

Website blocking--Popcorn Time users not app-y

12/05/2015

IP & IT analysis: Discussing the issues raised in *Twentieth Century Fox v Sky*, Richard Spearman QC at 39 Essex Chambers, points out that the jurisprudence in this area of the law is still developing, in particular so far as concerns the boundaries of what comprises 'communication to the public'.

Original news

Twentieth Century Fox Film Corporation and others v Sky UK Ltd and others [2015] EWHC 1082 (Ch), [2015] All ER (D) 229 (Apr)

The claimant companies were members of the Motion Picture Association of America and held copyright in a large number of films and television programmes. The defendants were the major internet service providers in the UK. The claimants applied for a website blocking order, under the Copyright Designs and Patents Act 1988, s 97A (CDPA 1988), in respect of nine different websites with the objective of restraining alleged large scale copyright infringement in films and television programmes. The Chancery Division held that, applying settled law to the facts, the court had jurisdiction under CDPA 1988, s 97A to make a blocking order and such an order was proportionate in the exercise of its discretion.

What was the background to this on paper application?

The first application for a website blocking order under CDPA 1988, s 97A was made by the major Hollywood film studios in 2011 against BT and concerned a website called Newzbin (or Newzbin2). That was treated as a test case, and it resulted in two landmark rulings of Arnold J--one concerning major points of principle (*Twentieth Century Fox Film Corp v BT* [2011] EWHC 1981 (Ch), [2012] 1 All ER 806) and the other concerning the appropriate form of order and costs issues (*Twentieth Century Fox Film Corp v BT (No 2)* [2011] EWHC 2714 (Ch), [2012] 1 All ER 869). The studios went on to obtain similar orders against the UK's other major internet service providers (the ISPs). Since then, the studios and other copyright owners have obtained many similar orders concerning (among others) streaming sites and BitTorrent sites. Once issues of principle had been determined, the ISPs adopted the stance of not opposing the orders, and this paved the way for most applications to be dealt with on paper. However, they have typically resulted in full public reasoned judgments (the majority delivered by Arnold J). It was against this background that, without opposition from the ISPs, the court was invited to deal with this application on paper.

In technical terms, what are the differences between streaming sites, BitTorrent sites and Popcorn Time type sites?

In essence, streaming sites operate as indexing or aggregation portals to content which is streamed. Typically, the user of such a site is presented with links, and by clicking on one of those links, is taken to a new page which features a 'frame' or window in which the content that is to be watched appears, possibly accompanied by advertising (from which the operator generates revenue). BitTorrent sites are sites which use the BitTorrent peer-to-peer file sharing protocol and work by creating and distributing torrent files which are associated with particular content files. The torrent files do not themselves contain any material from the associated content files, but instead enable the identification, and hence the uploading and downloading, of the relevant content files. Accordingly, they serve a similar function to the NZB files which formed a feature of the operation of the Newzbin and Newzbin2 websites.

So-called 'Popcorn Time' websites enable users to download and install one of a number of different forms of 'Popcorn Time' application from a website (a PTAS website) which then maintains links either with the same website from which the application was downloaded or with another website (probably run by the same or associated operators) which is used as a source of update information (a SUI website). In this way the content available using the Popcorn Time applications through their links with peers and torrent catalogue websites is constantly updated, and in a manner controlled by the operators of the Popcorn Time sites.

What was the court's issue with the type of application made and the Popcorn Time type sites?

The application related to three types of website: streaming sites, BitTorrent sites, and Popcorn Time sites. Birss J held that:

- o the issues raised by the first two types of website had been dealt with comprehensively in earlier judgments, and in so far as it related to them the application was suitable to be dealt with on paper
- o in contrast, the Popcorn Time type sites raised new and different issues from those considered in previous cases, and in so far as it related to them the application required to be dealt with at a hearing (as duly occurred)

What finding did the court make, and how did it arrive at this conclusion?

The basic principles were established in the original test case, and have been recognised ever since. First, there are four matters which need to be established for the court to have jurisdiction under CDPA 1988, s 97A to make the order sought:

- o that the ISPs are service providers
- o that users and/or the operators of the target websites infringe copyright
- o that users and/or the operators of the target websites use the services of the ISPs to do that
- o that the ISPs have actual knowledge of this

Second, if the jurisdictional requirements are satisfied, the court then has to consider whether an order is appropriate and in what terms.

Birss J held that there was no difficulty about the first and fourth matters, and that, subject to issues specific to Popcorn Time, this was a clear case for granting the order sought for the same reasons as had been considered in depth in previous cases. The debate concerned the second and third issues.

The studios contended that the operators of the Popcorn Time websites used the services of the ISPs to infringe copyright in protected film and TV works in three ways:

- o (a) by communicating the works to the public contrary to CDPA 1988, s 20(2)(b)
- o (b) by authorising the infringing communication to the public by:
 - o (i) the operators of the websites which directly transmit the protected works ('the host websites') to the users of the host websites and/or
 - o (ii) those who place infringing content on the host websites, and
- o (c) as joint tortfeasors with those described at (b)(i) and (ii).

It formed part of the studios' argument that there was no material difference between the NZB files in the *Newzbin* and *Newzbin2* cases and the BitTorrent files in other cases (in which all three forms of infringement had been upheld) and the Popcorn Time application (the sole purpose of which was to infringe copyright). The studios submitted that it could not, or should not, make all the difference that the website operators provide users with an app instead of providing them with NZB or BitTorrent files.

Birss J held that neither the operators of the PTAS websites nor the operators of the SUI websites committed acts of communicating copyright works to the public. In particular, he reasoned that:

'It is the Popcorn Time application, when running on the user's computer, that provides catalogued and indexed connections to the sources of infringing copies of the claimants' copyright works. The operators of the PTAS sites are facilitating the making available of the content by providing this tool but that is a different matter.'

Nor did those operators authorise infringement of copyright on the part of the operators of the host websites or those who place infringing content on the host websites. Accordingly, the case based on 'communication to the public' and 'authorisation' was not made out. However, Birss J upheld the case based on 'joint tortfeasance'. The application therefore succeeded.

What should lawyers take away from this case?

In procedural terms, the case has flagged up the need for applicants to ensure that they draw the court's attention to any new factors that are present in applications under CDPA 1988, s 97A which they are asking the court to deal with on paper. Birss J stated:

'If substantive new issues fall to be considered the matter is unlikely to be suitable for being dealt with on paper.'

This requires vigilance on the part of applicants and their lawyers--while some cases may be clear, it may not always be obvious to them that substantive new issues are involved. I would suggest that they should err on the side of caution, and, if they are unsure about whether an application raises new issues, set out in writing any concerns that they have and leave it up to the judge considering the application on the papers to decide whether a hearing is needed.

In substantive terms, it shows that the jurisprudence in this area of the law is still developing, in particular so far as concerns the boundaries of what comprises 'communication to the public'. In *Paramount Home Entertainment International Ltd and others v British Sky Broadcasting Ltd and others* [2013] EWHC 3479 (Ch), [2013] All ER (D) 151 (Nov), Arnold J set out 18 principles which he had distilled from decisions of the Court of Justice of the European Union (CJEU) up to that time. Following that decision, Henderson J considered the impact of the judgment of the CJEU in *Svensson v Retriever Sverige AB in Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd*: C-466/12 [2014] All ER (EC) 609, and Arnold J considered *UPC v Constantin Film Verleih GmbH*: C-314/12 [2014] All ER (D) 302 (Mar) and *LSG v Tele 2*: C-557/07 (in the context of trade marks) in *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch), [2014] All ER (D) 236 (Oct). Further English cases were listed by Arnold J in the latter case, in a passage quoted by Birss J in this case. In one of those cases, concerning streaming sites, Arnold J observed that:

'As an alternative, the user can download a free app from the website to their computer which will enable them to access links.'

That appears not to have made a difference to the grounds on which relief was granted in that case, but it did in this case.

What practical points can be taken from the order annexed to the judgment?

The form of order annexed to the judgment can be compared with that made in the original test case. The substance is the same, but the details are markedly different. The order reflects, on the one hand, how complex the practicalities of orders under CDPA 1988, s 97A may be, and, on the other hand, what can be achieved, with the assistance of the court, to take account of the interests and concerns of the ISPs while at the same time achieving the fundamental purpose of such orders, which is to require those who are best placed to do so (ie the ISPs) to assist in combatting very large-scale infringement of copyright using the internet.

A particular feature of the order, which is specific to Popcorn Time sites, is that it provides for blocking both PTAS and SUI websites. It also allows the applicants to update the IP addresses or URLs which are blocked in respect of both types of site. Birss J held that this was appropriate, because:

'The point of Popcorn Time is to infringe copyright. The Popcorn Time application has no legitimate purpose. It is a proper use of the court's power under s 97A both to seek to prevent its dissemination and to seek to interfere with its operation.'

Richard Spearman QC has a wide ranging general chancery, commercial and common law practice. He obtained the first order under CDPA 1988, s 97A, and has subsequently obtained many similar orders. He has appeared in many high-profile and reported cases, including cases concerning copyright and the film and music industries, and was the inaugural Legal 500 IP, IT and Media Silk of the Year in 2013. He is a Recorder and a Deputy High Court Judge. In Twentieth Century Fox v Sky, Richard was counsel for the claimants.

Interviewed by Kate Beaumont.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.



CLICK HERE FOR
A FREE TRIAL OF
LEXIS®PSL

[About LexisNexis](#) | [Terms & Conditions](#) | [Privacy & Cookies Policy](#)
Copyright © 2015 LexisNexis. All rights reserved.