

Landmark decision: *The Football Association Premier League Limited v British Sky Broadcasting Limited and Others* [2013] EWHC 2058 (Ch)

In July 2013, the High Court of England and Wales delivered a landmark judgment on the legality of online aggregators of unlicensed sports content. As the first of its kind, the case is likely to have a lasting impact on the sports broadcasting industry, providing not only an increased level of protection for licensed broadcasters but securing the future of supplementary revenue streams of sporting bodies and rightsholders.

Legal background

Before analysing the High Court's ruling, it is worth setting out the legal foundations that support its reasoning. Mr Justice Arnold, who gave judgment in the case, made reference to the provisions of two statutory instruments:

1. EU Directive 2011/29/EC (the "Copyright Directive")

Article 3(1) of the Copyright Directive (as implemented in the UK by the Copyright and Related Rights Regulations 2003) requires Member States to provide authors with the exclusive right to authorise or prohibit any communication to the public of their work by wire or wireless means.

2. Copyright, Designs and Patents Act 1998 (the "CDPA")

Section 20(1) of the CDPA provides that:

"the communication to the public of the work is an act restricted by the copyright in a literary, dramatic, musical or artistic work, a sound recording or film, or a broadcast."

"Communication to the public" is defined in s.20(2) as:

"[a] communication to the public by electronic transmission, and in relation to a work includes –

- (a) the broadcasting of the work;*
- (b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them."*

Section 97A of the CDPA grants the High Court the 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."

Factual background

The Football Association Premier League Limited ("FAPL") runs the English Premier League. FAPL is authorised by its member clubs to license broadcasters throughout the world to provide coverage of Premier League matches. A high proportion of the revenue generated by FAPL derives from the sale of such rights. The rights are offered to broadcasters by open competitive tender for a specified territory or groups of territories and term. The broadcast rights for the UK alone were last auctioned for some £3.018 billion, which is by a considerable margin the largest amount paid for sporting broadcast rights in the UK. FAPL owns copyright in the recordings of each and every Premier League football match, including the footage, ambient sound and action replays, as well as

in the artistic works which appear in the recordings, including the Premier League logo and on-screen graphics.

FirstRow Sports ("FirstRow") is an indexing and aggregation portal to streamed broadcasts of sporting events. A visitor to the FirstRow website is presented with a list of links, organised by sport and time of the day, to streams containing live coverage of a wide range of sporting events, including Premier League matches. Upon clicking on one of these links, the user is taken to a new page which features a frame in which that live coverage then appears, accompanied by advertising. The streams themselves are not provided by FirstRow, but by third-party streamers using one of a number of User Generated Content websites. FirstRow was ranked as the 239th most popular website in the UK in April 2013, being accessed by users to watch sports coverage at home, as well as by public houses to show to their customers. The service is highly lucrative, with experts estimating that the website generates advertising revenues of between £5.3m and £9.5m each year.

FirstRow did not have permission from FAPL to broadcast Premier League matches online. However, FAPL was unable to establish who the operators of FirstRow were, the website having been registered under many different domains using a variety of false names and addresses, and the current host of the website having failed to respond to FAPL correspondence. FAPL therefore applied for an injunction against the six main retail internet service providers in the UK, including BSkyB, BT and Virgin Media, requiring them to block or otherwise impede access by their customers to the FirstRow website. A number of other sporting rightsholders supported FAPL's application, including the Rugby Football Union, the Professional Darts Corporation Ltd and UEFA.

High Court decision

Mr Justice Arnold ruled on a number of issues at trial, at which neither the internet service providers nor FirstRow were represented. His decision can be divided into three distinct parts:

1. Copyright infringement

Arnold J held that the operators of FirstRow (and also the pub-cans using FirstRow to show sports events in their pubs) infringed FAPL's exclusive right under s.20 of the CDPA to communicate its copyright works, namely the Premier League football match recordings, to the UK public. His conclusions in this regard were drawn on the following bases:

(a) Communication to the UK public

With reference to the Court of Justice of the European Union's decision in C-607/11 *TVCatchup* (see this author's analysis in *Sports Law Administration and Practice*, April 2013 (Vol. 20, No. 2)), Arnold J held that there was a "communication" of the copyright works via the FirstRow website links as they were transmitted by a technical means that was different to that used by the Premier League (i.e. online streaming of television footage rather than terrestrial television broadcasting). Despite the internet being a global medium, this

“communication” was held to have been targeted at the UK public as FirstRow displayed adverts for UK companies, provided access to sports events that were very popular in the UK and 12 to 13.7% of its worldwide traffic came from the UK.

(b) Communication by FirstRow

While the streams aggregated by FirstRow emanated from User Generated Content, Arnold J considered that FirstRow’s level of involvement in the aggregation and indexing of the streams and the provision of hyperlink access and frames in which the streams appeared, meant FirstRow itself was responsible for the communication of the infringing works to the UK public. Arnold J held that, even if he was wrong in this respect, FirstRow would be jointly liable for the communication of the infringing works by the User Generated Content sites.

2. Use of ISP services and knowledge of ISPs

Arnold J held that both the users of the FirstRow website and FirstRow itself were using the services of the UK Internet Service Providers as a means of gaining access to and communicating FAPL’s copyright works. The Internet Service Providers were held to have actual knowledge of such use for the purposes of s.97A of the CDPA having previously received detailed letters before action from FAPL.

3. Proportionality

Arnold J was satisfied that, on an assessment of the fundamental rights of all parties involved, including FirstRow’s right to freedom of expression and the rights-holders’ interests in protecting their intellectual property rights, the injunction sought by FAPL was proportionate:

- FirstRow was profiting substantially from its infringement of FAPL’s rights;
- there was no other effective remedy available to FAPL in the UK, given the difficulty in identifying FirstRow’s operators;
- the public interest was being undermined by FirstRow enabling its users to watch live football matches during the “closed period”, the period during which UEFA prohibits the broadcasting of matches in order to encourage fan attendance and live support;
- the vast bulk of the content that FirstRow featured, and which is likely to be of interest to UK users, infringed the rights of FAPL and the other rights-holders supporting its application;
- users of the FirstRow website could obtain access to the copyright works and broadcasts through other, lawful, means;
- the order sought by FAPL was narrow, targeted and contained safeguards in the event of any change of circumstances; and

- although some users might be able to circumvent the technical measures the orders required (e.g. through the use of proxy sites), they were likely to be effective.

The injunction was therefore granted in FAPL’s favour.

Comment

Section 97A applications have, until now, come predominantly from businesses in the film and music sectors seeking to block user access to peer-to-peer file sharing sites, such as The Pirate Bay and Newzbin2. In comparison, FAPL’s successful application is the first in which a sports rightsholder has sought to combat aggregators of unlicensed broadcast streams.

The High Court’s ruling confirms the rights of content creators to control how, where and when their content is transmitted, with Mr Justice Arnold emphasising the need for them to be able to protect and prevent the unlicensed use of their works by new business models in the ever-evolving world of e-commerce. Of particular note is the minimal “involvement” needed of an aggregator in order for the operation of its site to constitute an independent and infringing “communication” of copyright works. Indeed, FirstRow was found to have infringed FAPL’s rights by merely providing links and serving as a portal to unlicensed content (rather than hosting the content itself). This is in contrast to the arguments of foreign courts that linking and framing do not constitute a communication to the public (see, for example, the widely publicised US case of *Perfect 10, Inc. v Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007)). As FirstRow did not appear in this case and such arguments were therefore not put to the Court, we shall wait with bated breath until the next trial in which an aggregator is represented and these foreign court decisions are raised.

Mr Justice Arnold’s decision comes at an opportune moment for FAPL, which sees a new set of UK rights deals with BSkyB and BT coming into effect this season. However, in order to ensure its rights are still considered of value and remain truly “exclusive”, it will be increasingly important for FAPL to be vigilant and stamp-down on those looking to exploit and distribute terrestrial broadcasts over the internet in the future.

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This article originally appeared in **Sports Law Administration & Practice** August 2013 (Vol. 20, No. 4), on page 9.