

# Kluwer Copyright Blog

## Popcorn Time – a website blocking order decision with a slightly different flavour

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Another blocking order in the UK, however, this time there was some complexity about the actual acts of infringement. In *Twentieth Century Fox Film Corporation & Ors v Sky UK Ltd & Ors*, the High Court considered the circumstances in which website blocking orders should be granted against websites facilitating the use of a “sophisticated and user friendly” application known as Popcorn Time, which uses the BitTorrent protocol to obtain infringing film and TV content from one or more host websites. Although the court ultimately granted the order on the basis of joint tortfeasance, on the particular facts of this application the court did not consider that infringing acts of communication to the public (or the authorisation of such acts) had been committed by the operators of the websites which supply the Popcorn Time application, in contrast to previous blocking order cases.

Popcorn Time is an open source application which uses the BitTorrent protocol to enable users to obtain film and TV content. Unlike previous versions of BitTorrent client software which require an entire film to be downloaded before it can be viewed, Popcorn Time uses sequential downloading which enables users to stream content. A user must first download and install the Popcorn Time application from a Popcorn Time application source website (a “PTAS website”). Once downloaded and installed, users do not need to return to the PTAS website in order to access content. The content available using Popcorn Time is constantly updated, in part through maintaining links with a website which acts as a source of update information (a “SUI website”). The target websites in this blocking order application were a combination of PTAS websites, SUI websites and websites which host content accessed by Popcorn Time.

It is well established since the landmark *Newzbin* decisions that the UK Court has jurisdiction to grant a website blocking order under [s.97A Copyright Designs and Patents Act 1988](#) (which implemented Article 8(3) of [Directive 2001/29](#)). In its consideration of this application the court scrutinised the grounds on which the operators of the target websites which supply the Popcorn Time application (the PTAS and SUI websites) were alleged to infringe copyright, namely (1) communication to the public, (2) authorisation of communication to the public and (3) joint tortfeasance.

*Communication to the public*

In previous website blocking order applications, the operators of both BitTorrent sites and streaming websites were held to infringe copyright by communication to the public (“CTP”) even though the infringing copy of the relevant work did not come directly from those websites. This was because the website operators catalogued and indexed connections to the sources of those copies, meaning they intervened in a highly material way to make the copyright works available to a new audience.

A key difference with the Popcorn Time application is that 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 – this information is not provided by the PTAS website from which the Popcorn Time application is downloaded. The judge said the PTAS website did not communicate any copyright work, it only provided the tool- the Popcorn Time application. From the users perspective it was the application that gave access to content, not the websites.

In his judgment Justice Birss commented, “*The operators of the PTAS sites are facilitating the making available of the content by providing [the Popcorn Time application] but that is a different matter*” (emphasis added). He went on to say “*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*”.

The judge was careful not to over stretch the CTP right as he felt Popcorn Time was merely making the application available which in turn is the means to access content. However, in *Svensson* the CJEU said that the act of communication to which Article 3(1) of the InfoSoc Directive refers “*must be construed broadly...in order to ensure...a high level of protection for copyright holders*”. Query whether there is scope to argue that CTP covers those providing the means to access content even if they themselves are not making the content available. Further, given the earlier orders made against websites that were cataloguing and indexing information thus making it more user friendly, it seems possible that Justice Birss could have found the PTAS websites’ mere *facilitation* of the making available of content to the public to constitute an infringing act of CTP.

### *Authorisation*

Under English copyright law, authorising an act restricted by copyright is itself an act of infringement. It was claimed in this case that the operators of both the PTAS and SUI websites authorised infringing CTP by (i) the operators of the websites which hosted the content accessed by Popcorn Time and/or (ii) those who place the infringing content on the host websites.

The court recognised that infringement of copyright is inevitable when Popcorn Time is used. Moreover, the court highlighted that Popcorn Time is not a passive means of accessing infringing content; it regularly updates the index of infringing content presented to users. However, whilst the court recognised these factors, it ultimately declined to find that the PTAS and SUI website operators authorised infringing acts carried out by the host website operators. This was due to a lack of evidence of the existence of any relationship between the relevant website operators. Interestingly, the court identified a potential alternative claim that the PTAS and SUI website operators authorised infringing acts by *users* of Popcorn Time, but the judge’s comments in this regard were *obiter dictum* as this was not a pleaded claim.

### *Joint tortfeasance*

Finally, the judge examined whether or not the operators of the PTAS and SUI websites were infringing copyright in the protected works as joint tortfeasors with the operators of the host websites and/or those who place infringing content on the host websites.

The threshold for liability to arise under joint tortfeasance is not met where there has been mere assistance or facilitation of the primary infringement. Instead, the joint tortfeasor must have induced, incited or persuaded the primary infringer to engage in the infringing act, or pursued a common design or concerted action or agreement on a common action with the primary infringer. The court held in this case that the operators of the PTAS and SUI websites were jointly liable with the operators of the host websites for the infringing communications to end users of Popcorn Time. In doing so, the court recognised that the Popcorn Time application is the key means which procures and induces the user to access the host websites, therefore causing the infringing communications to occur. Moreover, the court considered that the operators of the PTAS and SUI websites have a common design with the operators of the host websites to secure the communication to the public of the protected works.

#### *Observations on the Judgment*

The process of obtaining website blocking orders in the UK has been streamlined in recent years, with applications usually dealt with on paper without the need for the parties to attend a hearing. This was because those applications required consideration of equivalent circumstances to cases which had previously been considered in public hearings, and because the defendant ISPs did not oppose either the proposed order or the decision to deal with the application on paper. However, in this case the Court decided that the application was not suitable to be dealt with on paper due to the new set of facts surrounding the use and operation of Popcorn Time. Therefore, the Court arranged a hearing of its own motion.

Whilst the court ultimately granted the website blocking order on the ground of joint tortfeasance, in contrast to previous cases it declined to find that the operators of the websites supplying the Popcorn Time application infringed copyright by communication to the public or authorising infringement. It is worth noting, however, that the door has been left open for future claimants to claim authorisation of infringing acts by *end users* of a Popcorn Time-like application, as opposed to authorisation of acts by operators of the websites hosting the infringing content.

Those slightly bemused by the extent of blocking injunctions in the UK might be pleased to see the court does not just ‘rubber stamp’ an application for a blocking order and the court does ensure that there is a valid claim to copyright infringement; it is not enough merely to plead that a website has pirated content.

The potential breadth of CTP has been circumscribed in this particular case, however, as new technologies are developed, there are likely to be further cases where the court will need to consider whether providing software that facilitates a user accessing infringing content is itself an act of CTP.

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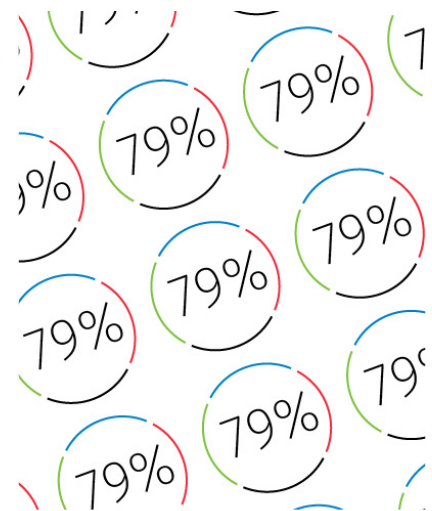
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