

HIGH COURT ORDERS ISPS TO BLOCK THEIR CUSTOMERS FROM RECEIVING UNAUTHORISED STREAMING OF PREMIER LEAGUE FOOTBALL MATCHES

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Legal Briefings

Following on from a number of decisions in which internet service providers (**ISPs**) were ordered to block their customers from accessing websites whose content infringed the rights of intellectual property owners, the High Court has granted an order sought by the Premier League that requires 6 major ISPs to block access by their customers to servers that stream live unauthorised footage of Premier League matches (*The Football Association Premier League Limited V British Telecommunications and Ors.* [2017] EWHC 480 (Ch)).

Business Impact

- The decision is the latest in a series of cases which demonstrate that the Court recognises that advances in technology mean that there are now additional methods in which intellectual property rights may be infringed and it is willing to be creative and to grant orders to protect those rights.
- The decision will be welcomed by owners and licensees of broadcasting rights in live sporting and other events and is likely to set a precedent for forms of order against

providers of unauthorised streaming services in the future.

The decision is of interest for the following reasons:

- Previous blocking orders related to the prevention of access to websites. This is the first time that a blocking order goes further up the chain of supply and applies to the blocking of streaming servers. This is to overcome developments in technology whereby unauthorised content can now be accessed via means and devices other than websites, such as media players, mobile apps and set top boxes.
- The application for the order was made by the Premier League, but was supported by other significant sports bodies in the UK and overseas that own and commercialise their rights in the televising of live sporting events.
- The application was also supported by 5 of the 6 defendant ISPs (TalkTalk did not oppose the application) two of which (BT and Sky) have exclusive rights to broadcast live Premier League matches in the UK.
- Notwithstanding that there was no dispute between the parties and the terms of the Order were agreed, it was necessary for the Court to consider whether the Order was justified.
- The Order itself has several novel features:
 - The Order is only effective at the times when live Premier League footage is being broadcast – referred to by the judge (Arnold J) as a "live" blocking order;
 - The list of target servers named in the Order is to be "re-set" each match week, so as to include new servers and to ensure old servers are not blocked, if they are not

streaming offending footage;

- The Order is for a short period - until the end of the Premier League season -so that the Premier League can evaluate the effectiveness of the Order and make any changes when applying for a similar order for the next season;
- As an additional safeguard the Order requires notice to be sent to the hosting provider of the streaming service each week, when its service is subject to blocking who can apply to set aside or vary the Order as can operators of the servers or customers who claim to be adversely affected by the Order.

Background

The Premier League licenses to broadcasters throughout the world the right to provide coverage of Premier League matches. Each match is filmed on behalf of the Premier League and recorded before onward transmission to the licensed broadcasters. The Premier League owns the copyright in these films and in associated logos and graphics. The Premier League's revenue from such licensing is £1.7billion a year.

The Premier League applied for an order pursuant to section 97A of the Copyright, Designs and Patents Act 1988 (**CDPA**) which implements Article 8(3) of the InfoSoc Directive 2001/29/EC and provides that:

"The High Court (in Scotland, the Court of Sessions) shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright."

The order sought required the defendants, the 6 main ISPs in the United Kingdom, to block access by their UK customers to streaming servers that were providing unauthorised live streams of Premier League matches.

Previous successful blocking orders had been directed towards identified websites. This application was prompted by the increasing ability of customers in the UK to readily access high quality unauthorised live footage of matches not only through websites, but through a range of devices such as mobile apps, media players and set-top boxes.

The streaming servers are key links in the chain of distribution of unauthorised coverage. The same stream or the same server can be accessed by multiple apps, websites and set-top boxes. If the streaming server is blocked, then the devices cannot access the infringing footage. Blocking access to the streaming server impacts closer to the origin of the unauthorised footage. Further, developments in technology have facilitated the swift identification of infringing streams.

The application was supported by other significant sports bodies in the UK and overseas that own and commercialise their rights in the televising of live sporting events, such as the England and Wales Cricket Board, the PGA European Tour and the RFU. The application was also supported by the defendant ISPs (save for TalkTalk who did not oppose the application).

The ISPs included Sky and BT who each have exclusive licences to transmit coverage of live Premier League matches and therefore the order sought would protect their own interests to some extent.

Jurisdiction

Unusually, but not unexpectedly, there was no dispute between the parties and the form of order was agreed. However this did not absolve the Court from the responsibility of considering whether the Order was justified.

Arnold J therefore considered whether the four matters required for the Court to have jurisdiction under Section 97A CDPA had been established.

1. Are the Defendants Service Providers?

This was a well established fact and each of the defendants is a service provider within the meaning of Regulation 2 of the Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013.

2. Do the operators and users of the identified streaming servers infringe the Premier League's copyrights?

Copying: Copying the work is an act restricted by copyright. The devices used by customers accessing the streams would create copies of the footage received in the memory of those devices and such copying takes place in the UK insofar as the device and customer are in the UK.

Communication to the Public: The communication to the public of the work is an act restricted by copyright. Streaming is an act of communication by electronic transmission to each customer who accesses a streaming server during a relevant match. The operators of the streaming servers commit that act of communication because they intervene deliberately, fully aware of the consequences of that intervention, to give access to match footage. There is evidence that the streams are viewed by a large number of users. Further streaming is a technical means different from the means by which the footage was originally delivered (i.e. cable or satellite broadcast) which had not been authorised by the Premier League. The users accessing the streams are a "new public" which was not taken into account by the Premier League or Sky or BT who only permit paying subscribers to access the footage by these means. Even if the streaming servers were providing access to freely available coverage of Premier League matches, they are doing so for profit and therefore are presumed to have the requisite knowledge for the communication to be to a new public. Finally, this communication is directed to the public in the UK and therefore the infringing act is to be regarded as taking place in the UK.

3. Is there use of the Defendant's services?

It is clear that the ISP's internet services were used by their customers to access the streaming servers and obtain infringing copies of the football coverage.

4. Defendant's Actual Knowledge

It was clear that the ISPs had knowledge of the infringing activities, not least as a result of monitoring of the streaming servers by the ISPs themselves.

Exercise of Discretion

Arnold J then went on to consider whether the Court should exercise its discretion to make the Order, the overriding issue being whether the Order was proportionate having regard to the competing rights of those affected by the Order. This required the court to consider the importance of, and the justification for interfering with, the Premier League's copyrights compared with the ISPs freedom to carry on business and internet users' freedom to convey or receive information.

Considering the Premier League's position, it was clear that there was infringement of its copyrights and that the Premier League had a legitimate interest in seeking to prevent such infringement (as did its licensees). The Premier League also contended that there was a wider public interest in protecting its rights, given the substantial support it gives to sport in the UK and the financial contribution made by it and its licensees to the UK economy.

Considering the position of the ISPs, their freedom to carry on business would not be impeded. The main effect of the Order would be to increase operating costs to effect the blocking but the fact that five of the six ISPs supported the application for the Order was strong evidence that their freedom to operate would not suffer.

Considering the position of the customers of the ISPs, the freedom to convey or receive information clearly does not give any right to infringe copyright. The Order was designed only to take effect during the periods when the operators of the streaming services would be engaged in infringing activity and therefore those operators would have no rights that required protection.

In so far as there was any concern that any lawful activity could be adversely affected, this was addressed by the targeted nature of the Order and the safeguards incorporated into the Order (summarised above). Any lawfully streamed content was likely to be *de minimis* and would be short-lived due to the limited duration of the blocking Order.

Arnold J therefore concluded that the Court had jurisdiction to grant the Order sought, it was proportionate and that he should exercise his discretion to grant the Order.

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