[GB] Supreme Court rules on ISPs' liability for website blocking fees

IRIS 2018-8:1/25

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On 13 June 2018, the UK Supreme Court held in Cartier International AG & Ors v British Telecommunications Plc & Anor that Internet service providers (ISPs) should not bear the costs incurred in implementing counterfeit site-blocking injunctions issued against them under section 37(1) of the Senior Courts Act 1981.

The appellants in this case are the five largest providers of networks through which subscribers can access content online but who do not provide, store or monitor content themselves. The respondents are well-known companies belonging to the Richemont Group. They design, manufacture and sell luxury-branded goods, infringing copies of which had been offered, according to the evidence, on some 46 000 websites. In 2014, the respondent companies obtained injunctions in the High Court against the appellants, requiring them to block access to specified "target websites" selling counterfeit goods in breach of their trademarks. Whilst such orders are available to copyright holders under section 97A of the Copyright, Designs and Patents Act 1988, there is no corresponding statutory provision relating to trademarks. Hence, the respondents had relied upon the general injunctive power available to the High Court under the Senior Courts Act.

In 2016, the Court of Appeal decided that the High Court had jurisdiction to make an order of the kind sought by Richemont. Moreover, both the court of first instance and a majority of the Court of Appeal took the view that it was implicit in the Information Society Directive (2001/29/EC) and the Enforcement Directive (2004/48/EC) that it was entirely appropriate for a national court to order that the costs of any such injunction should be borne by the intermediary. As Jackson LJ observed, the compliance costs are "part of the price which the ISPs must pay for the immunities which they enjoy under the two Directives".

The appeal to the Supreme Court centred on the issue of cost allocation, specifically in relation to the implementation of website-blocking orders. The pivotal question with which it was concerned was: "When an injunction is obtained against an innocent intermediary to prevent the use of his/her facilities by wrongdoers for unlawful purposes, who should pay the cost of complying with the order?" Overturning the decisions of the lower courts, the Supreme Court held that neither the relevant EU Directives nor the Court of Justice of the European

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Union had set any rules on the incidence of compliance costs. Lord Sumption stated - and the remaining four justices agreed - that this was a matter for individual member states to decide “within the broad limits set by the relevant EU principles of effectiveness and equivalence, and the requirement that any remedy should be fair, proportionate and not unnecessarily costly.”

Applying the ordinary principles of English law, the Supreme Court endorsed the neutral role played by ISPs as “mere conduits” of Internet traffic and unanimously ruled that innocent intermediaries were entitled to be indemnified by rightsholders against the costs of complying with a website-blocking order, unless there were good reasons for a different order. In the Court’s judgment, “there is no legal basis for requiring a party to shoulder the burden of remedying an injustice, if he has no legal responsibility for the infringement and is not a volunteer but is acting under the compulsion of an order of the court.” Lord Sumption emphasised that website-blocking injunctions are directed to the rightsholders’ protection in the pursuit of their “own commercial interest” and compliance with the order inures to their benefit. He added: “It is not ordinarily or naturally a cost of the business of an ISP which has nothing to do with the rights in question but is merely providing a network which has been abused by others”.

Finally, as far as litigation costs are concerned, applicants are, in general, responsible for their own costs of applying for a website-blocking order. In this case, however, Lord Sumption agreed that the first instance judge had properly exercised his discretion in awarding costs against the ISPs because they had made the litigation a “test case” and had, uncommonly, “strenuously resisted” the application.

Cartier International AG & Ors v British Telecommunications Plc & Anor [2018] UKSC 28

https://www.supremecourt.uk/cases/docs/uksc-2016-0159-judgment.pdf

Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors [2016] EWCA Civ 658

https://www.bailii.org/ew/cases/EWCA/Civ/2016/658.html

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