

EIP



FA Premier League takes the lead in battle against linking to infringing match content

Football Association Premier League Ltd v British Sky Broadcasting Ltd and others [2013] EWHC 2058 (Ch)

Summary

By way of a hearing on 16 August 2013, the Football Association Premier League ("FAPL"), the governing body of the Barclays Premier League, sought an injunction against the six main internet service providers in the UK under s.97 A of the Copyright Designs and Patents Act ('the CDPA'). The injunction sought required the Defendants to take measures to block (or at least impede) access by their customers to the FirstRow Sports website ("First Row"). FAPL's application was supported by eight other rights holders, who represented other sporting competitions. The application was heard by Mr Justice Arnold.

Background

FAPL are the copyright holders in various works associated with the broadcast of Premier League football matches.

FirstRow provides a list of links to live streams of sporting events, including Premier League matches and other competitions organised by the other supporting rights holders. Users who click on these links are taken to a new page featuring a frame in which the live stream appears. The live stream originates from a third party who has digitally captured the broadcast of the sporting event (user generated content or 'UGC') – FirstRow provides the frame.

In this regard, the infringement issues underlying the FAPL application differed from previous reported applications under s.97A of the CPDA (such as 20thC Fox v BT [2011] EWHC 1981 (Ch)) as FirstRow was not a peer-to-peer website.

Decision

The jurisdictional framework for such an application had previously been set out by Arnold J in *Dramatico v Sky* [2012] EWHC 268 (Ch). Arnold J appears to have had little trouble in finding that the Defendants were service providers; that users and/or operators of FirstRow use the Defendants' services; and that FirstRow communicated FAPL's copyrighted works by electronic transmission. The key question was whether FirstRow was responsible for that communication, and following thereon, whether this was communication to the public in the UK.

With regard to responsibility Arnold J found that FirstRow's actions amounted to an intervention which could be likened to the actions of the peer-to-peer providers and resulted in a finding that it was indeed responsible for the communication.

"42. In the present case the operators of FirstRow have intervened in a manner which, although technically different, is analogous to that of the websites under consideration in those cases. FirstRow aggregates together a large number of streams from a variety of streamers, indexes them for the convenience of the user and provides a simple link for the user to click on in order to access a specific stream. It is true that the technical effect of clicking on the link is to direct the stream from the UCG site to the user's computer, but even so the stream is presented in a frame provided by FirstRow. In all the circumstances, I consider that FirstRow is responsible for the communication."

Following this finding, there was little doubt that FirstRow's communication was a communication to the public and a number of factors went to show that this was indeed a communication of FAPL's copyrighted works to the public in the UK:

- FirstRow was an English language website;
- The advertising on FirstRow included adverts for companies located in the UK and products consumed in the UK;
- FirstRow provided access to a large number of competitions which are extremely popular with UK audiences. In particular, the amount of Premier League content on the website is up to 11% whilst a Premier League match is being played;

Following an assessment of proportionality, Arnold J granted the injunction.

Comments

Online infringement is a constant battle for many rights holders. This decision indicates that websites profiting from facilitating access to infringing content and enhancing the ability of the public to gain access to such content (thus greatly increasing the breadth of any infringement) are not going to be able to hide behind the fact that they don't directly stream or hold the infringing material themselves.

By Robert Lundie Smith and Gemma Wooden