



Neutral Citation Number: [2015] EWHC 1082 (Ch)

Case No: HC2014 - 002029

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28/04/2015

Before:
MR JUSTICE BIRSS

Between:

- (1) TWENTIETH CENTURY FOX FILM CORPORATION
(2) UNIVERSAL CITY STUDIOS PRODUCTIONS LLP
(3) WARNER BROS. ENTERTAINMENT INC.
(4) PARAMOUNT PICTURES CORPORATION
(5) DISNEY ENTERPRISES, INC
(6) COLUMBIA PICTURES INDUSTRIES, INC.
(On their own behalf and on behalf of all other companies that are controlled by, controlling of or under common control of the members of the Motion Picture Association of America Inc that are the owners, or exclusive licensees, of the copyright in films and television programmes)

Claimants

- and -

- (1) SKY UK LIMITED
(2) BRITISH TELECOMMUNICATIONS PLC
(3) EE LIMITED
(4) TALKTALK TELECOM LIMITED
(5) VIRGIN MEDIA LIMITED

Defendants

Richard Spearman QC (instructed by Wiggin LLP) for the Claimants
The defendants did not appear and were not represented

Hearing dates: 24th March 2015

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR. JUSTICE BIRSS

Mr Justice Birss:

1. The claimants are all members of the Motion Picture Association of America and hold copyright in a large number of films and television programmes. This is an application by those companies for an order under s97A of the Copyright Designs and Patents Act 1988. These orders are conventionally known as website blocking orders. The defendants are the major internet service providers in the UK (“ISPs”). In this case the ISPs do not oppose the orders sought by the claimants.
2. The proceedings were commenced as a Part 7 claim issued on 23rd December 2014 seeking the s97A order. On the same day the claimants issued an application notice to bring the application before the court. In cases of this kind once the order under s97A is made (assuming that is appropriate) the proceedings are effectively finished.
3. The jurisdiction to grant such orders and the considerations which arise relating to them have been dealt with in a series of judgments in the last four years. Paragraphs 3 and 4 of the recent judgment of Arnold J in Cartier v BSKyB [2014] EWHC 3354 (Ch) summarises the position as follows:

3. Over the last three years, a series of orders have been made requiring the ISPs to block, or at least impede, access to websites pursuant to section 97A of the Copyright, Designs and Patents Act 1988 (“the 1988 Act”), which implements Article 8(3) of European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (“the Information Society Directive”). I have considered the principles to be applied to applications of that kind in a series of judgments: *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011] EWHC 1981 (Ch), [2012] Bus LR 1471 (“*20C Fox v BT*”); *Twentieth Century Fox Film Corp v British Telecommunications plc (No 2)* [2011] EWHC 2714 (Ch), [2012] Bus LR 1525 (“*20C Fox v BT (No 2)*”); *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch), [2012] 3 CMLR 14 (“*Dramatico v Sky*”); *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd (No 2)* [2012] EWHC 1152 (Ch), [2012] 3 CMLR 15 (“*Dramatico v Sky (No 2)*”); *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch), [2013] ECDR 8 (“*EMI v Sky*”); *Football Association Premier League Ltd v British Sky Broadcasting Ltd* [2013] EWHC 2058 (Ch), [2013] ECDR 14 (“*FAPL v Sky*”); and *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd* [2013] EWHC 3479 (Ch), [2014] ECDR 7 (“*Paramount v Sky*”). Since the last of those judgments, Henderson J has considered the impact of the judgment of the Court of Justice of the European Union in Case C-466/12 *Svensson v Retriever Sverige AB* [EU:C:2014:76] in *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd* [2014] EWHC 937 (Ch) (“*Paramount v Sky 2*”).

4. It is convenient to note at this stage three points about the cases under section 97A. The first is that neither the ISPs nor the rightholders have appealed against any aspect of the orders made in those cases, including those aspects which deal with the costs of the applications and the costs of implementing the orders. The second is that, since *20C Fox v BT* and *20C Fox v BT (No 2)*, the ISPs have not opposed the making of the orders sought by the rightholders, but have restricted themselves to negotiating the wording of the orders if the Court is minded to grant them. Thirdly, in consequence, most of the orders have been granted after consideration of the applications on paper.

4. All of the decisions referred to have been judgments of the High Court. I gather that *Cartier* itself will come before the Court of Appeal but since *Cartier* is not a copyright case it is not directly concerned with s97A. The issue there is whether a similar order should be made to prevent trade mark infringement.
5. Now that the essential principles relating to s97A website blocking orders have been sorted out most of the orders have been granted on paper (see *Cartier* paragraph 4 above). Nevertheless this application is an illustration of the potential problems which can arise by taking that approach, as I shall explain.
6. It is a matter for the applicant to decide whether to ask to have an application heard on paper or not. There is a box to tick at part 5 on form N244. Two things are worth emphasising nevertheless. First, it is a matter for the court whether to deal with an application this way (see CPR Part 23 r 23.8). Second, on one view the application, although it has been brought by an application notice under Part 23, is in effect the disposal of the action. If the order is granted the action has come to an end. The general rule is that trials are to be in public (CPR Part 39 r39.2 (note that r39.1 provides that r39.2 refers to trials)). None of the limited exceptions in r39.2(3) apply here.
7. The previous applications on paper under Part 23 have come before various judges in this Division. To my knowledge all of the applications which have been dealt with on paper are ones in which the factual circumstances are the same as the cases which have been considered in reasoned public judgments and are ones in which the order is unopposed in that the ISPs do not oppose either the order itself or the fact the application is on paper. Moreover no-one else has come forward to oppose the order either. In those circumstances one can see why the court would not consider that a hearing was necessary (CPR r23.8(c)).
8. Another pragmatic aspect of some of the previous applications is that multiple different and independent websites are dealt with at the same time. When the issues raised are the same for each website, again it clearly makes sense, and is in accordance with the overriding objective to deal with cases justly and at proportionate cost (CPR r1.1) to group them together in this way.
9. This application came before me originally as a paper application. It sought an order under s97A in relation to nine different websites with the objective of restraining very large scale copyright infringement in films and television programmes. The target websites (as defined in the original skeleton argument) are:

- i) afdah.com (“Afdah”)
 - ii) watchonlineseries.eu (“Watch Online Series”)
 - iii) g2g.fm (“G2G”)
 - iv) axxomovies.org (“Axxo Movies”)
 - v) popcorntime.io (“Popcorn Time IO”)
 - vi) flixtor.me (“Flixtor”)
 - vii) moviepanda.tv (“Movie Panda”)
 - viii) popcorn-time.se (“Popcorn Time SE”)
 - ix) isoplex.isohunt.to (“Isoplex”).
10. The application was supported by detailed evidence running to six lever arch files with statements from Simon Baggs, Eloise Preston and Mahbood Moeiri-Farsi of Wiggin and Bret Boivin of Incopro as well as an expert’s report of Dr Martino Barenco. Mr Baggs’ evidence was the main factual evidence relied on and deals with the claimants’ rights and the various target websites. The evidence of Ms Preston, Mr Moeiri-Farsi and Mr Boivin addresses the availability of the claimants’ copyright works on the target sites and how they intervene in making the infringing content available. Dr Barenco explains the statistical analysis which has been undertaken to ascertain the proportion of copyright protected content made available by the target websites. The claimants’ junior counsel also provided a full skeleton argument.
 11. The target websites the subject of this application divide into three types depending on how the content is provided to users. Two types are streaming sites and BitTorrent sites. Streaming sites are sites which work in a broadly similar way to the websites discussed in *FAPL v Sky* [2013] EWHC 2058 (Ch) at paragraph 14-19 and *Paramount v Sky* [2013] EWHC 3479 (Ch). BitTorrent sites are sites which use the BitTorrent peer-to-peer file sharing protocol and work in the manner discussed in the Pirate Bay cases *Dramatico v Sky* [2012] EWHC 268 (Ch) and *Dramatico v Sky No 2* [2012] EWHC 1152 (Ch). Website blocking applications give rise to various questions and the answers to those questions for streaming sites and Bittorrent sites have been given in these previous judgments and in each of those cases s97A website blocking orders were made.
 12. The streaming and BitTorrent sites the subject of this application are Afdah, Watch Online Series, G2G and Axxo Movies. The issues raised by those types of website have been dealt with comprehensively in the judgments I have referred to and the application, in so far as it related to those types of site, was suitable to be dealt with on paper.
 13. The third type of site can be called Popcorn Time type sites. All of the other five target sites use the same Popcorn Time system although the name itself only appears in the name of two of them. This distinction was recognised in the evidence and skeleton argument provided for the paper application and the operation of the Popcorn Time system was described in evidence. However, beyond broad generic submissions

that the relevant tests were satisfied, and although the evidence did explain in detail features of the Popcorn Time websites and how they operate, neither the claimants' skeleton argument nor the evidence addressed in any depth how the questions which arise when considering a s97A website blocking injunction should be answered for Popcorn Time sites.

14. Although the ISPs did not oppose the orders I decided that the application was not suitable to be dealt with on paper and arranged for a hearing. The ISPs were invited to attend if they wished to do so. The claimants filed a further witness statement to address questions I had asked, a further skeleton argument of leading counsel and draft order. The ISPs confirmed they did not oppose the order in the revised form and did not attend the hearing.
15. It should not have been necessary for the court to have raised the need for a hearing of its own motion in this case. The Popcorn Time type sites raise new and different issues from those considered hitherto. Indeed, as became obvious at the hearing, it was not always clear to all members of the legal team representing the claimants how the Popcorn Time sites operate and how the considerations arising under s97A should be applied to them. The fact that the ISPs do not oppose the order is not the only consideration. Claimants must always ensure that they draw the court's attention to any new factors present in applications of this kind. If substantive new issues fall to be considered the matter is unlikely to be suitable for being dealt with on paper.

Popcorn Time

16. Mr Baggs' witness statement explained how the Popcorn Time system works.
17. The name "Popcorn Time" refers to an open source application which can be downloaded by the user onto their computer and which enables the user to obtain film and TV content using the BitTorrent protocol. The application operates as a Bittorrent client but with the addition of media player software, an index/catalogue of titles and images and descriptions of titles.
18. In order to access the content available using the application, the user must download and install the Popcorn Time application from a Popcorn Time application source website (a "PTAS website"). The application enables the user to browse, search and locate films and television programmes that they wish to view. The Popcorn Time application is free to download from the relevant PTAS website. Once the user has downloaded the Popcorn Time application, the user does not need to return consciously to the PTAS website at all.
19. In order to view content, the user runs the Popcorn Time application on their computer and is presented with contents pages showing what films and television programmes are available. Once a work has been selected the application downloads the content using the BitTorrent protocol. The user does not need to download or install BitTorrent client software separately. As a BitTorrent client the application identifies peers over the internet from which it can obtain the desired content. It communicates via the BitTorrent protocol. With BitTorrent, a file of content such as a film is broken up into numerous small pieces, held on peers' computers anywhere in the world. To download a file the BitTorrent client software collects the pieces together and assembles them into a content file for viewing.

20. Usually when using BitTorrent, the separate pieces of the content file are assembled in an ad hoc order depending in their availability from peers. The content file is only ready to be viewed when all the pieces have been assembled. However, the Popcorn Time applications use a feature of BitTorrent called sequential downloading. They are able to prioritise pieces at the beginning of the content. From the user's point of view the content is ready to be viewed more or less as soon as the process starts and they can watch the film or television programme as a stream rather than having to download the whole thing and then watch it. The whole content file is downloaded and created as a whole on the user's computer in a temporary folder. Although most users will simply watch the content in real time rather than save it for replay later; if they elect to do so, users can retain the whole content file as long as they understand how to alter the folder settings on their computer.
21. Popcorn Time applications locate torrents by searching catalogues of existing websites which host those torrents. In some cases the source site is not blocked under an existing s97A order but in other cases the site is blocked. When a blocked site is used as a source, it appears that the block is circumvented, probably by the Popcorn Time application using a proxy server or by encryption.
22. The content available using the Popcorn Time applications is constantly updated. That is because in addition to their links with peers and torrent catalogue sites, the Popcorn Time applications maintain links with a website which they use as a source of update information ("a SUI website"). That link is made so that the indexes held by the application are updated, so that new content is made available to users and so that the Popcorn Time application itself can be updated.
23. In evidence at the hearing was an article about Popcorn Time which appeared on the Bloomberg news website on 25th February 2015. The headline was "This Torrenting App is too good to be legal". The article describes that the application made its debut in March 2014 and describes it as the "kinder, gentler face of piracy online". The article also states that Popcorn Time has made BitTorrent far more user-friendly and less obviously sketchy. Apparently as many people in the Netherlands searched Google for "Popcorn Time" as they did for well known lawful streaming services.
24. It is manifest that the Popcorn Time application is used in order to watch pirated content on the internet and indeed it is also manifest that that is its purpose. No-one really uses Popcorn Time in order to watch lawfully available content. One can therefore entirely sympathise with the claimants in seeking to block its operation and use. I turn to consider the issues arising in relation to the s97A order.

The jurisdiction under s97A of the 1988 Act

25. There are four matters which need to be established for the court to have jurisdiction under s97A to make the order sought: (1) that the ISPs are service providers, (2) that the users and/or operators of the target websites infringe copyright, (3) that users and/or the operators of the target websites use the services of the ISPs to do that, and (4) that the ISPs have actual knowledge of this. If the jurisdictional requirements are satisfied then the court has to consider whether an order is appropriate and in what terms.

26. In this case there is no difficulty about (1). The status of these defendants has been ruled on in the previous cases. There is no difficulty about issue (4), the methods used to put the defendants on notice have been ruled on in the previous cases. The debate is about issues (2) and (3).
27. Before me the claimants focussed on the position of website operators in their submissions on points (2) and (3). They did not make any concession about whether users themselves commit infringing acts but argued the case based on operators of the sites.
28. In order to deal with points (2) and (3), one needs to identify the target website under consideration and understand what it does. As I have explained, the user downloads the software for a Popcorn Time application from a PTAS website and the application maintains a link to update information to a SUI website. On reading the original skeleton argument the application seemed to be based on the footing that the PTAS and SUI websites were the same and the original form of the website blocking order sought on paper was based on that assumption.
29. One of the detailed technical issues which needed to be clarified at the hearing was the extent to which that assumption was correct for a given Popcorn Time application. The arguments appeared to assume that by blocking access from a user's computer to the PTAS website not only would a user be prevented from obtaining a Popcorn Time application in the first place but the block would necessarily prevent any Popcorn Time application from working. However, the detailed evidence in support seemed to suggest that at least in some cases the SUI and PTAS websites were different. It was also not clear at the outset whether the claimants were seeking to be entitled to add IP addresses or URLs for SUI websites to the list of IP addresses and URLs to be covered by the block during the operation of the order. It is well established that website blocking orders can and should allow the applicant to alter the IP addresses or URLs which are blocked in order to deal with changes made by the operators of the sites. This facility to vary the precise identity of the blocked IP address or URL does not allow the applicant to block new sites which were not considered by the court when the s97A order was made.
30. This was all clarified at the hearing. Although there appears to have been a single Popcorn Time application when it was launched in early 2014, today there are different versions which work in different ways. The Popcorn Time applications available from Popcorn Time IO, Flixtor, and Movie Panda do not appear to return to the PTAS site during their operation. Their SUI sites seem to be distinct. The application available from Popcorn Time SE obtains some key files from the PTAS website but may also use a distinct SUI site. The Popcorn Time application available from the Isoplex site obtains indexes and other information from the PTAS site and may not access a separate SUI site at all.

Point (2): Do the operators of the target websites infringe copyright?

31. As is now conventional in website blocking cases, the claimants put their case in relation to point (2) in three ways: (a) communication to the public, (b) authorisation, and (c) joint tortfeasance. These three approaches have been considered and applied before in the various earlier website blocking cases cited above but they need to be considered afresh in relation to the target websites the subject of this application. At

the hearing the main way in which leading counsel put the case for the claimants was based on joint tortfeasance but all three approaches were advanced and I should deal with them.

communication to the public

32. On paper the claimants submitted that all the elements of the act of communicating copyright works to the public (s20(2)(b) 1988 Act) are made out in respect of the operators of all the target websites. At the hearing the claimants submitted that there was no material difference between the Popcorn Time websites and the websites considered in the earlier s97A cases.
33. To deal with this I need to recap on the previous findings of the court on BitTorrent and streaming sites.
34. The issue was first considered by Kitchin J in 20C Fox v Newzbin [2010] EWHC 608 (Ch) at paragraphs 113-125. That case related to a site called Newzbin. The Newzbin site provided, catalogued and indexed links to content available on Usenet. The operator was held to have intervened in a highly material way to make the films available to a new audience and to infringe pursuant to s20(2)(b). This was followed by Arnold J in 20C Fox v BT dealing with the similar Newzbin2 site (paragraph 113).
35. BitTorrent sites are like the Newzbin sites. BitTorrent sites provide the user with catalogues and indexes of the content and connections (files or links) to facilitate the user's downloading of the pieces of the content file from peers across the internet. In Dramatico v Sky Arnold J considered the BitTorrent site known as The Pirate Bay. In that case the claimants' submission was that the operators infringed copyright on the basis of authorisation and joint tortfeasance (paragraph 72). The claimants did not pursue the argument based on communication to the public on that occasion because the CJEU had not given judgment in Football Dataco v Sportradar (see EMI v Sky paragraph 44). In EMI v Sky Arnold J held that the operators of the BitTorrent sites there did infringe by communication to the public (paragraph 45-46). There was no distinction between these BitTorrent sites and the Newzbin site considered by Kitchin J in 20C Fox v Newzbin.
36. This issue was considered in relation to streaming sites in FAPL v Sky at paragraphs 6, 14-16 and 38-44 and in Paramount v Sky at paragraphs 5-7 and 32-34. Importantly the target websites in those cases were not hosting the content in question but rather were providing access to content hosted elsewhere and were indexing and aggregating that content (see FAPL v Sky paragraph 42, Paramount v Sky paragraph 5 ("content comprehensively categorised, referenced, moderated and searchable")). Nevertheless the operators of those sites were held to be infringing pursuant to s20(2)(b). As Arnold J put it in paragraph 34 of Paramount v Sky, from the perspective of the user, the websites do in a very real sense make the content available to the public.
37. So the operators of both BitTorrent sites and streaming website sites have been held to infringe copyright by communication to the public even though the infringing copy of the copyright work itself does not come directly from those websites but because the sites contain catalogued and indexed connections to the sources of those copies. The

website operators are held to have intervened in a highly material way to make the copyright works available to a new audience and to infringe.

38. The difference with the Popcorn Time system is that now it is the application itself running on the user's computer which presents to the user catalogued and indexed connections to the sources of the copies. If a PTAS site is purely the source from which the Popcorn Time application software is downloaded and the application itself, once operational on the user's computer, never connects back to the PTAS site then can the reasoning employed in the earlier cases apply? I do not believe it can. I cannot see how the operator of the PTAS website commits an act of communicating copyright works to the public. The PTAS site simply does not communicate any copyright works to anybody. There is no transmission (or retransmission) of the copyright work at all. What the PTAS site makes available is a tool. The tool is the Popcorn Time application. From the point of view of the user, the PTAS site is not the place at which they encounter a catalogue or index of content. It is the Popcorn Time application, when running on the user's computer, that provides catalogued and indexed connections to the sources of infringing copies of the claimants' copyright works. The operators of the PTAS sites are facilitating the making available of the content by providing this tool but that is a different matter. In my judgment the scope of the act of communication to the public cannot be stretched as far as to cover the operation of a site which simply makes the Popcorn Time application itself available for download.
39. Accordingly I am not satisfied that the operators of the PTAS websites Popcorn Time IO, Flixtor, and Movie Panda are committing an act of communication copyright works. (The claimants asked that the application in respect of the Movie Panda website should be adjourned in any event, because that website went offline after the application was issued.)
40. Do the operators of SUI sites commit an act of communication to the public? The claimants have a stronger case here but in the end I was not convinced.
41. The SUI site will be the source of a data file with the index/catalogue which is to be presented to the user when they run the Popcorn Time application. Whether the SUI site is the same as the PTAS site (as in the case of Popcorn Time SE and Isoplex) or is a different site makes no difference. The catalogue and index information presented by the user running their Popcorn Time application on their computer will have come from the SUI site. It may be that an initial data file of catalogue information comes with the Popcorn Time application software when it is downloaded from the PTAS site (in which case the SUI and PTAS sites will be the same at least initially).
42. In order to work out whether the operators of SUI sites are committing acts of communication to the public, one needs to consider the matter from the public's point of view. With the BitTorrent and streaming websites, when a user wishes to get access to one of the claimants' films or programmes, the user consciously chooses to visit one of those websites, where they are presented with the catalogue and where they can select which film to watch or obtain. So those websites in a real sense present the user with the catalogue information and thus those websites intervene in a material way to make the films available. However, with Popcorn Time the position is different. From the user's point of view, it is not the SUI websites which present them with catalogue/indexing information. The users are probably oblivious to their

existence. From the user's point of view what presents the catalogue/index to them is the Popcorn Time application itself. It is the application which intervenes to make the films available, not the websites. It is the Popcorn Time application which makes the content available at a time and place of the user's choosing, not the websites. I do not think it is meaningful to describe operating those sites as carrying on an act of communication to the public of the films.

(b) authorisation

43. One way or another, when a user uses Popcorn Time to watch one of the claimants' protected works, a copy of that work will be directly transmitted to the user's computer from another site or sites on the internet (a "host site"). Section 16 of the 1988 Act provides that authorising an act restricted by copyright is itself an act of infringement. The claimants submitted that the operators of both PTAS and SUI websites were infringing copyright in the protected works by authorising the infringing communication to the public by (i) the operators of the host websites and/or by (ii) those who place the infringing content on the host websites.
44. Again to deal with this I need to recap on the previous findings of the court relating to other kinds of piracy websites which do not directly host the protected content but provided some form of access to such content hosted elsewhere on host websites.
45. The leading authority on the issue is CBS v Amstrad [1988] AC 1013 about the supply of a twin tape recorder. Kitchin J addressed its application to the operators of the Newzbin site in 20C Fox v Newzbin at paragraphs 85-102. The judge summarised the applicable principles in paragraph 90. The factors to consider are the nature of the relationship between the operators of Newzbin and its users, the means used to infringe, the inevitability of infringement, the degree of control which the supplier retains and whether the supplier has taken any steps to prevent infringement. Again this was followed by Arnold J in 20C Fox v BT dealing with the similar Newzbin2 site (paragraph 113). Authorisation of the users' acts of copying and communication to the public was found on the same basis by Arnold J for the Pirate Bay BitTorrent site in Dramatico v Sky at paragraphs 73-81, for other BitTorrent sites in EMI v Sky at paragraphs 52-70 and for streaming sites in Paramount v Sky at paragraph 38 (for the users who supply links to the websites – see paragraph 37). It was not established in FAPL v Sky (see paragraph 50) but the facts of that case in this respect were different.
46. I turn to consider the factors relevant to authorisation. For this purpose I can treat the operators of the PTAS and SUI websites together. They are probably the same people but even if they are not it makes no difference since together the operators of the PTAS and SUI websites provide the various Popcorn Time applications to users and provide the update data needed to make them work. I will refer to them as the suppliers of the Popcorn Time application.
47. The relationship between suppliers or the Popcorn Time application and users is largely characterised by the nature of the Popcorn Time application itself. Once the user has downloaded the application from the PTAS site, everything else happens by running the application. Popcorn Time provides a sophisticated and user friendly environment in which its users are able to search for and locate content. It is indexed and catalogued to make it easy for users to find what they want. An attractive "front

end” is presented to users with images and information about the films and televisions programmes. Once the user has chosen which work to view, Popcorn Time takes care of everything and streams the film or programme directly to the user then and there. These features give the users an easy and comprehensive service. Popcorn Time is not a passive means for accessing protected content.

48. The Popcorn Time application is a means necessarily used for users to infringe the copyright in many senses. It is the means by which they find what content they want, it is the means by which they access and collect the pieces of the content files using the BitTorrent protocol and it is the media player on which the user actually watches the protected work. Infringement of copyright is inevitable when Popcorn Time is used. That is what it is for. Moreover it is not a tool like a twin tape recorder which could in principle be used by a user for any work (infringing or not). The Popcorn Time application accesses content using its index and that index is controlled by the suppliers. Each Popcorn Time application connects to SUI websites for updates of various sorts and by that means the suppliers of the Popcorn Time application retain control over its use. Whether the suppliers could turn off a user’s Popcorn Time application is not clear but in any event they determine what appears in the index.
49. The suppliers have taken no steps whatever to prevent infringement. The position is quite the reverse since they ensure that the infringing content available on Popcorn Time is constantly updated.
50. The factors I have mentioned above were emphasised on the claimants’ behalf in the evidence. These factors would be relevant to an argument that the suppliers of Popcorn Time applications were authorising acts of infringement by users but that is not the way in which the claimants’ case was put at the hearing. The submission is that the suppliers are authorising the acts of communicating to the public committed by the host website operators (20th March 2015 Skeleton Argument paragraph 9). The problem with this allegation is that there is no concrete information about that relationship in the evidence at all and most of the factors I have considered have nothing to do with the connection, if any, between the suppliers of Popcorn Time and the host website operators. I am sure that the operators of the host websites are carrying out infringing acts such as an act of communication to the public, but I am not satisfied that a case based on authorisation of those infringements by the operators of the PTAS and/or SUI websites is made out.

(c) joint tortfeasance

51. Finally the claimants submitted that the operators of both PTAS and SUI websites were infringing copyright in the protected works as joint tortfeasors with the operators of the host websites and/or with those who place the infringing content on the host websites. Kitchin J decided that the operators of the Newzbin site were liable as joint tortfeasors with the operators of the host websites in 20C Fox v Newzbin at paragraphs 103-112. After dealing with the leading authorities on the issue (CBS v Amstrad, Unilever v Gillette [1989] RPC 583, Credit Lyonnais v Exports Credits Guarantee Dept [1988 1 Lloyd’s Rep 19 and Sabaf v Meneghetti [2002] EWCA Civ 976) he summarised the principles at paragraph 108:

I derive from these passages that mere (or even knowing) assistance or facilitation of the primary infringement is not

enough. The joint tortfeasor must have so involved himself in the tort as to make it his own. This will be the case if he 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.

52. Kitchin J also referred to *L'Oreal v eBay* [2009] EWHC 1094 (Arnold J) in which the operator of the eBay website had been held not to be liable as a joint tortfeasor with those selling trade mark infringing goods on its site. Kitchin J held that the facts relevant to authorisation by Newzbin were highly relevant to the issue of joint liability and concluded that the operators had indeed engaged in a common design with Newzbin to infringe the claimants' copyrights.
53. Again this was followed by Arnold J in *20C Fox v BT* dealing with the similar Newzbin2 site (paragraph 113). Joint liability with users was found on the same basis by Arnold J for the Pirate Bay BitTorrent site in *Dramatico v Sky* at paragraphs 82-83. By the time the other BitTorrent sites were considered in *EMI v Sky* (at paragraphs 71-74) another relevant Court of Appeal judgment on joint liability had been given in *Football Dataco v Stan James* [2013] EWCA Civ 27. Arnold J took that into account and held that the operators of the BitTorrent sites were jointly liable for the infringements committed by their users.
54. For the streaming sites, Arnold J held that even if he was not correct to hold that the operators of the target websites were committing acts of communication (since the streams were coming from other host websites) the operators of the target websites were jointly liable for the communication by the operators of the host websites (see *FAPL v Sky* at paragraph 43 and also paragraphs 37-41). A similar conclusion, that the target site operators were jointly liable for communication by the host site operators was reached in *Paramount v Sky* at paragraph 35.
55. The issue I have to decide is whether the suppliers of the Popcorn Time applications are jointly liable with the operators of the host websites. In my judgment they are. The Popcorn Time application is the key means which procures and induces the user to access the host website and therefore causes the infringing communications to occur. The suppliers of Popcorn Time plainly know and intend that to be the case. They provide the software and provide the information to keep the indexes up to date. I find that the suppliers of Popcorn Time have a common design with the operators of the host websites to secure the communication to the public of the claimants' protected works, thereby infringing copyright.
56. Although I am not satisfied in relation to communication to the public or authorisation by the operators of the Popcorn Time websites, I am satisfied that the operators of these websites (both PTAS and SUI) are jointly liable for the infringements committed by the operators of the host websites.

Point (3): Do the operators of the target websites use the services of the ISPs to infringe?

57. In *20C Fox v BT* Arnold J held at paragraph 113 that the operators of the target website in that case (Newzbin 2) were using BT's service to infringe copyright in all three of the ways found in that case (communication to the public, authorisation and

joint liability). In *Dramatico v Sky (No 2)* Arnold J held that the operators of the Pirate Bay BitTorrent site were using the services of Sky and the other defendants to infringe on the same basis as in *20C Fox v BT*, see paragraph 6. In *EMI v Sky* Arnold J reached the same conclusion in paragraphs 76-88, bearing in mind questions referred to the CJEU in *UPC v Constantin* Case C-314/12. In *FAPL v Sky* and *Paramount v Sky* he reached the same conclusion as well (at paragraphs 51 and 39 respectively).

58. In paragraphs 147-156 of *Cartier v BSKyB* Arnold J again considered the same issue, albeit in the context of a trade mark case. By now there were two CEJU judgments to consider, *LSG v Tele 2* Case C-557/07 and *UPC v Constantin* itself. Applying these cases he held that the ISPs in *Cartier* had an essential role in the infringements of the operators of the target websites because it was through use of the ISPs' services that the operators carried out the acts of infringement.
59. I have found that the operators of the Popcorn Time websites (PTAS and SUI) are jointly liable for the copyright infringements committed by the operators of the host websites. In my judgment the operators of the Popcorn Time websites are using the services of the defendants to do this. The defendants' internet services, which they provide to their users, have an essential role in the infringements committed by the Popcorn Time website operators for the same reasons as have been considered in the earlier cases about other kinds of site and other infringements. It is through the use of the ISPs' services that the operators of the Popcorn Time websites carry out their acts.

Conclusion on jurisdiction

60. This case was, I think, much more complicated than it appeared to those seeking the s97A order. The fact that wholesale infringements of copyright are clearly taking place using Popcorn Time is true enough. However, it is nevertheless necessary to identify with precision the correct legal basis of the application. In the end although I have rejected significant parts of the claimants' case, I am nevertheless satisfied that the court has jurisdiction under s97A of the 1988 Act to make a blocking order in this case.

Proportionality and discretion

61. Having found the jurisdiction under s97A is engaged, the question of whether a blocking order would be proportionate and the exercise of the court's discretion to grant such an order does not pose any general difficulties. Subject to one Popcorn Time specific issue, it is a clear case for granting such an order for the same reasons as have been considered in depth in previous cases.
62. The Popcorn Time specific issue is a question about what the purpose of blocking the PTAS websites is. On paper it was not clear whether the ostensible purpose of the blocking order was intended just to prevent users from obtaining the Popcorn Time application itself or whether it was intended to interfere with the operation of Popcorn Time applications already downloaded. By the hearing this aspect had been clarified: the claimants are seeking to achieve both ends and a blocking order directed to both PTAS and SUI websites is likely to achieve both objectives. The final form of the order sought was drafted accordingly. I am satisfied that both objectives justify the

order sought and based on the evidence, both purposes are likely to be achieved by the blocks to be put in place following the order.

Form of order

63. Annex 1 is a copy of the order made on this application. The PTAS target sites are numbers 5 to 8 in Part 1 of Schedule 1. Part 2 of Schedule 1 consists of SUI websites and host websites which so far the claimants have been able to establish the Popcorn Time applications in Part 1 interact with.
64. I mentioned above that it is well established that website blocking orders can and should allow the applicant to update the IP addresses or URLs which are blocked. In this respect the order allows the claimants to update IP addresses and URLs for PTAS sites (paragraph 1(a)) and also allows the claimants to update the Part 2 sites (paragraph 1(b)). Paragraph 1(a) is in conventional terms and refers to the blocked website. Paragraph 1(b) is more general than previous forms of words which permit updating. The form of paragraph 1(b) is justified since it is not clear exactly which websites the Popcorn Time applications interact with. The claimants may find more and the sites accessed by these Popcorn Time applications may change. The order is not open ended since it is limited to the sites which are used by the Popcorn Time applications made available by the PTAS sites in Part 1.
65. Schedule 3 to the order is not included in the Annex as it is not germane to the issues discussed in detail in this judgment and is confidential.

Conclusion

66. The point of Popcorn Time is to infringe copyright. The Popcorn Time application has no legitimate purpose. It is a proper use of the court's power under s97A both to seek to prevent its dissemination and to seek to interfere with its operation. I will make orders accordingly.

Annex 1

UPON THE APPLICATION of the above named Applicants by Application Notice dated 23 December 2014

AND UPON reading the documents recorded on the court file as having been read

AND UPON the Court being satisfied on the evidence before the Court that the operators of the Target Websites (as defined in Schedule 1 to this Order) and in the case of the website referred to in sub-paragraph 4 in Part 1 of Schedule 1 to this Order the users of that website also use the services of each of the Respondents to infringe the copyrights of the Applicants in the United Kingdom

AND UPON the Court recording that the Respondents are not wrongdoers and have not themselves infringed the copyrights and make no admission of liability

IT IS ORDERED as follows:

1. That, within 10 working days of the date of notification, the Respondents shall block or attempt to block access to:
 - a. the Target Websites identified at Part 1 of Schedule 1 to this Order (“the Part 1 Target Websites”), their domains and sub-domains and any other IP address or URL notified to them by the Applicants or their agents whose sole or predominant purpose is to enable or facilitate access to a Part 1 Target Website; and
 - b. the Target Websites identified at Part 2 of Schedule 1 to this Order, their domains and sub-domains and any other IP address or URL notified to them by the Applicants or their agents whose sole or predominant purpose is to enable or facilitate use of the software applications made available by any of the so-called “Popcorn Time Websites”.
2. For the avoidance of any doubt:
 - a. paragraph 1 is complied with if a Respondent uses the technical means set out in Schedule 2 to this Order or any alternative and equivalent (including replacement) technical means to those set out in Schedule 2 to this Order provided that the Respondent gives notice to the Applicants of the change, and in respect of the customers set out in Schedule 2 to this Order;
 - b. a Respondent who adopts IP address blocking measures shall only be required to block IP addresses in respect of which the Applicants or their agents notify the Respondents that the server with the notified IP address does not also host a site that is not part of a Target Website (whether as defined in this Order or in any earlier order of the court made pursuant to an Application under section 97A of the Copyright, Designs and Patents Act 1988);
 - c. the Respondents are wholly reliant on the Applicants accurately identifying the IP addresses and/or URLs which should be blocked under the terms of this

Order. The Respondents have no obligation to verify whether the Applicants' or their agents' determination is correct;

- d. the caveat set out in Confidential Schedule 3 applies to this Order.
3. The Applicants or their agents must notify the Respondents should:
- a. any IP address and/or URL which has already been notified to the Respondents under the terms of this Order ceases to be a location whose sole or predominant purpose is (i) to enable or facilitate access to a Part 1 Target Website or (ii) to enable or facilitate access to and use of the software applications made available by any of the so-called "Popcorn Time Websites" (as the case may be). In this case the Respondents shall no longer be obliged to block that IP address and/or URL;
 - b. any Target Website move to an IP address where the server at that IP address hosts a site or sites that are not part of a Target Website, or should a server hosting a Target Website commence hosting a site or sites that are not part of a Target Website;
 - c. any Target Website where the server with the notified IP address hosts a site or sites that are not part of a Target Website and one or more of the site or sites that are not part of a Target Website ceases to carry out unlawful activity. In this case the Respondents shall not be required to block that IP address.
4. Notification under paragraphs 1 or 3 above must:
- a. be sent as soon as reasonably practicable from the date on which the Applicants or their agents become aware of the change in status of the Target Website or server, as the case may be;
 - b. be sent electronically according to a schedule and in a machine readable digital format to be agreed with each of the Respondents;
 - c. be provided no more frequently than once per week on a day to be agreed with the Respondents;
 - d. be sent to all Respondents on the same date; and
 - e. be implemented by the Respondents within 10 working days of receipt of a notification in the format agreed pursuant to paragraph 4(b) of this Order.
5. Where access to a Target Website is blocked by a Respondent pursuant to paragraph 1 above, that Respondent must take reasonable steps to make available the following information to customers whose access is impeded:
- a. that access to the website has been blocked by court order;
 - b. the identity of the parties who obtained this Order; and

- c. a statement that affected users have the right to apply to the Court to discharge or vary the Order.
6. For the avoidance of doubt, the information published to a customer pursuant to paragraph 5 may direct the customer to another URL through which the information set out at paragraph 5 is accessible.
7. A Respondent will not be in breach of this Order if it temporarily ceases to take the steps ordered in paragraph 1 (either in whole or in part) upon forming the reasonable view that suspension is necessary:
 - a. in order to:
 - i. correct or investigate over-blocking of material which is, or is reasonably suspected to be, caused by the steps taken pursuant to paragraph 1;
 - ii. ensure the reliable operation of its Internet Watch Foundation blocking system, if it reasonably considers that such operation is otherwise likely to be impaired;
 - iii. maintain the integrity of its internet service or the functioning of its blocking system;
 - iv. upgrade, troubleshoot or maintain its blocking system; or
 - v. avert or respond to an imminent security threat to its networks or systems;
 - b. and provided that:
 - i. it notifies the Applicants or their agents of such suspension and the reasons for the same as soon as reasonably practicable; and
 - ii. such suspension lasts no longer than is reasonably necessary.
8. For the avoidance of doubt, where this Order refers to a “**URL**” that is a reference to a uniform resource locator for a specific internet resource which comprises at least a fully qualified domain name, and optionally a specified resource within that domain name. Where a URL does not refer to a specified resource, the URL will be deemed to include all sub-pages of the URL.
9. The proceedings shall be stayed, save for the purposes of any application to give effect to the terms of this Order and save that the parties have permission to apply on notice in the event of any material change of circumstances including, for the avoidance of doubt but without limiting the generality of the foregoing, in respect of the costs, consequences for the parties and effectiveness of the aforesaid technical means from time to time.

10. The operators of the Target Websites (as defined in Schedule 1 to this Order) and the operators of any other website who claim to be affected by this Order and any customer of the Respondents, are to have permission to apply on notice to vary or discharge this Order insofar as it affects such an applicant, any such application to be on 10 days' notice to all the parties and to be supported by materials setting out and justifying the grounds for the application, including (supported by evidence) clear indication of the status of the applicant.
11. The part of the application that relates to the website known as the Movie Panda website that was accessible at moviepanda.tv at the time of the Application be adjourned generally and may be restored on notice by the Applicants.
12. The Respondents shall each separately bear their costs of implementing the terms of this Order.

Service of the order

The court has provided a sealed copy of this order to the serving party:

Wiggin LLP at 10th Floor, Met Building, 22 Percy Street, London W1T 2BU (Ref: SJB/RA/MMF/EBP)

SCHEDULE 1

Part 1 Target Websites

These Target Websites are:

1. the website that is currently accessible at afdah.com;
2. the website that is currently accessible at watchonlineseries.eu;
3. the website that is currently accessible at g2g.fm;
4. the website that is currently accessible at axxomovies.org;
5. the website that is currently accessible at popcorn.time.io;
6. the website that is currently accessible at flixtor.me;
7. the website that is currently accessible at popcorn.time.se;
8. the website that is currently accessible at isoplex.isohunt.to.

Part 2 Target Websites

These Target Websites are:

- eztvapi.re;
- eqwww.image.yt;
- yts.re;
- ui.time-popcorn.info;
- isoplex.isohunt.to.

Part 3 Provisions applicable to Part 1 and Part 2 Target Websites

The Part 1 Target Websites and the Part 2 Target Websites include any name and URL changes to these websites notified in writing to the Respondents by the Applicants from time to time (together the “Target Websites” and each a “Target Website”).

The Target Websites that are referred to at numbered sub-paragraphs 5 to 8 in Part 1 above are additionally referred to as the “Popcorn Time Websites”.

SCHEDULE 2

Technical Means

In relation to Sky UK Limited (the “First Respondent”)

1. In respect of its residential fixed line Sky Broadband customers to whose service the system known as Hawkeye is applied, whether optionally or otherwise, the technical means are:
 - (i) IP blocking in respect of each and every IP address notified to the First Respondent for IP blocking in accordance with this Order; and
 - (ii) IP address re-routing in respect of each and every IP address notified to the First Respondent for re-routing in accordance with this Order; and
 - (iii) URL blocking in respect of each and every URL notified to the First Respondent in accordance with this Order.
2. For the avoidance of doubt, paragraph 1 of the Order is complied with if the First Respondent uses the system known as Hawkeye or any subsequent system that has equivalent relevant functionality.

In relation to British Telecommunications Plc (the “Second Respondent”)

3. In respect of its customers to whose internet service the system known as Cleanfeed is applied whether optionally or otherwise, the technical means are:
 - (i) IP blocking in respect of each and every IP address notified to the Second Respondent for IP blocking in accordance with this Order; and
 - (ii) IP address re-routing in respect of each and every IP address notified to the Second Respondent for re-routing in accordance with this Order; and
 - (iii) DPI-based URL blocking utilising at least summary analysis in respect of each and every URL notified to the Second Respondent in accordance with this Order.
4. In respect of its customers who use the Second Respondent’s Domain Name System (“DNS”) servers, the technical means is DNS blocking in respect of each and every domain name or sub-domain notified to the Second Respondent in accordance with this Order.
5. For the avoidance of doubt, paragraph 1 of the Order is complied with if the Second Respondent uses the systems known as Cleanfeed (for the avoidance of doubt, this does not require the Second Respondent to adopt DPI-based URL blocking utilising detailed analysis) and Nominum Vantio Cacheserv or any subsequent system that has equivalent relevant functionality.

In relation to EE Limited (the “Third Respondent”)

6. In respect of its customers whose internet service is provided through its fixed line network currently known as EE Home, and utilising the traffic management system manufactured by Procera, whether optionally or otherwise, the technical means is IP

blocking in respect of each and every IP address notified to the Third Respondent for IP blocking in accordance with this Order.

7. For the avoidance of doubt, paragraph 1 of the Order is complied with if the Third Respondent uses the system known as Procera or any subsequent system that has equivalent relevant functionality.

In relation to TalkTalk Telecom Limited (the “Fourth Respondent”)

8. In respect of its customers to whose internet access service the system known as SIG (Service Inspection Gateway) is applied, whether optionally or otherwise, the technical means is URL blocking in respect of each and every URL notified to the Fourth Respondent in accordance with this Order.
9. In respect of its customers to whose internet access service the measure known as blackholing is applied, whether optionally or otherwise, the technical means is IP blocking in respect of each and every IP address notified to the Fourth Respondent for IP blocking in accordance with this Order, using the measure known as blackholing.
10. For the avoidance of doubt, paragraph 1 of the Order is complied with if the Fourth Respondent uses the systems known as SIG and blackholing or any subsequent system that has equivalent relevant functionality.

In relation to Virgin Media Limited (the “Fifth Respondent”)

11. In respect of its fixed-line residential and business retail broadband and narrowband customers to whose internet access service the system known as Web Blocker 2 is applied, the technical means are:
 - (i) IP blocking in respect of each and every IP address notified to the Fifth Respondent for IP blocking in accordance with this Order; and
 - (ii) IP address re-routing in respect of each and every IP address and URL blocking in respect of each and every URL notified to the Fifth Respondent for URL blocking in accordance with this Order.
12. For the avoidance of doubt, paragraph 1 of the Order is complied with if the Fifth Respondent uses the system known as Web Blocker 2 or any subsequent system that has equivalent relevant functionality.