



Neutral Citation Number: [2013] EWHC 379 (Ch)

Case Nos: HC12F4957, HC12F4958, HC12F4959

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 February 2013

Before :

THE HON MR JUSTICE ARNOLD

Between :

- (1) EMI RECORDS LIMITED
(2) INFECTIOUS LIMITED
(3) LIBERATION MUSIC PTY LIMITED
(4) POLYDOR LIMITED
(5) SIMCO LIMITED
(6) SONY MUSIC ENTERTAINMENT UK LIMITED
(7) UNIVERSAL MUSIC OPERATIONS LIMITED
(8) VIRGIN RECORDS LIMITED
(9) WARNER MUSIC UK LIMITED
(10) WEA INTERNATIONAL INC

Claimants

- and -

- (1) BRITISH SKY BROADCASTING LIMITED
(2) BRITISH TELECOMMUNICATIONS PLC
(3) EVERYTHING EVERYWHERE LIMITED
(4) TALKTALK TELECOM GROUP PLC
(5) TELEFÓNICA UK LIMITED
(6) VIRGIN MEDIA LIMITED

Defendants

Ian Mill QC, Edmund Cullen QC, Tom Richards and Shane Sibbel (instructed by Forbes Anderson Free) for the Claimants

The Defendants did not appear and were not represented

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON MR JUSTICE ARNOLD

MR JUSTICE ARNOLD :

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Introduction

1. The Claimants are record companies claiming on their own behalf and in a representative capacity on behalf of the other members of BPI (British Recorded Music Industry) Ltd ("BPI") and Phonographic Performance Ltd ("PPL"). The Defendants are the six main retail internet service providers ("ISPs") in the United Kingdom. Between them they have a fixed line market share of some 94% of UK internet users. By this claim the Claimants seek an injunction against the Defendants pursuant to section 97A of the Copyright, Designs and Patents Act 1988 ("the 1988 Act"), which implements Article 8(3) of European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ("the Information Society Directive"), requiring the Defendants to take measures to block or at least impede access by their customers to three peer-to-peer ("P2P") file-sharing websites called KAT (claim

HC12F4957), H33T (claim HC12F4958) and Fenopy (claim HC12F4959) (collectively “the Websites”).

2. Although the Claimants are formally the only applicants, the application is supported by the following organisations representing other groups of rightsholders, a representative of each of which has made a witness statement in support of the application:
 - i) The MCPS-PRS Alliance Ltd trading as PRS for Music which is the operating company for two collecting societies representing composers, writers and publishers of musical works and associated lyrics, namely Mechanical-Copyright Protection Society Ltd and Performing Right Society Ltd. MCPS has over 19,000 writer members and over 6,300 publisher members, while PRS has nearly 80,000 writer members and about 4,500 publisher members. In addition to acting for their members, MCPS and PRS act on behalf of similar organisations around the world under bilateral agreements. They are able to license the vast majority of the world’s repertoire of musical compositions for the UK.
 - ii) The Motion Picture Association, which is the international arm of the Motion Picture Association of America, Inc, a trade association that represents the major Hollywood film studios.
 - iii) Producers Alliance for Cinema and Television, a trade association which represents the commercial interests of independent feature film, television, digital and animated media companies in the UK.
 - iv) The Association for UK Interactive Entertainment, which represents the interests of almost all major companies involved in the development and publication of video games in the UK.
 - v) The Publishers’ Association Ltd, which represents the interests of UK book publishers.
3. In *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011] EWHC 1981 (Ch), [2012] Bus LR 1471 (“*20C Fox v BT*”) I held that the Court had jurisdiction, and that it was appropriate to exercise my discretion, to make a blocking order against the Second Defendant (“BT”) with respect to a website called Newzbin2. In *Twentieth Century Fox Film Corp v British Telecommunications plc (No 2)* [2011] EWHC 2714 (Ch), [2012] Bus LR 1525 (“*20C Fox v BT (No 2)*”) I determined the terms of that order. Subsequently Vos J and I made similar orders against the other Defendants.
4. As I explained in *20C Fox v BT* at [2], that application was a sequel to a successful claim for copyright infringement brought by the claimants in that case against Newzbin Ltd, which had operated an almost identical website to Newzbin2 (“Newzbin1”). Newzbin Ltd was found by Kitchin J (as he then was) to have infringed the claimants’ copyrights on a large scale: *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EWHC 608 (Ch), [2010] FSR 21 (“*20C Fox v Newzbin*”). He granted an injunction against Newzbin Ltd to restrain further infringements of the claimants’ copyrights. Subsequently the Newzbin1 website ceased operation. Shortly

afterwards, however, the Newzbin2 website commenced operation at the same location. As was explained in more detail in *20C Fox v BT* at [48]-[55], Newzbin2 operated in essentially the same manner as Newzbin1. It followed that Kitchin J's findings of infringement of copyright in respect of Newzbin1 were equally applicable to Newzbin2: see *20C Fox v BT* at [113].

5. Subsequently representatives of BPI and PPL applied for a website-blocking order in respect of a website called The Pirate Bay ("TPB"). The claimants had not brought proceedings for copyright infringement against the operators of TPB in this jurisdiction, although both civil and criminal proceedings had been brought in a number of other jurisdictions. Accordingly, the claimants and the Defendants agreed to an order for the trial of preliminary issues as to whether, on the evidence before the Court, (i) users and (ii) the operators of TPB infringed the claimants' copyrights in the UK. The remaining issues raised by the claim were left to be dealt with at a second hearing if the claimants prevailed on either or both of the preliminary issues. Understandably, the Defendants did not choose to appear or be represented at the trial of the preliminary issues; but they made it clear that their position was that it was not for the Defendants to decide whether or not users or the operators of TPB infringed the claimants' rights, but for the Court to do so.
6. In *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch), [2012] 3 CMLR 14 ("*Dramatico v Sky*") I held that both users and the operators of TPB did infringe the copyrights of the claimants (and those they represented) in the UK. Following that judgment, five of the Defendants indicated to the claimants that they did not oppose the making of orders under section 97A of the 1988 Act in terms which had been agreed between the parties. I acceded to the claimants' application that I should make those orders for the reasons I gave in *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd (No 2)* [2012] EWHC 1152 (Ch), [2012] 3 CMLR 15 ("*Dramatico v Sky (No 2)*").
7. In that judgment I held that the Court had jurisdiction to make the orders sought and that it was appropriate to exercise my discretion to do so. As I recorded at [9]-[11], the claimants rightly accepted that, even though the five Defendants did not oppose the making of the orders, the onus remained on the claimants to satisfy the Court that it was appropriate to make such orders, and in particular that the orders were proportionate. Where the terms of such orders have been negotiated between the parties, and those parties are professionally represented (or at least have access to professional advice), then it may be assumed that the orders are proportionate as between the parties; but it does not necessarily follow that they are proportionate as between the claimants and users of the Defendants' services. Accordingly, it is the duty of the Court not simply to rubber stamp the terms agreed by the parties, but independently to consider the proportionality of the proposed orders from the perspective of individuals affected by them who are not before the Court.
8. Subsequently I also made an order against the remaining Defendant in respect of TPB, again in terms agreed between the parties.
9. With the benefit of the experience gained on the previous applications, the Claimants have adopted a slightly different approach to the present applications. The applications have been made by CPR Part 8 Claim Forms issued on 20 December 2012 and application notices issued on the same date. The application notices were

listed for directions only on 19 February 2012. The Claimants adopted that approach for two reasons. First, in the hope that it would be possible in the intervening period for the Claimants to agree the terms of the orders sought with the Defendants. That hope has been realised: each of the Defendants has agreed the terms of the orders sought and none of the Defendants opposes the grant of such orders provided that the Court is satisfied that (i) it has jurisdiction to make such orders and (ii) it is appropriate to do so. Secondly, in order to seek directions from the Court as to whether or not the Claimants should be required to try to serve the applications on the operators of the Websites.

10. I have considered the applications on paper. I have already informed the Claimants that I did not require them to try to serve the applications on the operators of the Websites. My reasons for so directing are the same as those I gave with regard to the operators of TPB in *Dramatico v Sky* at [10]-[13]. So far as the third reason is concerned, the evidence on these applications satisfies me that it would be equally impracticable and pointless to try to serve the operators of the Websites.
11. It has been drawn to my attention that the Sixth Defendant has questioned the Claimants' use of the Part 8 procedure. I consider that, at it turns out, the Claimants' decision to use that procedure has been vindicated.

The Claimants' rights

12. I described the Claimants in *Dramatico v Sky* at [16]. For the purposes of these proceedings, the Claimants rely in particular upon the copyrights which the relevant Claimant owns in each of a number of sample recordings. It is not necessary to set all these out. The recordings relied on are not the same for each application. (As a result the Seventh Claimant in H33T and Fenopy is not a Claimant in KAT.) The Claimants' evidence is that BPI members have not granted the Websites any licences.

Bittorrent

13. I set out a description of Bittorrent given by the Claimants' expert Michael Walsh in *Dramatico v Sky* at [19]-[20]. Mr Walsh has given the same evidence in these applications.

The Websites

14. The Websites operate as Bittorrent indexing websites, providing an organised directory of content which users can browse and from which they can select the sound recordings (or other content) of their choice. Having selected the content, users download the relevant torrent file for that content from the Websites. The Websites also offer so-called magnet links, which are a different means of using the relevant torrent file to obtain the content (see *Dramatico v Sky* at [24]). The Bittorrent software on the users' computers will then use the information in the torrent file to download the "pieces" of the content files from the "swarm" in the manner described by Mr Walsh.
15. Each of the Websites operates as a substantial profit-making business. Their popularity and the scale of their use of the Claimants' sound recordings (and other copyright works) can be seen from the following.

KAT

16. KAT is a well-known website which has recently been identified in a memorandum issued by the Executive Office of the President of the USA as among the top 135 most visited sites in the world. It has a large base of internet users. The audience monitoring company Comscore recorded 3,741,901 visitors to the website from the UK in June 2012 alone (out of a worldwide total of 40,360,472 visitors that month).
17. The content available on the KAT website is vast in scale. As at 3 July 2012, its index listed 4,267,677 torrent files. In order to provide evidence of the extent to which BPI's members' works are included in that content, the Claimants' expert Dr David Price has undertaken an analysis of its distribution between different categories of content, concluding that 21.05% of torrent files available on the KAT website fell within the music category. Dr Price has then analysed the proportion of this content which is commercially available (and therefore highly likely to be protected by copyright). In the music category, 78.4% of the torrent files related to content which is commercially available. Applying these percentages to the total number of torrents available as at 3 July 2012, this analysis implies that 898,346 music torrents were listed on the KAT website, of which around 704,300 were commercially available. Dr Price also carried out an analysis of the availability via the KAT website of albums on the UK Top 75 Album chart for the week of 5 to 11 November 2012. Dr Price analysed availability each day between 12 and 18 November 2012. The results indicate that on each day of testing, 64 of the Top 75 Albums had at least one link on the KAT website.

H33T

18. Comscore recorded 424,407 visitors to the website from the UK in June 2012 alone (out of a worldwide total of 6,302,936 visitors that month). The content available on the H33T website is extensive. As at 6 July 2012, its index listed 241,477 torrent files. Dr Price's analysis of its distribution between different categories of content indicates that 21.04% of torrent files available on the H33T website fell within the music category. Dr Price has then analysed the proportion of this content which is commercially available (and therefore highly likely to be protected by copyright). In the music category, 97.1% of the torrent files related to content which is commercially available. Applying these percentages to the total number of torrents available as at 6 July 2012, this analysis implies that 50,806 music torrents were listed on the H33T website, of which around 49,330 were commercially available. Dr Price also carried out an analysis of the availability via the H33T website of albums on the UK Top 75 Album chart for the week of 5 to 11 November 2012. Dr Price analysed availability each day between 12 and 18 November 2012. The results indicate that on each day of testing, 57 of the Top 75 Albums had at least one link on the H33T website.

Fenopy

19. Fenopy is, like the other Websites, a well-known and frequently used website amongst internet users. International Federation of the Phonographic Industry ("IFPI") has identified its recent domain registrants as including Gottfrid Swartholm, who is believed to be Gottfrid Swartholm Warg, one of the individuals who was convicted in Sweden for his role in operating TPB. Comscore recorded 481,524

visitors to the website from the UK in June 2012 alone (out of a worldwide total of 6,384,394 visitors that month). The content available on the Fenopy website is vast in scale. As at 6 July 2012, its index listed 5,689,961 torrent files. Dr Price's analysis of its distribution between different categories of content indicates that 25.79% of torrent files available on the Fenopy website fell within the music category. Dr Price has then analysed the proportion of this content which is commercially available (and therefore highly likely to be protected by copyright). In the music category, 72.1% of the torrent files related to content which is commercially available. Applying these figures to the total number of torrents available as at 6 July 2012, this analysis implies that 1,467,440 music torrents were listed on the Fenopy website, of which around 1,058,024 were commercially available. Dr Price also carried out an analysis of the availability via the Fenopy website of albums on the UK Top 75 Album chart for the week of 5 to 11 November 2012. Dr Price analysed availability each day between 12 and 18 November 2012. The results indicate that on each day of testing, 72 of the Top 75 Albums had at least one link on the Fenopy website.

The legal framework

20. I set this out in *Dramatico v Sky* at [30]-[38].

Jurisdictional requirements

21. Section 97A of the 1988 Act empowers the High Court "to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright". In order for this Court to have jurisdiction to make the orders sought by the Claimants, four matters must be established. First, that the Defendants are service providers. Secondly, that users and/or the operators of the Websites infringe copyright. Thirdly, that users and/or the operators of the Websites use the Defendants' services to do that. Fourthly, that the Defendants have actual knowledge of this.

Are the Defendants service providers?

22. As I stated in *Dramatico v Sky (No 2)* at [5], I am in no doubt that the Defendants are service providers within the meaning of regulation 2 of the Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013, and hence within the meaning of section 97A of the 1988 Act. None of the Defendants has suggested otherwise.

Do the users of the Websites infringe?

23. The Claimants contend that UK users of the Websites infringe their copyrights in two ways. First, by copying sound recordings within section 17 of the 1988 Act. Secondly, by communicating sound recordings to the public within section 20 of the 1988 Act. I will consider these in turn.

Copying

24. It is clear that a user of the Websites who selects a torrent file in order to obtain a copy of particular content, and then downloads the associated content files, copies the content contained in those files on his or her computer. It follows that, if the content

files comprise a copyright work, and if the user does not have the licence of the copyright owner, he or she will be infringing copyright.

25. The Claimants have again adduced evidence from Thomas Sehested of MarkMonitor. Mr Sehested's evidence is that between 15 October and 5 December 2012 (i) torrent files for all of the sample recordings were available for download on each of the Websites (subject to minor exceptions in the cases of H33T and Fenopy), (ii) by means of those torrent files, at least 15% of each album comprised in the sample recordings was being shared by a user via an account held with each of the Defendants and (iii) at least 1% of each album had been downloaded by MarkMonitor from each user account. Thus users of the Websites who have accounts with each of the Defendants (and who are therefore in the UK) have been engaged in sharing (and thereby making unlicensed copies of) the sample recordings.
26. More generally, Mr Sehested explains that since 2007 MarkMonitor has monitored the activities of P2P users in the UK for IFPI. For this purpose IFPI has supplied MarkMonitor with sample lists of copyright-protected record label repertoire, selected on the basis of the UK Singles and Album charts. As at 14 December 2012, the list comprised over 18,000 titles. MarkMonitor monitors P2P networks to ascertain the number of instances where titles on the list are made available to, and downloaded by, P2P users via the Defendants. This information has been utilised for the purpose of providing notifications to the Defendants of instances where their services have been used for the illegal downloading of works of BPI members. By 3 December 2012, some 4,299,992 such instances had been identified. The vast majority of these involved the Bittorrent protocol. Since the Websites are all popular torrent sites, it may be inferred that a proportion of these instances involved use of one of the Websites.
27. I therefore conclude that UK users of the Websites who have accounts with the Defendants have infringed, and are continuing to infringe, the Claimants' copyrights by copying the Claimants' sound recordings on a large scale.

Communication to the public

28. I reviewed the law with regard to communication to the public under Article 3(1) of the Information Society Directive and section 20 of the 1988 Act at some length in *Dramatico v Sky* at [45]-[70]. (It should be noted that that the first sentence of [69] contains an extraneous word, "available".) My conclusion was that whether users of TPB communicated the claimants' sound recordings to the public involved two questions: first, did they communicate the recordings by electronic transmission; and secondly, did they communicate the recordings to a new public, that is to say a public which was not taken into account by the rightholders when authorising the distribution of the recordings, applying the test laid down by the Court of Justice of the European Union in Case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [2006] ECR I-11519, Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-0000, [2012] Bus LR 1321 and Joined Cases C-431/09 and C-432/09 *Airfield NV v Belgische Vereniging van Auteurs, Compositien en Uitgevers CVBA (SABAM)* [2011] ECR I-0000, [2012] ECDR 3. With regard to users of TPB who allowed copies of sound recordings on their computers to be uploaded to the "swarm", I answered both those questions in the affirmative.

29. Since then, there have been two further decisions of the CJEU which are of relevance.
30. In Case C-135/10 *Società Consortile Fonografici v Del Corso* [2012] ECR I-0000, [2012] Bus LR 1870 the Corte d'appello di Torino referred questions to the CJEU as to whether a dentist playing background music in his private dental practice was thereby communicating sound recordings to the public or making them available to the public for the purposes of Article 3(2)(b) of the Information Society Directive. The Court of Justice considered that Article 3(2)(b) was not applicable to the situation under consideration, but that the questions raised an issue of interpretation of Article 8(2) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending rights and on certain rights related to copyright in the field of intellectual property ("the Related Rights Directive"): see [57]-[64]. The Court held that the concept of communication to the public in that context was not necessarily the same as under Article 3(1) of the Information Society Directive: see [74]-[79].
31. Nevertheless, the Court recapitulated a number of criteria which it had identified in the context of Article 3(1) of the Information Society Directive as follows:
 - “82. First, the Court has already stressed the indispensable role of the user. Thus, the Court has held that the operator of a hotel or public house makes a communication to the public within the meaning of Article 3(1) of Directive 2001/29 when it intervenes, in full knowledge of the consequences of its action, to give access to a broadcast containing the protected work to its customers. Without its intervention the customers cannot enjoy the works broadcast, even though they are physically within the broadcast’s catchment area (see, to that effect, *SGAE*, paragraph 42, and Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-0000, paragraph 195).
 83. Second, the Court has already identified certain aspects of the concept of public.
 84. In that regard, the Court has held that the term ‘public’ within the meaning of Article 3(1) of Directive 2001/29 refers to an indeterminate number of potential listeners, and, in addition, implies a fairly large number of persons (see, to that effect, Case C-89/04 *Mediakabel* [2005] ECR I-4891, paragraph 30; Case C-192/04 *Lagardère Active Broadcast* [2005] ECR I-7199, paragraph 31, and *SGAE*, paragraphs 37 and 38).
 85. As regards, to begin with, the ‘indeterminate’ nature of the public, the Court has observed that, according to the definition of the concept of ‘communication to the public’ given by the WIPO glossary, which, while not legally binding, none the less sheds light on the interpretation of the concept of public, it means ‘making a work ... perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group’.

86. Next, as regards, the criterion of ‘a fairly large number of people’, this is intended to indicate that the concept of public encompasses a certain *de minimis* threshold, which excludes from the concept groups of persons which are too small, or insignificant.
87. In order to determine that number, the Court took account of the cumulative effects of making works available to potential audiences (*SGAE*, paragraph 39). In that connection, not only is it relevant to know how many persons have access to the same work at the same time but it is also necessary to know how many of them have access to it in succession.
88. Third, in paragraph 204 of the judgment in *Football Association Premier League and Others*, the Court held that it is not irrelevant that a ‘communication’ within the meaning of Article 3(1) of Directive 2001/29 is of a profit-making nature.
- ...
90. More specifically, the Court has held that the action by a hotel operator by which it gives access to a broadcast work to its customers must be considered an additional service performed with the aim of obtaining some benefit, since the provision of that service has an influence on the hotel’s standing and, therefore, on the price of rooms. Similarly, the Court has held that the transmission of broadcast works by the operator of a public house is made with the intention that it should, and is likely to, have an effect upon the number of people going to that establishment and, ultimately, on its financial results (see, to that effect, *SGAE*, paragraph 44, and *Football Association Premier League and Others*, paragraph 205).
91. It is thus understood that the public which is the subject of the communication is both targeted by the user and receptive, in one way or another, to that communication, and not merely ‘caught’ by chance.”
32. Applying these criteria, the Court went on to hold that the broadcasting of sound recordings within private dental practices did not amount to communication to the public for the purposes of Article 8(2) of the Related Rights Directive. The reasons for this were that the patients constituted a determinate circle of potential listeners, who only heard the recordings one at a time; that the patients attended for the purposes of dental treatment and had no choice over the recordings they listened to; and that the broadcast was not of a profit-making nature: see [92]-[102].
33. Case C-173/11 *Football Dataco Ltd v Sportradar GmbH* [2012] ECR I-0000, [2013] FSR 4 concerned the transfer of the contents of a database from a server in member state A to a user in member state B. The questions referred to the CJEU were whether, for the purposes of Article 7 of European Parliament and Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases (“the Database Directive”), the

sending of the data was an act of extraction or re-utilisation of the contents of the database, and if so whether the act occurred in member state A or in member state B or in both. The relevance of this question to Article 3(1) of the Information Society Directive (and hence section 20 of the 1988 Act) is that “re-utilisation” under Article 7(2)(b) of the Database Directive includes “making available to the public ... by online or other transmission”, wording which is similar to that used in Article 3(1) of the Information Society Directive.

34. The Court of Justice ruled that Article 7 of the Database Directive was to be interpreted as meaning that:

“the sending by one person, by means of a web server located in Member State A, of data previously uploaded by that person from a database protected by the *sui generis* right under that directive to the computer of another person located in Member State B, at that person’s request, for the purpose of storage in that computer’s memory and display on its screen, constitutes an act of ‘re-utilisation’ of the data by the person sending it. That act takes place, at least, in Member State B, where there is evidence from which it may be concluded that the act discloses an intention on the part of the person performing the act to target members of the public in Member State B, which is for the national court to assess.”

35. The Court did not in terms address the question of whether the act of re-utilisation also occurs in member state A (presumably because this was not strictly necessary for the purposes of the instant case). It did, however, adopt at [34] the analysis of Advocate General Cruz-Villalón in his Opinion, which was to the effect that re-utilisation involves a series of acts which are committed in both member state A and member state B. It then went on to introduce the caveat that, so far as member state B is concerned, members of the public in that state must be targeted – the mere fact that the server is accessible from that state is not enough. Thus the Court appears to have accepted that an act of re-utilisation is also committed in member state A.
36. This reading of the judgment is supported by a passage in which the Court rejected Sportradar’s argument that the act of re-utilisation occurs *exclusively* in member state A: see [44]-[46]. The Court did not reject the argument on the basis that there was no act of re-utilisation in member state A, but rather for the reasons that (i) because servers can be difficult to locate, this would render enforcement of intellectual property rights more difficult and (ii) the objective of the protection would be compromised if a person outside member state B (and perhaps outside the EU entirely) could target its citizens without being subject to its national laws. Those are reasons for treating the location of re-utilisation as including member state B. They are not reasons to exclude member state A from being a location of such activity.
37. Furthermore, this reading would be consistent with the natural meaning of “making available”. It would be odd if this did not include the place of origin.
38. The Claimants submit that, in the light of this decision, the answer to the question I identified in *Dramatico v Sky* at [67], namely whether the act of communication to the public for the purposes of Article 3(1) of the Information Society Directive occurs

where the communication originates or where it is received or both, is that the act may occur both where the communication originates and where it is received. Where a communication to the public which originates outside the UK is received inside the UK, the act will be treated as occurring within the UK if the communication is targeted at the public in the UK. I accept that submission.

39. Turning to the present applications, the first question is whether the users of the Websites who are uploaders communicate the Claimants' sound recordings to the public. In my judgment they do, since they make the recordings available by electronic transmission in such a way that members of the public may access the recordings from a place and at a time individually chosen by those members of the public. They do this by means of the Websites.
40. The second question is whether such users communicate the recordings to a new public applying the criteria identified in *SCF v Del Corso*. In my judgment they do. Such users intervene, in full knowledge of the consequences of their actions, to give others access to the Claimants' copyright works. The recordings are made available to all other users of the Websites, a large and indeterminate class of people, without having to purchase them from authorised sources. Although uploaders may not directly make money out of uploading, they hope that others will reciprocate, enabling them to download other recordings without payment in their turn. Thus uploaders benefit financially from their activity, albeit indirectly.
41. The third question is whether the act of communication to the public occurs in the UK. The Claimants contend that this occurs in the UK in two situations: (i) where the person making the work available (the uploader) is located in the UK; and (ii) where the recipient of the work (the downloader) is located in the UK. For reasons given in paragraphs 35-37 above, I agree that the act of communication to the public occurs in the UK in situation (i). In my view it is rather more doubtful that the act of communication to the public occurs in situation (ii), since it is not clear to me that the act of communication by the uploaders is targeted at members of the public in the UK. It is not necessary for me to reach a conclusion on this point, however.

Conclusion

42. Accordingly I conclude that users of the Websites infringe the Claimants' copyrights both by copying and by communication to the public.

Do the operators of the Websites infringe?

43. The Claimants contend that the operators of the Websites are liable for infringement of their copyrights on three bases. First, on the basis that the operators have communicated the Claimants' sound recordings to the public. Secondly, on the basis that the operators have committed the tort of authorising infringements by UK users. Thirdly, on the basis that the operators are jointly liable for infringements by UK users (i.e. liable as accessories).

Communication to the public

44. This cause of action was not pursued by the claimants in *Dramatico v Sky* because at that time the CJEU had not yet given judgment in *Football Dataco v Sportradar*. On these applications it is pursued.
45. The first question is whether the operators of the Websites communicate the Claimants' sound recordings to the public by electronic transmission. In *20C Fox v Newzbin* Kitchin J held at [113]-[125] that the operator of the Newzbin1 website had communicated the claimants' copyright films to the public, since the service provided by the defendant was not purely passive. On the contrary, the defendant had intervened in an active manner to make the films available. In my judgment there is no material distinction between Newzbin1 and the Websites in this respect. Accordingly, I conclude that the operators of the Websites do communicate the Claimants' recordings to the public by electronic transmission.
46. I would add that I see nothing in *Football Dataco v Sportradar* to exclude the possibility that more than one person may be involved in an act of communication to the public. In the present situation, the communication to the public involves both the operators of Websites, who provide a mechanism specifically designed to achieve this, and the users, who provide the actual recordings. (Even if I am wrong about this, the operators may still be liable on the grounds of authorisation and joint tortfeasance.)
47. The second question is whether the operators communicate the recordings to a new public applying the criteria identified in *SCF v Del Corso*. In my judgment they do. The operators intervene, in full knowledge of the consequences of their actions, to give others access to the Claimants' copyright works. The recordings are made available to all the users of the Websites, a large and indeterminate class of people, without having to purchase them from authorised sources. As discussed below, the operators benefit financially from their activities.
48. The third question is whether the act of communication to the public occurs in the UK. Since the operators appear to be based outside the UK, the question is whether their acts of communication to the public are targeted at the public in the UK.
49. In considering this question, it appears from the judgment of the CJEU in *Football Dataco v Sportradar* at [35]-[46] that it is relevant to take into account, by analogy, criteria which the CJEU has treated as relevant to the issue of targeting in a number of other contexts: see Joined Cases C-585/08 and C-144/09 *Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Heller* [2010] ECR I-12527 (Article 15 of Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels I Regulation")); Case C-324/09 *L'Oréal SA v eBay International AG* [2011] ECR I-0000, [2012] EMLR 6 (Article 5 of Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks ("the Trade Marks Directive") and Article 9 of Council Regulation 207/2009/EC of 20 December 1993 on the Community trade mark ("the CTM Regulation")); and Case C-5/11 *Donner* [2012] ECR I-0000 (Article 4 of the Information Society Directive).

50. In *Pammer and Hotel Alpenhof* the Court of Justice held at [93] as follows:

“The following matters, the list of which is not exhaustive, are capable of constituting evidence from which it may be concluded that the trader’s activity is directed to the Member State of the consumer’s domicile, namely the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader’s site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists.”

51. The Claimants rely upon the following factors as indicating that the Websites, and hence the operators’ acts of communication to the public, are targeted at the UK. First, there are a large number of users of each Website in the UK. Secondly, a substantial proportion of the visitors to each Website is from the UK. Thirdly, the recordings listed on each of the Websites include large numbers of both (a) recordings by UK artists and (b) recordings that are in demand in the UK. Fourthly, the default language of each of the Websites is English. In addition, in the case of KAT, it includes advertisements with prices in sterling. In my judgment KAT is reasonably clearly targeted at the public in the UK. The position is less clear in the case of H33T and Fenopy, but I reach the same conclusion.

Authorisation

52. The law with regard to authorisation was reviewed by Kitchin J in *20C Fox v Newzbin* at [85]-[95]. I applied that analysis in *Dramatico v Sky* at [73]-[81]. I shall do so again.

53. *The nature of the relationship.* Like TPB, KAT provides a sophisticated and user-friendly environment in which its users are able to search for and locate content. The Claimants’ witness John Hodge describes how the website is organised and the functions that are available to its users. As he explains:

- i) KAT indexes and arranges torrent files so that users can choose between various search and browsing facilities to assist them in locating content or specific categories of content to download. These facilities include the provision of various RSS feeds which continually alert users to the addition of new torrent files of their selected interest to the website’s directory.
- ii) KAT requires a user who uploads a torrent file to provide the website with detailed information about that torrent file, giving KAT the ability to index the

torrent file and make it available for searching and assist other users in choosing whether or not to download it.

- iii) KAT provides users with the option of uploading and downloading the content associated with the Bittorrent file via KAT's own Bittorrent tracker (a further way in which KAT not only receives the uploaded torrent file but also processes it).
 - iv) KAT provides users with assistance and advice as to how to download the indexed torrent files and their associated content.
 - v) KAT provides users with advice as to the trustworthiness and effectiveness of particular torrent files, and the likely quality of the content associated with those torrent files. This includes a 'Frequently Asked Questions' page dedicated to identifying the ultimate source of particular content (e.g., explaining that "CAM" in a torrent title identifies the torrent as coming from a digital camera recording taken in a cinema or theatre).
 - vi) KAT provides users with advice and assistance as to how to circumvent blocking measures taken as a result of Court orders.
 - vii) KAT provides registered users with a forum to share information about content and to ask other users to upload particular content. The website also grants registered users access to an Internet Relay Chat function for real-time discussions of these topics.
 - viii) KAT offers users a choice between 28 different languages to facilitate and encourage the widest possible participation in the use of its services by those engaged in P2P file-sharing. An "International" section of the website's forum is also provided for the same reasons.
 - ix) KAT actively encourages users to avail themselves of each of the services and functions described above through "Reputation" and "Achievement" systems and associated rewards. Some of these achievements are earned upon the download of specific (and undoubtedly copyrighted) material (e.g. the Harry Potter-specific reward "Master of Death").
54. These features are plainly designed by KAT to afford to its users the easiest and most comprehensive service possible. KAT is in no sense a passive repository of torrent files. It goes to great lengths to facilitate and promote the download of torrent files by its users.
55. Most of what I have said about KAT also applies to H33T. There are minor differences (e.g. it offers a choice of 35 languages rather than 28), but the general picture is the same.
56. Much of what I have said about KAT also applies to Fenopy. There are small differences (e.g. the absence of any reward system), but the general picture is much the same.

57. *The means used to infringe.* In respect of each of the Websites, the torrent files (and magnet links) which are so conveniently and helpfully indexed, arranged and presented by those Sites constitute precisely the means necessary for users to infringe. It is the torrent files which provide the means by which users are able to download the “pieces” of the content files and/or to make them available to others.
58. *Inevitability of infringement.* Infringement is not merely an inevitable consequence of the provision of torrent files by each of the Websites. It is also their objective and intention.
59. In relation to all three of the Websites, the enabling of mass online copyright infringement is the cornerstone of their business model. The entire purpose of each of the Websites is to attract users to them by providing those users with the free means of copying and making available content which people are interested in and would otherwise pay money for. Each of the Websites displays significant levels of advertising, which yield substantial advertising revenues. As part of his analysis of the Websites, Dr Price has estimated the likely advertising revenue earned by each, on a “costs per thousand impressions” basis. His estimated figure for annual advertising revenue for each Website (on a very conservative basis) is as follows:
- i) in the case of KAT, between \$12,525,469 and \$22,383,918;
 - ii) in the case of H33T, between \$1,432,229 and \$2,559,496; and
 - iii) in the case of Fenopy, between \$752,235 and \$1,344,298.
60. In addition to the commercial aspect that I have just described, infringement also appears inevitable having regard to features particular to each of the Sites indicating a wholesale disregard for the protection of copyright. In the case of KAT, these include the following:
- i) the website’s “User Rules” conspicuously fail to include any prohibition in respect of the uploading or downloading of copyrighted content, beyond informing users that “we are interested in keeping the site online and filled with content, but we are also obliged to remove content if we are contacted directly by the copyright owner”;
 - ii) the website openly educates its users and facilitates discussions on how to circumvent blocking measures and publishes guidance on how to upload and download copyrighted content without “getting caught”; and
 - iii) the website’s operators state that they “see the current issues with global copyright laws” and “stand for any changes that will leave [sic] to a better understanding between p2p users and copyright owners”.
61. Although KAT’s operators also state that “our team is completely against piracy!”, the sincerity of that statement must be judged in the light of the sheer quantity of infringing content offered on the website (as described above), the operators’ response to requests to remove such content (as described below) and the steps taken to avoid effective enforcement measures (as described below).

62. Similar points can be made regarding H33T and Fenopy.
63. Furthermore, each of the Websites has taken measures in order to frustrate international investigations, to conceal the identities of their operators and to evade copyright enforcement actions. The obvious inference is that the steps are borne out of an awareness of their inevitably infringing activities. As is explained in the evidence of the Claimants' witness Jeremy Banks:
- i) IFPI investigations into KAT indicate that the website's operators have changed its domain registrant details repeatedly over the last five years, shifting the relevant addresses between France, Lithuania, Serbia, Spain, Ukraine and the United States in that time. The most recent domain registrant has an address in Belgrade. When further investigated, those details have also been found to include false addresses and aliases. Likewise, the website appears to have repeatedly shifted between different service providers, and in the past three years has moved between various ISPs in France, Germany, Luxembourg, Poland, Romania, Spain, Sweden and Ukraine.
 - ii) IFPI investigations into H33T likewise reveal a pattern of evasive behaviour, involving the frequent changing of its domain registrant details over the past seven years between various claimed locations in the Netherlands, the UK and the Seychelles. Similarly, the website has also shifted repeatedly between various different ISPs based in Canada, France, the Netherlands, the Seychelles and the United States.
 - iii) In relation to Fenopy, IFPI's investigations have again revealed a repeated pattern of evasion, involving the frequent changing of the website's domain registrant details between various claimed addresses in France, Iran, Sweden and the United States. The stated addresses include those of domain privacy services (companies designed to shield the true identity of a website's operators). Fenopy has, moreover, engaged in multiple migrations between domain names which appear at least potentially to be motivated by a desire to avoid copyright enforcement measures being taken by the US Government and the European Union. Furthermore, Fenopy has also frequently shifted between different ISPs in different jurisdictions. In the case of Fenopy, those ISPs have been based in various locations in Canada, Japan and the United States.
64. *Degree of control.* Each of the Websites actively moderates its indexed content and the activities of its users. Each of them makes clear that uploaded torrents and posted comments etc. can be removed, and will be removed in certain prescribed circumstances, for example where the content is racist or constitutes child pornography. Further, the Websites also appear to have the power to ban users who repeatedly offend against their rules and policies, and/or add prescribed files to a "special filter" capable of preventing such files from appearing again. Thus, it is clear that the operators of each of the Websites can control the content on their site and remove particular torrents. Nevertheless, they choose to index and offer hundreds of thousands of torrents which manifestly relate to infringing content and, as described below, do not even remove such content when notified by rightsholders.
65. *Steps to prevent infringement.* Each of the Websites purports to maintain a content removal policy which claims to provide for the removal of copyrighted content from

the website upon receipt of a relevant notification. The reality appears to be that these policies are mere window-dressing, and that the operators of the Websites do not take any meaningful steps to prevent the widespread infringements of copyright which take place.

66. This is demonstrated by BPI's attempts to invoke these policies. As Mr Hodge explains, BPI tested the policies by sending URL notifications to each of the Websites in respect of a number of recordings. The results showed that the policies were not properly implemented and were in practice ineffective. Thus:
- i) In respect of KAT, 76% of the notified URLs remained accessible via the website some six months after the notifications were given.
 - ii) In respect of H33T, 83% remained accessible as at the same date. It is a striking feature of the H33T policy that it requires a fee of \$50 per URL. Unsurprisingly, BPI did not offer to pay this. That is perhaps why the operators responded to the notifications by saying that they did not comply with the policy. It is inconceivable that the operators could have any serious expectation that such a fee would be paid. It serves to emphasise the cosmetic nature of the "policy".
 - iii) In respect of Fenopy, 25% remained accessible as at the same date.
67. The extent to which the removal of URLs which did occur was a response to the notifications or was coincidental is unknown. As described below, further attempts to secure the co-operation of the operators of the Websites in the removal of infringing content have proved futile.
68. More fundamentally, for the reasons set out in the evidence of the Claimants' witness Kiaron Whitehead, the Websites' purported policies of removing infringing content only upon the provision of individual takedown notices would, even if rigorously implemented, be wholly inadequate to prevent the type of large scale, widespread copyright infringement which the Websites are engaged in. In particular:
- i) Requesting the takedown of individual torrent files by providing specific URLs is overly burdensome and renders it impractical significantly to reduce the number of files illegally available on the Websites in relation to any given piece of content.
 - ii) There are often multiple URLs for each recording where different users have uploaded a torrent relating to the same recording. Even as a means of trying to prevent infringement of one particular work, the "provision of URL" policy, even if implemented, would be impractical and ineffective.
 - iii) This is all the more so because of the constant additions made to the torrent files being offered. Thus, in respect of the URL notifications sent as part of BPI's test of the policies, not only had the particular URLs not all been removed, but numerous new torrents relating to the same content had been added.

- iv) In order to ensure the cessation of infringing activity in respect of a particular copyrighted work, a rightholder (even assuming 100% compliance by the operators of the Websites with takedown requests) would have to monitor the Websites on a continuous and ongoing basis.
 - v) A “provision of URL” policy might work for a website which generally hosts legal content, but which suffers from isolated instances of infringing content. It is entirely unworkable where the website is geared towards offering a constantly replenished stock of infringing content.
69. BPI has also sought to engage with the operators of the Websites in correspondence. BPI wrote to the operators of each of the Websites explaining to them the impracticality of a “provision of URL” policy for removal of content and asking them to remove all listings and links relating to a sample list of 533 recordings from 40 albums and to confirm that they would remove any further listings and links that were notified to them from time to time. As is explained by Mr Whitehead, the responses have either been obstructive (in the cases of KAT and H33T) or non-existent (in the case of Fenopy). None of the listings or links relating to the sample recordings was taken down by any of the Websites.
70. *Conclusion.* In my judgment, the operators of the Websites do authorise their users’ infringing acts of copying and communication to the public. They go far beyond merely enabling or assisting. On any view, they “sanction, approve and countenance” the infringements of copyright committed by their users. But in my view they also purport to grant users the right to do the acts complained of.

Joint tortfeasance

71. Kitchin J considered the law with regard to joint tortfeasance in *20C Fox v Newzbin* at [103]-[111]. I applied that analysis in *Dramatico v Sky* at [82]-[83].
72. Since then, the Court of Appeal has considered the elements of joint tortfeasorship in its recent decision in *Football Dataco Limited & Ors v Stan James plc, Sportradar GmbH & Ors* [2013] EWCA Civ 27. Having reviewed earlier authorities (including *20C Fox v Newzbin*) at [90]-[93], Sir Robin Jacob (with whom Lloyd and Lewison LJ agreed) concluded as follows:
- “96. So the question boils down to this: if A has a website containing infringing material which will inevitably be copied into the computer of B if he enters that website, is A a joint tortfeasor with B? I am conscious that this question is important. The answer would seem to apply equally to copyright as to database rights. If the answer is yes, then the owner of any website anywhere in the world will be a joint tortfeasor with a UK user of that website if the inevitable consequence of access to that site by the user is infringement by that user.
97. I would hold the answer to be yes. The provider of such a website is causing each and every UK user who accesses his site to infringe. His very purpose in providing the website is to

cause or procure acts which will amount in law to infringement by any UK user of it. The case is not one of a mere facilitator, such as eBay or Amstrad where the choice to infringe or not ultimately lay with the consumer. Here Stan James is in reality responsible for the punter's infringement.”

73. This approach cannot be translated wholesale to the present context, but in my view it provides support for the conclusions reached in *20C Fox v Newzbin* and *Dramatico v Sky*.
74. In the present cases, the matters I have considered in relation to authorisation lead to the conclusion that the operators of the Websites induce, incite or persuade their users to commit infringements of copyright, and that they and the users act pursuant to a common design to infringe. It is also relevant in this regard that the operators profit from their activities. Thus they are jointly liable for the infringements committed by users.

Conclusion

75. I conclude that the operators of the Websites infringe the Claimants’ copyright in each of the three ways alleged.

Do the users and/or operators use the Defendants’ services to infringe?

76. I held in *20CFox v BT* at [99]-[113] and *Dramatico v Sky (No 2)* at [6] that both users and the operators of the websites in issue used the Defendants’ services to infringe the claimants’ copyrights.
77. Since then, the Oberster Gerichtshof (Austrian Supreme Court) has referred two questions concerning this issue to the CJEU in Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH*. Although the reference is still pending before the CJEU, the questions raised by the Austrian Supreme Court merit consideration.
78. The background to the reference is as follows. UPC Telekabel Wien GmbH (“UPC”) is a major Austrian ISP (or “access provider” as it is described by the Oberster Gerichtshof). Constantin Film Verleih GmbH (“Constantin”) and Wega Filmproduktionsgesellschaft mbH (“Wega”) are the owners of copyrights in various films. These films, along with many other copyrighted films, were made available without Constantin’s or Wega’s consent on a website called kino.to.
79. I understand that kino.to was one of the most popular websites for the streaming and downloading of copyrighted film and TV content in German-speaking territories, with a top 40 ranking on Alexa.com, prior to being taken down upon the apprehension of its operators by the German authorities following an investigation spanning several years.
80. On an application by Constantin and Wega, the Court of First Instance made an order requiring UPC to block access to kino.to. That order was upheld by the Court of Appeal. UPC appealed to the Oberster Gerichtshof, which referred four questions to

the CJEU concerning the proper interpretation of Article 8(3) of the Information Society Directive. The first two are as follows:

- “1. Is Article 8(3) of Directive 2001/29/EC (the Information Society Directive) to be interpreted as meaning that a person who makes protected subject matter available on the internet without the rightholder’s consent (Article 3(2) of the Information Society Directive) is using the services of the access providers of persons seeking access to that protected subject matter?
 2. If the answer to the first question is in the negative: are reproduction for private use (Article 5(2)(b) of the Information Society Directive) and transient and incidental reproduction (Article 5(1) of the Information Society Directive) permissible only if the original of the reproduction was lawfully reproduced, distributed or made available to the public?”
81. In question 1, the Oberster Gerichtshof asks in effect whether the operators of a website like kino.to use the services of an ISP, whose customers seek to access the website via the ISP’s service, such that the ISP is an intermediary whose services are used by a third party to infringe copyright or related rights for the purposes of Article 8(3). (I presume that the question refers to Article 3(2) of the Information Society Directive, rather than Article 3(1), because the rights relied on by Contantin and Wega are their rights as producers of the first fixations of the films: see *Dramatico v Sky* at [61]-[65].)
82. The Oberster Gerichtshof suggests at [1.3] of the referring judgment that it might be said that the operators’ infringing act (making available) has already been completed before any use is made of the ISP’s services. Nevertheless, the Oberster Gerichtshof states in the referring judgment at [1.5] that it is inclined to regard the ISP as an intermediary whose services are used by the operators to infringe for the purposes of Article 8(3) for the reasons I gave in *20C Fox v BT*. Accordingly, I see no reason to change my opinion on this point.
83. In question 2, the Oberster Gerichtshof asks in effect whether the users of such a website use the services of the ISP via whose service they access the website to infringe copyright or related rights for the purposes of Article 8(3). The Oberster Gerichtshof considers that it might be argued that the users have a defence under Article 5(2)(b) or Article 5(1) of the Information Society Directive.
84. The first part of this question is not relevant to the present application because, unlike Austria, the United Kingdom has not at present provided for a “private use” exception under Article 5(2)(b).
85. As for the second part of the question, the electronic copies of the Claimants’ sound recordings which are created by the users on their computers by means of the Websites are permanent, not “transient or incidental”. Accordingly, it does not appear to me that Article 5(1) of the Directive (which is implemented by section 28A of the 1988 Act) has any application to the present case.

86. I note that the Claimants argue that it is an implicit requirement of Article 5(1) and Article 5(2)(b) that the source copy which has been reproduced should be a lawful one, but it is not necessary for me to go into this question for present purposes.
87. Turning to the present applications, the evidence of Mr Sehested is that, out of 4,299,992 instances where an IP address for a device connected to the internet and making available sound recordings from the list of 18,000 titles using an internet service provided by one of the Defendants had been identified, 1,014,274 instances related to BT, 1,090,503 instances related to Virgin, 760,107 to TalkTalk, 667,131 to Sky, 581,695 to Everything Everywhere and 186,282 to O2. These figures cover use of other websites in addition to the Websites, but they confirm substantial use by users of the Defendants' services for these kinds of activities.
88. Accordingly, I am satisfied that both users and the operators of the Websites use the Defendants' services to infringe the Claimants' copyrights (and the copyrights of those they represent).

Do the Defendants have actual knowledge?

89. As described by Mr Whitehead in his evidence, the information obtained by MarkMonitor has formed the basis of weekly notifications to the Defendants of infringing activities, on the basis of which the Defendants have been made aware that their services are being used for copyright infringement by the users and operators of the Websites. In addition, prior to the commencement of these proceedings, the Claimants (via BPI) wrote to each of the Defendants specifically drawing to their attention the use by their subscribers of their respective services to infringe BPI members' copyrights through access to each of the Websites. Furthermore, the Defendants have been served with the evidence in support of these applications and are therefore aware of all the matters contained in that evidence. I am satisfied that, as a result, the Defendants do have actual knowledge that users and the operators of the Websites use the Defendants' services to infringe copyright. Indeed, I note that none of the Defendants denies this.

Proportionality and discretion

90. The Claimants contend that I should exercise my discretion to make the orders sought. Unlike in *20C Fox v BT*, the Defendants do not advance any reasons as to why I should exercise my discretion to refuse to make the orders sought. Even so, as the Claimants rightly accept, the onus remains on the Claimants to satisfy the Court that it is appropriate to make such orders, and in particular that the orders are proportionate.
91. As I noted in *Golden Eye (International) Ltd v Telefónica UK Ltd* [2012] EWHC 723 (Ch), [2012] RPC 28 at [116], there are two reasons why it is necessary to consider the proportionality of orders in this field. The first is that Article 3(2) of European Parliament and Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights ("the Enforcement Directive") imposes a general obligation to consider the proportionality of remedies for the infringement of intellectual property rights: see *L'Oréal v eBay* at [139]-[144]. The second is that the CJEU has held that, when adopting measures to protect copyright owners against online infringement, national courts must strike a fair balance between the protection of intellectual property rights guaranteed by Article 17(2) of the Charter of

Fundamental Rights of the European Union (“the Charter”) and the protection of the fundamental rights of individuals who are affected by such measures, and in particular the rights safeguarded by the applicable Articles of the Charter: see Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-271 at [61]-[68], C-70/10 *Scarlet Extended SA v Société belge des auteurs compositeurs et éditeurs (SABAM)* [2011] ECR I-0000, [2012] ECDR 4 at [42]-[46], [50]-[53] and Case C-360/10 *Société belge des auteurs compositeurs et éditeurs (SABAM) v Netlog NV* [2012] ECR I-0000, [2012] 2 CMLR 18 at [41]-[51].

92. The approach to considering proportionality which I set out in *Golden Eye* at [117] was as follows:

“... First, the Claimants’ copyrights are property rights protected by Article 1 of the First Protocol to the ECHR and intellectual property rights within Article 17(2) of the Charter. Secondly, the right to privacy under Article 8(1) ECHR/Article 7 of the Charter and the right to the protection of personal data under Article 8 of the Charter are engaged by the present claim. Thirdly, the Claimants’ copyrights are ‘rights of others’ within Article 8(2) ECHR/Article 52(1) of the Charter. Fourthly, the approach laid down by Lord Steyn where both Article 8 and Article 10 ECHR rights are involved in *Re S* [2004] UKHL 47, [2005] 1 AC 593 at [17] is also applicable where a balance falls to be struck between Article 1 of the First Protocol/Article 17(2) of the Charter on the one hand and Article 8 ECHR/Article 7 of the Charter and Article 8 of the Charter on the other hand. That approach is as follows: (i) neither Article as such has precedence over the other; (ii) where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary; (iii) the justifications for interfering with or restricting each right must be taken into account; (iv) finally, the proportionality test – or ‘ultimate balancing test’ - must be applied to each.”

93. This statement of the law was approved by Lord Kerr of Tonaghmore JSC delivering the judgment of the Supreme Court in *Rugby Football Union v Viagogo Ltd* [2012] UKSC 55, [2012] 1 WLR 3333 at [45].
94. In the present context, the rights which are engaged by the orders sought by the Claimants are the rights to freedom of expression under Article 10 of European Convention on Human Rights and Article 11 of the Charter of (a) the Defendants, (b) the operators of the Websites and (c) the users of the Websites: see *20C Fox v BT* at [164], [199]-[200] and *Dramatico v Sky (No 2)* at [8].
95. Since *20C Fox v BT* and *Dramatico v Sky (No 2)*, the correctness of this Court’s approach to considering the proportionality of website blocking orders of the kind presently in issue has been questioned by the Oberster Gerichtshof in *UPC v Constantin*. Questions 3 and 4 of the reference are as follows:

- “3. If the answer to the first question or the second question is in the affirmative and an injunction is therefore to be issued against the user's access provider in accordance with Article 8(3) of the Information Society Directive: is it compatible with Union law, in particular with the necessary balance between the parties' fundamental rights, to prohibit an access provider from allowing its customers access to a certain website (without ordering specific measures) as long as the material available on that website is provided exclusively or predominantly without the rightholder's consent, if the access provider can avoid incurring preventive penalties for breach of the prohibition by showing that it had nevertheless taken all reasonable measures?
4. If the answer to the third question is in the negative: is it compatible with Union law, in particular with the necessary balance between the parties' fundamental rights, to require an access provider to take specific measures to make it more difficult for its customers to access a website containing material that is made available unlawfully if those measures require not inconsiderable costs and can easily be circumvented without any special technical knowledge?”
96. It appears from the referring judgment at [3.4]-[3.6] that the reason for question 3 is that Constantin and Wega had applied for a general “prohibition of outcome”, i.e. an absolute bar on the ISP “facilitating access” to *kino.to*. Such a “prohibition of outcome” was a standard order under the Austrian law relating to infringements of absolute rights. In making such an order, there would not be any examination as to whether complete blocking was possible at all or whether the measures required for this adequately took account of the fundamental rights of the parties involved and were proportionate until there were enforcement proceedings for breach of the order. The Oberster Gerichtshof is concerned that an examination of fundamental rights and proportionality only after the event in enforcement proceedings fails to meet the requirements of European law.
97. By contrast, under United Kingdom law, the Court will carefully consider such matters before any blocking order is made. Accordingly, I do not consider that question 3 suggests that this Court should change its approach to such applications.
98. I would add that, in so far as question 3 involves consideration of the extent to which the material available on the particular website infringes the particular claimants' rights, this is a matter which I addressed in *20C Fox v BT* at [179]-[186]. I am satisfied that the considerations I outlined there are equally applicable to the Websites.
99. Turning to question 4, the Oberster Gerichtshof expresses concern at [4.1] that Courts in different Member States have reached different conclusions on the proportionality of blocking orders. It suggests at [4.2] that the question “should be judged in a uniform manner throughout Europe” in accordance with “guidelines for assessing the proportionality of specific blocking measures” laid down by the CJEU.

100. I would respectfully suggest that, whether or not the CJEU accedes to the invitation to issue guidelines, the proportionality of a blocking order is bound to be a context-sensitive question. As I hope my judgments in *20C Fox v BT*, *Dramatico v Sky (No 2)* and the present case demonstrate, this Court does not make such orders without thorough consideration of whether it is appropriate to make an order in the light of the specific facts of each case.
101. Question 4 suggests that blocking orders “require not inconsiderable costs and can easily be circumvented without any special technical knowledge”. I shall address these points in turn.
102. So far as the cost of complying with a blocking order is concerned, this is a factor in the proportionality of the order as between the Claimants and the Defendants. The blocking orders which this Court has made require use by the Defendants of technical measures which they already have available, and therefore the cost of compliance is modest: see *20C Fox v BT* at [200] and *20C Fox v BT (No 2)* at [32]. In this context, it is important to note that none of the Defendants has appealed against any of the blocking orders made by this Court. Furthermore, both in *Dramatico v Sky (No 2)* and in the present cases the Defendants have agreed the terms of the orders and have not opposed the making of the orders. None of the Defendants has sought to resist the making of the orders on the grounds that compliance will be unduly burdensome or costly.
103. As to ease of circumvention, this is a factor in the proportionality of the order both as between the Claimants and the Defendants and as between the Claimants and the operators and users of the Websites. I would make three points in this respect.
104. The first is that I remain of the view that a blocking order may be justified even if it only prevents access by a minority of users: see *20C Fox v BT* at [192]-[198].
105. The second is that efficacy depends on the precise form of the order. The orders I granted in *Dramatico v Sky* are likely to have been less easy to circumvent than the original order made in *20C Fox v BT (No 2)*: see *Dramatico v Sky (No 2)* at [13]. The same is true of the orders agreed in the present cases.
106. The third is that the evidence indicates that blocking orders *are* reasonably effective. The effect of the order made in Italy with regard to TPB referred to in *20C Fox v BT* at [197] was a 73% reduction in audience accessing TPB in Italy and a 96% reduction in page views. The blocking order made in Italy in relation to KAT has had a similar effect. As for the effect of the orders made in England in relation to TPB, as at 19 December 2011, TPB was ranked by Alexa as number 43 in the UK, while as at 21 November 2012, its UK ranking had dropped to number 293.
107. Having considered the proportionality of the orders sought by the present applications as between the Claimants (and those they represent) and the Defendants and as between the Claimants and the operators and users of the Websites, I am satisfied that the orders sought are proportionate for similar reasons to those I gave in *20C Fox v BT* at [199]-[200]. The orders are necessary and appropriate to protect the intellectual property rights of the Claimants (and other copyright owners). Those interests clearly outweigh the Charter Article 11 rights of the users of the Websites, who can obtain the copyright works from many lawful sources. They even more clearly outweigh the

Article 11 rights of the operators of the Websites, who are profiting from infringement on an industrial scale. They also outweigh the Defendants' Article 11 rights to the extent that they are engaged. The orders are narrow and targeted ones, and they contain safeguards in the event of any change of circumstances. The cost of implementation to the Defendants will be modest and proportionate.

Conclusion

108. I will make the orders requested by the Claimants.