

Copyright in wordstrings, straplines, hyperlinks etc

The UK IPO website confidently states that there 'is no copyright in a name, slogan or phrase'. While we may smile knowingly and state that all generalisations are dangerous, the UKIPO statement now needs to be treated with increasing caution in light of the recent *NLA v Meltwater* case. Here the Newspaper Licensing Authority ('NLA') succeeded in its High Court action against the *Meltwater* media monitoring service. The NLA claimed, amongst other things, that copyright could exist in newspaper headlines and short text extracts (used as hyperlinks to the main article). In applying the tests laid down by the European Court of Justice in the earlier case of *Infopaq International A/S v Danske Dagblades Forening*, Mrs Justice Proudman held that headlines were capable of being considered independent literary works as their creation will often involve considerable skill, thereby being expressions of the author's intellectual creation. Further, short text extracts (in this case as few as 11 consecutive words and contained in a hyperlink) could also be considered literary works protectable by copyright to the extent such extracts exhibited the necessary quality of originality. *Infopaq* therefore held that the relevant test to decide on applicability of copyright protection is not the degree of substantiality, but rather the degree of objective creativity and originality.

In the advertising industry, the use of straplines and slogans is as popular as ever. Consider how recognisable some may find the following: *Every little helps, Good with food, I'm Lovin' It, Just Do It, Have a break*. Such slogans have traditionally not been thought to attract copyright protection and so the best form of protection has been to apply for a trade mark. But new straplines and slogans will often fail to meet the relevant distinctiveness requirements for trade mark purposes. Only after acquiring that distinctiveness through substantial use will trade mark protection become an option, thereby leaving what are considered valuable marketing properties vulnerable to hijacking by competitors in the early days of their use. Trade mark applications can be made adding other distinctive elements (such as the house brand or artwork) to the straplines, however such protection is narrow and therefore of limited value.

So, in light of the *Meltwater* case, can businesses relax about seeking trade mark protection for their straplines and slogans safe in the knowledge that they will be protected by copyright? While this decision may bring copyright protection for some slogans closer, we would say not. The *Meltwater* case concerned use of headlines and text extracts that hyperlinked to full articles. As far as the hyperlinks and headlines were concerned, Mrs Justice Proudman was persuaded that the headlines attracted copyright protection because of the substantial skill involved in creating them in such a way as to entice readers to read the relevant article by informing of the content in an entertaining manner. While there may be room in certain circumstances to argue that some straplines and slogans are cleverly created in such a way as to entice custom, such argument seems less persuasive where not linked directly to an associated copyright work of which the slogan forms part.

So we should be cautious about believing this case extends copyright to most slogans, hyperlinks, headlines. For slogans such as I'M A CELEBRITY GET ME OUT OF HERE and NICE TO SEE YOU, TO SEE YOU NICE, copyright protection is still unlikely to be relevant.

The reason why most people would want to protect hyperlinks is really as a mechanism of preventing unauthorised links to other copyright protected materials. This seeking to benefit are looking to prevent others from deriving benefit from using such links. If the creators of such hyperlinks wish them to be considered copyright works, then care should be taken to make them of sufficient length (clearly 11 words is enough) and sufficiently cleverly created using key phrases from the work to which they point (sufficient enough to create in the mind of the reader (and who 'reads' hyperlinks?) enough interest and enjoyment).

So for example:

<http://www.xyz/article77234-nnbdy-lzzye243538> will not be likely to attract copyright protection,

whereas, according to the *Meltwater* case,

<http://www.xyz/copyrightcasereviews/ECJrulings/Meltwater/copyrightgrantedto11wordstring> just might do so.

For creators of straplines and slogans therefore the advice is clear: create something clever and distinctive - in doing so you increase both the likelihood of early availability of trade mark protection.

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