

Review

Commercial & Dispute Resolution



Amstrad revisited in the digital age

It is not only the person who carries out the infringing act who is liable for copyright infringement. Copyright is also infringed by a person who, without the licence of the copyright owner, does, or authorises another to do, any act restricted by copyright. Further, a person who procures an infringement of copyright or who participates in a common design to infringe is jointly and severally liable with the primary infringer.

The scope of authorisation and procurement has recently been considered by Mr Justice Kitchin in the case of *Twentieth Century Fox Film Corporation v Newzbin Limited* [2010].

Background

Usenet

Usenet is a world wide internet discussion system (a bit like a small-version of the world wide web) which allows users to upload and view messages on an electronic equivalent of public bulletin boards.

The content posted by users is either text or binary. Text materials are designed to be read by other users without further processing. Binary materials (such as films), are larger than text materials and requiring processing: first they are encoded in text form and then split up into multiple parts so they can be posted as a set of individual, but related, messages. So for example, where a user posts a film on Usenet, it is split into a large number (possibly hundreds of thousands) of messages. If another user wishes to download the film, he must identify every one of those messages from a list of all messages available on Usenet. Each message must be assembled together to form the whole copy of the film.

Newzbin

Newzbin (a members only service) was described by the defendant as a search engine like Google but directed to Usenet rather than the world wide web.

Newzbin retrieved information about messages posted on Usenet. This information was stored in three indices:

1. RAW Index – this index automatically listed individual files for a particular film or other binary content. Any particular work, such as a film, identified in the RAW

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Index may comprise several (perhaps a hundred) such files. Content was categorised, for example as “Movies” or “TV”.

2. Condensed Index – the index was produced by automatically identifying all the files making up a copy of a particular work (e.g. a film) and drawing that information together under a single entry. Again the content was categorised.
3. Newzbin Index – this was the highest level index. The entries in the index were assigned “reports”. The reports were created by “editors” and listed by the name of the film, or other work, in question. Take for example a film: the editors acted as a quality control to ensure that all individual messages that make up the film were identified. They also added further descriptive information such as the title of the film. The categories were themselves broken down into sub-categories. For example, “Movies” was broken down into sub-categories such as “CAM” (which typically refers to the use of a handheld camera in the cinema) “DVD” and “Blu-Ray”.

The defendant had also developed a facility for members to easily create “NZB” files. Each NZB file contains all the information a user needs to fetch all the Usenet messages relating to a particular work and reassemble them into the original work.

Without Newzbin, Usenet users who wanted to download a film would have to identify each of the messages making up the film, download them one at a time, and then use separate software to reassemble them together. This could take days to accomplish and if just one message was omitted, the work could not be reassembled.

The claimants contended that the defendants had infringed their copyrights by authorising acts of infringement by its members and/or procuring, encouraging and entering into a common design with its members to infringe.

Authorisation

Mr Justice Kitchin found that “authorisation” means the grant or purported grant of the right to do the act complained of. It does not extend to mere enablement, assistance or encouragement. The grant or purported grant to do the relevant act may be express or implied from all the relevant circumstances. Circumstances may include the nature of the relationship between the alleged authoriser and the person who carries out the infringement; whether the equipment or other material supplied constitutes the means used to infringe; whether it is inevitable that the equipment will be used to infringe; the degree of control which the supplier retains and whether he has taken any steps to prevent infringement.

In this case the relevant factors were as follows:

- Members were invited to explore the various indices and could search and browse not only by reference to the names of particular films, but also by genre. This was a sophisticated facility;
- Newzbin identified all of the several thousand messages which made up a particular binary work, thus saving members the substantial task of manually locating and identifying each of them separately;
- Upon the press of a button, the system creates a NZB file which is delivered to the member’s computer. When run, it fetches all the Usenet messages and reassembles the original binary work, inevitably making an infringing copy. Once a work is entered onto the Newzbin index, use of the NZB facility is bound to result in that work being copied;
- The defendant did not install a filtering system, which it could easily have done;
- The defendant actively encouraged its editors to make reports on films;

Newzbin had authorised the copying of the films and procured and engaged with its members in a common design to copy

- The defendant took no steps to remove editors who posted reports on infringing materials.

Mr Justice Kitchin concluded that a reasonable member of Newzbin would deduce from the defendant's activities that it purported to possess the authority to grant any required permission to copy any film that a member chose from the Movies category and that the defendant had sanctioned, approved and countenanced the copying of the claimant's films.

Procurement and participation in a common design

Mr Justice Kitchin held 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.

Of particular relevance in this case:

- The defendant knew that it was making available infringing copies of films;
- Newzbin was designed and intended to make infringing copies of films readily available;
- The site was structured in such a way as to promote infringement by guiding members to infringing copies and then providing them with means to download those infringing copies using the NZB facility;
- The activation of the NZB facility would inevitably result in the production of an infringing copy;
- The defendant encouraged and induced its editors to make reports of films protected by copyright;
- The defendant profited from the infringement.

Mr Justice Kitchin found in all the circumstances that the defendant had procured and engaged in a common design with its members to infringe the claimant's copyright.

Newzbin was ultimately found liable for copyright infringement because it had authorised the copying of the claimants' films and procured and engaged with its members in a common design to copy the claimants' films.

Comment

In reaching his decision on authorisation and procurement, Mr Justice Kitchin revisited many of the principles discussed by the House of Lords in the 1988 case of *C.B.S. Songs Ltd v Amstrad Consumer Electronics Plc*. Although today's technology (such as that used by Newzbin) is far more sophisticated and advanced than a twin cassette deck which permitted "high speed copying of a recording from one tape to another", the considerations raised in *Amstrad* are still relevant and continue to apply.

FURTHER INFORMATION

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