



What role for online intermediaries? The UK experience

Eleonora Rosati

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- Injunctions against intermediaries: the EU framework
- UK implementations and missed implementations
- The *Cartier* judgment
- Questions left open by *Cartier* ... also at the EU level

The EU framework

- Copyright: Article 8(3) InfoSoc Directive (Directive 2001/29)

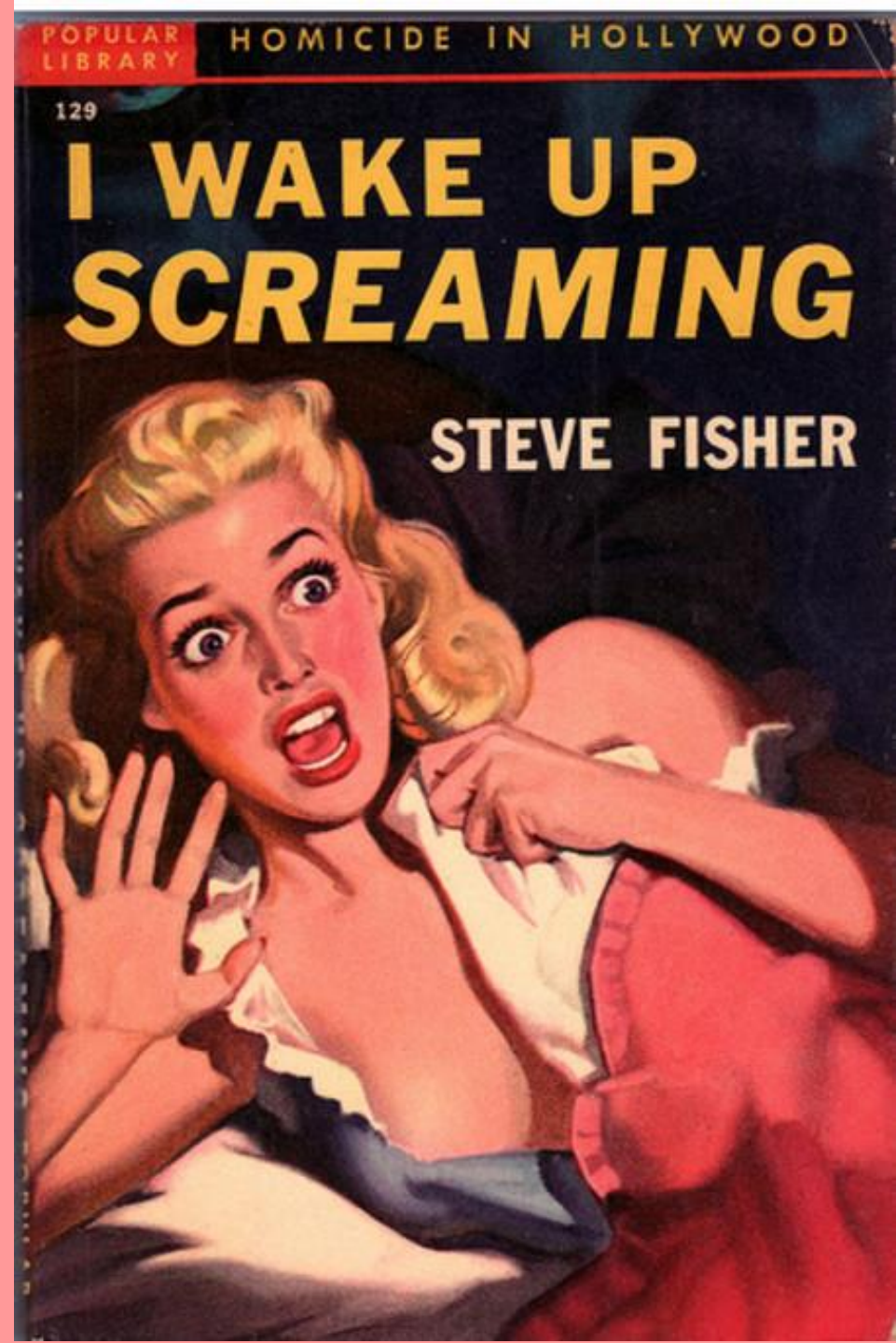
“Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.”

- Other IP rights: Article 11 Enforcement Directive (Directive 2004/48)

“... Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.”

What happened in the UK?

- Transposed Art 8(3) as s97A CDPA: *“The High Court ... shall have 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 ...”*
- Did not transpose Art 11 Enforcement Directive
 - Does this mean that the only available blocking injunctions relate to copyright?



UK website blocking jurisprudence: copyright

- 2011: first blocking order (*Newzbin 2*)
- From 2011 to mid-2015: 200 websites blocked by UK courts
- Different copyright owners: music, films, FAFL, publishers



Cartier



The High Court decision (Arnold J)

- No specific provision under UK law which allows TM owners to seek injunction against intermediaries that have actual knowledge of another person using their services to infringe their rights
- UK Gov't thought that it did not need to take any action to transpose third sentence in Article 11 into its own law
 - s37(1) of the Senior Courts Act 1981 would do: “[t]he High Court may by order (whether interlocutory or final) grant an injunction ... in all cases in which it appears to be just and convenient to do so.”
- Arnold J concluded that blocking injunctions also available to TM owners

Blocking injunctions for Arnold J

- No real alternatives
 - Notice-and-takedown
 - Payment freezing
 - De-indexing
- Block circumvention
- Reduction of infringements
- Not up to rightholders to show efficacy
- ISPs to bear implementation costs (£14,000 per website)
 - Think of alternative measures, *eg* preventative filtering
- Safeguards against abuse
 - Time limit
 - Involvement of users

Court of Appeal round

- Upheld the "entirely correct" decision of Arnold J
- Threshold conditions
 1. ISPs must be intermediaries
 2. Either users or website operators must be infringing the claimant's trade marks
 3. Users or website operators must use ISPs' services of the ISPs
 4. ISPs must have actual knowledge of this
- Principles
 - Necessary, effective, dissuasive, not unnecessarily complicated/costly; barriers to legitimate trade; fair and equitable; proportionate
- Costs (Briggs LJ dissenting)
 - Of application: rightholders
 - Of implementation: ISPs

Questions raised by *Cartier*



- The Court of Appeal used the Court's general power to grant injunctive relief to block counterfeit websites, but to what extent did EU law come into it?
- Will the floodgates now open?
- Who should bear the implementation costs?
- What next: who else can expect a blocking application? Search engines? Mobile operators?

In all this

- Digital Single Market Strategy
- Public Consultation on functioning of Enforcement Directive (ended 1 April 2016)
- Second copyright package (14 September 2016)
- And then ...

From UK discussion

- Role of injunctions, including website blocking
- A harmonised framework?
 - Missed implementations
 - Missed harmonisation (eg costs)
- Role of national law
- Should it remain like this?

Thanks for your
attention!



Are we going
to have tea or not?

eleonora@e-lawnora.com

[@eLAWnora](https://twitter.com/eLAWnora)