R v Alan Ellis
15 January 2010

A UK Court held that the administrator of Oink's Pink Palace, the peer-to-peer website that connected users to share copyright protected files, was not guilty of fraud by infringing the rights of copyright owners.

In the present decision, a jury handed down a verdict that deemed the accused not guilty of conspiracy to defraud 'such persons as have an interest in musical works, sound recordings, and in the performance of music by distributing infringing copies of musical works and sound recordings'. The accused was the administrator of one of the world's then largest peer-to-peer websites, Oink's Pink Palace, Mr Alan Ellis. The jury returned a unanimous verdict of not guilty in just 90 minutes.

Napster, the first website that allowed the distribution of files between individuals users (known as 'peers'), provided a centralised system of categorising copyright works, and was therefore shut down due to its direct copyright infringement[1]. However, the newer generation of centralised peer-to-peer file-sharing websites and torrent websites has created a fecund area for litigation, because claims are complicated by the fact that such websites now have no centralised architecture and because administrators can justifiably claim not to 'deal'[2] in infringing articles, or even to have any knowledge of them.

Content owners attempting to protect their products online have various potential targets: the Internet Service Providers (ISPs), who provide the internet connections (but who benefit from various statutory protections), the creators and distributors of peer-to-peer software, and the individual users or peers engaged in direct infringement. There are legal or practical difficulties with each of these targets, but the most effective method is to target the website providers.

A key difficulty to making such claims initially appeared to be the precedent set by the Sony Betamax[3] decision in the US and the Amstrad[4] decision in the UK, where claims for contributory infringement were not successful due to evidence of significant non-infringing use. Many websites sought to rely on this by positioning themselves as distribution systems for unsigned bands. However, ultimately, the courts around the world responded robustly. The Grokster[5] case in the US was concluded successfully in favour of the Motion Picture Association of America, on the grounds of contributory infringement and vicarious liability, with the US Supreme Court setting down an 'inducement' theory of infringement. In Sweden, the owners of Pirate Bay were fined more than £2million and sentenced to more than a year in jail each, though this is subject to an ongoing appeal.

In Australia, the courts found, in the Sharman Networks case[6], that the KaZaA network was liable for authorising a user's primary copyright infringement, as he found 'something more' than the mere provision of facilities. Under the Australian Copyright Act, it does not follow that a person who provides facilities that are used by another to infringe copyright will be taken to have authorised such infringing use. Instead, other factors are weighed up to decide whether authorisation had occurred, such as the power to stop infringement, the nature of the relationship between the infringer and the person or entity allegedly authorising the infringement, and what reasonable steps were taken in order to stop infringement. Since, in that case, there was evidence of KaZaA having encouraged unlawful file sharing, and having done nothing to prevent it in the way of filtering, it was held by Wilcox J that authorisation had taken place.

However, in the UK, this most recent decision has bucked that trend. Why was there such a completely different result? One of the reasons might be because within the UK, the concept of contributory copyright infringement is not as developed as it is in the US, although the UK does have some case law relating to it[7]. It was this concept of contributory copyright infringement (a concept that arguably the Grokster case did much to expand), that proved crucial to the claimants in the US successfully arguing that the central point from which any peer-to-peer file sharing operation was being organised, should be deemed to be infringing, if not directly, then at least by contribution.

Until very recently in the UK, there had been no case law dealing with claims made against a peer-to-peer website itself. Perhaps the leading UK case in this area is Polydor Limited and others v Brown[8], which was not a claim made against a website but which concerned an individual music file sharer, who had connected a computer running peer-to-peer software to the internet with copyrighted music files placed in a shared file directory. The defendants were found to have communicated a copyright work to the public by 'making it available' and so were found to be infringing that copyright.

In Brown, the UK Court granted summary judgment in favour of the record companies. The court was satisfied, based on the evidence, that Mr. Brown had infringed copyright. He was held to have committed copyright infringement by connecting a computer to the internet where the computer was running peer-to-peer software, and placing music files with copies of the record companies' copyright works in a shared directory. Section 20 of the Copyright, Designs and Patents Act 1988 states that 'the communication to the public of the work is an act restricted to...'[9], which meant that the mere fact that infringing files were present, and were made available to others, meant that it should be considered copyright infringement.

The facts of the case in this most recent decision are more similar to the facts of the KaZaA case in Australia. It, too, targeted the network that linked file sharers and it also did not use filters to prevent file sharing. Perhaps the difference here is that the charges brought against Alan Ellis were not mere civil claims of copyright infringement, but were criminal charges of conspiracy to defraud. The prosecution did not feel capable of bringing a charge that the defendant had made available infringing works, since such works were clearly not known to him and had not had any contact with him. The prosecution did not bring a charge for statutory conspiracy under Criminal Law Act 1977 for similar reasons. Their charge of conspiracy to defraud would hinge on the issue of whether Mr Ellis was acting dishonestly. His acquittal by unanimous verdict must therefore have been because the jury did not accept that it had been proved beyond reasonable doubt that Ellis had acted dishonestly. Ellis argued that he was merely in receipt of donations, as opposed to running a business.

In addition, Mr Ellis argued that he was effectively a 'mere conduit' further to the meaning of the E-Commerce Directive[10], as implemented in the UK by the Electronic Commerce (EC Directive) Regulations[11] and did not take part in the copyright infringement. In other words, he was effectively 'just like Google', the popular search engine, only he focused on connecting people that wanted to access music.

At the time of writing this is a recent result and, in the light of the cases discussed above, and others around the world, perhaps a surprising one. In response to this decision, the British Phonographic Industry has stated that 'this is a hugely disappointing verdict. The defendant made a large amount of money by exploiting other people's work without permission. The case shows that artists and music companies need better protection'.

The suggestion that the law does not adequately protect copyright owners is not new, and the Government's own investigation into the digital world and the legislative changes needed in order to keep legislation up to date (ultimately published as the 'Digital Britain White Paper', entitled 'Digital Britain: Final Report'[12]), made a number of similar recommendations.

As a direct result, the Digital Economy Bill, now progressing through Parliament, takes forward some of those changes as legislation. Key amongst them is the issue of the online infringement of copyright, which will certainly impose obligations on internet service providers aimed at the reduction of online infringement of copyright. However, it is difficult to see how these changes, even if enacted, would affect the outcome in R v Ellis, unless over time, they encourage a change in public perception, so that this sort of activity is regarded as dishonest.

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1. A&M Records, Inc. v Napster, Inc., 239 F.3d 1004.
2. Section 107(2) of Copyright, Designs and Patents Act 1988 (CDPA).
3. Sony Corp. of America v Universal City Studios, Inc. 464 U.S. 417 (1984).
4. CBS Songs Ltd v Amstrad Consumer Electronics plc [1988] AC 1013.
5. MGM Studios, Inc. v Grokster, Ltd. 545 U.S. 913 (2005).
6. Universal Music Australia Pty Ltd v Sharman Licence Holdings Ltd. [2005] FCA 1242.
7. Abkco Music & Records Inc. v Music Collection International Limited and Another [1995] RPC 657 (CA).
8. Polydor Limited and others v Brown and others [2005] EWHC 3191 Ch.
9. Section 20.of the CDPA.
10. Directive 2000/31/EC of 8 June 2000.
11. Electronic Commerce (EC Directive) Regulations 2002: SI 2002/2013.
12. 'Digital Britain: Final Report' (Cm 7650) in June 2009.