

COMMENTS

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Of Maps, Crown Copyright, Research and the Environment

Ⓞ Crown copyright; Fair dealing; Infringement; Maps; Research

The HMSO and Ordnance Survey v Green Amps case discusses the fair dealing exception for research for the first time and implies that copyright could be trumped by the Re-Use Public Sector Information Regulations. It also raises the question whether protection of the environment can be an arguable defence to copyright infringement.

A few months ago, the Chancery Division gave its ruling in *The Controller of Her Majesty's Stationery Office, Ordnance Survey v Green Amps*.¹ The main interest of this case lies in the fact that it is the first one interpreting the exception of fair dealing for the purposes of research.² Article 5(3)(a) of the Copyright Directive,³ which the United Kingdom implemented in the Copyright and Related Rights Regulations 2003⁴ states that:

"Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this

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1 [2007] EWHC 2755, November 5, 2007.

2 *Universities UK v Copyright Licensing Agency Ltd* [2002] E.M.L.R. 35; [2002] R.P.C. 36; (2002) 25(3) I.P.D. 25021 briefly touched upon the interpretation of s.29(1) at para.34 where the Copyright Tribunal stated that "... [c]learly, a student who takes a photocopy for the purposes of his course of a relevant article, or a relevant short passage from a book is likely to do so in circumstances which amount to fair dealing. At the other extreme, if he were to take a photocopy of a whole textbook, we think that his dealing would not be fair, even if done for the purposes of private study".

3 Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L167, June 22, 2001, p.10-19.

4 SI 2003/2498 is available at <http://www.opsi.gov.uk> [Accessed January 28, 2008].

turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved".

It therefore forced the United Kingdom to modify its corresponding exception which previously implied that commercial research could be fair dealing.⁵ Accordingly, s.29(1) now provides:

"Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement."

The legislative scene being set, one can turn to the case.

Facts and ruling

The claimants, Ordnance Survey and the Controller of Her Majesty's Stationery Office, have Crown copyright in digital maps. The defendant, Green Amps, a company providing wind turbines that generate renewable energy, employed a student of the University of Southampton during his holidays. After the student left, Green Amps used the username and password of one of his fellow students (that the student they had employed had been using) to download maps from Ordnance Survey's Digimap database.⁶ By accessing Digimap in that way, Green Amps would have seen the screens advising that the maps were copyright and that the service was restricted to educational institutions and for educational purposes, which included research. Their downloading was clearly held to be a copyright infringement.

Green Amps sought to rely on several defences. The first lies in the Re-Use of Public Sector Information Regulations 2005, which implemented Directive 2003/98/EC. It allows public sector bodies, "to charge only for the cost of reproducing the maps plus a reasonable return on the amount expended in doing this."⁷ Accordingly, for the court, the Regulations did not allow the defendant to download the maps free of charge, as it did. If someone believes the charge is excessive, they must use the internal complaints procedure set out in the Regulations, which Green Amps did not do. Section 29(1) of the Copyright, Designs and Patents Act (CDPA) 1988 was Green Amps' second defence. It argued that it used the maps it downloaded from Digimap for a "mapping tool" which at the moment of litigation still had "R&D status". As the end-use of the maps was to make a commercial toolkit, the judge found that the research was for a commercial purpose and the defence did not apply. The court added that the dealing was clearly not fair. The amount taken was too great, the dealing implied competition with the owner's exploitation of

5 Parliament refused to require a non-commercial purpose because it is often difficult to draw the line. See W. Cornish and D. Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 6th edn. (London: Sweet & Maxwell), para.12-39, p.476. As an example of borderline situations, they mention the case of a student subsidised by a firm.

6 Green Amps obtained the username and password of the fellow student because they were cached on its computers. The student they employed was not a party to the litigation.

7 Para.15 of the judgment.