

Liability for Authorizing or Procuring Infringement

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By John McKeown

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A recent decision of the High Court in the United Kingdom found that a company which operated a website that provided indexes of media files relating to commercial films that were posted on its site was liable for infringing copyright.

The Facts

The defendant, Newzbin Limited, owns and operates a website on the Usenet discussion system referred to as Newzbin. Usenet allows its users to upload and leave messages in the electronic equivalent of a public bulletin board. It was originally designed to support text content but has subsequently evolved to support non-text or binary content. Usenet servers are operated by Internet Service Providers for the benefit of their subscribers. Different providers provide different levels of service.

Access to the Newzbin website was restricted to its members. The defendant accepted applications for membership only from users who obtained an invitation from a current member. The basic membership required no fee but a premium membership required a weekly fee be paid. Only premium members could download the contents of files sourced using Newzbin. The defendant also permitted its premium members to search indices and the Newzbin website by reference to various categories which included movies.

The defendant employed a team of editors who were encouraged to make reports about content available on the site. It appears that infringing copies of films were posted on the site and the editors were particularly encouraged to make reports concerning these films.

The defendant argued that the Newzbin website was “content agnostic” and designed to index the entire content of Usenet.

The Proceedings

The plaintiff and other owners of copyright in commercial films notified the defendant that the Newzbin website was being used by members to infringe copyright in films. Shortly thereafter, six specific films were downloaded from the website by an investigator employed by the plaintiffs and proceedings were instituted. The plaintiffs claimed that the defendant had authorized infringement by its premium members and procured, encouraged and entered into a common design with its members to infringe copyright.

Infringement

Copyright in a film includes the sole right to reproduce the film and to authorize others to do so. It is an infringement of copyright for any person, without the consent of the owner of copyright to reproduce the film, including the right to authorize the exercise of this right.

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The Judge found that as a result of the structure of the Newzbin website, the categorization of the content and the encouragement given to editors to make reports concerning films, the defendant had been aware for many years that the vast majority of the films available in the “movies” category of Newzbin were commercial, likely protected by copyright and that premium members of Newzbin who used its facilities to download the films were infringing copyright.

Authorization

The Judge said that “authorize” means the grant of the right to reproduce the films. It does not extend to mere enablement, assistance or even encouragement. The grant to reproduce may be express or implied from all the relevant circumstances. In a case which involves an allegation of authorization, the circumstances may include the nature of the relationship between the alleged authorizer and the primary infringer; whether the equipment or other materials supplied constitutes the means used to infringe; whether it is inevitable it will be used to infringe; the degree of control which the defendant retains; and whether the defendant has taken any steps to prevent infringement. These matters were to be taken into account and may or may not be determinative depending on all the circumstances.

The following matters were considered to be of particular importance:

- The defendant provides premium members with a facility that extends considerably beyond indexing and categorization.
- With the press of a button the system creates a file which is delivered to the member’s computer where it may be stored. In the case of a work subject to copyright, the copy is inevitably infringing.
- A large portion of the content in the movies category was commercial and very likely protected by copyright. The defendant took no steps to install a filtering system to exclude such works from its systems.
- The defendant actively encouraged its editors to make reports on films and rewarded them for so doing.

As a result, the Judge was satisfied that a reasonable premium member would deduce from the defendant’s activities that the defendant purported to possess the authority to grant permission to reproduce any film that a member chooses from the “movies” category of the Newzbin website and that the defendant sanctioned, approved or countenanced the reproduction of the plaintiffs’ films.

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Procurement and Participation in a Common Design

In the United Kingdom as in Canada, a person who procures an infringement of copyright is liable, jointly and severally, with the infringer. Similarly, two or more persons may participate in a common design to infringe, rendering them jointly liable. Mere (or even knowing) assistance or facilitation of the primary infringement is not enough to find liability. The joint infringer must have so involved himself in the infringement so as to make it his own.

In this instance, in addition to what was said concerning “authorization” the Judge emphasized the following relevant matters:

- The defendant was well aware of the fact that it was making available to premium members infringing copies of films.
- The defendant operated a site which it designed and intended to make infringing copies of infringing films readily available to premium members.
- The site was structured in such a way as to promote infringement by guiding the premium members to infringing copies of their choice and then providing them with a means to download those infringing copies.
- The activation of the defendant’s facilities in relation to the plaintiffs’ films inevitably resulted in the reproduction of an infringing copy.
- The defendant encouraged and induced its editors to make reports of films.
- The defendant assisted its premium members to engage in infringement by providing advice through sharing forums.
- The defendant profited from the infringement.
- The plaintiffs were not able to identify infringement by particular members only because the defendant did not keep records of the files downloaded.

As a result, the Judge found that the defendant had procured and engaged in a common design with its premium members to infringe the plaintiffs’ copyright.

Comment

The defendant, in effect, provided premium members with infringing copies of commercial films and was found liable even though it did not post the infringing content on its site.

All of the principles applied in this case are part of the law of Canada and a similar decision could be arrived at in Canada in an appropriate factual situation.