

Case No: OCL 70086, Case No: OCL 70087, Case No: OCL 70101, Case No: OCL 70102,
Case No: OCL 70103, Case No: OCL 70106, Case No: OCL 70114, Case No: OCL 70115

Neutral Citation Number: [2010] EWPC 17

IN THE PATENTS COUNTY COURT

St. Dunstan's House

133-137 Fetter Lane

London EC4A 1HD

Date: 1/12/2010

Before :

HIS HONOUR JUDGE BIRSS QC

Between:

	MEDIA C.A.T. LIMITED	Claimant
	- and -	
	A	Defendant
	and between:	
	MEDIA C.A.T. LIMITED	Claimant
	- and -	
	B Defendant	
	and between:	
	MEDIA C.A.T. LIMITED	Claimant
	- and -	
	C	Defendant
	and between:	
	MEDIA C.A.T. LIMITED	
	Claimant	
	- and -	
	D	Defendant
	and between:	
	MEDIA C.A.T. LIMITED	Claimant
	- and -	
	E	Defendant
	and between:	
	MEDIA C.A.T. LIMITED	Claimant
	- and -	
	F Defendant	

	and between:	
	MEDIA C.A.T. LIMITED	Claimant
	- and -	
	G	Defendant
	and between:	
	MEDIA C.A.T. LIMITED	Claimant
	- and -	
	H	Defendant

ACS Law for the Claimant

The defendants did not appear and were not represented

JUDGMENT

His Honour Judge Birss QC:

1.This judgment deals with a series of Requests for Judgment made by the claimant in eight parallel actions. The claimant is the same but the defendant is a different individual in each case. The cases are separate but they raise issues in common and the requests for judgment were received by the Court at the same time. It is convenient to deal with them together.

2.The matters were determined on paper without a hearing. The procedure governing requests for judgment of this kind does not involve notice to the defendant and thus in these cases the defendants have had no notice of these applications and no opportunity to make submissions. In the circumstances it seemed to me to be appropriate to use a letter of the alphabet to refer to each defendant.

The claim

3.The Particulars of Claim in each case are the same for all practical purposes. Paragraph 1 of the Particulars of Claim states:

"The claimant is a company incorporated in England and Wales under company number 04426555. The claimant represents various owners or exclusive licensees of copyrighted works ("**Rights Owners**") to monitor and protect their copyrighted works from acts of infringement. The claimant has an agreement with the Rights Owner of the exclusive license in the United Kingdom that gives to the Claimant the express right to indentify, pursue and prosecute instances of copyright infringement of various works, including, inter alia the film named "5 Linsey Dawn McKenzie Films on Tape") ("**the Work**") that take place through peer to peer file sharing networks."

4.Apart from the fact that the film in question varies from case to case, the pleading is the same in each case (the quote is from OCL 70101, chosen at random). The films are all pornographic in nature. Video classification certificates are annexed to the Particulars of Claim which show that the films are all classified as "R18 restricted" which is a special restricted classification and which means that the film may only be shown in licensed cinemas and video recordings may only be supplied in a licensed sex shop.

5.The Particulars of Claim goes on to plead that the Work "embodies sound recordings, films, broadcasts or cable programmes" and gives the relevant British Board of Film Classification certificate number. A copy of the Work is available for inspection from the claimant's solicitors.

6.The Particulars of Claim then state:

"The defendant, someone authorised by him to use his internet connection, or someone who gained access to the defendant's internet connection due to the router to that connections having no or no adequate security was at all material times a user of the peer-to-peer ("**P2P**") file sharing software known as BitTorrent 6.1.2 which allows the

user to share digital media content files on a network with other users ("**P2P network**")."

7. In some claims different versions of the BitTorrent software is referred to but nothing turns on that.

8. The Particulars of Claim pleads that the claimant, with the assistance of a specialist data monitoring company NG3 Systems Limited, monitored the unauthorised exploitation of the Work on the P2P network between 30 May 2009 and 30 September 2009 (in two cases the period ends in November 2009). During this time the defendant is alleged to have committed a number of acts without the licence of the claimant. The first two allegations are that the defendant has (1) reproduced of the Work (or a substantial part of it) by copying it onto their computer hard drive; and (2) made copies available on the internet to third parties for downloading using a P2P network. Allegation (3) is that the defendant has:

"operated, at the time of the identified infringement an internet connection router that was not secured either adequately or at all, so as to enable another to carry out an act of copyright infringement of the claimant's Work via the internet connection of the defendant."

9. Particulars are then given setting out the date, time and P2P network on which details of the defendant's alleged infringement were observed and captured using NG3's monitoring program. These details include amongst other things an IP address and a date and time relevant to the allegation.

10. Next the Particulars of Claim plead that the defendant has by him or herself, or "by allowing others to do so", infringed the copyright subsisting in the Work contrary to sections 16(1) (a) and 17 of the Copyright Designs and Patents Act 1988 ("the 1988 Act") in respect of allegation (1) above and contrary to s16(1)(d) and 20 of the 1988 Act in respect of

allegation (2) above.

11. Next the Particulars of Claim pleads that "It should be noted that under section 12 of the Video Recordings Act 1984, it is a criminal offence to disseminate pornographic films certified R18 by the BBFC other than through licensed sex shops."

12. After a standard plea about the particulars being the best the claimant can give at present, the Particulars of Claim state that:

"By reason of the infringement(s) the claimant has suffered loss and damages and by this claim seeks compensation for the loss and damages suffered together with an injunction against the defendant to prevent repetition of the infringement and/or an injunction to compel the defendant to take adequate measures to effectively secure their internet connection."

13. Particulars of loss and damage are provided which consist of a statement that the Work is legitimately available through licensed retail outlets on DVD together with the date the Work was first available.

14. The Particulars of Claim continues by stating that the defendant's details were obtained pursuant to orders of Chief Master Winegarten earlier this year which required the defendant's internet service provider to disclose details of the registered owner of the internet accounts to which particular internet protocol addresses were assigned which had been identified as being used to infringe the claimant's copyright.

15. Apart from a claim for interest, the Particulars of Claim end with a plea stating that the claimant will seek an enquiry as to damages, stating how those damages will be determined and making it clear that the damages will be claimed whether the infringement was by the defendant or by a "third party who was enabled by the

defendant's failure to institute reasonable safeguards on his/her internet connection to commit the infringement of the claimant's rights".

16. The prayer for relief includes conventional claims for damages for copyright infringement, interest and costs. There is a claim for additional damages for flagrant infringement and then a claim for the following injunction:-

"a permanent injunction pursuant to the inherent jurisdiction of the Court; ordering the defendant to take reasonable steps to safeguard their internet connection being used, either through the defendant's personal computer and/or third parties taking advantage of the defendant's unsecured wireless connection to repeat the infringement of the claimants copyright in the Work(s)."

17. The only document annexed to the Particulars of Claim is the BBFC classification for the film in question.

18. The statement of truth is signed by the claimant's solicitor, Andrew Crossley, on the basis that the claimant believes the facts stated in the Particulars of Claim are true.

19. It will be apparent that the claim has a number of unusual features, leaving aside the nature of the films themselves:

- i) The claimant's right to be a claimant at all is somewhat unclear on the face of the pleading. A copyright case can be brought by the owner of copyright or an exclusive licensee (see s101 and 102 of the 1988 Act) but the Particulars of Claim does not allege the claimant is either of those. The allegation is that the claimant "represents" such persons. There is a plea that the claimant has an agreement with the Rights Owner to identify, pursue and prosecute instances of copyright infringement but no plea that the claimant owns the copyright or has an

exclusive licence.

- ii) The Particulars of Claim include allegations about unsecured internet connections. I am aware of no published decision in this country which deals with this issue in the context of copyright infringement. The German Bundesgerichtshof (BGH) dealt with a similar case in its judgment of 12th May 2010 – **I ZR 121/08 – Sommer unseres Lebens** (Summer of our lives). According to the court's press release the German Supreme Court decided that the owner of the unsecured wireless internet router accused of being involved in a sharing network on the internet could be subject to an injunction to secure their router but was not liable to pay damages. I mention this decision not to decide the point but simply as an illustration of the complex and significant legal issues arising.
- iii) The plea that "allowing" others to infringe is itself an act restricted by s16 (1)(a) and 17 of the 1988 Act is simply wrong. The term used by those sections of the Act is "authorising" and the difference may be very important if the allegation is about unauthorised use of an internet router by third parties.
- iv) The injunction claimed in the prayer is unusual too. There is no claim for an injunction to restrain copyright infringement, as one would ordinarily expect to see in a copyright claim. The injunction claimed relates to "safeguarding" the defendant's internet connection. This relates to the previous points.

20.The claim forms were issued on the following dates:-

<u>Action</u>	<u>Date of issue</u>
Case No: OCL 70086	13 th September 2010
Case No: OCL 70087	13 th September 2010
Case No: OCL 70101	14 th October 2010
Case No: OCL 70102	14 th October 2010
Case No: OCL 70103	14 th October 2010
Case No: OCL 70106	14 th October 2010
Case No: OCL 70114	19 th October 2010
Case No: OCL 70115	19 th October 2010

21.The new procedures applicable to proceedings in the Patents County Court came into effect

on 1st October 2010 and thus there is no doubt that the new procedures apply to the most recent six cases. In the light of my judgment in the **Technical Fibre** case ([2010] EWPC 011) the new procedures do not apply to the first two.

22.One consequence of the new procedural rules is that the Particulars of Claim (in the cases to

which the rules apply) are defective on a number of somewhat technical but important grounds: they do not comply with CPR r63.20(2) which provides that the Particulars of Claim must state whether the claimant has complied with elements of the Practice Direction (Pre-action Conduct); and they do not comply with CPR r63.21 which provides that the statement of truth must be signed by a person with knowledge of the facts. I also strongly doubt that the Particulars of Claim comply with CPR r63.20(1) in that they do not at first sight plead all facts and arguments to be relied on (concisely or otherwise). For example: no attempt is made to deal with the issue of qualification for copyright protection (see s153-156 of the Copyright Designs and Patents Act 1988), the reference to cable programmes does not grapple with the way in which cable programme copyright was abolished as such in 2003 and subsumed into copyright in broadcasts, and the claim for damages under s97(2) of the 1988 Act does not appear to comply with

Paragraph 22.1 of Practice Direction 63. Nevertheless I do not base my decision on the matters before me on these grounds.

The requests for judgment

23. The requests came before me on Tuesday 30th November 2010. The notices are in one of two forms.

24. The first kind is found in actions OCL 70086, OCL 70087, OCL 70114, and OCL 70115.

Here the Request for Judgment consists of the bottom half of the Court's Notice of Issue form. The Notice of Issue gives details such as the date the claim form was issued and details of the court's service of the claim form. The request states that "*The defendant has not filed an admission or defence to my claim, or an application to contest the court's jurisdiction and the time for doing so has expired. I request that judgment be entered for an amount including costs, to be decided by the court.*" It is signed by the claimant's solicitor.

25. In the other cases, the request for judgment is on court form N227. This has no Notice of Issue attached to it. These requests state "*The defendant has not filed (an acknowledgement of service) (a defence) to my claim and the time for doing so has expired. I request that judgment be entered against the defendant for an amount to be decided by the court and costs.*" The request is signed by the claimant's solicitor.

26. Thus all of the requests for judgment are requests for judgment in default - i.e. default of defence or default of acknowledgement of service (see CPR Part 12, rule 12.3 – conditions to be satisfied to obtain judgment in default).

27.CPR r12.4 provides that a claimant may obtain a default judgment by filing a request in the relevant practice form where the claim is for (a) a specified amount of money, (b) an amount of money to be decided by the court, (c) delivery of goods where the claim form gives the defendant the alternative of paying their value, or (d) any combination of these. However this is expressly subject to CPR r 20.4(2) which provides that the claimant must make an application in accordance with Part 23 if he wishes to obtain a default judgment (a) on a claim which consists of or includes a claim for any other remedy; or (b) where rule 12.9 or 12.10 apply. Rule 12.9 is irrelevant but rule 12.10 provides that the Part 23 process must be used in a number of cases including (12.10(a)) when the defendant is a child or protected party. Thus Practice Direction 12 para 3.2 provides that the date of birth of an individual defendant (if known) must be written on the request form.

28.It is clear that the request procedure is only applicable to claims falling within r12.4(1). If default judgment is sought in any other claim, an application is required under Part 23 and that procedure must be followed. One important difference between the Part 23 application procedure and the request for judgment procedure under rule 12.4(1) is that under Part 23, the general rule is that a copy of the application notice must be served on the respondent and Practice Direction 12 para 5.1 provides that notice must be given on all "applications" for default judgment (an "application" is different from a "request"). There is no requirement to give notice of requests under rule 12.4(1). So (as far as I am aware) no notice has been given in these eight cases.

29.Finally rule 12.4(3) provides that where a claimant claims any other remedy in his claim form in addition to those specified in paragraph (1); but abandons that claim in his request for judgment, he may still obtain a default judgment by filing a request under

paragraph (1).

30. Practice Direction 12 para 4.1 provides that both on a request and on an application for default judgment the court must be satisfied that:

- (1) the particulars of claim have been served on the defendant (a certificate of service on the court file will be sufficient evidence),
- (2) either the defendant has not filed an acknowledgement of service or has not filed a defence and that in either case the relevant period has expired,
- (3) the defendant has not satisfied the claim,
- (4) the defendant has not returned an admission to the claimant under rule 14.4 or filed an admission with the court under rule 14.6.

31. Thus the issues I have to decide are:-

- i) whether the Particulars of Claim have been served; and if so
- ii) whether the defendant is in default; and if so
- iii) whether default judgment under rule 12.4 can be given even if the defendant is in default.

32. For reasons which will emerge below, I will consider items i) and ii) together and then deal separately with item iii).

i), ii) Have the Particulars of Claim been served? Are the defendants in default?

33. In the four actions in which the first kind of Request for Judgment has been employed (OCL 70086, OCL 70087, OCL 700114, and OCL 70115) the form includes a Notice of Issue

which gives details the court's service of the claim form. In claims OCL 70086 and OCL 70087 the claim forms were issued on 13th September 2010, posted by the court on the same day and were therefore deemed served on 15th September. The Notice then states that the defendant had until 29th September to reply. This corresponds to CPR Part 10, in which rule 10.3 (1) provides that the time for filing acknowledgement of service is 14 days after service of the claim form (or of the Particulars of Claim if that was not included in the claim form). In this case the claim forms all include Particulars of Claim. These two requests for judgment were signed on 5th October 2010. There is nothing on the court file to show that either defendant has filed an acknowledgement of service and I conclude that the defendants in those two actions (OCL 70086 and OCL 70087) are in default and the condition set by rule 12.3(1) for obtaining judgment in default of acknowledgement of service is satisfied in those two cases.

34. The corresponding dates in OCL 70114 and OCL 70115 are: claim form issued 19th October 2010, posted by court on 25th October, deemed served on 27th October, reply due 10th November 2010. The requests were signed on 16th November 2010. Despite the signature on the requests, it is manifest that the defendant is not in default in either case. In action OCL 70114 the defendant has filed a defence on the form N9D denying the allegations altogether. The defence was received by the court on 3rd November. The defence refers to correspondence I have not seen and includes a statement that the defendant denies having the computer skills to distribute works over the internet and a statement that "I can only conclude I have been the victim of foul play." It has a statement of truth signed by the defendant in person. Similarly in action OCL 70115 a

defence has been filed in a similar way and was received by the court on 2nd November 2010. It also denies all the claims and bears a statement of truth signed by the defendant in person. There is no conceivable basis for default judgment in these two cases. The requests for judgment should never have been filed.

35. It is not clear whether copies of the defences in these cases have been served on the claimant (CPR r15.6) and I note the White Book 2010 15.6.1 draws attention to that fact that rule 15.6 is "disappointingly vague about who should serve a copy of the defence", the defendant or the court. However even if copies of the defences have not been served, the relevant criterion for judgment in default is that they be filed (see rule 12.3), and both defences clearly satisfy that criterion.

36. In the remaining actions, all the claim forms were issued on 14th October 2010 and in each case the Request for Judgment follows form N227. The form has no Notice of Issue appearing on it. When I examined the court file in these cases, the following appears:-

37. In action OCL 70101 there is nothing on the face of the claim form which indicates it has been served at all. The claim form bears counter stamps which appear to indicate that the issue fee was collected. There is a covering letter from the claimant's solicitors to the court stating that it encloses three copies of the Claim Form and Particulars of Claim and asking the court to serve them directly. One might infer from the single copy on the court file that this was done but in truth there is no evidence at all. The case is similar to the situation before the Court of Appeal in **Mayuk Kantilal Patel v Keith Smeaton** unrep CA 24th October 2000. Here Lady Justice Hale (with whom Chadwick LJ agreed) considered an appeal from a refusal to set aside a possession order. One basis on which the tenant contended the order should have been set aside was that no notice of proceedings had been received. His Honour Judge Krikler had refused to do so because

"it is assumed that if service of proceedings is the court's job then they will have served the relevant documents on the parties involved." The Court of Appeal allowed the appeal and at paragraph 10 of her judgment Hale LJ said:

"It is of course the case that, if there is evidence that something has been posted, then it is for the addressee to show that it has not been received. But where, as here, there is no evidence that the court did in fact serve the summons and each of the indications that one would have expected had they done so is absent, then there can be no presumption - and no evidence, indeed - that it was served. I, for my part, simply cannot accept that there is a presumption that, if service of proceedings is the court's job, then it will have been done. There has to be at least some record to indicate that that has indeed been done."

38. In this case (OCL 70101) there is no record to indicate that the claim form has been served.

Applying *Mayuk Kantilal Patel v Keith Smeaton*, I should not presume it has been served and accordingly there is no evidence the Particulars of Claim have been served.

39. The court files in cases OCL 70102 and OCL 70106 are in precisely the same state as OCL 70101, there is no evidence of service of the Particulars of Claim.

40. However even though the claim form and Particulars of Claim in case OCL 70103 are the same as in the previous three cases and are stamped in the same way and despite the lack of a Notice of Issue, there is clear evidence the proceedings have been served, in that the defendant has instructed solicitors, acknowledged service and filed a defence. The defence denies the claim and raises a number of other matters including a challenge to the claimants right to bring the action at all at least without joining the copyright owner under s102 of the 1988 Act. There is no conceivable basis for default judgment in this case.

41. In conclusion: in two cases it appears the defendant is in default, in three others there is simply no evidence proceedings have been served and I refuse to find that they have been and in the final three cases the defendant has responded to the claim, filed a defence and is not in default at all.

iii) Should I give default judgment under rule 12.4?

42. For the two cases OCL 70086 and OCL 70087 the relevant defendant does appear to be in default and thus the condition set by rule 12.3 is satisfied. I need to consider whether to give default judgment under rule 12.4. In my judgment I should not do so for the following reason. Default judgment may only be obtained using the without notice Request for Judgement procedure if the claim is one for a sum of money, a sum to be decided by the court, certain delivery of goods claims or a combination of them (r12.4(1)). Otherwise an application under part 23 must be made. It is clear that none of the claims before me fall within r12.4(1) on their face since the claim forms seek an injunction (set out above). However r12.4(3) allows a claimant to abandon his claim for other remedies outside 12.4(1) in his request for judgment and if he does so he may still obtain default judgment this way.

43. Has this claimant abandoned the claim for the injunction? In my judgment the answer is no. It is true that the request form states "*I request that judgment be entered for an amount including costs, to be decided by the court*" but I do not interpret that as an abandonment of the injunction claim. It is simply standard wording which corresponds to rule 12.4 (1) (b) and is found on form N227. In my judgment a claimant who wished to abandon an injunction claim and so fall within rule 12.3 needs to use more direct and explicit language than that. This is particularly so given the nature of the Particulars of Claim in this case and the injunction requested there. It would be surprising if the claimant

wanted to abandon the injunction claim and a much clearer statement to that effect than I find here would be needed. Accordingly the Request for Judgment in actions OCL 70086 and OCL 70087 does not fall within rule 12.4(1) and no default judgment should be given. I note that this reasoning would also apply to the other six claims before me.

44.Finally I note that there is no evidence about the age of the individual defendants in these two cases. Rule 12.10 provides that the request for judgment procedure is not applicable if the defendant is a child. The claimant obviously does not know the defendants dates of birth since the relevant part of the Request forms is blank. Nevertheless it would be surprising if the named defendants in these cases were children given that their names have been provided by an internet service provider as the registered owners of internet accounts and I will not pursue this aspect further.

45.I should end by recording that I am not sorry to have reached the conclusion I have in refusing all the requests for default judgment. The nature of the allegations made in the Particulars of Claim are such that it seems to me that it would be unfortunate if it were possible to obtain a default judgment without notice using the Request for Judgment procedure in rule 12.4(1) even if the claimant had abandoned all remedies save for the claim for an enquiry as to damages. The Request for Judgment procedure is an essentially administrative procedure and plays an important role in court procedure in the vast majority of cases in which it is used. However these are specialist intellectual property claims raising difficult and potentially controversial legal issues.

46.Rule 12.11 provides that where the claimant makes an application for a default judgment, judgment shall be such judgment as it appears to the court that the claimant is entitled to on his statement of case. This rule is expressed in such a way that it applies to applications (under part 23) and therefore not to requests such as are before me. This

provision appears to me to be another important difference between the request procedure and the procedure by application. In the present case it is not clear what judgment the claimant might be entitled to on the Particulars of Claim. The claimant's right to bring these claims at all may be entirely solid but that does not emerge clearly from the statement of case. A key part of the plea of infringement rests on an assertion that "allowing" others to infringe is itself an infringing act, when it is not. There is no plea that the works qualify for copyright protection at all. If the claim were to be restricted to damages in order to avoid the part 23 procedure, it is all the more striking that the German BGH allowed an injunction but refused damages in a similar case.

47. In all these circumstances, a default judgment arrived at without notice by means of an essentially administrative procedure, even one restricted to a financial claim, seems to me to be capable of working real injustice.

48. Peer to peer file sharing which involves copyright infringement is an important and serious matter and claimants with a proper claim are entitled to use the full machinery of the courts to enforce their rights. Default judgment is an important part of the court's armoury in order to ensure that defendants engage with the legal process properly but it would not be a significant burden on claimants in cases like these to be required to use the part 23 procedure in all such cases.