



# **Online Copyright Infringement, File Sharing and ISPs: Where Are They Now?**

*Presented by the ITechLaw  
Intellectual Property Committee*



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## **Where Are They Now?**

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- Who should be held liable when copyrighted content is transmitted over the internet?
- Shall service providers („intermediaries“) such as YouTube or other hosting providers of third party online content (audio & video data, documents) be liable for copyright infringement?
  - Recent developments in Europe give cause for discussion

- ISPs Liability is set forth in the Directive 2000/31/EG (Directive on certain legal aspects of electronic commerce in the Internal Market) also known as the „E-Commerce-Directive“
- Relevant Articles: 12, 13, 14 and 15 ECRL
- Main Principle: ISPs shall not be liable under any field of law applicable to their services where the application of strict liability would impair the expansion of E-Commerce in the EU

- ISPs “liability privilege”:
  - When serving “mere conduit” of information (Article 12)
  - Providing “temporary caching” for the sole purpose of making transmission more efficient (Article 13)
  - Hosting content without actual knowledge or awareness of illegal activity + acting expeditiously to remove or disable access to the illegal content (Article 14)
- According to Article 15 ECRL, ISPs covered by Article 12, 13, 14 ECRL
  - shall not be generally obligated to monitor information they transmit
  - or actively seek facts or circumstances indicating illegal activity

- The conditions in Article 14 (1) ECRL are the basis for the development of „notice and take down“ procedures by the copyright owners
- ECRL does not require legislative actions concerning implementations of „notice and take down“ procedures
- EU prefers that copyright owners develop own „notice and take down“ procedures together with ISPs

## Belgium: SABAM v. ISP Scarlet (1)

- 2004: Sabam (Belgian authors' collecting agency) sued Scarlet (internet access provider, formerly known as Tiscali) for alleged copyright infringements committed by Scarlet customers in P2P filesharing networks
  - The court rejected that the requested technical measures impose a duty prohibited by Article 15
  - Accordingly the filtering and blocking measures regarding specific content shall not constitute a “general obligation to monitor”
- Problem: Conflict with Article 12 ECRL, which grants immunity to ISPs when they serve as “mere conduits”

## Belgium: SABAM v. ISP Scarlet (2)

- 2007: The Brussels Court of First Instance ruled that Scarlet should implement a filtering system to detect and filter any infringing files out of the P2P traffic of its customers
- 2010: The Brussels Court of Appeal referred the case to the European Court of Justice for a preliminary ruling asking:
  - whether a national court in the EU has the power to mandate an ISP to filter content on its network in order to identify copyright infringements and
  - whether a national court also has the power obligate an ISP to block infringing content in transit

## Belgium: SABAM v. ISP Scarlet (3)

- Now: The European Court of Justice (ECJ) will have to clarify if Article 15 of the ECRL prohibits an injunction compelling an ISP to filter P2P traffic because Tier 1 ISPs are generally privileged (no general obligation to monitor)
- Advocate General *Cruz Villalón*, advisor to the ECJ, stated (Press Release No. 37/11, 14<sup>th</sup> April 2011):
  - “A measure (as a new obligation) ordering an ISP to install a system for filtering and blocking electronic communications in order to protect intellectual property rights in principle infringes fundamental rights” and
  - “the installation of that filtering and blocking system is a restriction on the right to respect for the privacy of communications and the right to protection of personal data, both of which are rights protected under the Charter of Fundamental Rights. By the same token, the deployment of such a system would restrict freedom of information, which is also protected by the Charter of Fundamental Rights.”

# Germany: GEMA v. RapidShare

- 2009: The Hamburg Regional Court granted an injunction (cease and desist order) in preliminary proceedings in favor of GEMA against RapidShare (one of the most visited file sharing websites located in Switzerland)
  - RapidShare was found responsible not for direct copyright infringement, but as a "disquieter" ("Störer") under the principle of "Breach of Duty of Care" ("Störerhaftung")
    - In Germany a "disquieter" is made liable limited to c&d and removal for an infringement of a protected legal interest because of his willingly and adequately causally contribution (no culpability) if he has he legal possibility to have prevented the predicated offence and
    - the liability privilege according to the German Telemedia Act (TMG), on the basis of the ECRL only applies to liability for damages and criminal liability. It does not apply to claims for injunctive relief!
  - RapidShare was held liable to c&d because it did not effectively prevent internet users from sharing copyrighted works of GEMA even after being informed
  - The Court stated, that the sole use of a filter software (MD5) is insufficient because it did not effectively prevent users sharing copyrighted files; RapidShare had to take more "reasonable" action

- 2010: GEMA requested the Regional Court of Hamburg to issue an injunction against YouTube
- Court found
  - that there is a strong indication GEMA would be entitled to request a c&d order to force YouTube to remove the unlicensed videos and
  - that YouTube did not take the necessary filtering measures to prevent copyright infringements

## Germany: Peterson v. YouTube

- 2010: Only a few days later the Regional Court of Hamburg granted the composer and producer of Sarah Brightman, Mr. Frank Peterson, a preliminary injunction against YouTube
  - The court did not rely on the unique German „disquietor“ principle and treated the uploaded end-user content as own content of YouTube!
  - Therefore YouTube was held directly liable as infringer which clearly violates the privilege in Article 15 of the ECRL

## Conclusion

- Lobbying of copyright owners seem to force policymakers and courts to apply a strict standard of ISP liability; possibly more strictly than initially envisioned in the ECRL
- Possible reason: better filtering and blocking technologies available
- Recent decisions in Belgium and Germany have imposed obligations to ISPs to adopt technical measures to prevent filesharing of copyright protected content
- Preview: Abandonment of the ECRL principles?

# **Online Copyright Infringement, File Sharing and ISPs - where are we now?**

## **- current issues in the UK**

Susan Barty  
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# Online Copyright Infringement, File Sharing and ISPs - Where Are We Now?

- UK Perspective
- UK Digital Economy Act 2010
- Judicial Review by ISPS BT and Talk Talk
- Twentieth Century Fox and others v Newzbin
- Twentieth Century Fox and others v British Telecommunications plc

# The UK Digital Economy Act - measures to prevent online copyright infringement

- ‘Initial Obligations’
  - Notification Obligation
  - Monitoring Obligation
- Technical Measures
  - Injunctions preventing access to locations on the Internet

# Initial Obligations

- Provide a new mechanism to require ISPs to notify subscribers of alleged copyright infringement
- Notification Obligation
  - ISPs to send letters to those whose accounts are associated with copyright infringement
  - In response to Copyright Infringement Reports (CIRs)
- Monitoring Obligation
  - ISPs to provide anonymised “copyright infringement lists” to a copyright owner
  - Lists can be used to apply for a court order

# Technical Measures

- Obligations to limit internet access
- Cannot be brought into effect until 12 months after the initial obligations code is brought into force
- Regulator's view to be taken into account
- Secondary legislation to specify criteria and steps
- Potentially very broad – includes disconnection
- Likely to be implemented as an escalation of initial obligations

# Injunctions Preventing Access to Locations on the Internet

- Power to draft new regulations granted
- Would allow rights holders to request court orders requiring ISPs to block access to certain websites
- Broad - court injunctions in respect of **any location on the internet** from/at which a **substantial amount of material** has been, is being, or is likely to be, **obtained / made available** in infringement of copyright
- Or, a location which **facilitates access** to such a location
- Secondary legislation required

## Initial Obligations - Draft Code

- Participation by Copyright Owners
- “Magnificent Seven” ISPs
- Copyright Infringement Reports
- Quality Assurance
- Copyright Infringement Lists
- Subscriber Appeals
- Costs dealt with by separate consultation and secondary legislation

# Initial Obligations – Draft Code – Participation

- Participation by Copyright Owners
  - “Qualifying Copyright Owners”
  - Provide estimates of Copyright Infringement Reports in advance
  - Pay notification costs to ISPs and Ofcom in advance
- Internet Service Providers
  - Fixed Network Providers only (not mobile ISPs)
  - Those which provide internet access service to >400k subscribers
  - Seven meet this criterion: BT, O2, Orange, Post Office, Sky, TalkTalk and Virgin Media
  - Regulator regularly to review criteria

# Initial Obligations – Draft Code – Identifying Infringers

- Copyright Infringement Reports
  - Must be sent within 10 days of collecting evidence
  - Details of the protected work
  - Name and address of copyright owner
  - Description of the infringement, IP address, date and time etc.

# Initial Obligations – Draft Code – Quality Assurance

- Copyright Owners to provide regulator with Quality Assurance Reports
  - Details of processes and systems used
  - Steps taken to ensure integrity and accuracy of evidence
  - Self-certification and statement of compliance with data protection laws
  - Regulator may give directions or require audit of those systems
- ISPs to self-certify re matching IP addresses to accounts
- Allowed to reject incomplete/unworkable CIRs

# Initial Obligations – Draft Code – Notifications and CILs

- Notification Process
  - First CIR triggers first notification
  - Second Notification upon first CIR received after one month
  - Third and Final Notification upon first CIR received after another month
- Copyright Infringement Lists
  - Copyright Owners will not be able to make more than one request for a CIL to each ISP within a three month period.
  - ISPs have five days to comply

## Initial Obligations – Draft Code – Subscriber Appeals

- Grounds for Appeal to an independent Appeals body
  - Act complained of is not an infringement of copyright
  - CIR does not relate to subscriber's IP address
  - Not done by subscriber AND reasonable steps to prevent other persons infringing copyright by means of their connection
  - Breach of the Code
- No simple 'it wasn't me' defence

## Initial Obligations – Cost Sharing

- Consultation – Government Response - September 2010
- Notification costs for ISPs and regulator to be split 75:25
  - On the basis of the costs of an ISP which is an “efficient operator” as verified by regulator
  - Costs include costs of subscriber appeals
- No fee for subscribers to appeal
  - Government retains power to introduce fee

# Judicial Review

- ISPs BT and TalkTalk challenged the legality of the Online Infringement of Copyright provisions of the Act
- Judgment Handed Down on 20 April 2011
- Online infringement of copyright provisions found to be legal and proportionate
- Costs sharing provisions unlawful and in breach of the EU Authorisation Directive – will need to be rewritten
- Appeal likely

Obligation to notify European Commission	X
Digital Economy Act is not compatible with the Ecommerce Directive	X
Digital Economy Act is in breach of Data Protection Legislation	X
Digital Economy Act is in breach of the EU Authorisation Directive	X
“qualifying costs” amounted to unlawful administrative costs	√
Digital Economy Act fails the requirement of proportionality	X

# Twentieth Century Fox and others v Newzbin

- Newzbin – Internet Usenet indexer
- Turnover - >£1million in 2009; 700,000 members
- Site focused on piracy?
- OR “content agnostic” search engine
- Judge no doubt that Newzbin knew “*vast majority of films ...are commercial and so very likely to be protected by copyright*”
- Newzbin liable for copyright infringement

# Twentieth Century Fox and others v British Telecommunications plc

- Impact of Newzbin case on ISPs
- Newzbin2 website set up – servers in Sweden
- Claim against BT as largest ISP in UK
- BT put on notice – actual knowledge its service being used to infringe copyright
- BT has technology available to prevent access to site

# Twentieth Century Fox and others v British Telecommunications plc

- BT's defence – no admissions as to Newzbin
- Other apparently legitimate content on website
- Denial that all users infringe copyright
- Users do not use BTs information society service to infringe copyright
- Transmission of data automatic, intermediate and transient
- No knowledge of any identified person infringing copyright

# Twentieth Century Fox and others v British Telecommunications plc

- BT not able to prevent users from accessing website
- Only able to impair access – and easily circumvented
- Not best placed to bring infringing activities to an end
- Not host website – users could simply use other ISPs
  
- Court hearing – June 2011
- Judgment - 28 July 2011...



Online Copyright Infringement, File Sharing and ISPs -  
Where Are They Now?

## Legal Status of Peer-to-Peer Systems Under U.S. Law

*Ilan Barzilay, Robert Milligan, and Joseph Walker*

- The legal status of peer-to-peer file sharing systems is in flux
- High level service providers may escape liability by taking advantage of statutory protections (DMCA)

- Kinds of Infringement
- Legal / Technology Background
- Statutory Protections
- File Sharing and Peer-to-Peer Cases
- Status of Ongoing Cases
- What the Future Holds?
- As Things Stand

- **Direct Infringement – 17 U.S.C. § 106**
  - May not reproduce (copy), distribute copies, make derivative works, display, etc. without owners permission
- **Contributory Infringement**
  - Knowingly induce, cause, or materially contribute to another's infringement
  - Knowledge may be actual or constructive
- **Vicarious Liability for Infringement**
  - Right and ability to control infringers acts
  - Receives a direct financial benefit from infringement

- 1984 – VCRs (contributory)
  - *Sony v. Universal Studios*, 464 U.S. 417 (1984)
- 1996 – Swap Meets (contributory and vicarious)
  - *Fonovisa v. Cherry Auction*, 76 F.3d 259 (9<sup>th</sup> Cir. 1996)

- **Digital Millennium Copyright Act (DMCA)**
  - Various portions, including portions bringing U.S. in line with WIPO treaties, and anti-circumvention provisions
  - Included a safe harbor provision for online service providers (OSPs)
  - Safe harbor protects OSPs from liability due to infringing activity by users
    - No monetary damages against protected OSPs
    - Limited injunctive relief available

- **To Qualify for Safe Harbor:**
  - No actual knowledge of infringing activity
  - No knowledge of facts or circumstances from which infringing activity is apparent
  - Must quickly remove or disable infringing content when discovered
  - If OSP has right and ability to control infringing activity
    - Must not receive financial benefit directly attributable to the infringing activity

- **To Qualify for Safe Harbor:**
  - Must register an agent with the Copyright Office
  - Must adopt reasonable “repeat infringer” termination policy
  - Must accommodate and not interfere with “standard technical measures”
  - Must have a takedown procedure

- **Peer-to-peer file sharing networks:**
  - End users share, transmit, copy, and/or distribute files over the network
  - Owners of peer-to-peer websites and software are (generally) not directly involved in the above activity
- **Networks (generally) not liable for direct infringement**
- **Question comes down to contributory infringement / DMCA protections**

- *A&M Records v. Napster*, 239 F.3d 1004 (9<sup>th</sup> Cir. 2001)
  - Allowed user-to-user internet transfer of audio files
  - No protection under DMCA
  - No Fair Use
  - Likely contributory infringement
  - Likely vicarious liability
  - Injunction ordered, shutting down Napster

- *In re Aimster*, 334 F.3d 643 (7<sup>th</sup> Cir. 2003)
  - Allowed user-to-user internet transfer of audio files
  - Files encrypted through software furnished by Aimster
  - Willful blindness = knowledge
  - No protection under DMCA
  - Likely contributory infringement
  - Injunction ordered, shutting down Aimster

- *MGM v. Grokster*, 545 U.S. 913 (2005)
  - Allowed user-to-user internet transfer of files
  - Grokster indexed files on user computers and stored indices
  - Knowledge and encouragement of infringement
  - No protection under DMCA
  - Case against Grokster allowed to proceed

- *UMG v. Veoh*, 665 F. Supp. 2d 1099 (C.D. Cal. 2009)
  - Good review of issues facing hosting companies
  - Veoh is a video hosting site; performed takedowns of specifically noticed copyright material but couldn't keep up
  - UMG argued Veoh did not qualify for protection under the DMCA because:
    - Veoh had knowledge of infringing videos; and
    - Did not expeditiously remove such content

- *UMG v. Veoh*, 665 F. Supp. 2d 1099 (C.D. Cal. 2009)
  - Veoh met the requirements of the DMCA safe harbor and case was dismissed. The court reasoned that:
    - A general awareness of infringement is not enough
    - There is no requirement in the DMCA that a service provider implement filtering technology or search its system for infringing content
    - The DMCA does not place the burden of ferreting out infringement on the service provider
  - Appeal to 9<sup>th</sup> Circuit pending (argued May 9, 2011)
    - Is general knowledge of infringement enough for liability?
    - Does filtering provide the right and ability to control user content?

- *Viacom v. YouTube*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010)
  - YouTube is a video hosting site
  - YouTube had knowledge of general infringing activity, but performed takedowns of content when specifically notified by rights holders
  - YouTube met the requirements of the DMCA safe harbor and case was dismissed
  - Appeal to 2<sup>nd</sup> Circuit pending (argued May 9, 2011)
    - General knowledge / willful blindness
    - Right and ability to control
    - Does safe harbor protect inducements of infringement?

- Liability of web hosting / payment services:
  - *Perfect 10 v. CCBill*, 488 F.3d 1102 (9<sup>th</sup> Cir. 2007)
- Liability of search engines for image thumbnails:
  - *Perfect 10 v. Amazon & Google*, 487 F.3d 701 (9<sup>th</sup> Cir. 2007)
- Liability regarding policing repeated postings of same work:
  - *Wolk v. Kodak*, 2011 WL 940056, 10-cv-4135-RWS (S.D.N.Y. 2011)

- Service providers that approach “willful blindness” to specific infringement are at risk
- Pending cases may alter rule that general knowledge of infringement is not enough
- Right and ability to control being tested
- Supreme Court may weigh in

- DMCA safe harbor proving valuable
- Important to meet criteria to make use of safe harbor
- Burden of policing falls presently on copyright holders



**Questions?**