

The UK's first 'live' blocking order prevents users accessing Premier League football streams

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Over the last decade, in particular, the English courts have shown a strong resolve to tackle online infringements of IP rights, and also an ability and willingness to be flexible in the remedies which they can provide to assist IP rights holders in tackling the ever evolving challenges which new technologies have created.

A recent example of the court's flexibility can be seen in Arnold J's recent judgment in *FAPL v BT [2017] EWHC 480 Ch*. This case addresses what Arnold J described as the "growing problem" of live streaming of Premier League football matches.

Many readers of this blog will be familiar with website blocking orders, which are available in the UK pursuant to s.97A of the Copyright, Designs and Patents Act 1988. Such orders require ISPs, such as the UK's broadband providers, to block their users from accessing specified websites which host copyright infringing content. In recent years, website blocking orders have also been made in order to prevent trade mark infringements, as was confirmed last year by the Court of Appeal in *Cartier v BskyB [2016] EWCA Civ 658*.

However, consumers are increasingly accessing illegal live streams of broadcast content by using a device (such as a set top box or a USB stick pre-loaded with software) in order to connect directly to streaming servers via their IP address, rather than by accessing a specific website. This means that a website blocking order is ineffective.

This was the problem faced by the FA Premier League ("FAPL"), who owns the copyright in the broadcasts of live footage of Premier League matches. In *FAPL v BT [2017] EWHC 480 Ch*, the Court ordered an injunction which required the defendants (the UK's six main broadband providers) to block access by their customers to the various streaming servers which are being used to deliver infringing live streams of Premier League footage to UK consumers.

How live streaming works

To understand the injunction which was granted it is necessary to understand, in broad terms, how live streaming operates.

There are four main elements which are required to stream live content to consumers: (i) a feed of infringing footage (perhaps from a satellite decoder box being used to receive a licensed service by an authorised FAPL licensee outside of the UK); (ii) a platform to manage distribution of the footage; (iii) a streaming server hosted by a hosting provider which transmits copies of the footage; and (iv) a user interface (such as a set top box or a USB stick with pre-loaded software) which a consumer can use to access the footage in real time.

The streaming server is therefore a crucial link in the chain - and a single server can be accessed by thousands of consumers using different apps, set top boxes and other devices. The FAPL therefore turned its attention to blocking access to the servers themselves.

Does the Court have jurisdiction to block access to servers?

Section 97A of the CDPA, which implements Article 8(3) of the Infosoc Directive, empowers the High Court to grant an injunction against a service provider such as a broadband provider where the service provider has actual knowledge of another person using its service to infringe copyright.

Those threshold conditions were met in this case:

1. the broadband providers are service providers within the meaning of section 97A;
2. both the operators and users of the target servers are infringing the FAPL's copyright (individual consumers by copying the content in the course of the streaming, and the operators of the servers by communicating the infringing works to the public^[1]);
3. The ISPs' services are used to commit those infringements, because they enable consumers to access the servers and therefore obtain infringing copies; and
4. The ISPs had actual knowledge of the infringements as a result of, amongst other things, pre-action correspondence from the FAPL and also as a result of the ISPs' own monitoring (some of the ISPs, such as Sky and BT, also broadcast Premier League matches as FAPL licensees and therefore have their own interest in preventing UK consumers accessing infringing content).

The Court therefore held that it has jurisdiction to make an order which blocks access to servers.

In what circumstances will the Court exercise its jurisdiction?

In deciding whether to exercise its discretion, the Court went on to consider proportionality. The factors to be considered will be familiar to many readers. These are: the comparative importance of the FAPL's rights and the ISP's freedom to carry on business; the effectiveness of the order which is sought (i.e. the amount that it is likely to reduce infringement of the FAPL's works); the risk that consumers will find substitutes to the servers which are blocked; the availability (or otherwise) of effective alternatives to the measures which are sought by the FAPL; and the cost and complexity of implementing the block.

The FAPL's application was not opposed. In fact, the majority of the ISPs actively supported the application made against them. Arnold J was, perhaps unsurprisingly, comfortable that the order sought was proportionate and that it should be made.

How the order works: novel features and flexibility

An interesting feature of this case is the novel features of the order which was granted by the Court. These features go to demonstrate the flexibility which the English courts have at their disposal. By way of example:

- The blocking order is 'live', in that it only has effect at the times when Premier League matches are being broadcast.
- The list of target servers to be blocked can be re-set each week, meaning that new servers can be identified by the FAPL (or the ISPs) and other servers unblocked (unless they are still acting as sources of infringing content).
- The order only applies from 18 March until the end of the current Premier League season in May, at which point its effectiveness will be assessed. The FAPL is then likely to apply for a similar blocking order before next season begins, assuming that this season's order has been effective.

Observers are likely to follow developments in this area with interest, particularly as any future judgment in respect of next season's blocking order is likely to shed light on the effectiveness of this latest tool to tackle unlawful streaming.

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[1] The judgment contains an interesting analysis of communication to the public at paragraphs 32-38, including the first application by the UK courts of the CJEU judgment in *GS Media*.