

# United Kingdom, High Court, Twentieth Century Fox Film Corporation et al v British Telecommunications

Deciding bodies and decisions  
UK High Court

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## Subject matter

Freedom of expression- intellectual property rights- proportionality- copyrights infringements by users of an internet service provider-, injunctions and filtering obligations on internet service providers

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## Summary Facts Of The Case

The 20th Century Fox v BT case is about the legal remedies that can be obtained to combat online copyright infringement. The case solved the dispute between the six applicants, a group of well-known film production companies or studios that carry on business in the production and distribution of films and television programmes (the Studios), and the British Telecom (BT), UK's the largest internet service provider. The applicants sought an injunction against BT pursuant to section 97A of the Copyright, Designs and Patents Act 1988, in order to block or at least impede access by BT's subscribers to a file-sharing website.

In order to assess the position of the parties, Arnold J took into account several aspects related to the domestic and European legal framework, including Article 10 ECHR, Article 1 of the First Protocol to ECHR, as well as a detailed analysis of EU law and jurisprudence. Moreover, the court took into account a selection of similar cases regarding injunctions solved in other jurisdictions, leading Mr Justice Arnold to affirm that so far no uniform 'European approach' on applications seeking injunctions of blocking or filtering internet websites has emerged.

The final decision of Arnold J relied heavily on the case law of the CJEU and specifically on the Opinion of the AG Villalón in Scarlet. Arnold J argued that, even if the CJEU would have entirely endorsed the AG opinion – the CJEU had not yet delivered its decision at that time - the case at stake was different, as the order sought by the applicants was "clear and precise; it merely requires BT to implement an existing technical solution which BT already employs for a different purpose; implementing that solution is accepted by BT to be technically feasible; the cost is not suggested by BT to be excessive; and provision has been made to enable the order to be varied or discharged in the event of a future change in circumstances. In my view, the order falls well within the range of orders which was foreseeable by ISPs on the basis of section 97A, and still more Article 8(3) of the Information Society Directive. I therefore conclude that the order is one "prescribed by law" within Article 10(2) ECHR, and hence is not contrary to Article 10 ECHR."

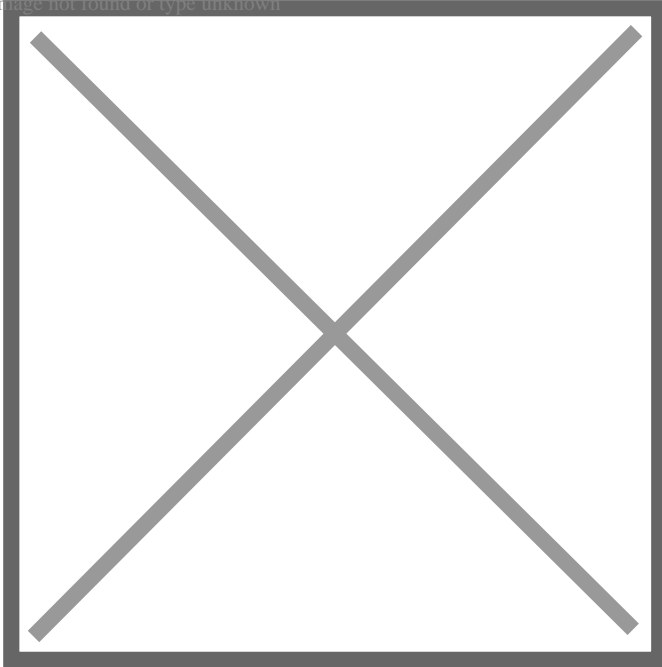
Arnold J also addressed the question of proportionality, affirming that "In general, I am satisfied that the order sought by the Studios is a proportionate one. It is necessary and appropriate to protect the Article 1 First Protocol rights of the Studios and other copyright owners. Those interests

clearly outweigh the Article 10 rights of the users of Newzbin2, and even more clearly outweigh the Article 10 rights of the operators of Newzbin2. They also outweigh BT's own Article 10 rights to the extent that they are engaged. The order is a narrow and targeted one, and it contains safeguards in the event of any change of circumstances. The cost of implementation to BT would be modest and proportionate.”

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## Diagram

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Vertical (UK High Court – CJEU)

Horizontal external (national-national)

Horizontal internal (different judgments of the same Judge)

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## Impact on Jurisprudence

The UK High Court in the following judgments *Dramatico Entertainment Ltd v. British Sky Broadcasting Ltd* (2012) and *Emi Records and others v. British Sky Broadcasting Ltd and others* (2013) relied on *Twentieth Century Fox* judgment and the subsequently established criteria of the CJEU in *Scarlet v SABAM*. The Studios also noted that the *Twentieth Century Fox* case is meant to be a test case and that if they are successful in obtaining an order against BT, they intend to seek similar orders against all the other significant Internet Service Providers in the UK.

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## Sources - ECHR

- Article 10
  - Article 1, Protocol 1
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## Sources - CJEU Case Law

- Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentación SA [1990] ECR I-4135
- Cases C-397/01 to C-403/01 Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV [2004] ECR I-8835

(Arnold J refers to the above-mentioned cases to confirm the duty to interpret in conformity with EU Law.)

- Case C-306/05 Sociedad General de Autores y Editores de España v Rafael Hoteles SA [2006] ECR I-11519

(Arnold J derives from this case the principle of contextual interpretation.)

- Case C-557/07 LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH [2009] ECR I-1227

(Arnold J refers to this case to interpret the meaning of 'intermediaries whose services are used by a third party to infringe a copyright or related right' as stipulated in Article 8(3) of the Information Society Directive 2001/29/EC and the corresponding section 97A of the Copyright, Design and Patents Act 1988.)

- Case C-324/09 L'Oreal v eBay [2011] ECR I-6011

(Arnold J uses the guidance of this judgment to determine the scope and proportionality of the injunction sought.)

- Case C-275/06 Productores de Musica de España (Promusicae) v Telefonica de España SAU [2008] ECR I-271

(Arnold J refers to this judgment for the balancing test between Art. 10 ECHR and Art. 1 First Protocol.)

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## Sources - Internal or external national courts case law

External:

- IFPI Danmark v Tele 2 A/S (Copenhagen City Court, 25 October 2006) iSABAM v Tiscali SA (Brussels Court of First Instance, 29 June 2007)
- IFPI Danmark v DMT2 A/S (Frederiksberg Court, 29 October 2008) upheld sub nom Sonofon A/S v IFPI (High Court of Eastern Denmark, 26 November 2008) and sub nom Telenor v IFPI (Danish Supreme Court, 27 May 2010)
- Bergamo Public Prosecutor's Office v Kolmisappi (Italian Supreme Court of Cassation, 29 Sept 2009)
- Columbia Pictures Industries Inc v Portlane AB (Swedish Court of Appeal, 4 May 2010)
- Nordic Records Norway AS v Telenor ASA (Borgarting Court of Appeal, 9 February 2010)
- Stichting Bescherming Rechten Entertainment Industrie Nederland (BREIN) v. Ziggo BV

(District Court of the Hague, 19 July 2010)

- EMI Records (Ireland) Ltd v UPC Communications Ireland Ltd (High Court of Ireland, 10 November 2010)
- Constantin Film v UPC (Commercial Court of Austria, 13 May 2011)

Internal:

- House of Lords in Ghaidan v Godin-Mendoza [2004] UKHL 30, [2004] 2 AC 557
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## Comments

1. The High Court rejected the respondent's proposal to refer the case to the CJEU on the grounds, that the principles of European law to be applied are sufficiently clear to enable him to determine the questioned application without recourse to a reference. In the view of the High Court, the interpretation of the requirement of "actual knowledge" in section 97A of the Copyright, Designs and Patents Act 1988 is primarily a matter of domestic law. Nevertheless, Arnold J applies a broad interpretation, which can be seen as following the applicants' proposal to interpret this term in a way that does not hinder the effectiveness of the protection granted by the national legislation and the underlying EU Directives.
  2. The High Court extensively refers to CJEU case law in order to confirm general principles of EU Law. The High Court notes firstly that domestic legislation, which implement EU Directives have to be interpreted in conformity with the former and secondly that such interpretation has to be conducted according to EU principles of interpretation as developed by the CJEU, such as the principle of contextual interpretation.
  3. Concerning the substantive scope of the specific national legislation, the High Court heavily relies on CJEU case interpreting the underlying Directives and the Opinion of AG Villalón in *Scarlet v SABAM* (2010). The High Court holds that the conditions for an adequate legal base established by AG Villalón are met as the order sought by the applicants is precise, clear and proportionate and was generally foreseeable by ISP's. The order is therefore one "prescribed by law" within Article 10(2) ECHR, and hence not contrary to Article 10 ECHR. In addition CJEU case law is used to interpret the term 'intermediary whose services are used by a third party to infringe a copyright or related right' (Case C-557/07 *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH*) and to determine the scope and the proportionality of the order sought (Case C-324/09 *L'Oréal SA v eBay International AG*).
  4. The High Court refers to several judgment of other national European Courts. Although they are not analysed in details, the High Court notes their importance for the given case. The Court concludes that no uniform 'European approach' has yet emerged as to the legal remedies that can be obtained to combat online copyright infringement.
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