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Case No: IL-2021-000045

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22/10/2021

Before:

MRS JUSTICE FALK

Between:

- (1) COLUMBIA PICTURES INDUSTRIES INC
(2) DISNEY ENTERPRISES INC
(3) NETFLIX STUDIOS LLC
(4) PARAMOUNT PICTURES
CORPORATION
(5) UNIVERSAL CITY STUDIOS
PRODUCTIONS LLP
(6) WARNER BROS. ENTERTAINMENT INC

Applicants

- and -

- (1) BRITISH TELECOMMUNICATIONS PLC
(2) EE LIMITED
(3) PLUSNET PLC
(4) SKY UK LIMITED
(5) TALKTALK TELECOM LIMITED
(6) VIRGIN MEDIA LIMITED

Respondents

Richard Spearman QC (instructed by Wiggin LLP) for the Applicants

Hearing date: 18 October 2021

APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on Friday 22 October 2021.

Mrs Justice Falk

Mrs Justice Falk:

1. These are my written reasons for the grant of a website blocking order under section 97A Copyright, Designs and Patents Act 1988 (“CPDA”). I considered detailed written submissions and evidence. I was invited to make the order on the papers but decided to request oral submissions on certain aspects. Mr Spearman QC provided those submissions on 18 October 2021, following which I made the order. I am grateful for Mr Spearman’s assistance.
2. The applicants (the “Studios”) are members of well-known studio groups, acting on their own behalf and behalf of other members of their respective groups. The Studios and those they represent own the copyright in a large number of motion pictures and television programmes.
3. The respondents (the “ISPs”) are the six major UK internet service providers, with a combined market share of over 90% of the UK fixed line broadband market. All the ISPs have been subject to blocking orders made in other proceedings brought under section 97A CPDA, and all have confirmed that they do not oppose this application. The terms of the draft order were discussed with them.

The Target Websites

4. The application relates to five websites currently located at 123movies.online/123moviesfun.ch, europixhd.net, levidia.ch, tinyzonetv.to and watchserieshd.tv (the “Target Websites”). The Studios’ position is that the purpose of these websites is to make available for streaming vast amounts of copyright protected film and television content, including content owned by the Studios and their affiliates, without any licence being in place.
5. The Target Websites do not themselves host the relevant content. In all cases audio visual content is transmitted from a third-party site that hosts the content, rather than directly from the Target Websites. The way that the Target Websites work is to provide links to content on those other sites, but indexed and categorised in a way that enables users to search for, select and access content straightforwardly. For example, as well as providing a search facility additional information is provided about the listed content, such as the genre, synopsis, running time, release date, language and a rating. In essence, the sites enable users to access material in a user-friendly manner. Active steps are taken to maintain the relevant site and editorial control is clearly exercised. Steps are taken to encourage users to access content, for example advertising recently added content and facilitating the sharing of links on social media. Profits are generated from advertising.
6. Four out of five of the Target Websites use embedded players to stream content selected by a user from the host website. In those cases there is nothing that clearly indicates that the user has been redirected to a third-party site. One site, levidia.ch, uses a “pop-up” window instead. With that site the user can choose between different host sources by making a selection from links provided on the relevant contents page. When this is done the URL of the relevant host is displayed in the browser bar.

7. The witness statement in support of the application confirmed that all of the Target Websites are substantially the same, in terms of their purpose and general mode of operation, as websites that are subject to existing orders under section 97A. Further, a number of the websites have adopted the brand names of sites that are already the subject of a blocking order.
8. The activities of the Target Websites have not been curtailed despite attempts to contact their operators. There is no indication that any of them has a legitimate purpose. Rather, they are focused on the provision, without charge, of content that has been made available, or is scheduled to be made available, for commercial purchase.
9. The Target Websites are all operated outside the jurisdiction. The majority are hosted via CloudFlare's delivery platform. Where that is the case it is not possible to determine definitively whether or not other sites are also hosted on the same server. The applicants have confirmed that, following the grant of the order, they will notify the Target Websites to CloudFlare and request that they be allocated to dedicated IP addresses. This approach has been taken in respect of sites blocked pursuant to existing orders under section 97A, and is intended to ensure that only material on the Target Websites is blocked.

Copyright infringement: communication

10. The Studios' primary contention is that the operators of the Target Websites infringe copyright by communicating to the public copyright works owned and controlled by the Studios or their affiliates, contrary to section 20 CPDA. They contend that the necessary territorial link is established by the targeting of users in the UK.
11. The relevant principles were recently considered by the Court of Appeal in *TuneIn Inc v Warner Music UK Ltd* [2021] EWCA Civ 441 ("*TuneIn*").
12. It is clear that the Target Websites enable works to be made available in such a way that members of the public can access them from a place and at a time of their choosing. The operators of the Target Websites are clearly aware that, by including links to content, they are providing access to the works. That is the purpose of the sites. The sites provide access to content in a straightforward way, enable users to enjoy the works where they would otherwise not be able to do so, or would find it difficult to do so. That amounts to "communication": see *TuneIn* at [70(8)]. In particular, the fact that the infringing content may be hosted at a third party location does not prevent the activities of the Target Websites from amounting to communication, because of the active intervention to make the content available to users in a readily accessible manner. See for example *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch) ("*EMF*") at [45], referring to *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EWHC 608 (Ch) ("*Newzbin*"), and *Paramount Home Entertainment International Limited & Ors v British Sky Broadcasting Limited & Ors* [2013] EWHC 3479 (Ch) ("*Paramount*") at [32]. It is not necessary to show that the work in question is actually accessed: *TuneIn* at [70(9)].

13. Although levidia.ch uses a slightly different mechanism to access content, with the result that a user may be more likely to recognise that content is being accessed via a third party site, this does not alter the key point that the Target Website provides access to content in a straightforward manner, without the difficulties that would otherwise be involved in locating the material.
14. I am further satisfied that content is communicated to “the public”. The Target Websites are generally available to, and indeed have been accessed by, a large and indeterminate number of persons. Insofar as it may be necessary to show that the communication was to a “new public” because the same technical means is being used as for an original, authorised, communication (see *TuneIn* at [70(13)]), then that requirement is met. The Target Websites are operated for profit, and the rebuttable presumption that the CJEU held to exist in Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV* [2016] Bus LR 1231 (“*GS Media*”) at [51] applies:

“... when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a ‘communication to the public’ within the meaning of article 3(1) of Directive 2001/29.”
15. This passage from *GS Media* was considered and applied in *TuneIn*: see in particular paragraphs [70(15)], [104] and [151]-[159]. As noted in *TuneIn*, the CJEU applied its reasoning in *GS Media* in Case C-527/15 *Stichting Brein v Wullems* (“*Filmspeler*”) and Case C-610/15 *Stichting Brein v Ziggo BV* [EU:C:2017:456] (“*Pirate Bay*”).
16. Operators conducting their activities for profit are therefore expected to have carried out the necessary checks to ensure that the works to which links are provided are not illegally published. In this case there is nothing to rebut the presumption of knowledge. The Target Websites are being operated for profit. No consent has in fact been provided by owners of the works. Any authorisation given by the relevant copyright owner to a work being available to the public on a subscription service (such as Netflix) clearly does not extend to it being freely available to all internet users. The operators of the Target Websites clearly know, or at least must be taken to know, that they are providing access to works that have been placed on the internet without any such consent. The Target Websites are generally available to members of the public, without members of the public having to pay to access the content in the manner contemplated by any communication authorised by the copyright owners. That is their purpose. I note the discussion of similar points in *EMI* at [47] (which predated *GS Media*) and *Football Association Premier League v British Telecommunications plc* [2017] EWHC 480 (Ch) (“*FAPL*”) at [37].

17. I have also concluded that there is the requisite targeting of UK users. The principles to apply are summarised in *TuneIn* at [60] and [61]. In particular, the question of targeting must be considered from the perspective of the public in the relevant state (here the UK), the test is an objective one (although evidence of intention is nonetheless relevant), and the court must carry out an evaluation of all the relevant circumstances. Factors to be taken into account include the appearance of the web pages, such matters as language, currency and any use of national top level domain names, the nature and size of the provider's business, the characteristics of the goods and services offered and the number of visits made from the UK.
18. The default language of the Target Websites is English and they provide access to English language content. There have been significant numbers of visits to the sites from the UK. I was also shown advertising targeted at the UK market, including use of sterling. The evidence sufficiently demonstrates that there is targeting at UK users.

Copyright infringement: authorisation and copying

19. The Studios also maintain that the operators of the Target Websites infringe copyright by authorising acts of copying by UK based users of those sites. This is on the basis that the streaming process causes the user's computer or device to create copies of the content in its memory, which is an infringement under section 17(1) CPDA (see *FAPL* at [31]). The Studios say that this is authorised by the operators for the purposes of section 16(2) CPDA.
20. In *TuneIn* at [166] the Court of Appeal approved a statement of the law relating to authorisation by Kitchin J in *Newzbin* at [90]:

“...‘authorise’ means the grant or purported grant of the right to do the act complained of. It does not extend to mere enablement, assistance or even encouragement. The grant or purported grant to do the relevant act may be express or implied from all the relevant circumstances. In a case which involves an allegation of authorisation by supply, these circumstances may include the nature of the relationship between the alleged authoriser and the primary infringer, whether the equipment or other material supplied constitutes the means used to infringe, whether it is inevitable it will be used to infringe, the degree of control which the supplier retains and whether he has taken any steps to prevent infringement. These are matters to be taken into account and may or may not be determinative depending upon all the other circumstances.”

21. In my view the Target Websites do authorise infringing acts of copying by users, and indeed positively encourage and facilitate it. The fact of extensive copying by users can be inferred from the quantity of material indexed on the Target Websites, their purpose of making the content available and the extent of traffic to the sites. As to authorisation, the nature of the relationship is the provision by the Target Websites of a user-friendly environment to locate and access content. The sites provide the means to infringe, and infringement by copying is an inevitable consequence of accessing the material. The Target Websites have the

means to control access but have taken no steps to prevent infringement. The activities amount to the purported grant of the right to do the acts complained of. I note the application of these principles to users in *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch) at [73]-[81] and in *EMI* at [52]-[70].

Host websites and joint tortfeasors

22. The Studios also submit that the activities of the operators of the Target Websites amount to authorising infringing communications to the public by operators of host websites or those who place infringing content on them, and further rely on the operators being joint tortfeasors with both users and operators of host websites. Given the conclusions I have reached about communication (and indeed authorisation in respect of users) it is not necessary to express a view on these points.

Requirements of section 97A

23. The legal principles to apply are now well established. In summary, the jurisdiction to grant an order under section 97A is dependent on the court being satisfied that (1) the ISPs are service providers; (2) users and/or operators of the Target Websites infringe copyright; (3) users and/or operators use the services of the ISPs to do that; and (4) the ISPs have actual knowledge of that fact. If the court has jurisdiction, then it must consider whether, in all the circumstances and in particular having regard to proportionality, it is appropriate to make the order sought.

Jurisdiction

24. I am satisfied that the court has jurisdiction. There is no doubt that the ISPs are service providers. As already discussed, copyright is infringed by communication of works to the public and by authorising UK users to infringe copyright by copying. It is also clear that the operators and users of Target Websites use the services of the ISPs to infringe copyright: see for example *Paramount* at [39]. It can reasonably be inferred that subscribers to the ISPs' broadband services use them to access the Target Websites, given their popularity in the UK and the ISPs' market share. The ISPs also have actual knowledge of the use of their services to infringe copyright, given the advance notice they were given of this application, which included sample evidence, and the service of the application and supporting evidence on them, and indeed their expressed lack of opposition to the order.

Discretion and proportionality

25. The principles that the court applies in determining whether to exercise its discretion to grant an order under s 97A are now well established. They were summarised by Arnold J in *Nintendo v Sky* [2019] EWHC 2376 (Ch) at [41]:

“The injunction must be (i) necessary, (ii) effective, (iii) dissuasive, (iv) not unduly costly or complicated, (v) avoid barriers to legitimate trade, (vi) a fair balance between the fundamental rights engaged,

(vii) proportionate and (viii) safeguarded against abuse. Of these factors, proportionality is the key one, since consideration of the other factors feeds into the proportionality analysis.”

26. The principal rights engaged are, on the one hand, Article 1 of the First Protocol to the European Convention on Human Rights (“ECHR”) and the intellectual property rights of the Studios, and on the other hand rights to freedom of expression under Article 10 ECHR of the ISPs and of the operators and users of the Target Websites.
27. I am satisfied that the injunction is necessary to prevent or at least reduce damage to the Studios. I accept that the grant of an injunction under s 97A has proved to be the most effective means of impeding and dissuading infringing activity of this nature. It will have no impact on legitimate trade. Having heard submissions on the form of the order, I am satisfied that it is proportionate and not unduly complicated. There is no indication that it will be difficult or costly to implement.
28. In my view the injunction does strike a fair balance between protecting the Studios’ rights and the other rights engaged. In particular, the public has no legitimate interest in accessing copyright works in infringement of the Studios’ rights and to the Studios’ significant detriment. Any interference with their rights and those of the ISPs is justified by the legitimate aim of preventing such infringement. The order contains appropriate safeguards.

Conclusion

29. In conclusion, it is appropriate to grant the order sought.