

Intellectual Property & Information Technology

Internet Service Provider UPC – Successful In Illegal Download Battle

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UPC one of Ireland largest internet providers, holding 15% market share, has succeeded in a legal action taken in the Irish High Court by record companies Sony BMG, EMI records, Warner Brothers, Universal Music and WEA International Inc.

The record companies' sought to force internet service providers to adopt a "three strikes" rule to curb illegal downloading and file sharing by internet users whereby customers receive three warnings before their Internet connection is cut off.

The record companies' sought to rely on Section 40 (4) of the Copyright and Related Rights Act 2000 ("the 2000 Act") which provides that:

"Without prejudice to subsection (3), where a person who provides facilities referred to in that subsection is notified by the owner of the copyright in the work concerned that those facilities are being used to infringe the copyright in that work and that person fails to remove that infringing material as soon as practicable thereafter that person shall also be liable for the infringement"

Subsection 3 provides that the provision of facilities for enabling the making available to the public of copies of a work will not of itself constitute an act of making copyrighted work available to the public for the purpose of copyright infringement.

Critically section 40 (4) imposes liability on an ISP if it does not remove infringing material once it knows about it.

Mere Conduit

UPC defended its position by focusing on the mere conduit provision which provides that an internet service provider cannot be held liable for content transmitted across its network. As a mere conduit UPC was not storing the information so it could not remove the material and, since the law was silent on preventing access Mr Justice Charlton found that the court would therefore be acting outside of its legislative powers if such order was granted.

Mr Justice Charlton found that while injunctions directing UPC to act against music piracy were justified, the lack of any provision in the 2000 Act to block, disable and interrupt copyright theft via the internet prevented the granting of the orders sought. He further acknowledged that this gap in the legislation means that "Ireland is not fully in compliance with its obligations under European Law"

He noted that section 40 (4) of the 2000 Act is limited in nature and the only relevant power which the court possesses in accordance with this section is to require an ISP to remove copyright material and this case would therefore fall outside the scope of section 40 (4).

The implications of the decision...

Fundamentally Mr Justice Charlton admitted in his judgment that he has erred in his previous judgment in the *EMI (Ireland) Limited v. Eircom Plc* [2009] IEHC 411. In that case Eircom agreed to implement measures aimed at stopping illegal downloading, by disclosing to the companies the identities of those responsible for downloading and uploading music through their IP addresses. Eircom customers who were found to be downloading music would then receive two warnings and would subsequently have their internet service slowed and finally would be disconnected if they continued to engage in illegal downloading. The Judge said that there was no basis in the Irish legislation upon which he had reached his decision and he has given his consent to those parties to reapply to the court if they so wish.

The five music labels in the proceedings have seen their sales fall by €64 million from 2005 to 2009. The court acknowledged that the music business is being devastated by illegal downloading. The Judge said that "if there are no profits and no royalties to artists that the legal sale of recorded music, through the preparation of albums, will cease". It is likely that the Irish Recorded Music Association will now look for the constitutional rights of the copyright holders to be vindicated and will lobby the Government to reform the law in favour of the record companies. There is however, at this time, no indication of when such legislation will be enacted to deal with this issue.