

## High Court orders ISPs to block access to file-sharing website

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### Briefing note

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His Honour Mr Justice Arnold has ruled in favour of a number of British record companies and ordered the UK's six main Internet Service Providers (ISPs) to block access to the file-sharing website called Pirate Bay.

### The Claim

All nine claimants in the action were record companies, who owned the copyright in a large number of sound recordings. Proceedings were brought against six of the country's main ISPs for an injunction under s.97A of the Copyright, Designs and Patents Act 1988 (the "CDPA"), which provides that the High Court has 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. The claimants sought an order requiring the ISPs to block or otherwise impede access to the Pirate Bay website.

### Infringements by Pirate Bay users and operators

As a preliminary issue, Arnold J found in February that both the users and operators of the Pirate Bay website (none of whom were party to the proceedings) infringed copyright owned by the claimants.

Users were found to be copying the copyright works in breach of s.17 of the CDPA. They were also found to be in breach of s.20 CDPA, which prohibits communication of the work to the public. Arnold J said that it was unclear whether communication to the public occurred when users uploaded or downloaded music, but in this instance, it was not necessary to consider that question as there was evidence that Pirate Bay users both uploaded and downloaded music.

Arnold J found that the operators of Pirate Bay had a clear objective and intention to infringe copyright and had the means and control over the website in order to be able to prevent infringement, but chose not to. Their actions went far beyond enabling and assisting. Their conduct amounted to authorisation of its users copyright infringement and communication to the public contrary to s.16(2) of the CDPA. The operators of the Pirate Bay website were also held to be jointly liable for the infringements committed by its users.

### Proportionality of the orders made

In making orders against the defendants, Arnold J was obliged to consider the proportionality of remedies for the infringement of intellectual property rights (under Article 3(2) of the European Parliament and Council Directive 2004/48/EC).

In this instance, following Arnold J's decision on infringement, the terms of the orders had been negotiated and agreed between the claimants and the defendants, all of whom were professionally represented, and so it was assumed by the Court that the orders were proportionate between the parties.

Nonetheless, Arnold J noted that it was also necessary for the Court to consider if the orders were proportional as between the record companies and the users of the ISP's

services. He held that they were proportionate, on similar grounds to those in the earlier case of *20C Fox v BT [2011] EWHC 1981 (Ch)* (concerning the blocking of the Newzbin file sharing website), in which Arnold J found that the rights of Claimant under Article 1 of the First Protocol to the European Convention on Human Rights (which provides that every person is entitled to the peaceful enjoyment of his possessions) outweighed the individual user's right to freedom on expression under Article 10 ECHR.

### Technological measures

The terms of the orders took into account the technological measures available to the ISPs. In *20C Fox v BT* the orders required the use of BT's "cleanfeed" system (developed to block access to child pornography) to prevent access to the Newzbin website. It was pointed out, however, in a report submitted to the Court in these proceedings that this system could be circumvented. As a result, the orders agreed required the ISPs to use IP address blocking to prevent access to the Pirate Bay website.

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#### More information

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