



Copying in Any Material Form: Is it an infringement of Copyright to Access Protected Material Online?

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This paper considers the construction of section 17(2) of the Copyright, Designs and Patents Act 1988, reproducing the work in any material form, including storing the work in any medium by electronic means. The paper then seeks to discuss how judges interpret and apply the section to modern digital technologies.

The discussion reveals that the original intention of the clause was to protect stored work as a copyright work in itself, in the event that someone might try to steal it before it was written down in a recorded form. The clause was created at a time when the use of computers was limited and it is unlikely that the legislators could have foreseen the developments in technology to which it now applies.

The case law demonstrates that over time the legal definition of copying and storage has developed as technological developments have occurred. This is to be expected in light of technological developments of course, and could be argued to be a strength of the drafting that it encapsulates circumstances never envisaged at the time of drafting. However, this can lead to the law going too far, for example, the broadening of the law to encompass *access to* and *display of* copyright materials.

Judges and counsel often attempt to map the law onto new technical circumstances with the use of analogy, or the internal perspective, by way of similes, metaphors or skeumorphs. This demonstrates the attempt to understand new technologies, and how the law applies to them, through the use of previous knowledge and understanding. There are many drawbacks of attempting to apply the law to online activity, by trying to understand it as if it were offline activity, for example it can be inaccurate, misleading and inappropriate.

On the other hand, judges take an external perspective when describing the facts of the case; they take time to understand in great detail the technical function of the process in question. This has led to very technologically specific law. Laddie, Prescott and Vitoria suggest that with this reasoning reading a newspaper over somebody's shoulder could be infringement by "electronic means" because "electronic" includes "actuated by electro-magnetic [or] electro-chemical energy" and light is a form of electromagnetic energy."

Whilst, a distinction was made between copying without knowledge and involuntary copying,¹ the subsequent case law essentially found that any person using a computer could be said to be taking a voluntary action by viewing, accessing, using a work via a computer.

However, the *Meltwater* decision steered away from the UK understanding of voluntary copying by accessing the work. Instead, the CJEU stated that on-screen copies and cached copies are created and deleted by the technological process and therefore it is irrelevant that the process is "activated by the internet user". This decision has been considered the prevailing of "common sense", offering the UK some relief from the restrictions of the overly technical approach taken in the case law. However, the implications of the *Meltwater* decision remains to be seen.