

THE HIGH COURT

2008 1601 P

BETWEEN

EMI RECORDS (IRELAND) LIMITED,
 SONY BMG MUSIC ENTERTAINMENT (IRELAND) LIMITED,
 UNIVERSAL MUSIC (IRELAND) LIMITED, AND
 WARNER MUSIC (IRELAND) LIMITED

PLAINTIFFS

AND

EIRCOM PLC

DEFENDANT

JUDGMENT of Mr. Justice Charleton delivered on the 24th day of July, 2009 ex tempore

In this ruling, I just want to make it clear that I have only heard one side, and that therefore any decision I am making in relation to the law is on the basis of one side putting forward an argument in the context of a settlement that was reached between the parties in the main proceedings, whereby it was agreed between the plaintiffs and the defendant that the defendant would not oppose this, the plaintiffs', application.

This is an application by the plaintiffs who are EMI Records, Sony, Universal, and Warner to require Eircom plc to block access to a site which is commonly called Pirate Bay, which is the subject of proceedings in its country of origin, and which is a site dedicated, on a weird ideological basis, to basically stealing the copyright owned by the plaintiffs in mainly musical works. That copyright, I am satisfied, has been assigned to the plaintiffs often by hardworking artists, some of whom may indeed be very wealthy, but some of whom may be trying to do their very best to make a living out of the work that they love, namely, making music, making films, or other forms of entertainment, and that work, let us be clear, enriches the human race. Having created original work, copyright arises as a legal right under statute in the author. Apart from legislation, a natural human expectation arises that there should be such a right as a matter of simple fairness. As St. Colmcille, one of the patron saints of Ireland, said, "le gach bó a buinín agus le gach leabhar a chóip" (to every cow its calf and to every book its copy). This work is now being taken by people using the internet, going on to the Pirate Bay site, getting the appropriate information and/or software for their computers, thus identifying swarms of other people currently online who will share the material and then accessing these swarms whereby, in small portions from multiple individuals within the online swarms, entire songs, musical works, or video works, are appropriated by them free of charge from multiple individuals who already have taken the copyright material.

Now, as I understand it, as a matter of law up to the Copyright and Related Rights Act 2000 there was only the possibility of basically making an injunction against parties who were infringing copyright by doing any of the acts set out in s. 40(1) of the Copyright and Related Rights Act 2000, of which para. (g) has been in turn amended by the Copyright and Related Rights Amendment Act 2007. The legal wrongs against copyright could be making available copies of a copyright work, performing it, broadcasting it, including a copy of a work in a programme, issuing copies of the work to the public, renting copies of the work, or lending copies of the work without the payment of remuneration to the owners of the copyright work. These actions under the Act of 2000, and the legislation which preceded it, can all be unlawful methods of infringing copyright through making available without authorisation of the owner or her or his assignee a copyright work to the public.

There is no doubt that EMI, Sony, Universal, and Warner have copyright by way of assignment from musicians and other artists in a vast bulk of copyright work, and there is no doubt, on the affidavits before me, that they as plaintiffs in this action are facing a situation of undermining their intellectual property rights (and those who have assigned such rights to them) by virtually unrestrained unauthorised copying over the internet, which I regard as being theft. I note the quote from the 'Envisional Report', in evidence before me, which is attributed to Mr. Peter Sunde who is one of the controlling minds of Pirate Bay:

"This is how it works: Whatever you sink, we build back up. Whomever you sue, 10 new pirates are recruited. Wherever you go, we are already ahead of you. You are the past and the forgotten; we are the internet and the future."

Well, that kind of statement I have just quoted is clear evidence of both an intention to flout the law and of an inflated personality which believes that Mr. Peter Sunde is on some kind of a white horse and carrying a lance on behalf of good. I am convinced, on the affidavits before me, that he is carrying a lance on behalf of self-interest. In part, that is proved in the affidavits before me by the amount of advertising which Pirate Bay carries, which is making him and those associated with him a very substantial amount of money from those accessing their sites. Those accessing the sites of Pirate Bay are shown on the affidavits before me to have advertising popping up in relation to what they do, and those advertisers are paying money to Pirate Bay.

It is clear to me at the moment, though it hasn't been argued in this case to the contrary, going back to the copyright point, that s. 40(4) of the Act of 2000 gives an entitlement in the right circumstances to the plaintiffs to seek an order against a party who is essentially innocent in relation to copyright infringement, in distinction to those actively stealing

copyright material through the act of copying without authorisation and facilitating it, Pirate Bay and the illegal downloaders, and I put Eircom into that category of innocent transmitter of infringing material. For the sake of clarity, I quote the section:

"40.—(1) References in this Part to the making available to the public of a work shall be construed as including all or any of the following, namely:

- (a) making available to the public of copies of the work, by wire or wireless means, in such a way that members of the public may access the work from a place and at a time chosen by them (including the making available of copies of works through the Internet);
- (b) performing, showing or playing a copy of the work in public;
- (c) broadcasting a copy of the work;
- (d) including a copy of the work in a cable programme service;
- (e) issuing copies of the work to the public;
- (f) renting copies of the work;
- (g) lending copies of the work without the payment of remuneration to the owner of the copyright in the work,

and references to "lawfully making available to the public" shall mean the undertaking of any of the acts referred to in *paragraphs (a) to (g)* by or with the licence of the copyright owner.

(2) References in this Part to the making available to the public of copies of a work shall include the making available to the public of the original of the work.

(3) Subject to subsection (4), the provision of facilities for enabling the making available to the public of copies of a work shall not of itself constitute an act of making available to the public of copies of the work.

(4) Without prejudice to subsection (3), where a person who provides facilities referred to in that subsection is notified by the owner of the copyright in the work concerned that those facilities are being used to infringe the copyright in that work and that person fails to remove that infringing material as soon as practicable thereafter that person shall also be liable for the infringement.

(5) Without prejudice to subsection (4), the Minister may prescribe the form of the notice to be given under that subsection and the form shall specify—

- (a) the name and address of the person claiming to be the owner of the copyright in the work concerned,
- (b) the grounds that the person requesting the removal of material has for such removal, and
- (c) a list of the material which is to be removed."

Now, why is this decision different to an injunction that might be obtained directly against the infringer of copyright, such as Pirate Bay, as opposed to a carrier of the breach by other people, the internet service providers? The person who takes a book and photocopies it for themselves in breach of copyright is, of course, infringing the legal right of the copyright owner. The person who takes a CD and makes a copy of it in their own home is, of course, infringing copyright. But without infringement of copyright, and having heard only one side, and I again emphasise that, it seems to me that s. 40(4) gives a wider entitlement to a copyright owner by providing that, without prejudice to subs. (3), (which relates to the provision of facilities for enabling the making available of copies of a work to the public, not in itself constituting an act of making available to the public copies of the work), where a person who provides facilities that are being used to infringe the copyright in a work and the infringing material is not removed on being notified by the owner (and that has happened here) that those facilities are being used to infringe the copyright in that work, and the person who provides facilities fails to remove that infringing material as soon as practicable thereafter, that person shall also be liable for the infringement. I interpret that, at the moment, as saying that the pipe or channel (i.e. the electronic pipe or channel in this case) down which the copyright infringing material is going can be the subject of injunctive relief under s. 40(4). This section is derived according to the long title of the 2000 Act as amended in 2007 from the relevant EU Directive, and is to be interpreted in conformity with it. In its original form, that Directive is Council Directive 2001/29 EC of the 22nd May, 2001, on the harmonisation of certain aspects of copyright and related rights in the information society with recitals to which I have regard and the relevant article reads:

"Article 8

Sanctions and remedies

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.
2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).
3. 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.”

Article 9 of the Directive provides for exclusive rights in the owner of copyright to make available copies to the public by sale or otherwise. Under Article 8, and for the first time, the owner of facilities used to infringe those rights can be subject to injunctive relief. Eircom, the defendant, is an innocent party here, but an innocent party whose facilities are being used so that their publicly available channels for the transmission of material over the internet (*i.e.* electronic pipes) are being used for the transmission of copyright material, and therefore the infringement of copyright works, and this under the Directive as implemented in s. 40(4) of the 2000 Act, as amended, can be made the subject of an injunctive order. Had the matter been argued on both sides, and it wasn't (as I said, it's the subject of a settlement) well, then, in those circumstances, it may be that a different conclusion would have been reached by a different court, but that's my conclusion, at the moment, having heard one side, and I therefore emphasise that.

The next thing is the question of damages. Under the Supreme Court of Judicature Act 1875, an injunction is granted where it is “just and convenient” for a court to so order. Even at final hearing, a court must weigh up the legal remedy of damages as an alternative and the convenience of the remedy as opposed to any alternative. I cannot decide if the transmission through the Eircom network of copyright infringing material gives rise to a remedy in damages. That might possibly be argued in the context of a statutory duty arising as a benefit to copyright owners as a particular class, but as it has not been argued here, I am making no decision. For the moment, I have no entitlement it seems to order damages as an alternative to an injunction. Even if I were so entitled, I am satisfied on the affidavit evidence before me that the damage being suffered by those who work for the plaintiffs, or in association with them, and who ultimately assign copyright material to them are being deprived of their livelihoods through the agency of Pirate Bay. The operation of this site is completely undermining the fundamental notion of copyright, so that those who create a work are put in a position where they no longer, in effect, own the benefit of the work because it is being illegally copied wholesale. I am satisfied the balance of convenience also lies in favour of an injunction being granted.

I am satisfied, on those two points, that if I were not to grant this injunction, notwithstanding the fact that the plaintiffs are going to have a further battle on their hands in terms of dealing with people like Mr. Peter Sunde and the other controllers of Pirate Bay and the like, the effect would be for the Court not to enforce copyright and to throw up its hands and to say in effect that it's useless and it's futile. I am satisfied that it is not useless and it is not futile to grant an order in this form.

Therefore, on the basis of the affidavit evidence that I have heard from Willy Kavanagh, the exhibits therein, and the affidavit evidence that I have heard in relation to the progress of proceedings in other jurisdictions from Helen Sheehy, I am going to grant an injunction in the form of paragraph 1 of the Notice of Motion that I have amended in red ink for my registrar Ms. Feerick, which will be an order pursuant to s. 40(4) of the Copyright and Related Rights Act 2000 requiring the defendant to block or otherwise disable access by its internet subscribers to the website - thePirateBay.org and related domain names, as set out in the schedule, to IP addresses and URLs, as set out in the schedule, together with such other domain names, IP addresses and URLs as may reasonably be notified as related domain names by the plaintiffs to the defendant from time to time. And I'm sure everyone will act reasonably in that regard.

Secondly, as this is a final but unopposed order that I am making, I am making a direction that the application be heard on affidavit without oral evidence. I am satisfied it is not necessary to hear oral evidence as there is cogent and persuasive evidence on affidavit.

Thirdly, I am making a further order of liberty to both sides to apply, and a stay on the order until the 1st September, 2009, because there needs to be some enabling and technical uptooling by the defendant, who, again I emphasise, is entirely, to my mind, an innocent party in relation to this.

There will be no order in relation to the costs as the costs have not been sought by either party. That, therefore, is the order the Court will make.