

## Twentieth Century Fox and Others v. Sky UK and Others

UK High Court, [2105] EWHC 1082 (Ch), 28 April 2015

The ruling concerns the technology used by ‘Popcorn Time’ websites, which offer software tools allowing users to access unlicensed TV and film content; the decision marks another step forward in the maturing body of case law relating to site blocking.

The High Court has for the first time issued a Court order blocking access to ‘Popcorn Time’ sites, following an application by six major Hollywood film studios, who are all members of the Motion Picture Association (*Twentieth Century Fox and Others v. Sky UK and Others* [2105] EWHC 1082 (Ch)). Popcorn Time sites offer software tools that provide access to unlicensed TV and film content, enabling the user to access an up-to-date database of unauthorised content quickly and easily. The Popcorn Time interface presents thumbnails and film titles in a similar manner to lawful catalogue sites like Netflix, using BitTorrent technology to download illegal content.

The judgment means that the five leading internet service providers (‘ISPs’) in the UK are all required to block customers’ access to the site. The Order, which was unopposed by the ISPs, was the latest to be granted under section 97A Copyright, Designs and Patents Act 1988 (‘CDPA’), which is a cause of action that has been deployed effectively by media rightsowners over the past few years to control and block the use of infringing content online. It is a notable decision on the nuances of the technology used by ‘Popcorn Time’ sites, which advances the rapidly developing body of case law in this area of copyright law.

### Background

Section 97A CDPA (‘s.97A’) entitles copyright owners to apply to the Court to seek injunctive relief against ISPs who are hosting material that infringes their copyright, where the ISPs have ‘actual knowledge’ of the infringement. S.97A implements Article 8(3) of the Copyright Directive (2001/29/EC) in England and Wales.

The first application for

injunctive relief under s.97A was made by Hollywood film studios against BT in relation to the Newzbin2 website. Newzbin was a website that indexed and made available unlicensed film and other content for users to download. After the movie studios secured injunctive relief against Newzbin on the basis of copyright infringement (*Twentieth Century Fox v. Newzbin* [2010] EWHC 608 (Ch)), the operators of the website relocated and created a new website (Newzbin2) offshore and out of the jurisdiction, making it very difficult for the studios to enforce the judgment they had obtained. The studios sought an alternative route to enforce their rights, using the then seldom used s.97A right in a test case to block access to the content via the ISP. The result was the decision in *Twentieth Century Fox & Ors v. BT*, granting the movie studios the relief they sought under s.97A, and effectively laying down a template that rightsholders in a range of industries could deploy in the future. The movie studios subsequently obtained similar orders against the UK’s other major ISPs.

Since then, copyright owners from a variety of sectors have sought and been granted similar orders, mostly in relation to streaming and BitTorrent sites.

### Order sought

The application sought in this case, which was originally brought on paper, related to nine target websites, which consisted of four streaming and BitTorrent websites (which the presiding judge, Birss J, determined raised issues that had already been dealt with comprehensively in previous cases and could therefore be dealt with on paper) and five ‘Popcorn Time’ sites, which, Birss J held, raised new and complex issues that had to be

dealt with at a hearing.

‘Popcorn Time’ is an open source application that can be downloaded and installed by the user onto their computer device from a Popcorn Time application source (‘PTAS’) website. Popcorn Time apps can be downloaded for free and can be used to browse, search and locate films and TV content from third party websites without users having to return to the Popcorn Time site from which they originally downloaded the tool. It acts as a BitTorrent client, collecting pieces of broken up film content together and assembling them into a content file for viewing, with the addition of media player software, an index /catalogue of titles and images and descriptions of titles. Popcorn Time applications locate torrents by searching catalogues of existing websites that host those torrents.

Once a work is selected by the user, the application seeks the most popular and/or highest quality version of the content chosen, and streams as it downloads the content using the BitTorrent protocol. The user may start watching the content as soon as the process (known as sequential downloading) starts. You do not have to wait for the completion of the download. The content available using the Popcorn Time applications is constantly updated as they link to a website that they use as a source of update information (‘SUI website’).

Popcorn Time sites often feature glossy, user-friendly interfaces and popular content. The typically high quality design of Popcorn Time sites and user-friendly experience means that there is the potential for them to be confused as being lawful, legitimate sites.

### Decision

Birss J ordered the defendant ISPs to block access to all the target

websites.

Although the nature of the 'Popcorn Time' technology was different to BitTorrent sites, the Court followed the same criteria that had been laid down in the *Newzbin2* case for establishing jurisdiction under s.97A, namely:

1. that the ISPs are service providers;
2. that the users and/or the operators of the target websites infringe copyright;
3. that the users and/or the operators of the target websites use the services of the ISPs to do this; and
4. that the ISPs have actual knowledge of this.

If the above jurisdictional requirements are made out, the court then has to go on to consider whether an order is appropriate in the circumstances and on what terms the order is to be made.

Birss J found no difficulty in establishing points (1) and (4), and that, in relation to the streaming and BitTorrent sites, there was a clear basis for granting the order sought for the same reasons as had been considered in detail in previous cases.

However, Birss J held that questions (2) and (3) were less clear in relation to the Popcorn Time websites.

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

1. communicating the works to the public contrary to s 20(2)(b) CDPA;
2. authorising the infringing communication to the public contrary to s 16(2) CDPA by:
  - (i) the operators of the websites that host the infringing content; and/or
  - (ii) those who place infringing content on the host websites; and
3. acting as joint tortfeasors with

the operators of the host websites/those who place infringing content on such websites.

#### **Communication to the public**

Birss J agreed that the Popcorn Time application is used in order to watch infringing content on the internet and not really used in order to watch lawfully available content.

However, the judge did not agree that there had been a 'communication to the public' under s.20(2)(b) CDPA in respect of the Popcorn Time sites. The judge held that, with regard to the Popcorn Time sites, it was the application itself that was running on the user's computer, which presented to the user catalogued and indexed connections to the sources of the copies. The PTAS site did not communicate any copyright works to anyone. There was no transmission (or re-transmission) of a copyright work. As a PTAS site did not contain any information about any work, it could therefore not be 'communicating a work.' The site instead made available a tool, namely the Popcorn Time application, which could be used to retrieve content from third party linked sites. The operators of the PTAS sites were consequently facilitating the making available of the content by providing the tool. Birss J considered that the scope of the act of communication to the public could not be stretched as far as to cover the operation of a site that simply made the Popcorn Time application itself available for download.

The judge considered the case against the operators of the SUI websites to be stronger on the basis that the SUI sites are the source of the catalogue/index presented to the user each time they access the Popcorn Time application.

However, the judge ruled that there was again no communication to the public because it was the Popcorn Time application that made the content available at a time and place of the user's choosing, not the SUI websites.

#### **Authorisation**

The movie studios argued that the operators of both the PTAS and SUI websites were infringing copyright in the protected works by authorising the infringing communication to the public (pursuant to s.16(2) CDPA) by the operators of the host websites and/or by those who placed the infringing content on the host websites.

Birss J considered that the Popcorn Time application was a technical means necessarily used by users to infringe the copyright in the content. The tool is used to find, access and collect the pieces of the content files using the BitTorrent protocol and to watch the protected work via the media player. Infringement of copyright was inevitable when Popcorn Time was used. The operators of the PTAS and SUI websites had taken no steps to prevent infringement. Instead, they ensured that the infringing content available on Popcorn Time was constantly updated.

The judge said that these points would be relevant to an argument that the suppliers of the Popcorn Time applications were authorising acts of infringement by users. However, the claimants' case was that the operators of the PTAS and SUI websites were authorising the acts of infringement committed by the host website operators. But Birss J held that there was insufficient evidence about a relationship between the suppliers of the Popcorn Time app and the host website operators. Indeed, most of the factors he had

considered had nothing to do with the connection, if any, between the suppliers of the Popcorn Time application and the host website operators. While the operators of the host websites were carrying out infringing acts, such as communicating the work to the public, he was not satisfied that a case based on authorisation of those infringements by the operators of the PTAS/SUIs' websites was made out.

#### Joint tortfeasorship

A party may also be liable for copyright infringement as a joint tortfeasor where that party "has induced, incited or persuaded the primary infringer to engage in the infringing act or if there is a common design or concerted action or agreement on a common action to secure the doing of the infringing act" (20C *Fox v. Newzbin* at para 108).

Despite dismissing the 'authorisation' claim, Birss J did uphold the submission that the operators of the Popcorn Time sites were joint tortfeasors with the operators of other sites on which unlawful copies of protected content were hosted (and which could be accessed by the users of the Popcorn Time sites) on the basis that the Popcorn Time application was the key means used to procure and induce the user to access the host website and therefore cause the infringing communications to occur. The suppliers of Popcorn Time plainly knew and intended that to be the case, and therefore shared a 'common design' with the operators of the host websites to secure the communication to the public of the claimants' protected works.

Having found liability on the basis of joint tortfeasorship, Birss J had no difficulty in finding that granting the orders was

proportionate and appropriate given the court's discretion.

#### Takeaways

The decision marks another step forward in the maturing body of case law relating to site blocking orders. It was also a departure from the series of cases that had been dealt with on paper because the nature of the 'Popcorn Time' sites raised new and different issues because of the nature of the technology used, and the interrelationship of the Popcorn Time apps with the sites that hosted the protected works.

It was key to the decision that the Popcorn Time application has "no legitimate purpose" (para 66) and that its only purpose was to infringe copyright. Popcorn Time sites can therefore be sharply contrasted with content agnostic platforms.

It is notable that Birss J granted the blocking orders despite finding that there was no infringement of the 'communication to the public' right. In reaching his decision, the judge focused on the absence of 'transmission' of a copyright work. This is surprising given that in previous cases brought under s.97A it has been held that transmission by the site concerned is not an essential requirement for finding infringement by way of unauthorised communication to the public.

It is also notable that the claimants' claim for 'joint tortfeasance' succeeded despite the claim for 'authorisation' failing. Birss J was confident that the operators of the host websites were carrying out infringing acts, but did not consider that there was sufficiently clear evidence about the relationship between Popcorn Time operators and the host websites.

In practical terms, it will be important for content owners to

flag new substantive issues that cannot be dealt with on a paper application under s.97A. This decision ultimately turned out to be far from a 'slam dunk' decision for the movie studios. Indeed, two of the three grounds for bringing the s.97A order were dismissed, which could make s.97A more complex for rightsowners to bring in the future, depending on the nature of the technology that is the source of the complaint and its interrelationship with ISPs.

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