



United Kingdom Copyright Decisions and Legislative Developments 2023

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Abstract This report highlights the most significant UK copyright decisions in 2023 and provides an overview of the Retained EU Law (Revocation and Reform) Act 2023 and its implications for copyright law. The cases deal with copyright subject matter, originality, infringement, copyright ownership, and remedies (including blocking injunctions). It also discusses the first order made in the legal proceedings brought by stock photography supplier Getty Images against generative AI startup Stability AI.

Keywords AI · Blocking orders · Brexit · Copyright · Infringement · Ownership · Originality · Subject matter

Legislation Copyright, Designs and Patents Act (UK); Electronic Commerce (EC Directive) Regulations 2002 (UK); European Database Directive 96/9/EC; European E-Commerce Directive 2000/31/EC; European Enforcement Directive 2004/48/EC; European Directive on the harmonisation of certain aspects of copyright and related rights in the information society 2001/29/EC; European Software Directive 2009/24/EC; European Union (Withdrawal) Act 2018 (UK); Retained EU Law (Revocation and Reform) Act 2023 (UK); Senior Courts Act 1981 (UK).

Cases *Altimo Holdings and Investment Ltd v. Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; *Austin v. Southwark LBC* [2010] UKSC 28; *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury* C-393/09; *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV* C-683/17; *Creation Records Ltd v. News Group*

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Newspapers Ltd [1997] EMLR 444; *E-Accounting Solutions Ltd (t/a Advancetrack) v. Global Infosys Ltd (t/a GI Outsourcing)* [2023] EWHC 2038 (Ch); *Evans v. John Lewis Plc* [2023] EWHC 766 (IPEC); *Football Dataco Ltd v. Sportradar GmbH* C-604/10; *Funke Medien NRW GmbH v. Bundesrepublik Deutschland* C-469/17; *Getty Images (US) Inc v. Stability AI Ltd* [2023] EWHC 3090 (Ch); *HTC Corp v. Nokia Corp* [2013] EWHC 3778 (Pat); *Infopaq International A/S v. Danske Dagblades Forening* C-5/08; *Kenrick & Co v. Lawrence & Co* (1890) 25 QBD 99; *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 All ER 465; *Levola Hengelo BV v. Smilde Foods BV* fC-310/17; *Lidl Great Britain Ltd v. Tesco Stores Ltd* [2023] EWHC 873 (Ch); *Lidl Great Britain Ltd v. Tesco Stores Ltd* [2023] EWHC 1517 (Ch); *Marleasing SA v. La Comercial Internacional de Alimentación SA* C-106/89; *Mei Fields Designs Ltd v. Saffron Cards and Gifts Ltd* [2018] EWHC 1332 (IPEC); *Moviebox Megastores International Ltd v. Rahi* [2023] EWHC 501 (Ch); *OBG Ltd v. Allan* [2007] UKHL 21; *Painer v. Standard Verlags GmbH* C-145/10; *PQ Systems Europe Ltd v. Aughton* [2023] EWHC 581 (Pat); *Response Clothing Ltd v. Edinburgh Woollen Mill Ltd* [2020] EWHC 148 (IPEC); *SAS Institute Inc v. World Programming Ltd* [2013] EWHC 69 (Ch); *Sheeran v. Chokri* [2022] EWHC 827 (Ch); *Shelfer v. City of London Electric Lighting Company* [1895] 1 Ch 287; *SI v. Chedech/Get2Get* C-833/18; *Sky UK Ltd v. British Telecommunications Plc* [2023] EWHC 2252 (Ch); *Software Solutions Ltd v. 365 Health and Wellbeing Ltd* [2021] EWHC 237 (IPEC); *Sony Computer Entertainment Inc v. Ball* [2004] EWHC 1738 (Ch); *Technomed Ltd v. Bluecrest Health Screening* [2017] EWHC 2142 (Ch); *Temple Island Collections Ltd v. New English Teas Ltd* [2012] EWPC 1; *Thaler v. Comptroller General of Patents, Trade Marks and Designs* [2021] EWCA Civ 1374; *THJ Systems Ltd v. Sheridan* [2023] EWHC 927 (Ch); *THJ Systems Ltd v. Sheridan* [2023] EWCA Civ 1354; *TuneIn Inc v. Warner Music UK Ltd* [2021] EWCA Civ 441; *VTB Capital Plc v. Nutritek International Corp* [2013] UKSC 5; *Wheat v. Google LLC* [2020] EWHC 27 (Ch); *Wright v. BTC Core* [2023] EWHC 222 (Ch); *Wright v. BTC Core* [2023] EWCA Civ 868; *Your Response Ltd v. DataTEAM Business Media Ltd* [2014] EWCA Civ 281.

1 Judicial Decisions

This part of the report highlights UK copyright decisions from the previous year that may be of interest to comparative lawyers. The most significant of these relate to the question of what constitutes a “work” capable of being protected by copyright, as well as the requirement of originality. These topics have been the focus of much recent academic debate, and are likely to remain so for at least the next few years.¹ Several of the other cases reviewed in this report provide insights as to the remedies available in a wide range of cases, including where a rightholder has had their works removed from an internet hosting platform pursuant to a wrongfully filed copyright removal – or “notice and takedown” – request. One of the cases discussed provides further clarification as to how the “causal connection” requirement is to be made out in an infringement case, following from the high-profile decision in *Sheeran v. Chokri*² which was handed down last year. Another

¹ See Lee (2023), pp. 400–405.

² [2022] EWHC 827 (Ch).

case provides guidance on the ownership of copyright in works created in an employment context, including a clear illustration as to the weight to be given to the different factors that are relevant to the analysis. Finally, 2023 also saw the first order made in the high-profile suit brought by the well-known stock photography supplier Getty Images against the UK-based generative AI startup Stability AI, arising from Stability AI's application for reverse summary judgment and/or the striking out of Getty's claims.

In order to contextualise the decisions relating to copyright subject matter and originality, it is worth setting out in brief the UK's legal framework as to copyright subsistence. For a work to be protected by copyright under the UK Copyright, Designs and Patents Act 1988 ("CDPA"), it must first fall within one of the eight categories of subject matter set out in the statute, namely: (1) literary works; (2) dramatic works; (3) musical works; (4) artistic works; (5) films; (6) sound recordings; (7) broadcasts; and (8) the typographical arrangement of published editions.³ While this has traditionally been understood as an exhaustive – or "closed" – list, this position has come under challenge due to a line of decisions from the Court of Justice of the European Union ("CJEU") interpreting various European directives on copyright, in particular the European Directive on the harmonisation of certain aspects of copyright and related rights in the information society ("InfoSoc Directive"). In *Levola Hengelo BV v. Smilde Foods BV*,⁴ the CJEU laid down two requirements that must be fulfilled for something to be regarded as a "work" in the copyright sense. First, it must be original in the sense that it is the author's own intellectual creation. Second, it must be the "expression" of such intellectual creation. In relation to this, the CJEU has stated that this entails the existence of subject matter which is identifiable with sufficient precision and objectivity. In subsequent decisions such as *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV*⁵ and *SI v. Chedech/Get2Get* (also known as the "*Brompton Bicycle*" case),⁶ the CJEU has also effectively held that Member States are precluded from imposing any additional requirements for the subsistence of copyright. The clear implication of this is that Member States are not permitted to impose any additional criteria for the conferral of copyright protection, including 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

³ CDPA, Sec. 1(1).

⁴ C-310/17, IIC 50:389 (2019), <https://doi.org/10.1007/s40319-019-00801-4>.

⁵ C-683/17; IIC 51:499 (2020), <https://doi.org/10.1007/s40319-020-00935-w>.

⁶ C-833/18.

transition period,⁷ the principles set out in them were effectively binding on courts in the UK,⁸ at least until 31 December 2023.⁹

Under the CDPA, literary, dramatic, musical and artistic works can only be protected by copyright where they are “original”.¹⁰ Historically, the British courts had defined “originality” by reference to whether the work in question was the product of the author’s “labour, skill and judgment”.¹¹ This began to shift, however, following the decision of the CJEU in *Infopaq International A/S v. Danske Dagblades Forening*,¹² where the court harmonised the concept of originality by extending the definition of the term as set out in the Software and Database Directives – namely that the work is the product of the “author’s own intellectual creation” – to authorial works in general. While the British courts seemed initially hesitant to embrace this definition, and for a time had a tendency to use both the “labour, skill and judgment” and “author’s own intellectual creation” standards interchangeably,¹³ it now appears to be settled law that the correct standard is that of “author’s own intellectual creation”, particularly following the judgment of the Court of Appeal in *THJ Systems Ltd v. Sheridan* (discussed below).¹⁴ Finally, the CDPA provides that, for a literary, dramatic or musical work to be protected by copyright, it must be “recorded, in writing or otherwise”.¹⁵ This is also known as the requirement of “fixation”.

These requirements for the subsistence of copyright were discussed in *Wright v. BTC Core*,¹⁶ where both the High Court and the Court of Appeal had to consider whether copyright subsisted in a file format used by the Bitcoin System (referred to in the pleadings and judgments as the “Bitcoin File Format”).¹⁷ The issue arose in the context of an application made to the High Court by the claimant Craig Steven Wright, who claimed to be the inventor of the Bitcoin System, to serve a claim for copyright infringement in the Bitcoin File Format on defendants who were located

⁷ 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 (“UK-EU Withdrawal Agreement”), Art. 126.

⁸ 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.

⁹ From 1 January 2024, the position has changed following the coming into force of the Retained EU Law (Revocation and Reform) Act 2023. See the discussion below.

¹⁰ CDPA, Sec. 1(1).

¹¹ *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 All ER 465.

¹² Case C-5/08.

¹³ See *Temple Island Collections Ltd v. New English Teas Ltd* [2012] EWPC 1.

¹⁴ [2023] EWHC 927 (Ch); [2023] EWCA Civ 1354.

¹⁵ CDPA, Sec. 3(2).

¹⁶ [2023] EWHC 222 (Ch); [2023] EWCA Civ 868.

¹⁷ A file format is “a standard way that ... data and information is encoded for storage in a computer file”. See Penney and Taylor (2012), p. 258.

outside the jurisdiction of England and Wales. As a court may grant a litigant permission to serve their claim on a defendant outside the jurisdiction only if it is satisfied that there is a serious issue to be tried on the merits of the claim,¹⁸ it was necessary for the court to determine whether the claimant had a real prospect of establishing that copyright subsisted in the Bitcoin File Format at trial.

The question of copyright subsistence in data file formats had previously been discussed by the High Court of England and Wales in *SAS Institute Inc v. World Programming Ltd*,¹⁹ which was referred to extensively by Mellor J at first instance in *Wright v. BTC Core*. In *SAS Institute*, Arnold J (as he then was) expressed doubt as to whether copyright subsisted in the data file format used by the claimant's software on a number of grounds. First, he noted that the question of whether such a file format was capable of being a "work" at all was "not straightforward", as it could arguably be regarded as something which enabled the creation of a work (in much the same way as a programming language) rather than being a work in itself. Second, he pointed out there was a question as to whether such a file format was capable of fulfilling the originality requirement, under which copyright subsists only in works that constitute the author's own intellectual creation. Finally, he observed that it was not clear whether the claimant's file format fulfilled the requirement of fixation. In relation to this, Arnold J noted that the claimant had not established that the file format was fixed in its software or its software manuals – the works on which its claim was founded.

In *Wright v. BTC Software*, Mellor J held at first instance that the claimant had no real prospect of establishing that copyright subsisted in the Bitcoin File Format, as it did not fulfil the fixation requirement. In doing so, Mellor J emphasised that "no relevant work" had been identified by the claimant containing content which defined or indicated the structure of the Bitcoin File Format, as opposed to content which merely "reflected" that structure. Mellor J further explained the distinction between the two as follows:

By "content indicating the structure", I mean, by way of a crude example, a flag or symbol in the block which signals "this is the start of the header" or "this is the end of the header", or an equivalent of the sort of content which is found in an XML file format.

It was on this basis that Mellor J distinguished *Wright v. BTC Software* from two earlier High Court cases, *Technomed Ltd v. Bluecrest Health Screening Ltd*²⁰ and *Software Solutions Ltd v. 365 Health and Wellbeing Ltd*.²¹ In both of these cases, the defendants had conceded that copyright subsisted in the XML file formats at issue, so the question was not ultimately addressed by the court; however, Mellor J considered that these concessions had been made correctly, as the file formats at issue contained content which defined their structure.

¹⁸ *Altimo Holdings and Investment Ltd v. Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; *VTB Capital Plc v. Nutritek International Corp* [2013] UKSC 5.

¹⁹ [2013] EWHC 69 (Ch).

²⁰ [2017] EWHC 2142 (Ch).

²¹ [2021] EWHC 237 (IPEC).

Mellor J's decision was reversed by the Court of Appeal. The judgment was given by Arnold LJ (with whom Asplin and Warby LJ agreed), who had previously handed down the High Court judgment in *SAS Institute*. Arnold LJ took the view that there were several flaws in Mellor J's reasoning, the most crucial of which were as follows. First, in holding that "no relevant work" had been identified by the claimant, Mellor J had conflated the work and its fixation. The work relied upon by the claimant, Arnold LJ explained, was the Bitcoin File Format itself, which had been clearly identified, and it was the claimant's case that the work was first fixed when the first Bitcoin block was written and stored in the Bitcoin File Format. Second, while Mellor J was correct to say that the structure of the Bitcoin File Format must be fixed in order for copyright to subsist in it, it did not follow that such a file format could be "fixed" only where there was content defining (or indicating or describing) its structure. All that was required was for the structure to be clearly and unambiguously recorded. Third, the Mellor J failed to have regard to the test laid down by the CJEU in *Levola Hengelo* (which post-dated *SAS Institute*), which would have required him to ask whether the fixation relied on by the claimant made the Bitcoin File Format identifiable with sufficient precision and objectivity. Fourth, and closely related to the previous point, Mellor J did not consider whether the fixation relied upon by the claimant – namely the first block in the Bitcoin blockchain – was sufficient to fulfil the two purposes of the fixation requirement, namely to evidence the existence of the work and to delimit the scope of protection. In relation to the third and fourth points, Arnold LJ observed that there was evidence that third parties had been able to deduce the structure of the Bitcoin File Format from the blocks in the Bitcoin blockchain. This, in his view, strengthened the claimant's case. On this basis, he took the view that the claimant had a real prospect of establishing at trial that the fixation requirement was satisfied.

In relation to the requirement that something must be a "work" in order for copyright to subsist in it, Arnold LJ acknowledged, following his previous approach in *SAS Institute*, that it could be argued that the Bitcoin File Format was something which enabled the creation of works rather than being a work in itself. To put it another way, it was arguably an "idea, procedure, method of operation or mathematical concept" within the meaning of Art. 9(2) of the TRIPS Agreement and Art. 2 of the WIPO Copyright Treaty, and therefore excluded from the scope of copyright protection altogether. However, as Mellor J had taken the view at first instance that the claimant had a real prospect of successfully establishing that the Bitcoin File Format was a work, Arnold LJ saw no reason to differ from that assessment. Arnold LJ also suggested that a possible riposte to the argument he had put forward, namely that anything which satisfied the two cumulative conditions set out in *Levola Hengelo* amounted to a work capable of being protected by copyright. Arnold LJ also stated that, should the Bitcoin File Format be found to be a "work", there would be no difficulty classifying it as a "literary work" within the statutory scheme set out in the CDPA. As to the requirement of originality, Arnold LJ expressed scepticism as to whether the Bitcoin File Format was an intellectual creation. In particular, he observed that on the materials present before the court, there was a strong argument that it was differentiated from other file formats only by technical considerations. However, as Mellor J had accepted that the claimant had a

real prospect of success on this question, Arnold LJ once again saw no reason to differ from that assessment. Should these questions proceed to a full trial, the outcome will no doubt be hotly awaited.

The question of copyright subsistence also arose in *THJ Systems Ltd v. Sheridan*.²² This case involved the expulsion of one partner by the other from a limited liability partnership (“LLP”) whose core business was the provision and licensing of software used to facilitate options trading. A key issue which arose was whether the software’s graphical user interface (“GUI”), which had been designed by one of the partners in the LLP, was an artistic work protected by copyright. At first instance, John Kimbell KC (sitting as a Deputy High Court judge) had answered that question in the affirmative, on the basis that the creation of the overall look, framing and layout of the graphics and tables that comprised the GUI involved the exercise of sufficient skill and labour. The defendants appealed, contending that the judge had erred by applying the incorrect test and that, had the correct test been applied, the GUI would have been found on the evidence not to be original.

At the Court of Appeal, Arnold LJ (with whom Asplin and Moylan LJJs agreed) took the view that the defendants were right insofar as the judge had indeed applied the incorrect “skill and labour” test of originality. Arnold LJ emphasised that the correct test of originality was now the one laid down by the CJEU in *Infopaq*, namely the test of “author’s own intellectual creation”. This is perhaps the clearest, most categorical statement to date from an appellate court that the traditional British test of “labour, skill and judgment” has been superseded by the “author’s own intellectual creation” test. Arnold LJ went on to explain that the two tests were not the same, and in particular that the “author’s own intellectual creation” test was more demanding than the “skill and labour” test. Having done so, he then turned to re-assess the originality of the GUI under the “author’s own intellectual creation” test. He had regard to the CJEU’s jurisprudence on the definition of “author’s own intellectual creation”, and referred to several post-*Infopaq* decisions where the CJEU had held that the requirement of “author’s own intellectual creation” will be fulfilled where the author was able to express their creative abilities in the production of the work by making free and creative choices so as to stamp the work created with their personal touch.²³ Arnold J also referred, in particular, to *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury*,²⁴ where the CJEU had held that the requirement is not satisfied where the content of the work is dictated by technical considerations, rules or other constraints that leave no room for creative freedom.

The evidence before the Court of Appeal showed that the creator of the GUI had designed the display so as to cram quite a large amount of information into a single screen, and that he had made choices as to the locations in which each of the components (which he had sourced from an existing library) was to be put and what

²² [2023] EWHC 927 (Ch); [2023] EWCA Civ 1354.

²³ *Painer v. Standard Verlags GmbH* C-145/10; *Football Dataco Ltd v. Sportradar GmbH* C-604/10; *Funke Medien NRW GmbH v. Bundesrepublik Deutschland* C-469/17, IIC 50:1154–1155 (2019) <https://doi.org/10.1007/s40319-019-00875-0>; *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV* C-683/17, IIC 51:499 (2020) <https://doi.org/10.1007/s40319-020-00935-w>; *SI v. Chedech/Get2Get* C-833/18.

²⁴ C-393/09.

fonts and colours were to be used. There was nothing to suggest that the visual appearance of the GUI was dictated by technical constraints that left no room for creative freedom. While the degree of visual creativity which had gone into the GUI was low, that did not mean there was no creativity at all. The consequence of this low level of creativity, Arnold LJ explained, was that the scope of protection conferred by copyright would be narrow, so that only a very close copy would infringe.²⁵ It did not mean that no copyright subsisted in the GUI at all. On this basis, Arnold LJ held that, although the judge at first instance had applied the wrong test, he had nevertheless arrived at the correct outcome, namely that the GUI was protected by copyright, albeit one which was narrow in scope.

The requirement of originality was also the focus of the copyright claim in *Lidl Great Britain Ltd v. Tesco Stores Ltd*.²⁶ Both the claimant, Lidl, and the defendant, Tesco, were well-known supermarket chains in the UK. Lidl brought an action in copyright infringement against Tesco, contending that the latter had infringed the copyright in two versions of its logo.²⁷ The first version of the logo consisted of a blue square background bearing a yellow circle and bordered with a thin red line. The second version of the logo was identical to the first, but with the addition of the name “Lidl” in a stylised font in the yellow circle. Tesco was said to have infringed the copyright in Lidl’s logo by using a sign consisting of a blue square background and yellow circle in order to promote its discounted “Clubcard Prices” throughout its stores nationwide. A key issue which arose was whether Lidl’s logo fulfilled the originality requirement.

The case was heard by Joanna Smith J at the High Court. The judge accepted that the correct test was that of “author’s own intellectual creation” as set out in *Infopaq*, but in applying that test to the facts of the case, also used the language of “skill and labour” alongside that of “intellectual creation”. For instance, she described the act of bringing together the Lidl text with the yellow circle and the blue background as “an act which involved skill and labour – the combination of colours and shapes and the orientation of the various elements”. She rejected Tesco’s argument that the Lidl logo did not demonstrate sufficient originality because of its simplicity, holding that simplicity of design and/or a low level of artistic quality did not preclude originality. On balance, therefore, the judge held that the creation of the Lidl logo was likely to have involved “time, labour and creative freedom (even if the artistic quality involved is not ‘high’)”. Ultimately, she concluded that the litmus test was whether the creation of the logo involved “the exercise of intellectual creation involving the expression of free choice”, and held that it did. Leaving aside the references to “skill and labour”, Joanna Smith J’s judgment in this regard is largely consistent with the approach taken by the CJEU in recent cases such as *Cofemel*, in which the CJEU made it clear that national legislatures are precluded from imposing additional requirements relating to, for instance, a minimum level of artistic complexity before an artistic work can be protected by copyright.

²⁵ *Kenrick & Co v. Lawrence & Co* (1890) 25 QBD 99.

²⁶ [2023] EWHC 873 (Ch); [2023] EWHC 1517 (Ch).

²⁷ Lidl also brought claims in trade mark infringement and passing off against Tesco.

Having satisfied herself that copyright subsisted in the Lidl logo, the judge then turned to the question of whether it had been infringed by Tesco's "Clubcard Prices" sign. As it was common ground between the parties that Tesco was well aware of and had access to Lidl's logo, the question turned on whether Tesco had copied a "substantial part" of it, which is required for a finding of infringement. Joanna Smith J held that the blue background with the yellow circle formed a substantial part of the Lidl logo, and found Tesco liable for copyright infringement on that basis. This aspect of the judgment is open to critique. The judge had previously acknowledged that the design of the Lidl logo was a very simple one, and there is established British authority to the effect that, where the level of originality that has gone into creating a work is very low, only an exact reproduction of it will constitute infringement.²⁸ Indeed, this was precisely the principle referred to by Arnold LJ in *Wright v. BTC Core*, discussed above. It was therefore open to the judge in *Lidl v. Tesco* to hold that, while copyright subsisted in Lidl's logo, it was not infringed by Tesco's "Clubcard Prices" device, as the latter was not an exact copy of the former.

At the conclusion of the trial in *Lidl v. Tesco*, Joanna Smith J had granted an injunction against Tesco to prevent it from continuing to use the "Clubcard Prices" sign. The appropriateness of the remedy was challenged by Tesco, who argued that the judge should have exercised her discretion to award damages in lieu of an injunction instead.²⁹ This issue fell to be determined by the principles set out in *Shelfer v. City of London Electric Lighting Company*,³⁰ the leading British authority on the power of the courts to award damages in lieu of an injunction. In *Shelfer*, AL Smith LJ had set out a "good working rule" for determining when it would be appropriate to award damages in substitution for an injunction, namely: (1) if the injury to the claimant's legal rights is small; and (2) is one which is capable of being estimated in money; and (3) is one which can be adequately compensated by a small money payment; and (4) the case is one in which it would be oppressive to the defendant to grant an injunction. The essence of Tesco's case was that all four of these factors were fulfilled. Tesco argued that signs artistically similar to Lidl's logo were available for licensing at very low cost in the market, meaning that the injury to Lidl's legal rights was small and could be compensated adequately by a small money payment, and that the costs of replacing the Clubcard Prices sign across all of its stores (estimated at £7 million) would be so high as to make the grant of an injunction oppressive.

Joanna Smith J rejected Tesco's arguments, holding that it was inappropriate to discount the brand value of Lidl's logo when assessing the cost of a notional licence. Accordingly, she held that the injury to Lidl's legal rights caused by the use of Tesco's Clubcard Prices sign was not "small", that its true extent was difficult to determine, and that it was unrealistic to believe that this injury could be compensated for by a small one-off money payment. As to Tesco's arguments relating to the oppressiveness of such an injunction, the judge held that where the

²⁸ *Kenrick & Co v. Lawrence & Co* (1890) 25 QBD 99.

²⁹ Senior Courts Act 1981, Sec. 50.

³⁰ [1895] 1 Ch 287.

first three *Shelfer* questions are answered in the negative, it would be unusual for the court to refuse to grant the injunction on the ground of oppression. She also noted that Art. 3(2) of the Enforcement Directive requires remedies for infringement to be “effective and dissuasive”,³¹ and observed that the grant of damages in lieu will be “inevitably less effective and dissuasive than the grant of an injunction”. On the facts before her, the judge was not in a position to determine that the costs to Tesco of around £7 million would be disproportionate to the level of Lidl’s loss in the event of the infringing acts continuing indefinitely, or that the need to engage in expenditure of £7 million would in itself be oppressive to Tesco. She also took note of the fact that Tesco had repeatedly rejected requests from Lidl to cease using the Clubcard Prices sign. In light of this, the injunction remained in place.

*Evans v. John Lewis Plc*³² provides further guidance on the “causal connection” element of a claim for copyright infringement, building upon the principles set out in *Sheeran v. Chokri*,³³ one of the most high-profile cases decided in the previous year. The claimant in this case, Faye Evans, was a children’s author who had self-published three books. One of these was a book entitled *Fred the Fire-Sneezing Dragon*, and tells the story of a young dragon named Fred who attends an otherwise all-human school. Fred accidentally emits fire every time he sneezes, with unfortunate results such as burning books and papers, melting ice cream in the school’s tuck shop, and setting fire to trees while on a cross-country run. The book ends on a triumphant note for Fred, when the oven of the school canteen breaks down and he is able to save the day by cooking the school lunch with his fiery breath. The book contained illustrations drawn by a freelance illustrator, Lisa Williams, who had assigned her copyright in them to the claimant. The claimant brought an action in copyright infringement against the department store John Lewis, contending that her copyright in *Fred the Fire-Sneezing Dragon* had been infringed by John Lewis’ 2019 Christmas advertisement. The advertisement shows a young dragon living in an otherwise all-human (possibly medieval) village who unintentionally emits fire every time he becomes excited, with disastrous results, such as accidentally melting a snowman being built by two children, melting the ice in the village skating rink, and burning down the Christmas tree in the town square. Towards the end of the advertisement, the dragon retreats dejectedly to his home, but emerges when his best friend, a young girl, gives him a present – a Christmas pudding. He brings the pudding to the village Christmas banquet and lights it with his fiery breath, to cheers from all the villagers.

The case was heard by HHJ Melissa Clarke at the High Court. Under the CDPA, for infringement to be made out, it must be shown that there is a “causal connection” between the defendant’s work and the claimant’s work – or to put it another way, it must be shown that the defendant’s work was derived from the claimant’s work. An issue which arose was whether Evans was required to prove on the balance of probabilities that John Lewis’ employees and contractors had access to *Fred the Fire-Sneezing Dragon*, or whether she was merely required to prove the

³¹ *HTC Corp v. Nokia Corp* [2013] EWHC 3778 (Pat).

³² [2023] EWHC 766 (IPEC).

³³ [2022] EWHC 827 (Ch). For commentary, see Lee (2022), pp. 409–411.

possibility of such access. Referring to *Sheeran v. Chokri*, the judge held that what was required was proof of access and not just the possibility of access. However, she also went on to state that access could be evidenced either directly or inferred from the possibility of access and other circumstances. The judge also made it clear that no causal connection can be found where there exists only a possibility of access and an inference cannot be properly drawn that the alleged infringer actually did access the original work. On the evidence before her, HHJ Melissa Clarke held that no such inference could be properly drawn in this case. *Fred the Fire-Sneezing Dragon* had sold in very small numbers, mainly in primary schools in the North West of England (and there was no evidence that anyone involved in the creation of John Lewis' advertisement lived there), with only 120 or so copies being purchased on Amazon and via Evans' website. The similarities between *Fred the Fire-Sneezing Dragon* were few and could easily be explained by coincidence rather than copying. Accordingly, the judge concluded that there was no evidence of actual access to *Fred the Fire-Sneezing Dragon* by John Lewis' creative team, and while there was a possibility of such access as the book was available through Amazon and the claimant's website, the likelihood of such access having been actually obtained was "so remote as to be entirely theoretical". She also granted the remedies sought by John Lewis by way of counterclaim, namely a declaration of non-infringement and a publicity order requiring Evans to publish the judgment on her website for at least six months. This was in view of the fact that, over the past three and a half years, Evans had engaged in a campaign publicising her claims of copyright infringement against John Lewis, potentially causing reputational harm to the company as well as its employees and contractors.

A further development of the UK's jurisprudence on website blocking injunctions can be seen in *Sky UK Ltd v. British Telecommunications Plc.*³⁴ This case was brought by the broadcaster Sky against the major internet service providers (ISPs) who are the usual parties to injunctions of this kind, and who did not appear to oppose the making of the injunction, as has become the usual practice in cases of this kind. The form of the injunction sought by Sky in this case differed from those that had previously been granted by the courts, in that it would allow Sky to choose both when blocking measures were to be applied and the duration for which they would be applied. The application came before Meade J at the High Court, who noted that this was a potentially significant change as it diminished the amount of foresight the court could have about the proportionality of the blocking. At the same time, he also noted that any concerns about over-blocking were ameliorated to a significant extent by: (1) the fact that the ISPs did not oppose the application; (2) the value of Sky's investment in its broadcast business and the very significant amounts it paid for the rights to broadcast the content it did; and (3) the fact that research into the infringing content and operation of the websites targeted by the order had revealed that there was essentially no legitimate non-infringing content on them at all. On this basis, Meade J was satisfied that the risk of over-blocking was negligibly small. However, as this was a new form of blocking injunction, he exercised a

³⁴ [2023] EWHC 2252 (Ch).

degree of caution by granting it only for four months, rather than the full year sought by Sky, after which it would be reviewed and potentially renewed.

The case of *Moviebox Megastores International Ltd v. Rahi*³⁵ provides some useful guidance on avenues of redress for parties whose works have been removed from internet hosting platforms pursuant to a wrongfully filed copyright removal request, or “notice and takedown” request. In the UK, the legislative basis for the notice and takedown procedure is Sec. 19 of the Electronic Commerce (EC Directive) Regulations 2002, which is the UK’s domestic implementation of Art. 14(1) of the E-Commerce Directive. Section 19 establishes a “safe harbour” regime offering immunity to online service providers from claims of, *inter alia*, copyright infringement, provided that they have no knowledge or awareness of the fact that infringing material is being provided through their services and, upon acquiring knowledge of awareness of that fact, act expeditiously to remove or disable access to that material. Most major hosting platforms – including YouTube, the platform at the centre of the *Moviebox* case – now have systems in place which make it relatively simple for rightholders to file removal requests for unauthorised copies of their works. However, these systems are also open to abuse, as the facts of this case illustrate.

The first defendant, Mohammad Akram Rahi, was a well-known singer of Pakistani folksongs in Punjabi and Urdu, while the claimants were publishers of Indian and Pakistani sound recordings and films. Rahi had uploaded to his own YouTube channel recordings of songs on which he was the singer, but whose copyrights vested in the first claimant Moviebox. Using YouTube’s notice and takedown system, Moviebox caused those recordings to be removed from Rahi’s channel. Rahi retaliated by issuing removal requests in relation to 11 songs appearing on 26 videos featured across Moviebox’s own YouTube channel, by fraudulently purporting to be the author of those songs and the owner of the copyright in them. Acting in accordance with its “three strikes” policy, under which users who receive three or more copyright removal requests within the same 90-day period may have their channel suspended, YouTube deactivated Moviebox’s channel, deleted the disputed videos, and blocked Moviebox from uploading new content. As a result, Moviebox lost the revenue it would otherwise have gained from the channel. Moviebox also contended that Rahi had encouraged two further defendants – another singer, Shazia Manzoor, and her manager, Azeem Ud Din Qureshi – to make fraudulent copyright removal requests in relation to a number of other songs hosted on Moviebox’s YouTube channel, resulting in the removal of those songs. Rahi had also issued a removal request in relation to a single song which appeared on 12 videos hosted on the second claimant Oriental Star’s YouTube channel, also purporting to be the author of the song and the owner of the copyright in it. As a result, YouTube deleted the 12 disputed videos from Oriental Star’s channel and blocked Oriental Star from uploading any new content. Both Moviebox and Oriental Star brought claims against Rahi in the tort of causing loss by unlawful means, arguing that: (1) Rahi had wrongly interfered with the actions of YouTube, a third party with whom the claimants had an economic interest; (2) Rahi

³⁵ [2023] EWHC 501 (Ch).

intended, by doing so, to cause harm to the claimants; and (3) Rahi had perpetrated deceit on YouTube by knowingly making groundless, fraudulent and malicious complaints that the claimants had infringed his copyright, with the aim of inducing YouTube to suspend the claimants' channels.³⁶ Moviebox claimed additionally that Rahi had acted in common design with Manzoor and Qureshi to injure its economic interests, in that they had combined to take unlawful action in order to cause damage to it. Judgment in default had already been entered against Manzoor and Qureshi, so this case did not directly concern them.

The case was heard by Rawlings J at the High Court. On the evidence, the judge found that Rahi did not own the copyright in any of the songs at issue, and that Rahi himself was fully aware of this. The judge was also satisfied that Rahi intended to cause loss to the claimants, as (1) he was aware of YouTube's three-strikes policy and its consequences; (2) he issued three copyright removal requests within the 90-day period to which the three-strikes policy related; and (3) it was evident from social media posts he made after YouTube suspended Moviebox's channel and deleted the 12 disputed videos from Oriental Star's channel – in which he had stated, among other things, that “Moviebox, very big channel of the gangsters, Almighty God has shut it down” – that he considered this to be the successful and desired outcome of his actions. The judge noted that Rahi knew his actions to be “intrinsicly injurious”, because of the measures that YouTube was empowered to take in relation to them.

Rahi contended that his actions did not interfere with the relations between YouTube and the claimants, arguing that YouTube was free to take any action that it wished – or, indeed, no action at all – in response to the removal requests he had issued. Rawlings J rejected this argument, noting that YouTube was obliged under its own policies and the legal framework surrounding the “safe harbour” regime to act rapidly in response to claims of infringement. By providing false information in support of his removal requests, Rawlings J found, Rahi had misled YouTube into believing, on a cursory examination of his claim, that he held the copyright in the disputed songs. But for Rahi providing that false information to YouTube, YouTube would not have taken action against the claimants' channels. That, in Rawlings J's judgment, amounted to interference with the contractual relationship between YouTube and the claimants. Rawlings J also found that the suspension of Moviebox's channel and the deletion of 12 videos from Oriental Star's channel were the result of Rahi's actions. On the evidence, he also found that Rahi had engaged in a common design with Manzoor and Qureshi to cause loss to Moviebox by unlawful means. On this basis, he found that that Rahi had caused loss to the Moviebox and Oriental Star in the form of: (1) Moviebox's channel being de-activated by YouTube; (2) both claimants being prevented from uploading new content to their channels; and (3) the 12 disputed videos being deleted from Oriental Star's channel.

In terms of remedies, Rawlings J considered it appropriate to grant an injunction against Rahi, which would have the effect of: (1) dissuading Rahi from issuing further removal requests against the claimants' YouTube channels and/or encouraging others to do so; and (2) enabling the claimants to demonstrate to YouTube

³⁶ On the nature and elements of the tort, see *OBG Ltd v. Allan* [2007] UKHL 21.

that there was in place an extant injunction that prohibited Rahi from issuing removal requests. This was in addition to damages to be calculated at a subsequent hearing. In doing so, Rawlings J noted that Rahi had shown “a willingness, acting in his own name and through others, to pursue a relentless and fraudulent campaign aimed at damaging the economic interests” of the claimants. This case thus provides parties who have been subjected to groundless copyright removal requests with guidance as to an appropriate cause of action, how each element of the cause of action can be made out, and potential remedies.

The case of *PQ Systems Europe Ltd v. Aughton*³⁷ reiterated and clarified several points of principle relating to the ownership of copyright in works created in an employment context. The first claimant here, PQ Systems Europe (“PQE”) was a company which specialised in the development of software for assisting with quality assurance in manufacturing. The first defendant, Jeff Aughton, had been employed as a software developer by the first claimant in 1989, a position from which he resigned in 2015. During the period of his employment, he developed a piece of software named “ProSPC”. Following his resignation from PQE, Aughton developed and sought to market another piece of software named InSPC. PQE brought a claim for copyright infringement against Aughton, claiming that Aughton had copied from ProSPC in writing InSPC, and that PQE owned the copyright in ProSPC. At issue therefore was whether ProSPC had been written by Aughton in the course of his employment with PQE. It was Aughton’s contention that the copyright in ProSPC belonged to him, and not to PQE, because it had been written as a hobby project outside the course of his employment.

The case was heard at the High Court by Zacaroli J. In arriving at his decision, Zacaroli J began by reiterating the established principle that the test of whether a work had been created in the course of employment involved a multi-factorial assessment. He then set out the relevant factors as identified in the previous case of *Mei Fields Designs Ltd v. Saffron Cards and Gifts Ltd*,³⁸ namely: (1) the terms of the contract of employment; (2) where the work was created; (3) whether the work was created during normal office hours; (4) who provided the materials for the work to be created; (5) the level of direction provided to the author; (6) whether the author could refuse to create the work; and (7) whether the work was “integral” to the employer’s business.

Applying these principles to the evidence before him, Zacaroli J held that ProSPC had been written by Aughton in the course of his employment with PQE. Perhaps most significantly, the judge found that Aughton had copied source code from other software belonging to PQE in developing ProSPC. In a disciplinary hearing, Aughton had admitted to “reusing” and “lifting” routines from other software belonging to PQE, “enhancing” and “making the necessary changes” to adapt them to ProSPC as he saw fit. Zacaroli J also found that there were significant similarities between the source code of ProSPC and the source code of another program owned by PQE which strongly indicated that the former had been copied from the latter. This conclusion was also consistent with expert evidence. The judge

³⁷ [2023] EWHC 581 (Pat).

³⁸ [2018] EWHC 1332 (IPEC).

also held that Aughton's work in writing ProSPC was "integral" to the business of PQE, since developing software of that nature was PQE's core business. While the terms of Aughton's employment contract provided little assistance to the court, it being a very basic contract, Zacaroli J took the view that the fact that Aughton had not been specifically directed to write ProSPC by anyone at PQE did not point away from it being done in the course of employment. The judge also observed that Aughton held a relatively senior position, and had a degree of autonomy over the projects he chose to work on. As to whether the work had been created during normal office hours, while Aughton claimed to have worked on ProSPC from home and in his own time (i.e. during evenings and weekends), the judge found that this was ultimately of little relevance. Aughton worked from home for most of the time while he was employed by PQE, and with little clear delineation between personal and work matters; he was, for instance, accustomed to working on PQE matters during evenings and weekends. As to who provided the materials for the work to be created, Zacaroli J found that not only had ProSPC been developed using source code belonging to PQE, but it had been written using Visual Studio and other resources licensed by PQE. The evidence also indicated that Aughton had written ProSPC on a computer provided to him by PQE for use when working at home, rather than on Aughton's own personal home computer. This, Zacaroli J held, showed that PQE had provided at least some of the "materials" that were used in the creation of ProSPC. On this basis, he held that ProSPC had indeed been written in the course of Aughton's employment, such that the copyright in it belonged to PQE.

Zacaroli J then went on to find that there were significant similarities between the source code of ProSPC and the source code of InSPC which were strongly indicative of copying. This conclusion was supported by expert evidence. On this basis, he concluded that Aughton had copied a substantial part of ProSPC in developing InSPC, and in doing so, had infringed PQE's copyright.

Last, but very much not least, 2023 also saw the first order made in the high-profile suit brought by the well-known stock photography supplier Getty Images against the UK-based generative AI startup Stability AI, in *Getty Images (US) Inc v. Stability AI Ltd.*³⁹ It was Getty's case that Stability AI had "scraped" millions of images from Getty's websites without consent and used those images as input to train and develop its deep learning AI model Stable Diffusion. Accordingly, Getty brought claims against Stability AI for, *inter alia*, copyright infringement and database right infringement arising from the development and training of Stable Diffusion (referred to as the "training and development claim"), and for secondary infringement of copyright arising from the importation of an infringing "article" – in the form of pre-trained Stable Diffusion software – into the UK by making the software available to users in the UK via its website (referred to as the "secondary infringement claim").⁴⁰ Stability AI applied to the High Court for reverse summary judgment and/or to strike out Getty's claims.

³⁹ [2023] EWHC 3090 (Ch).

⁴⁰ Getty also made claims on the basis of trade mark infringement and passing off.

Key to Stability AI's application insofar as it related to the training and development claim was whether there was *prima facie* evidence that the training and development of Stable Diffusion had taken place in the UK, or whether it had taken place elsewhere (most notably in the US, where Stability AI also had offices). In the absence of any evidence to this effect, Stability AI argued, Getty's claims were bound to fail. This is due to the territorial nature of copyright and the database right, which confers protection on its holder only within the borders of the UK. In support of its application, Stability AI presented evidence that: (1) Getty was also suing it in the US, and the US suit was premised on the contrary assertion that the training and development of Stable Diffusion took place in the US; (2) all of the computing resources which it used in the training of Stable Diffusion were, at all times, located outside the UK; and (3) none of its UK-based employees had ever worked on – or, indeed, had the right equipment to work on – developing or training Stable Diffusion. On balance, however, Joanna Smith J found that there were some inconsistencies in Stability AI's evidence, noting that it might not present a complete picture of what had transpired and that a fuller investigation of the facts might alter or add to the evidence available on the issue. On this basis, she held that the training and development claim had a real prospect of success at trial and rejected Stability AI's application relating to that claim.

Insofar as Stability AI's application related to the secondary infringement claim, meanwhile, the court held that it turned on the correct interpretation of the term "article" in Secs. 22, 23 and 27 of the CDPA, and in particular whether the term "article" was confined to tangible objects or could be extended to dealings with intangible things (such as Stability AI making Stable Diffusion available to users in the UK via its website). Section 22 of the CDPA provides that:

The copyright in a work is infringed by a person who, without licence of the copyright owner, imports into the United Kingdom, otherwise than for his private and domestic use, an article which is, and which he knows or has reason to believe is, an infringing copy of the work.

It was Stability AI's contention that the term "article" within the meaning of the CDPA was confined to tangible objects, relying on case law establishing the principle that abstract information is not property.⁴¹ Stability AI also contended that examples of this approach could be seen in copyright cases such as *Sony Computer Entertainment Inc v. Ball*,⁴² a case concerning "modchips" capable of bypassing the copy-protection system built into Sony's PlayStation 2 consoles, and *Wheat v. Google LLC*,⁴³ which concerned the lawfulness of Google's inclusion of hotlinking websites in its search results. However, Joanna Smith J was not fully persuaded by Stability AI's arguments. She observed that the authorities as to information not being property were not directly relevant to the construction of Sec. 22, that *Sony Computer Entertainment Inc v. Ball* did not directly address the question of whether

⁴¹ *Your Response Ltd v. Datateam Business Media Ltd* [2014] EWCA Civ 281; *Thaler v. Comptroller General of Patents, Trade Marks and Designs* [2021] EWCA Civ 1374.

⁴² [2004] EWHC 1738 (Ch).

⁴³ [2020] EWHC 27 (Ch).

the term “article” was confined to tangible objects, and that no detailed arguments on this specific point had been presented to the judge in *Wheat v. Google*. In light of this, Joanna Smith J considered that the question of whether the term “article” could be extended to dealings with intangible things was a novel one, not definitively determined previously, and would be better resolved at a full trial. Accordingly, she also dismissed Stability AI’s application in relation to the secondary infringement claim.

2 The Retained EU Law (Revocation and Reform) Act 2023

The Retained EU Law (Revocation and Reform) Act 2023 (“REULA”), which came into force on 1 January 2024, fundamentally alters the relationship between European law and UK national law, with potentially significant implications for intellectual property law in general and copyright law in particular.⁴⁴ First, the REULA revokes (in the language of the statute, “sunsets”) a number of pieces of EU-derived subordinate legislation (i.e. statutory instruments that give effect to the UK’s obligations under European law) and retained direct EU legislation (i.e. EU regulations, EU decisions or EU tertiary legislation, now known as “assimilated direct legislation” following the amendments made by the REULA),⁴⁵ including seven pieces of legislation relating to intellectual property.⁴⁶ As these pieces of legislation have been superseded or rendered inoperable by subsequent legislation, this particular development has a minimal effect on UK intellectual property law.

More significantly, however, the REULA abolishes the principle of supremacy of European law⁴⁷ and other general principles of European law.⁴⁸ From 1 January 2024, the *Marleasing* principle,⁴⁹ which formerly required UK national courts to interpret domestic law in accordance with European law “as far as possible”, is no longer in effect. Instead, any provision of retained EU direct legislation must now be read and given effect in a way which is compatible with domestic law.⁵⁰ The High Court has held, however, that in a post-REULA world, it would still be permissible

⁴⁴ For an overview, see Johnson (2023).

⁴⁵ REULA, Sec. 1.

⁴⁶ Artist’s Resale Right (Amendment) Regulations 2009 (SI 2009/2792); Community Designs (Fees) Rules 2002 (SI 2002/2942); Council Decision of 22 December 1994 on the extension of the legal protection of topographies of semiconductor products to persons from a Member of the World Trade Organization (94/824/EC); Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs; Commission Regulation (EC) No 2246/2002 of 16 December 2002 on fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs) in respect of the registration of Community designs; Commission Regulation (EC) No 877/2007 of 24 July 2007 amending Regulation 2246/2002 concerning the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs) following the accession of the European Community to the Geneva Act of the Hague Agreement concerning the international registration of industrial designs; Regulation (EU) No 386/2012 of 19 April 2012 on entrusting the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights.

⁴⁷ REULA, Sec. 3.

⁴⁸ REULA, Sec. 4.

⁴⁹ *Marleasing SA v. La Comercial Internacional de Alimentación SA* C-106/89.

⁵⁰ REULA, Sec. 3.

for a UK court to draw on European legislation and judgments of the CJEU as an external aid to the purposive interpretation of the relevant (domestic) provision.⁵¹ The REULA also gives the Supreme Court and designated appellate courts (referred to as the “higher courts” in the REULA) greater freedom to depart from retained EU case law (that is, decisions of the CJEU made prior to the end of the Brexit transition period agreed in the UK-EU Withdrawal Agreement, now known as “assimilated case law” following the amendments made by the REULA).⁵² Under the previous iteration of the European Union (Withdrawal) Act 2018, the higher courts had the power to depart from retained EU case law on the same basis as the Supreme Court could depart from its own decisions,⁵³ namely “where it is right to do so”, such as where adherence to its previous decisions would lead to injustice in a particular case or unduly restrict the development of the law.⁵⁴ The amendments introduced by the REULA remove this relatively stringent test, and set out a non-exhaustive list of factors to be taken into account by the higher courts in determining whether or not to depart from retained EU case law, namely: (1) the fact that decisions of a foreign court are not binding (except where otherwise provided); (2) any changes of circumstances which are relevant to the retained EU case law; and (3) the extent to which the retained EU case law restricts the proper development of domestic law.⁵⁵

The abolition of the principle of supremacy of EU law has potentially significant implications for several fundamental copyright concepts. These include, most obviously, the scope of protected subject matter and the requirement of originality. As stated previously, these have been the subject of significant judicial and academic attention over the last few years. While the CDPA’s “closed list” of protected subject matter has traditionally been viewed as an exhaustive list, the UK courts had, prior to the coming into force of the REULA, begun to interpret these categories very broadly⁵⁶ so as to bring them in line with the recent jurisprudence of the CJEU in cases such as *Levola*, *Cofemel* and *SI v. Chedech/Get2Get*. It is now unclear whether the abolition of the principle of supremacy of EU law will lead the courts to revert to the traditional approach of treating the subject matter categories as a more restrictive “closed list”.⁵⁷ The same concern arises in relation to the originality requirement. As explained previously, the traditional British test of originality was whether the work in question was the product of the author’s “labour, skill and judgment”. As the Court of Appeal confirmed in *THJ v. Sheridan* (discussed above), the applicable test is now that of “author’s own intellectual

⁵¹ *E-Accounting Solutions Ltd (t/a Advancetrack) v. Global Infosys Ltd (t/a GI Outsourcing)* [2023] EWHC 2038 (Ch).

⁵² REULA, Sec. 6.

⁵³ European Union (Withdrawal) Act 2018, Sec. 6(5) (as enacted).

⁵⁴ Practice Statement (Judicial Precedent) [1966] 1 WLR 1234; *Austin v. Southwark LBC* [2010] UKSC 28.

⁵⁵ These reflect, to some degree, the considerations outlined in *TuneIn Inc v. Warner Music UK Ltd* [2021] EWCA Civ 441. For commentary, see Lee (2022), pp. 398–400.

⁵⁶ See *Response Clothing Ltd v. Edinburgh Woollen Mill Ltd* [2020] EWHC 148 (IPEC).

⁵⁷ See *Creation Records Ltd v. News Group Newspapers Ltd* [1997] EMLR 444.

creation”, following the CJEU’s post-*Infopaq* jurisprudence. Once again, the REULA has introduced uncertainty into this position. Will the UK courts revert to the traditional test of “labour, skill and judgment”, or will they seek to retain the “author’s own intellectual creation” test? If the latter, what are the conceptual tools they can rely on to bring a principle developed entirely in European law to bear on the interpretation of a provision of the CDPA, a domestic statute? The changes introduced by the REULA are likely to result in a significant degree of uncertainty for UK copyright law, at least over the short term, as litigants wait to see how the courts will respond.

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