COPYRIGHT IN TITLES AND NEWSPAPER HEADLINES

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1. Introduction

What are the legal implications for digitising newspaper headlines and other titles? This guidance provides the legal background to copyright protection in titles and newspaper headlines, discussing the definition of a literary work and with reference to relevant cases.

2. In Practice

As there is no definitive piece of UK copyright law that refers to titles and headlines, a decision on digitising such items requires being aware of significant legal cases and making a risk judgement. The date the headline or title was created will be relevant, and the influence of European copyright rulings on UK copyright law has been significant.

Date work created	**Relevant Legal Cases**	**Implications**	**Risk Level of copying headlines**
Before 22 December 2002	*Francis Day*, *Shetland Times*, *Fairfax Media Publications, Meltwater*	In theory a newspaper headline may be capable of protection but in general they will not be sufficiently substantial to justify a claim to protection. All decisions must be made on a case-by-case basis, but prior to *Meltwater*, all attempts to establish copyright protection in a title or a newspaper headline in the UK or Australia were unsuccessful.	No risk or very low risk
After 22 December 2002	*Meltwater, Infopaq*	Headlines are capable of being literary works, whether independently or as part of the articles to which they relate. However, a headline will only be protected if it is original in the *Infopaq* sense, and whether an individual newspaper headline meets that standard will depend on the case. All decisions must be made on a case-by-case basis, but remember that the concept of the author's own intellectual creation is not necessarily a threshold that is easily met.	Low to medium risk

3. Why 22 December 2002?

Decisions of the European Court of Justice on the definition of an original work only apply to works created after the relevant harmonising Copyright Directive. For authorial works (other than computer programs, photographs and databases) this date is 22 December 2002, when the *Information Society Directive 2001* came into force.

4. Definition of a Literary Work

The term 'literary work' does not imply literary merit or style.[1] Literary works include those things we normally think of as literature such as novels, short stories and poetry as well as the ordinary and the banal: listings of stock exchange prices, chronological tables, logarithm tables.

When problems have arisen in deciding whether or not something is a literary work, the courts have tended to rely on the test set out in *Hollinrake* v. *Truswell* (1894) in which the Court of Appeal suggested that to qualify as a literary work, the work must provide 'either information or instruction, or pleasure, in the form of literary enjoyment'.

5. Legislative Background

Literary works first received statutory protection in the UK under the *Statute of Anne* 1710. Today, they are protected under s.1(1) of the *Copyright Designs and Patents Act* 1988 (the CDPA). The CDPA defines literary works to include 'any work, other than a dramatic or musical work, which is written, spoken or sung' (s.3(1)), and this definition includes:

- a table or compilation (other than a database)
- a computer program
- preparatory design material for a computer program
- a database

The CDPA states that to qualify for protection a literary work must be 'original' (s.1(1)(a)). Under UK law, judicial decisions on the concept of originality have not always been consistent. However, the courts are generally agreed that if the author expended labour, skill and judgment in the production of the work, the work should be copyright-protected. This is often referred to as the *sweat of the brow theory*. Within the UK the threshold for protection traditionally had been set at a very low level such that even the expenditure of *non-creative* skill and labour could result in a work attracting copyright protection.

Since the 1990s, a succession of European directives specifically adopted a higher standard in determining what was original or not. Both the *Software Directive* and *Database Directive* stated that a computer program or a database would only be protected if the work was original in the sense that it was the 'author's own intellectual creation'. Similarly, Article 6 of the *Term Directive* set out that: '[p]hotographs which are original in the sense that they are the author's own intellectual creation shall be protected'.

[1] See, e.g., the comments of Lord Evershed in Ladbroke *(Football) Ltd* v. *William Hill* (1964), at p.281.

There is a growing consensus that the European Court of Justice (the ECJ) has established the concept of 'an author's own intellectual creation' as *the* benchmark for satisfying the originality criterion in relation to all types of authorial works, and not just computer programs, databases and photographs. The key decision of the ECJ in this regard is *Infopaq International A/S* (2009) discussed below.

This new standard only applies to works created after the protection of a particular type of work had been harmonised within Europe. These dates are:

Computer programs	After 1 January 1993
Photographs	After 1 July 1995
Databases	After 11 March 1996
All other types of literary, dramatic, musical and artistic works (including newspaper articles)	After 22 December 2002 (in accordance with the *Information Society Directive*)

6. Relevant Legal Cases

Typically, the titles of books, plays, songs, films, and so on, have not been afforded copyright protection as literary works in themselves. For example, claims for protection were rejected for the following:

- *Splendid Misery* for a book (*Dick* v. *Yates* (1881))
- *The Licensed Victuallers' Mirror* for a newspaper (*Licensed Victuallers' Newspaper Co* v. *Bingham* (1888))
- *Nellie the Elephant* for a song (*Animated Music Ltd's Trade Mark* [2004] ECDR 27)
- *Opportunity Knocks* for a TV gameshow (*Green* v. *Broadcasting Corp of New Zealand* [1989])

In *Francis Day* v. *Twentieth Century Fox* (1940) the claimants (Day) sought damages for the unauthorised use of their song title *The Man Who Broke the Bank at Monte Carlo*. The defendants had used the song title as the title of their 1935 film, starring Ronald Colman and Joan Bennett. The dispute reached the House of Lords.

Lord Wright commented as follows: '[I]n general a title is not by itself a proper subject-matter of copyright. As a rule a title does not involve literary composition, and is not sufficiently substantial to justify a claim to protection. That statement does not mean that in particular cases a title may not be on so extensive a scale, and of so important a character, as to be a proper subject of protection against being copied … But this could not be said of the facts in the present case.'

The House of Lords rejected the claimant's argument in this particular instance but left open the possibility that an appropriately literary or substantive title might qualify for copyright protection.

Lord Hamilton made similar comments in *Shetland Times* v. *Wills* (1997) a case that specifically concerned newspaper headlines. He considered it 'arguable' that a newspaper headline *might* constitute a literary work 'since the headlines at issue (or at

least some of them) involve eight or so words designedly put together for the purpose of imparting information'. The case never progressed to a full trial, however, so no final determination was ever made about whether any of the headlines in question were copyright-protected.

One case in which the argument about the copyright status of newspaper headlines did proceed to full trial was *Fairfax Media Publications* (2010), from the Federal Court of Australia. Although an Australian decision, *Fairfax* is important in that Justice Bennet, the presiding judge, engaged in an extensive review of all relevant British and Australian authorities on this issue. Bennet concluded that '[h]eadlines generally are, like titles, simply too insubstantial and too short to qualify for copyright protection as literary works. The function of the headline is as a title to the article as well as a brief statement of its subject, in a compressed form … It is, generally, too trivial to be a literary work.'

Bennet conceded that, in theory, a headline might exhibit such extensive and significant character as to attract copyright protection, but continued that, while the majority of headlines are short factual statements of the subject of an article, '[t]he addition of a pun does not, of itself … convert such statements into literary works'.

The *Infopaq* case

Infopaq International A/S v. *Danske Dagblades Forening* (2009) concerned a media monitoring business, *Infopaq*, that scanned newspapers on a daily basis to identify and summarise articles of interest to its clients. Their media monitoring process involved the automated copying of eleven-word extracts of text from relevant newspaper articles. The European Court of Justice was asked for guidance as to whether this automated copying might constitute copyright infringement.

The decision of the ECJ is notable for two reasons.

First, the Court set out that copyright only applies to a literary, dramatic music or artistic work that is original 'in the sense that it is its author's own intellectual creation' (para.37). In other words, the Court standardised the test for originality as a criterion for copyright protection across Europe.

Second, the Court determined that parts of a copyright work will enjoy copyright protection so long as 'they contain elements which are the expression of the intellectual creation of the author of the work' (para.39). The Court continued that individual sentences *or even parts of sentences* from a literary work, such as a newspaper article, would be protected by copyright 'if that extract contains an element of the work which, as such, expresses the author's own intellectual creation' (para.48). As such, the copying of an eleven-word extract from a newspaper article without permission might constitute infringement, depending on the nature of the extract.

After *Infopaq*: the *Meltwater* case

In *Newspaper Licensing Agency* v. *Meltwater* a British court, for the first time, expressly acknowledged that newspaper headlines were protected by copyright as free-standing literary works. The High Court decision in *Meltwater* was handed down by Mrs Justice Proudman in 2010, and approved by the Court of Appeal in 2011.

Referring to *Fairfax Media Publications* (2010) Proudman commented that '[e]ven though Bennet J's analysis is persuasive as a historical analysis of the law any historical perspective has for the purposes of this Court been overtaken by the decision of the ECJ in Infopaq.' In short, in Proudman's opinion, the *Infopaq* decision had changed the legal landscape on this issue. Headlines, she noted 'involve considerable skill in devising and they are specifically designed to entice by informing the reader of the content of the article in an entertaining manner. / In my opinion headlines are capable of being literary works, whether independently or as part of the articles to which they relate.'

In determining whether a specific headline was copyright protected, she continued, the only real test to apply was whether the headline was original in the *Infopaq* sense. In other words, did it constitute the author's own intellectual creation?

Proudman's decision was upheld on appeal, Lord Justice Jackson noting that it was 'plainly correct'.

The *Infopaq* effect

Infopaq has had a curious, somewhat counterintuitive, impact on the landscape of British copyright law as it applies to titles and newspaper headlines.

Before *Infopaq*, case law on the concept of originality was not always consistent in the UK but the courts were generally agreed that so long as the author expended labour, skill and judgment in the production of the work, the work should be copyright-protected. That is, even the expenditure of *non-creative* skill and labour could result in a work attracting copyright protection.

Following *Infopaq*, non-creative skill and labour will *not* be sufficient to satisfy the criterion of originality. That is, a higher threshold has been established regarding originality, such that only works that are the author's own intellectual creation will enjoy copyright protection. But at the same time as establishing this higher standard, titles and newspaper headlines – works that were typically thought too insubstantial and too short to qualify for copyright protection within the UK – have, for the first time, been extended copyright protection by the courts, so long as they can be considered original.

7. Legal References

Legislation

Copyright Designs and Patents Act 1988 c.48 (www.legislation.gov.uk/ukpga/1988/48/)

Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L122/42 (the *Software Directive*)

Directive 93/98/EEC of October 1993 harmonizing the term of protection of copyright and certain related rights [1993] OJ L290/9 (the *Term Directive*)

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20 (the *Database Directive*)

Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (the *Information Society Directive*)

Cases

Animated Music Ltd's Trade Mark [2004] ECDR 27

Dick v. *Yates* (1881) LR 18 Ch D 76

Fairfax Media Publications Pty Limited v. *Reed International Books Australia Pty Limited* [2010] FCA 984

Francis Day v. *Twentieth Century Fox* [1940] AC 112

Green v. *Broadcasting Corp of New Zealand* [1989] RPC 469

Hollinrake v. *Truswell* (1894) 3 Ch 420

Infopaq International A/S v. *Danske Dagblades Forening* [2009] (C-5/08)

Ladbroke (Football) Ltd v. *William Hill (Football) Ltd* [1964] 1 WLR 273

Licensed Victuallers' Newspaper Co v. *Bingham* (1888) LR 38 Ch D 139

Newspaper Licensing Agency v. *Meltwater* [2010] EWHC 3099 (Ch) and [2011] EWCA Civ 890 (CA)

Shetland Times v. *Wills* [1997] SC 316

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