

Premier blocking order for streaming servers

The High Court has granted the Football Association Premier League what is, in effect, a prototype blocking order against the six main UK internet service providers.¹ Most of the ISPs actively supported FAPL's application. The order required them to block access to streaming servers that deliver infringing live streams of Premier League footage to UK consumers. All the requirements of section 97A of the Copyright, Designs and Patents Act 1988 were held to be satisfied, including that the users and operators of the servers infringed related copyrights – the operators by communicating those works to the public in the UK. The order, which was confined to live match windows and to the remainder of the 2016/17 season, was also found to be proportionate.

Introduction

The claimant, FAPL, is the governing body of the Premier League. FAPL owns the copyright in films consisting of television footage of Premier League matches, and in certain artistic works that appear within that footage. The defendants were the six main UK internet service providers. FAPL sought an injunction against the ISPs under section 97A of the Copyright, Designs and Patents Act 1988, requiring them to take measures to block access by their customers to streaming servers that deliver infringing live streams of Premier League footage.

In some respects the claim was similar to the claim in *FAPL v Sky*, a 2013 case in which a blocking order was made in relation to the website FirstRow Sports.² It differed in a number of respects, however, and in particular in that it was directed at streaming servers rather than a website. This was the first time that such an order has been sought. The application was supported by various other sports rights-holders.

On 8 March 2017, Mr Justice Arnold made an order substantially in the terms that had been agreed between the parties for the following reasons.

The law

The judge noted that the law on website blocking orders is now well established and was recently reviewed by the Court of Appeal in *Cartier International AG v British Sky Broadcasting Ltd*.³

FAPL and its rights

Since *FAPL v Sky* there have been certain changes to FAPL's rights. In particular, the "Clean Live Feed" for each match is now recorded before onward transmission, and so FAPL now claims copyright in those films. FAPL also claims copyright in new logos and graphics. The judge held that copyright subsists in the various copyright works relied on by FAPL, and that FAPL owns those copyrights. The value of FAPL's rights is currently £1.7 billion annually in the UK alone.

The defendants

The judge noted that some of the defendants have an interest in the subject-matter of FAPL's rights. Further, FAPL's application was in fact supported by BT, EE, Plusnet, Sky and Virgin, and TalkTalk did not oppose it. All of the defendants were involved in agreeing the terms of the order. Since the

¹ *The Football Association Premier League Ltd v British Telecommunications plc* [2017] EWHC 480 (Ch), 13 March 2017.

² [2013] EWHC 2058 (Ch).

³ [2016] EWCA Civ 658.

order would affect third parties, however, the court was not absolved from considering whether it was justified.

Confidentiality

Some of the parties had sought confidentiality for parts of their evidence and parts of the order – in the case of the evidence, because some of it revealed commercially sensitive information and also because disclosure of some of it would facilitate infringement of FAPL's rights and/or circumvention of the order, and in the case of the order, confidentiality was claimed on the second ground. The judge ruled that the claim to confidentiality was well founded.

Background to the application

The application sought to combat the problem of the streaming of live Premier League footage without consent. Since *FAPL v Sky*, this problem has increased in five main ways:

- (a) Consumers are increasingly turning to set-top boxes, media players (e.g. the Amazon Fire TV Stick) and mobile device apps to access infringing streams. This means that traditional website blocking orders will not prevent the growing majority of infringements.
- (b) The skill and effort required to find and use such devices and apps to access infringing content has fallen dramatically.
- (c) It is now possible to access a large number of high-quality infringing streams of footage of each Premier League match.
- (d) A significantly higher proportion of UK consumers believes that it is lawful to access such unauthorised streams than believes that it is lawful to access unauthorised content via file-sharing websites.
- (e) The streaming servers in question have increasingly been moved to offshore hosting providers who do not co-operate with rights-holders' requests to take down infringing content (either at all or in a timely manner).

As a result, football fans are turning to such streaming devices as a substitute for paid subscriptions. This undermines the value of FAPL's rights and is likely to reduce the revenue returned by FAPL to football clubs, sports facilities and the wider sporting community. An added concern is the availability of live streams of Premier League match footage during the so-called "closed period", which deters attendance at those matches.

The judge noted that there are four main elements required to stream live content: (i) a source feed; (ii) a platform to manage distribution; (iii) a streaming server hosted by a hosting provider that actually transmits copies of the footage; and (iv) a user interface that a consumer can use.

The judge noted that the streaming server is the crucial link in the chain, as it may be accessed using a number of different user interfaces. If access is blocked, all of those access mechanisms will be disrupted.

Order

The order set out in a confidential schedule a list of IP addresses of the target servers to block in the first instance.

One criterion for selecting the servers was held to be confidential. Two were not: first, FAPL must reasonably believe that the server has the sole or predominant purpose of enabling or facilitating

access to infringing streams; secondly, FAPL must not know (or have reason to believe) that the server is being used for any other substantial purpose.

The order differed from websites blocking orders in four other important respects. First, the order is a "live" blocking order that only has effect at the times when live Premier League match footage is being broadcast. Secondly, the order provides for the list of target servers to be "re-set" each match week. Thirdly, the order only lasts to the end of the 2016/2017 Premier League season, to enable an assessment of its effectiveness. Fourthly, the order requires a notice to be sent to each hosting provider each week when one of its IP addresses is subject to blocking.

Jurisdictional requirements

Section 97A empowers the High Court to grant an injunction against a service provider where it has actual knowledge of another person using its service to infringe copyright. Four matters must be established: (a) the defendants are service providers; (b) users and/or operators of the target servers infringe FAPL's copyrights; (c) users and/or operators of the target servers use the defendants' services to do that; and (d) the defendants have actual knowledge of this.

Are the defendants service providers? – The judge held that they are.

Do the operators and/or users of the target servers infringe FAPL copyrights? – FAPL contended that the operators and users of the target servers infringe its copyrights in a number of ways and the judge accepted this, for the following reasons.

In the course of streaming the works, users who access a stream cause their computer, mobile device or set-top box to create copies of the works in the memory of those devices. In some cases, a substantial part of a work may be copied in a single frame (e.g. a logo). In the case of films, copying of a substantial part is very likely to occur if users stream footage of any appreciable segment of the match. Such copying takes place in the UK to the extent that the users are in the UK.

Operators of target servers that stream the works also communicate the works to the public for the following reasons:

- (a) Streaming involves an act of communication of the works by electronic transmission to each user.⁴
- (b) The operators of the target servers commit that act of communication because they intervene deliberately, and in full knowledge of the consequences of their actions, to give access to the works in circumstances where the users would not in principle be able to enjoy the works without that intervention.⁵
- (c) The works are communicated to the public, since the streams are capable of being viewed by an indeterminate number of potential viewers, and are in fact viewed by a large number of people.⁶
- (d) To the extent that the streams are taken from cable or satellite broadcast, streaming is a different technical means which requires separate authorisation from the rights-holder.⁷

⁴ See Case C-607/11 *ITV Broadcasting Ltd v TVCatchup Ltd* [EU:C:2013:147], [2013] FSR 36 at [26] and [35] and Case C-466/12 *Svensson v Retriever Sverige AB* [EU:C:2014:76], [2015] EMLR 5 at [17]-[20].

⁵ See Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV* [EU:C:2016:221], [2016] Bus LR 1231 at [35].

⁶ See *GS Media* at [36].

- (e) Even where the source is an internet transmission, the class of persons to whom the works are communicated is a "new public" which was not already taken into account by FAPL when they authorised the initial communication to the public to authorised users of paid streaming services: see *Svensson* at [24]-[31]. Even where there is mere linking to freely available services, that it is done so for profit, frequently in the form of advertising revenue, and there is therefore a presumption of requisite knowledge for the communication to be to a new public: see *GS Media* at [51].
- (f) These acts of communication to the public are targeted at the UK and are to be regarded as taking place here. This conclusion is supported by a number of factors:
 - (i) A very substantial volume of traffic from ISPs has been recorded from these servers during match times.
 - (ii) The traffic spikes are sustained throughout the period of each match.
 - (iii) The only other spikes in UK traffic that have been observed have occurred during the broadcast of other sporting events on subscription TV, all of which would also be of interest to viewers in the UK.
 - (iv) It is reasonable to assume that traffic of this magnitude accounts for a substantial proportion of all communications with the target servers.
 - (v) In many cases, the channels being offered on the target servers reproduce licensed UK subscription channels that carry Premier League content, which are themselves deliberately targeted at UK consumers.
 - (vi) Where the streams are embedded into websites, they commonly have advertising targeted at UK consumers.

The operators of the target servers authorise copying by their UK users or, alternatively, they are liable as joint tortfeasors.

The order aims to restrain future infringements.⁸

The defendants' internet access services play an essential role in enabling users to access the target servers.⁹

Actual knowledge – The defendants have actual knowledge of the infringing use of their services as a result of detailed correspondence, monitoring, notices sent by FAPL, the application in this case and accompanying evidence.

Should an order be made?

The judge noted that the correct approach was considered by the Court of Appeal in *Cartier*.¹⁰ The overriding question is whether the order is proportionate having regard to the competing rights of those affected by it. The judge found the order to be proportionate for the following reasons.

⁷ See *ITV* at [24]-[26] and [39].

⁸ See Case C-324/09 *L'Oreal SA v eBay International AG* [2011] ECR I-6011 at [144].

⁹ See Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* [EU:C:2014:192], [2014] Bus LR 541 at [30]-[32].

Comparative importance of rights engaged and justifications for interfering with those

This required the court to consider the comparative importance of, and the justifications for interfering with, FAPL's copyrights versus the defendants' freedom to carry on business and internet users' freedom to impart or receive information.

As for FAPL's copyrights, it is clear that users and operators of the target servers are infringing those copyrights. FAPL and its licensees have a legitimate interest in curtailing such activity. Also, given FAPL's role in supporting sport in the UK and the substantial contributions its licensees make to the UK economy, there is a public interest in combatting infringements.

As to the defendants' position, the order sought by FAPL would not impair the freedom to carry on business. The order would not interfere with the provision by the defendants of their services or require them to acquire new technology. The main effect would be to impose additional operating costs on them.

As for the freedom of internet users to impart or receive information, this does not extend to engaging in copyright infringement.

Effectiveness and dissuasiveness

FAPL contended that the order would be effective and dissuasive in that it would substantially reduce infringements.

- (a) Past experience suggests that blocking causes a material reduction in the number of UK users who access blocked websites.¹¹
- (b) Recent academic literature supports this conclusion.
- (c) Blocking streaming servers is likely to be more effective than blocking websites that embed or link to streams from such servers.
- (d) Monitoring and blocking techniques employed by FAPL and the defendants respectively have improved considerably since earlier website blocking orders were made.
- (e) Blocking access to the target servers should help to educate consumers that accessing infringing streams is not a lawful or reliable way to access Premier League content.

Substitutability

The fact that websites other than the blocked website could be used to infringe did not detract from the effectiveness of the blocking measure.¹² FAPL also relied on the fact that the order makes provision for the future detection and blocking of streaming servers that are used to stream Premier League content, as well those on the initial list of target servers. This made the prospect of consumers' switching to other streaming servers less of a concern.

Alternative measures

¹⁰ At [103]-[129].

¹¹ See *Cartier* at [220]-[236].

¹² See the Advocate General's opinion in Case C-610/15 *Stichting BREIN v Ziggo BV* [EU:C:2017:99] at [81].

FAPL contended that the available alternative measures are either ineffective or incomplete in addressing this problem.

- As far as take-down notices to streaming server operators and hosting providers are concerned, FAPL and its licensees have made extensive efforts. While some of those notices are complied with promptly, many are not.
- Almost all hosting providers used by streaming server operators are located offshore, and accounts are often registered anonymously, which makes it impossible or impractical to pursue the primary wrongdoer.
- Take-down notices have also been sent to marketplace operators (such as eBay and Amazon) requesting removal of listings advertising set-top boxes that are configured to access infringing material. But sellers are becoming more sophisticated in how they market these products, making them harder to detect, and marketplaces often fail to remove listings when asked.
- Licensees can sometimes identify the customer from which an infringing stream originates. But this will not usually be effective to interrupt a stream mid-way through a match.
- Criminal prosecutions have been pursued against sellers of infringing set-top boxes, but the police are unwilling or unable to pursue every possible prosecution.

So the judge concluded that FAPL does not have alternative measures available to it that are as effective as the order but less onerous.

Complexity/cost

There was no suggestion by the defendants that the order is unnecessarily complicated or costly.

Avoidance of barriers to legitimate trade

It was accepted that the targeted nature of the order means that it avoids creating barriers to legitimate trade. The content being streamed infringes copyrights. Further, because of the short lifespan and high bandwidth requirements of streaming servers, they are almost exclusively dedicated to the activity of streaming and are not used for other legitimate purposes. While it is theoretically possible that a certain proportion of streamed content may be non-infringing, the inference to be drawn is that such content is *de minimis*.

Safeguards

The order contained certain additional safeguards to those previously adopted for website blocking.

Conclusion

For those reasons, the judge concluded that the court had jurisdiction to make the order.

Comment

The outcome of the case is not a surprising one, not least because the judge concerned knows as much about blocking injunctions as anyone, and because the parties had agreed to the terms of the order itself. What is more unusual is that this is the first blocking case relating to streaming servers. For rights-holders, it is encouraging to see the law keeping up with technological advances – a problem which, in the field of copyright, has presented a challenge for decades. Although illegal

streaming is the present concern, another form of technology-aided copyright infringement awaits, and the law must be flexible enough to evolve with it.

Tom Iverson, Partner, Simkins LLP