

UK court blocks stream aggregator's domain

The latest in a line of cases in which English courts have ordered ISPs to block the domains of peer-to-peer websites showing pirated material has now applied the same principles to a hugely successful stream aggregator of sports content. This kind of remedy - against ISPs rather than the site's operators - is used when the operators of the site are hard to track down or, as in the *Newzbin 2* case, where they ignore the injunction against them and move their servers offshore. The ISPs tend not to object, but the rights owner still has to prove its case.

Facts

On 16 July 2013, the Premier League took action in respect of a site called FirstRow, which indexed and aggregated streams of football and other sports broadcasts from streamers who in turn sourced these from user-generated content ("UGC") sites. FirstRow had a huge number of visitors (nearly 10 million in April), making it more popular than lastminute.com and the Financial Times website in recent months. Its advertising revenues were estimated at somewhere between £5m and £9m. The various domain names it used were often registered under false names and addresses and warning letters had been ignored. The sporting content was extremely valuable: UK broadcast rights for Premier League matches were auctioned for over £3bn. Some of FirstRow's domain names had been seized by the US Department of Homeland Security.

So far, so typical; but some aspects of the case differed from its predecessors and an intervening decision of the Court of Justice of the European Union ("CJEU") also shed light on the criteria which the UK court should apply. (As before, the defendant ISPs, who represented the majority of the UK market, did not object and indeed had agreed the scope of the blocking order with the Premier League.)

Legal and technical differences

The key difference was a technical one: the FirstRow site facilitated access to streams of TV sports broadcasts but the streams emanated from the UGC sites rather than from FirstRow. FirstRow aggregated and indexed the many streams, enabled users to click so as to direct the streams to their computers and presented the streams in its own frame.

This technical difference raised the issue of whether FirstRow was liable for copyright infringement by virtue of "communicating to the public" the infringing material. (For the domain blocking order to be made against the ISPs, FirstRow itself had to be infringing.) The judge (who had also dealt with previous cases, including *Newzbin 2*, the first case of this kind) had no difficulty in saying "yes": FirstRow's involvement was analogous to that of those behind peer-to-peer sites whose domains had already been blocked by the courts and it was responsible for the communication. Even if that had not been the case, FirstRow would have been jointly liable with the UGC sites for their acts of communication.

TV Catch-up and "communication to the public"

Earlier this year, in the *TV Catch-up* case, the CJEU had looked at the parallel issue of whether a website which re-transmitted live TV broadcasts over the internet to people who had a licence to watch those broadcasts on the TV was liable for "communication to the public" for copyright law purposes. It held that:

- each transmission or re-transmission of copyright-protected content which uses a different "technical means" needs the copyright owner's permission (with limited exceptions where the technology is simply used to ensure or improve reception); and

- you do not need to show that the audience which accesses the re-transmission is different from the one which accessed the original transmission (i.e. there is no “new public” test where different technology is used in the re-transmission).

The overwhelmingly infringing nature of the FirstRow site, the fact that there was no other effective remedy for the Premier League and the fact that the site targeted UK users meant that other criteria for the domain-blocking order were satisfied and the order was made.

What next?

The court recognised that domain blocking is not a complete answer and does not stop savvy internet users finding ways around the injunction by using proxy sites. Even then, the pirates may not have the last laugh, as they risk losing a chunk of their advertising revenue if the proxy sites substitute their own adverts.

Case references

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

ITV Broadcasting Ltd v TVCatch-up, Case C-607/11, 7 March 2013

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