

Web Blocking in the English courts

Fordham IP Conference

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The Hon. Mr Justice Birss

Legislation

- ***E-Commerce Directive*** 2000/1/EC Art.s 12-20 court actions and safe harbour provisions: mere conduit, caching, hosting, no general obligation to monitor
- ***Info. Soc. Directive*** 2001/29/EC Art 8(3) *“Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.”*
- ***UK CDPA*** 1988 s97A *“The High Court ... 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.”*
- ***IP Enforcement Directive*** 2004/48/EC Art 11 generalised Info Soc Art 8(3) to any IP right

Series of decisions in the English courts

- Over a span of four years
- Starting with *20th Century Fox v BT* [2011] EWHC 1981 (Newzbin 2)
- The cases mostly involve copyright and involve websites offering streaming services or by hosting BitTorrent peer to peer downloading
- But they are not the only cases, recent developments are:
 - *Cartier v BSKyB* [2014] EWHC 3354 about trade marks, followed recently by [2016] EWHC 339 for more sites. These cases are going on appeal.
 - *20th Century v Sky* [2015] EWHC 1082 (Popcorn time) which dealt with an app to download instead of sites providing streaming or BitTorrent hosting either directly or indirectly

So everything is fine?

- The core idea is that an ISP whose services are being used by a third party to infringe is amenable to a blocking injunction
- The English cases have been based on three theories:
 - Communication to the public (s20(2)(b) CDPA 1988)
 - Authorisation (s16 CDPA 1988)
 - Joint tortfeasance (common law)
- These are all highly fact sensitive and neither theory of primary liability has prevailed in every case because the simple model of a site being a direct source of infringing material is not accurate.

The two bases for primary liability

- Communication did not succeed in the *Popcorn time* case. The website was simply a source of the app. Note also the complexity of the reasoning over the scope of communication right in the CJEU (new public, linking, *Svensson etc.*)
- Authorisation did not succeed in *Football Assoc. v Sky* [2013] EWHC 2058 or in *Popcorn time*. The *Football Assoc* case was an aggregator of streamed broadcasts. The test for authorisation is strict (the grant or purported grant of right to do the act) and does not extend to mere enablement, assistance or encouragement.

Joint tort liability is the saviour?

- Common law joint tortfeasance (aka accessory liability) is the only theory which has always succeeded in England
- Used as a back stop in the cases in which the site to be blocked (the target) is different from the actual source of the infringing content. Even if the operator of the target is not committing the act of primary infringement (communication or authorisation), the target is jointly liable for the primary act committed by the source (e.g. *Football Assoc., Paramount v Sky* [2013] EWHC 3479, *Popcorn time*) and so the target site to be blocked is being used to commit tortious acts

Difficulties?

- Might seem odd that a key aspect of the web blocking orders in England is based on common law extension of scope of torts: procuring and acting as part of a common design.
- Difficulty illustrated by recent decision in Sweden refusing a injunction against an ISP to block the Pirate Bay and another site. Legislation required ISP to be “aiding and abetting” infringements of the copyrights (music, film). Court held that although the sites were sources of infringing material, the ISP was not aiding and abetting.
- NB the English and Swedish cases are looking at liability of different actors

What lessons to learn?

- To work a scheme like this needs careful attention to identifying the basis on which to fix various actors with liability:
 - The actual sources of infringing material
 - The facilitators of access to those sources
 - The providers of internet access to consumers
- The website operators rarely appear in court so these decisions are not argued in an fully adversarial way. The ISP's interests are not aligned with those of the website operators.
- Public hearings and cost



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Thank you