are carried out entirely in the context of the implementation of a technological process and (2) the completion of those acts of reproduction is necessary, in that the technological process could not function correctly and efficiently without those acts*).

<sup>1</sup> EC Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society (“InfoSoc Directive”) was introduced in 2001 to meet the challenge of the Internet, e-commerce, and digital technology.

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- The sole purpose of copying is to enable *a transmission in a network between third parties by an intermediary or a lawful use of a work.*
- Copying has *no independent economic significance.*

Both the UK High Court and UK Court of Appeal agreed that PRCA members needed a licence from the NLA in order to receive the Meltwater service. The PRCA appealed to the UK Supreme Court.

## UK SUPREME COURT

The UK Supreme Court held that both on-screen and cached copies satisfy the temporary copies exemption detailed in Article 5(1). However, given the potential transnational effect, the UK Supreme Court decided to stay the proceedings and request a preliminary ruling from the CJEU as to whether Internet browsing falls within the exemption of Article 5(1).

## EUROPEAN COURT OF JUSTICE

The CJEU has agreed with the UK Supreme Court that Internet browsing falls within the Article 5(1) exemption, on the following grounds:

- Temporary – On-screen copies are temporary as they are deleted when the user moves away from a given website, and cached copies are temporary because they are automatically replaced by other content after a period of time.
- Transient and Incidental – On-screen copies only exist to the extent necessary to view the website and are therefore transient. Although cached copies are not deleted when the user stops viewing the website, they are incidental because they do not have a purpose independent of the technological process.
- Integral and Essential – On-screen copies and cached copies are an integral part of the technological process because they are created and deleted by the technological process used for viewing websites and they are essential because the viewing of websites would not function correctly and efficiently without them.

In order to rely on the Section 5(1) exemption, the copies must also satisfy Article 5(5) of the InfoSoc Directive (i.e., the Article 5(1) exemption only applies in certain special cases which do not conflict with a “*normal exploitation of the work*” and “*do not unreasonably prejudice the legitimate interests of the rights holder*”).

On Article 5(5), the CJEU held that internet browsing should be considered a ‘special case’, and that the copies did not unreasonably prejudice the “legitimate interests” of the rights holder (on the basis that Article 3(1) of the InfoSoc Directive requires a website publisher to obtain the consent of rights holders before publishing any content). The CJEU also held that the creation of copies in the course of viewing a website constituted a ‘normal exploitation of the work’.

The case will now be referred back to the UK Supreme Court for confirmation of its final decision based on the CJEU’s preliminary ruling.

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## BROWSING IMPLICATIONS

With this decision, the millions of users who browse the Internet across Europe every day can continue as before, without the need for specific “browsing licences”. However, if users print, download, store or email any copyrighted material this will fall outside the exemption. So, where rights holders do not consent to users’ printing, downloading, storing or emailing any copyrighted material that is otherwise freely available for browsing, they should continue to ensure that these prohibitions are explicit in website terms and conditions.

Whilst individual users may now be seen as “innocent browsers” and exempt from infringement, rights holders retain meaningful remedies. The CJEU relied on the fact that Article 5(5) requires that the rights holder’s permission is obtained before a publisher can post its content on the Internet. Accordingly, it will remain very important for rights holders to monitor the posting of any copyrighted materials on the Internet and take steps to remove any content that is posted without permission.

## BEYOND BROWSING; STREAMING

Although the CJEU did not refer to streaming in its ruling, there has been some subsequent speculation that this decision could, by analogy, be extended beyond browsing to web streaming. In turn, this has raised concerns that streaming of pirated content in Europe may increase with browsers freed from the threat of possible sanctions for copyright infringement.

These concerns may be supported by the facts that:

- In the UK Supreme Court rulings Lord Sumption stated “*it has never been an infringement ... for a person merely to view or read an infringing article in physical form...All that Article 5.1 of the Directive achieves is to treat the viewing of copyright material on the internet in the same way as its viewing in physical form*”; and
- The proposed Ofcom anti-piracy code (yet to be implemented in the UK) is targeted at Internet users who are suspected of illegally downloading copyrighted material. The draft code makes no reference to ‘streaming’.

It may be that enjoyment of infringing streamed content will be found to fall with the Article 5(1) exemption. However, we would suggest that caution is more appropriate here than panic. Streaming involves a variety of different technologies and processes, and the copyright implications of each will need to be considered on its merits. Furthermore, the InfoSoc Directive explicitly contemplated browsing as being an act for which the Article 5(1) exemption was designed; and we should not be surprised that the exemption has been successfully applied. By contrast, and as possible comfort to rights holders, the Recitals to the InfoSoc Directive also explicitly contemplated that “new uses of copyright works” may require more limited exemptions, and therefore greater scrutiny.

So, in line with our somewhat arbitrary scoring system in this series of Alerts, we are calling this a shared victory for both copyright holders and the Internet. Browsing continues as a functional freedom and rights holders can still seek meaningful remedy for copyright infringement.

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**Contact:**

**Sue McLean**

+44 (0)20 7920 4045

[smclean@mofo.com](mailto:smclean@mofo.com)

**Chris Coulter**

+44 (0)20 7920 4012

[ccoulter@mofo.com](mailto:ccoulter@mofo.com)

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