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Case No: HC13F04302

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 13 November 2013

**Before :**

**THE HON MR JUSTICE ARNOLD**

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**Between :**

- (1) PARAMOUNT HOME ENTERTAINMENT  
INTERNATIONAL LIMITED  
(2) SONY PICTURES HOME  
ENTERTAINMENT LIMITED  
(3) TWENTIETH CENTURY FOX FILM  
COMPANY LIMITED  
(4) UNIVERSAL PICTURES (UK) LIMITED  
(5) WARNER BROS. ENTERTAINMENT UK  
LIMITED  
(6) DISNEY ENTERPRISES, INC.

**Claimants**

- and -

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

**Defendants**

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**Richard Spearman QC (instructed by Wiggin LLP) for the Claimants**  
**The Defendants did not appear and were not represented**  
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# **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 :

### Introduction

1. This is another application for website-blocking orders under 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”). The Claimants, who each sue in a representative capacity on behalf of companies in the same group, are major film studios. The First to Fifth Claimants are members of the Federation Against Copyright Theft Ltd, as is a member of the Sixth Claimant’s group. The Defendants are the six main retail internet service providers (“ISPs”) in the United Kingdom. The targets of the present application are two websites located at [www.solarmovie.so](http://www.solarmovie.so) (“SolarMovie”) and [www.tubeplus.me](http://www.tubeplus.me) (“TubePlus”) (collectively, “the Websites”).
2. The principles to be applied to applications of this kind are now settled at this level, having been established in a series of earlier judgments of mine: *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011] EWHC 1981 (Ch), [2012] Bus LR 1471 (“*20C Fox v BT*”); *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)*”); *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch), [2012] 3 CMLR 14 (“*Dramatico v Sky*”); *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd (No 2)* [2012] EWHC 1152 (Ch), [2012] 3 CMLR 15 (“*Dramatico v Sky (No 2)*”); *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch), [2013] ECDR 8 (“*EMI v Sky*”); and *Football Association Premier League Ltd v British Sky Broadcasting Ltd* [2013] EWHC 2058 (Ch), [2013] ECDR 14 (“*FAPL v Sky*”).
3. As with most of the previous applications, the Defendants do not resist the application, and have agreed the terms of the orders that should be made if the Court is satisfied that it is appropriate to make orders in respect of the Websites.

### The Claimants’ rights

4. The Claimants, and those they represent, own the copyrights in a very large number of commercially available films and television programmes.

### The Websites

5. Each of the Websites provides access to streams of a large range of films and television programmes. In the case of SolarMovie, it appears to be the operators’ policy not to provide access to downloads. In the case of TubePlus, it also provides access to downloads. The Claimants’ evidence is that over 99% of the content accessible via each Website is likely to be protected by copyright. The mode of operation of the Websites is broadly similar to that of the FirstRow website described in *FAPL v Sky* at [14]-[19]. Importantly, as in the case of FirstRow, the Websites do not host the content in question. Rather, the Websites ensure that the content is comprehensively categorised, referenced, moderated and searchable. In the case of SolarMovie, links to content are supplied by registered users of the Websites subject to approval by moderators. A key purpose of moderation is quality control (i.e.

control over the quality of the link and the material to which it provides access). In the case of TubePlus, it is not clear to what extent links are provided by users and to what extent by the operators of the Website.

6. Users who wish to access content via one of the Websites are provided with a number of these links in response to searches or when browsing. Typically, clicking on a link enables the user to view a stream of the chosen content on an embedded player (as noted above, some of the TubePlus links provide access to downloads). The content is hosted by one of a number of third party websites. Some of the host sites require the user to become a member before streaming the chosen content, while others do not. At least in the latter case, the host sites tend not to be searchable.
7. The ultimate source of the content varies. In the case of television programmes, it is typically a copy captured from a broadcast (with HD broadcasts being favoured for obvious reasons) or (in the case of older programmes) a DVD. In the case of films, it is likely to be a Blu-Ray disc or DVD, but in other cases it may be a television broadcast or a copy of a film made in a cinema using a camcorder or mobile phone. Users who provide links to SolarMovie must specify the “quality” (i.e. source) of the link.

#### Jurisdictional requirements

8. 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 the Claimants’ copyrights. 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?

9. 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 operators and/or users of the Websites infringe the Claimants’ copyrights?

10. The Claimants contend that the operators of the Websites infringe their copyrights in two ways. First, by communicating the copyright works to the public within section 20 of the 1988 Act, alternatively by acting as joint tortfeasors with the operators of the host websites. Secondly, by authorising infringements by users. The Claimants contend that some UK users of the Websites, namely users who submit links to infringing content to the Websites, infringe their copyrights by communicating the copyright works to the public.

*Communication to the public*

11. As I have explained in previous judgments, section 20 of the 1988 Act confers rights of communication to the public on copyright owners which give effect to (and indeed, extend beyond) Article 3(1) of the Information Society Directive. The Court of Justice of the European Union has now considered the concept of “communication to the public” within Article 3(1) in a series of nine judgments: Case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [2006] ECR I-11519; Case C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireia* [2010] ECR I-37; Case C-393/09 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* [2010] ECR I-13971; Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083; Joined Cases C-431/09 and C-432/09 *Airfield NV v Belgische Vereniging van Auteurs, Compositien en Uitgevers CVBA (SABAM)* [2011] ECR I-9363; Case C-283/10 *Circul Globus București (Circ & Variete Globus București) v Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor (UCMR – ADA)* [2011] ECR I-12031; Case C-135/10 *Societá Consortile Fonografici (SCF) v Del Corso* [2012] Bus LR 1870; Case C-162/10 *Phonographic Performance (Ireland) Ltd v Ireland* [2012] ECDR 15; and Case C-607/11 *ITV Broadcasting Ltd v TVCatchup Ltd* [2013] ECDR 9. I have considered most of these judgments in previous judgments on section 97A applications.
12. The principles established by the CJEU case law can, I think, be summarised as follows:
  - (1) “Communication to the public” must be interpreted broadly: *SGAE* at [36], [54], *FAPL* at [186], *ITV* at [20].
  - (2) “Communication to the public” covers any transmission or retransmission of the work to the public not present at the place where the communication originates by wire or wireless means: *ITV* at [23].
  - (3) “Communication to the public” does not include any communication of a work which is carried out directly in a place open to the public by means of public performance or direct presentation of the work: *Circul* at [36]-[41], *FAPL* at [200]-[203].
  - (4) There is no “communication to the public” where the viewers have no access to an essential element which characterises the work: *Bezpečností* at [57].
  - (5) “Communication” includes any retransmission of the work by a specific technical means different from that of the original communication: *ITV* at [24]-[26].
  - (6) A mere technical means to ensure or improve reception of the original transmission in its catchment area does not constitute a “communication”: *SGAE* at [42], *FAPL* at [194], *Airfield* at [74], *ITV* at [28].

- (7) There is an act of “communication” when someone gives members of the public access to the work in circumstances where they would not be able to enjoy the work without that intervention: *SGAE* at [42], *FAPL* at [194]-[196], *Airfield* at [72], *SCF* at [82], *PPIL* at [31].
- (8) It is sufficient for there to be “communication” that the work is made available to the public in such a way that the persons forming that public may access it whether or not those persons actually access the work: *SGAE* at [43].
- (9) Mere provision of physical facilities does not as such amount to “communication”: *SGAE* at [46].
- (10) Nevertheless, the installation of physical facilities which distribute a signal and thus make public access to works technically possible constitutes “communication”: *SGAE* at [46]-[47], *Organismos* at [39]-[41].
- (11) “The public” refers to an indeterminate number of potential recipients and implies a fairly large number of persons: *SGAE* at [37]-[38], *SCF* at [84], *PPIL* at [33], *ITV* at [32].
- (12) For that purpose, the cumulative effect of making the works available to potential recipients should be taken into account, and it is particularly relevant to ascertain the number of persons who have access to the same work at the same time and successively: *SGAE* at [39], *SCF* at [87], *PPIL* at [35], *ITV* at [33].
- (13) In considering whether there is a communication to “the public”, it is not irrelevant that the communication is of a profit-making nature: *SGAE* at [44], *FAPL* at [204]-[206], *Airfield* at [80], *SCF* at [88]-[90], *PPIL* at [36].
- (14) There is no communication to “the public” where sound recordings are broadcast by way of background music to patients of a private dental practice: *SCF* at [92]-[102].
- (15) Where there is a communication which does not use a different technical means to that of the original communication, it is necessary to show that the communication is to a new public, that is to say, a public which was not considered by the authors concerned when they authorised the original communication: *SGAE* at [40], *Organismos* at [38], *FAPL* at [197], *Airfield* at [72], [76], *ITV* at [38].
- (16) There is a communication to a new public where television broadcasts are transmitted to an additional public (that is to say, additional to the public constituted by owners of television sets who receive broadcasts within their own private and family circle) such as customers of hotels and public houses: *SGAE* at [41], *Organismos* at [37], *FAPL* at [198]-[199].
- (17) There is also a communication to a new public where a satellite package provider expands the circle of persons having access to the relevant works: *Airfield* at [77]-[82].

- (18) Where there is a communication using a different technical means to that of the original communication, it is not necessary to consider whether the communication is to a new public: *ITV* at [39].
13. There are presently three references pending before the CJEU which bear upon the issues in the present case. The first is Case C-466/12 *Svensson v Retriever Sverige AB*. This is a reference from the Svea Hovrätten (Svea Court of Appeal) in Sweden. The Claimants have helpfully provided me with English translations of the judgments of the Swedish courts in this case.
  14. The claimants were four journalists who between them had written 13 articles published by the *Göteborgs-Posten* newspaper. Three of the journalists were employed by the newspaper, while one was freelance. All of the articles had all been published not only in print, but also online on the newspaper's website. In the case of one of the articles, which was written by the freelance author, the online publication by the newspaper was not licensed by the author. In addition to publishing the articles online on its own website, the newspaper had licensed Mediarkivbolaget to make copies of the articles available from its Mediarkivet database. None of the claimants had licensed this. The defendant Retriever was a member of the same group of companies as Mediarkivbolaget which provided media monitoring and search services. The claimants brought proceedings before the Stockholm District Court claiming that Retriever had infringed their copyrights in the articles.
  15. Retriever provided its services to about 3,000 subscribers. The media monitoring service involved Retriever searching the internet using agreed search words so as to inform the subscriber as to how it had been reported in the media or how specific issues had been handled. The results of the searches were sent by Retriever to the subscriber by an email which included links to relevant articles (that is to say hyperlinks to websites on which the articles were available) together with so-called "link tails" which included a few words from the articles in question. The subscriber could also review the search results by logging onto Retriever's website. If the subscriber so requested, and paid an additional fee, the search would include a search of the Mediarkivet database.
  16. The search service comprised a search facility on Retriever's website. The search included a search of the Mediarkivet database. The search result was presented to the subscriber in the form of lists of links. The claimants contended that each of the thirteen articles had been accessed via such links by one of Retriever's subscribers who had used the search function.
  17. The District Court first considered the claimants' claim that Retriever had made the articles available in full text by either its media monitoring service or its search service. Retriever denied this, contending that it had only provided links. The District Court rejected this claim on the ground that the claimants had failed to prove that Retriever, rather than Mediarkivbolaget, had made the articles available in full text.
  18. The District Court then considered the claimants' claim that Retriever had made the articles available to the public by the provision of links in the results of its search service. (This claim did not extend to the media monitoring service.) The District

Court noted that this claim depended on the interpretation of the Information Society Directive, but decided not to refer any questions to the CJEU.

19. The District Court noted that, given the circumstances of the case, there was reason to pose the question whether links to works which are lawfully available on the Internet should be treated differently from a legal perspective than links to works which are unlawfully available on the internet. It could be said that links to the former were subject to an implied licence from the copyright owner, whereas linking to an address on which the work has been unlawfully placed might constitute copyright infringement. The real question, however, according to the District Court, was whether linking amounted to communication to the public at all.
20. The District Court went on to distinguish between “deep linking”, where the user does not notice that they have been transferred to another website, and “reference linking”, where this is clear to the user. (I note that this use of these expressions is, in my experience, unusual.) The District Court considered that the preponderant view amongst commentators was that “reference linking” did not constitute communication to the public and shared this view. Since Retriever’s links were reference links, the District Court concluded that there was no communication to the public in the instant case.
21. Finally, the District Court considered the position in respect of certain alleged infringements which took place prior to Sweden’s implementation of the Information Society Directive, and which thus fell to be considered under the previous law. This aspect of the judgment is not relevant for present purposes.
22. The claimants appealed. As I understand it, the claim was only pursued in respect of the claims relating to Retriever’s provision of links, not the claim relating to full text articles. The Svea Court of Appeal referred the following questions to the Court of Justice without expressing any preliminary view as to how they should be answered:
  - “1. If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society?
  2. Is the assessment under question 1 affected if the work to which the link refers is on a website on the Internet which can be accessed by anyone without restrictions or if access is restricted in some way?
  3. When making the assessment under question 1, should any distinction be drawn between a case where the work, after the user has clicked on the link, is shown on another website and one where the work, after the user has clicked on the link, is shown in such a way as to give the impression that it is appearing on the same website?



4. Is it possible for a Member State to give wider protection to authors' exclusive right by enabling 'communication to the public' to cover a greater range of acts than provided for in Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society?"
23. The second is Case C-279/13 *C More Entertainment AB v Sandberg*. This is a reference from the Högsta domstolen (Supreme Court) in Sweden. I have not seen copies of the judgments in this case. As I understand it, however, the background is as follows. The claimant, C More Entertainment, was a company which had an agreement with the Swedish Ice Hockey League to produce television broadcasts of Elite Series ice hockey matches. Canal+ offered these broadcasts as part of a pay-per-view web television service. The defendant found a way to get free access to broadcasts of two ice hockey matches. He published links to these on his website. C More Entertainment brought proceedings for copyright infringement, contending that the defendant had communicated its works to the public.
24. The Swedish Supreme Court referred the following questions to the Court of Justice:
  - “1. Does the expression communication to the public, within the meaning of Article 3(1) of the Information Society Directive, include measures to make available on a website open to the public a clickable link to a work which is broadcast by the holder of the copyright in that work?
  2. Is the manner in which the linking is done relevant to the answer to question 1?
  3. Is it relevant if the access to the work to which the linking is done is in any way restricted?
  4. May the Member States give wider protection to the exclusive right of rightholders by enabling 'communication to the public' to cover a greater range of acts than provided for in Article 3(1) of the Information Society Directive?
  5. May the Member States give wider protection to the exclusive right of authors by enabling 'communication to the public' to cover a greater range of acts than provided for in Article 3(1) of the Information Society Directive?"
25. The third is Case C-348/13 *BestWater International GmbH v Mebes*. This is a reference from the Bundesgerichtshof (Federal Court of Justice) in Germany. An English translation of the referring judgment has recently been published at [2013] JIPLP 887.
26. In this case BestWater manufactured and sold water filtration systems. It commissioned the production of a short advertising film on the issue of water contamination. BestWater owned the copyright in the film. Someone uploaded the

film to the well-known video-sharing website YouTube without BestWater's consent. The defendants were two self-employed commercial representatives of a competitor to BestWater. The defendants operated their own websites advertising the products they sold. The defendants enabled visitors to their websites to view the BestWater film. This was done by means of "framing". According to the Federal Court of Justice, when visitors clicked on a link, this triggered downloading of the film from YouTube and it was displayed within a frame on the defendants' respective websites. (I suspect that the technology involved was an embedded stream rather than a download, but this makes little difference for present purposes.)

27. The Federal Court of Justice referred the following question to the Court of Justice:

"Does the embedding, within one's own website, of another person's work made available to the public on a third-party website, in circumstances such as those in the main proceedings, constitute communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC, even where that other person's work is not thereby communicated to a new public and the communication of the work does not use a specific technical means which differs from that of the original communication?"

28. The Federal Court of Justice suggested that this question should be answered in the affirmative for the following reasons:

"[24] (1) However, according to the case law of this Court, a person who merely places a hyperlink to a website containing a copyright work lawfully made available to the public does not encroach upon the right of communication to the public in the form of the right to make the work available to the public. Placement of such a link does not amount to an act of use under copyright law, but, rather, merely constitutes a reference to the work in a manner that facilitates the access already available to users. The person placing the link does not keep the work available for downloading, nor does he transmit it to third parties on demand. He does not decide whether or not the work will remain publicly accessible, rather, the party that placed the work on the internet in the first place does. If the website containing the copyrighted work is deleted after placing of the hyperlink, that link will lead nowhere (cf. BGHZ 156, 1, 14-15 – Paperboy).

[25] (2) However, according to the case law of this Court, the situation changes where a deep link is placed, if in doing so technical protection devices installed by the right holder are circumvented. Where the right holder installs technical protection measures in order to restrict access to the copyrighted work to certain users or to enable use solely via a certain path, the right holder only makes the work available in that restricted manner. Where a hyperlink is placed which circumvents such protection measures, this opens up access to

work which would not otherwise be available to those users or in that manner. This encroaches upon the right of communication to the public in the form of the right to make the work available to the public. (cf. BGH, GRUR 2011, 56, No. 25-27 – Session-ID).

[26] (3) A person who – as in the present case – incorporates the work of a third party that was made available to the public on that party’s website into its own website as an integral part, by way of ‘framing’, facilitates access to the work for users, not only on the original website. Rather, he misappropriates the work as his own by embedding it into his website. He does not make the work available himself, for which he would require the author’s consent. Upon a weighted assessment, this Court holds such conduct to be communication to the public in the sense of Article 3(1) of Directive 2001/29/EC, which is subject to the separate authorization of the author. Contrary to a user who merely places a hyperlink and like a user who places a deep link while circumventing technical protection measures installed by the right holder, such a user plays a pivotal role in communication of the work, as emphasized by the CJEU (cf. judgment of the CJEU, GRUR 2007, 225, No. 42 – SGAE v Rafael; GRUR 2012, 156, No. 195 – Football Association Premier League and Murphy; GRUR 2012, 593, No. 82 – SCF v Marco Del Corso). It is important to take into account here that the term ‘communication to the public’ is to be given a broad interpretation in view of the principal objective of Directive 2001/29/EC to establish a high level of protection for authors and to enable them to receive adequate remuneration for the use of their works also by way of communication to the public, so that it encompasses any communication of copyrighted works irrespective of the technical means or processes employed (judgment of the CJEU, GRUR 2012, 156, Nos. 186 and 193 – Football Association Premier League and Murphy; judgment of the CJEU, GRUR 2013, 500, Nos. 20 and 23 – ITV Broadcasting v TVC).

[27] In contrast, it is not decisive whether the viewer of the website recognizes that the operator of the website does not keep the copyright work available itself. Nor is it relevant whether the operator of the website – as in the present case – is acting for profit-making purposes. What is considered to be decisive by this Court is that the operator misappropriates the copyrighted work by embedding it in its website. Nor is it of relevance that the work was kept available on the original website with the right holder’s consent. Consent granted to a certain form of communication to the public does not exhaust the right with regard to different, independent acts which also constitute communication to the public (judgment of the CJEU, GRUR 2013, 500, No. 23 – ITV Broadcasting v TVC).”

29. These references, and in particular the *Svensson* reference, have occasioned considerable debate amongst commentators. In particular, the European Copyright Society, a group of eminent European academics, published an Opinion on 17 February 2013 in which the authors argued that, in general, hyperlinking did not constitute “communication to the public” within Article 3(1). They also argued that “deep linking” and “framing” were no different to hyperlinking for this purpose. This Opinion was published before the judgment of the Court of Justice in the *ITV* case, however. More recently, the Executive Committee of the Association Littéraire et Artistique Internationale adopted a Report and Opinion on 16 September 2013 which argued that the making available right under Article 3 covers hyperlinks that enable members of the public to access specific protected materials (i.e. direct links to the material in question), but not hyperlinks which merely refer to a source from which a work may subsequently be accessed (e.g. the home page of the relevant website). Reference may also be made to earlier academic commentaries which suggest that hyperlinking may constitute communication to the public at least in some circumstances: see e.g. Ricketson and Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention* (2<sup>nd</sup> ed, 2005) at §§12.60-12.61 and Walter and von Lewinski, *European Copyright Law: A Commentary* (2010) at §11.3.35.
30. These are clearly difficult and controversial issues. I therefore find it surprising that the Court of Justice has decided to proceed to judgment in the *Svensson* case without the benefit of an Advocate General’s opinion. Even so, given that the hearing in that case only took place on 7 November 2013, it is likely to be some months before its judgment becomes available. The question I have to decide is whether, on the current state of the law, the operators and/or users of the Websites communicate the Claimants’ copyright works to the public.

*Communication to the public by the operators of the Websites*

31. In *FAPL v Sky* I reasoned as follows:
- “38. *Is there a communication by FirstRow?* FAPL contends that FirstRow communicates FAPL’s copyright works by electronic transmission. In my judgment it is clear from the CJEU’s reasoning in *ITV v TVCatchup* at [26] and [30] that there is a communication of the works. More specifically, the works are made 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 them within section 20(2)(b).
39. The more difficult question is whether FirstRow is responsible for the communication. FAPL accepts that, in technical terms, the streams emanate from the UGC sites and not from FirstRow itself. FAPL nevertheless contends that both the UGC sites and FirstRow communicate the works.
40. In support of this contention, FAPL relies upon the reasoning of Kitchin J (as he then was) in *Twentieth Century Fox Film*

*Corp v Newzbin Ltd* [2010] EWHC 608 (Ch), [2010] FSR 21 at [125]:

‘The defendant has provided a service which, upon payment of a weekly subscription, enables its premium members to identify films of their choice using the Newzbin cataloguing and indexing system and then to download those films using the NZB facility, all in the way I have described in detail earlier in this judgment. This service is not remotely passive. Nor does it simply provide a link to a film of interest which is made available by a third party. To the contrary, the defendant has intervened in a highly material way to make the claimants’ films available to a new audience, that is to say its premium members. Furthermore it has done so by providing a sophisticated technical and editorial system which allows its premium members to download all the component messages of the film of their choice upon pressing a button, and so avoid days of (potentially futile) effort in seeking to gather those messages together for themselves. As a result, I have no doubt that the defendant’s premium members consider that Newzbin is making available to them the films in the Newzbin index. Moreover, the defendant has provided its service in full knowledge of the consequences of its actions.’

41. FAPL also relies on what I said in *EMI v Sky* at [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.)’

42. In the present case the operators of FirstRow have intervened in a manner which, although technically different, is analogous to that of the websites under consideration in those cases. FirstRow aggregates together a large number of streams from a variety of streamers, indexes them for the convenience of the user and provides a simple link for the user to click on in order to access a specific stream. It is true that the technical effect of clicking on the link is to direct the stream from the UCG site to the user’s computer, but even so the stream is presented in a frame provided by FirstRow. In all the circumstances, I consider that FirstRow is responsible for the communication.

43. Even if I am wrong about that, I consider that FirstRow is jointly liable for the communication by the UGC sites: compare *EMI v Sky* at [71]-[74].
44. *Is the communication to the public?* FAPL contends that the communication is to the public, relying on the reasoning of the CJEU in *ITV v TVCatchup* at [35]-[36]. I agree that this reasoning is equally applicable to the present case. Furthermore, FAPL contends that it is not necessary for it to show that the communication is to a new public, relying on *ITV v TVCatchup* at [39]. I accept this. In any event, even if FAPL had to show that the communication was to a new public, I consider that it is clear that that requirement is satisfied, since the effect of FirstRow's activities is to make the broadcasts available to persons who are not legitimately entitled to view them either because those persons have not subscribed to the broadcaster's service or because the broadcaster has only been licensed by FAPL for a different territory."
32. I have reconsidered this reasoning in the light of the matters referred to in paragraphs 13-29 above. As the law presently stands, I adhere to the view that the actions of operators of websites like the one under consideration in *FAPL v Sky* amount to communication to the public of works within Article 3(1) of the Information Society Directive, and more specifically to making those works available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them. I acknowledge that it is arguable that the mere provision of a hyperlink is not enough to constitute communication to the public (particularly if the hyperlink is not directly to a source of the copyright work). I also acknowledge that it is arguable that it makes no difference whether or not the source of the copyright work to which the hyperlink links is licensed by the copyright owner. I also acknowledge that it is arguable that it makes no difference whether clicking on the links results in framing (i.e. the work being presented within the frame of the operator's website) or not. What the operators of FirstRow were doing, however, went beyond the mere provision of hyperlinks linking (directly) to (unlicensed) sources of copyright works (which were framed). As explained in the passage quoted above, they were intervening in a highly material way to make the copyright works available to a new audience.
33. On reflection, I am more doubtful whether I was correct to say that the operators of FirstRow were using a different technical means to that of the original communication in accordance with the reasoning of the CJEU in *ITV*. The operators of FirstRow were undoubtedly using a different technical means (namely transmission via the internet) to that of the copyright owners (namely transmission by terrestrial and/or satellite and/or cable broadcasting), but they were arguably not using a different technical means to that of the UGC sites. Even if that is so, however, I remain of the view that they were communicating the copyright works to a new public.
34. I turn, therefore, to consider whether there is a material difference between FirstRow and the Websites in this respect. In my judgment, there is no material difference, and the operators of the Websites communicate the Claimants' works to the public. Indeed, the evidence in the present case makes it clear that it would be very difficult

for members of the public to access much of the content directly from the host sites if it were not made available by the Websites. Even where the content could be accessed from the host sites, the Websites make it much easier for members of the public to find what they want. Viewed from the perspective of the user, the Websites do in a very real sense make the content available to the public.

35. Even if I am wrong about that, however, it seems clear that the host sites communicate the Claimants' works to the public and that the operators of the Websites are jointly liable for this: see *EMI v Sky* at [71]-[74].
36. I am also satisfied that there is communication to the public in the UK in the present case for similar reasons to those I gave in *FAPL v Sky* at [45]-[46].

#### *Communication to the public by users of the Websites*

37. In the present case the Claimants contend that there is communication to the public by UK users of the Websites who supply links to the Websites. For the reasons explained above, I am not sure that the mere provision of a hyperlink amounts to communication to the public. It is clear from the evidence in this case, however, that many, if not most, of the users in question do not merely provide a link to the host site, they also upload the content to the host site. In my judgment, the combined effect of these acts does amount to communication to the public even assuming that the mere provision of a hyperlink does not.

#### *Authorisation by the operators of the Websites*

38. The Claimants contend that the operators of the Websites authorise the communication to the public by the users, and therefore infringe in that way also. I accept this contention for similar reasons to those I gave in *Dramatico v Sky* at [73]-[81] and in *EMI v Sky* at [52]-[70].

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

39. I held in *20CFox v BT* at [99]-[113], *Dramatico v Sky (No 2)* at [6], *EMI v Sky* at [76]-[88] and *FAPL v Sky* at [51] that both users and the operators of the websites in issue used the Defendants' services to infringe the claimants' copyrights. In my judgment, that reasoning is equally applicable to the present case.

#### Do the Defendants have actual knowledge?

40. On 18 September 2013 a representative of the Claimants sent emails to the Defendants which attached evidence of infringement. In addition, the Claimants have served the Defendants with the present application and the Claimants' supporting 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

41. 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.

42. I reviewed the correct approach to the assessment of proportionality in *EMI v Sky* at [91]-[106]. I shall adopt the same approach here. In my judgment the orders sought are proportionate for essentially the same reasons as I gave in *FAPL v Sky* at [55]-[59].

#### Form of the orders

43. A minor point arises on the form of two of the orders. In three recent applications by the Claimants which came before Birss J on paper, he required that some of the draft orders be amended so as to recite (as the other draft orders already did) that the Court was satisfied on the evidence before it that the operators and/or users of the target websites used the services of the relevant Defendant to infringe the copyrights of the Claimants (and those they represented) in the UK. I agree with this. Accordingly, the recital in the orders agreed with the First and Fourth Defendants should take this form.

#### Conclusion

44. Subject to the minor point just mentioned, I will make the orders sought by the Claimants.