

## FORDHAM IP CONFERENCE 2010

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### *The 2009 Infopaq decision of the European Court of Justice - has the originality criterion been harmonised?*

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**Re: European Court of Justice (Fourth Chamber), 16 July 2009, Case C-5/08  
(Infopaq International A/S v. Danske Dagblades Forening)  
curia.europa.eu/jurisp/cgi-bin/gettext.pl?**

#### 1. DISPUTE:

From the decision:

13. *Infopaq operates a media sponsoring and analysis business which consists primarily in drawing up summaries of selected articles from Danish daily news papers and other periodicals. The articles are selected on the basis of certain subject criteria agreed with customers and the selection is made by means of a 'data capture process'. The summaries are sent to customers by email.*

14. *DDF is a professional association of Danish daily newspaper publishers, whose function is inter alia to assist its members with copyright issues.*

15. *In 2005 DDF became aware that Infopaq was scanning newspaper articles for commercial purposes without authorisation from the relevant rightholders. Taking the view that such content was necessary for processing articles using the process in question, DDF complained to Infopaq about this procedure.*

16 *The data capture process comprises the five phases (described below; deleted but see sub RULING) which, according to DDF, lead to four acts of reproduction of newspaper articles.*

#### 2. RULING CONSIDERATIONS:

33. *Article 2(a) of Directive 2001/29 provides that authors have the exclusive right to authorise or prohibit reproduction, in whole or in part, of their works. It follows that protection of the author's right to authorize or prohibit reproduction is intended to cover 'work'.*

34. *It is, moreover, apparent from the general scheme of the Berne Convention, in particular Article 2(5) and (8), that the protection of certain subject-matters as artistic or literary works presupposes that they are intellectual creations.*

35 *Similarly, under Articles 1(3) of Directive 91/250, 3(1) of Directive 96/9 and 6 of Directive 2006/116, works such as computer programs, databases or photographs are protected by copyright only if they are original in the sense that they are their author's own intellectual creation.*

36. *In establishing a harmonized legal framework for copyright, Directive 2001/29 is based on the same principle, as evidenced by recitals 4, 9 to 11 and 20 in the preamble thereto.*

37. *In those circumstances, copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation.*

38. *As regards the parts of a work, it should be borne in mind that there is nothing in Directive 2001/29 or any other relevant directive indicating that those parts are to be treated any differently from the work as a whole. It follows that they are protected by copyright since, as such, they share the originality of the whole work.*

### 3. RULING:

*1. An act occurring during a data capture process, which consists of storing an extract of a protected work comprising 11 words and printing out that extract, is such as to come within the concept of reproduction in part within the meaning of Article 2 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, if the elements thus reproduced are the expression of the intellectual creation of their author; it is for the national court to make this determination.*

### 4. COMMENT

This decision is of particular importance, since it is the first decision of the EU CoJ with regard to the work concept in relation to the originality criterion under EU copyright law.

In order to determine the legal meaning of the undefined term *reproduction in part* under Article 2 (a) Directive 2001/29, on which the dispute focuses, the Court finds it necessary to determine, first, the meaning of the equally undefined term *work*.

With reference to three successive directives on computer software, databases and photographs, read in relation to that on copyright, the Court determines that for claiming that certain subject-matters are works, it is required that they are original in the sense that they are (their author's own) intellectual creations (Considerations nos. 34, 35, 37).

This reasoning gives rise to at least the following two intriguing questions:

- a. was the Court authorized to determine a EU-wide harmonized work concept or, as the case may be, to introduce a EU-wide harmonized originality criterion on the basis of the three mentioned directives (directed towards specific subject-matters used in specific areas of industry) in connection with the referred to preambles to Directive 2001/29?
- b. is the new originality criterion well chosen?