



Neutral Citation Number: [2021] EWHC 409 (Ch)

Case No: IL-2018-000221

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25/02/2021

Before :
MR JUSTICE MILES

Between :

- (1) CAPITOL RECORDS, A DIVISION OF
UNIVERSAL MUSIC OPERATIONS LTD
(2) DOMINO RECORDING COMPANY LIMITED
(3) MATADOR RECORDS LIMITED
(4) QUEENS LITE, INC
(5) SIMCO LIMITED
(6) SONY MUSIC ENTERTAINMENT UK LTD
(7) WARNER BROS. RECORDS, INC
(8) WARNER MUSIC UK LTD
(9) XL RECORDINGS LIMITED
(10) YOUNG TURKS RECORDINGS LIMITED
(suing on their own behalf and in a representative
capacity on behalf of members of BPI (British
Recorded Music Industry) Limited and of
Phonographic Performance Limited)

Claimants

- and -

- (1) BRITISH TELECOMMUNICATIONS PLC
(2) EE LIMITED
(3) PLUSNET PLC
(4) SKY UK LIMITED
(5) TALKTALK TELECOM LIMITED
(6) VIRGIN MEDIA LIMITED

Defendants

Edmund Cullen QC & Gwilym Harbottle (instructed by **DLA Piper UK LLP**)
for the **Claimants**

The Defendants did not appear

Hearing dates: 3 February 2021

JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30 am on 25 February 2021.

Mr Justice Miles:

Introduction

1. The Claimants are record companies suing for themselves and in a representative capacity on behalf of other record company members (“Members”) of BPI (British Recorded Music Industry) Limited (“BPI”) and Phonographic Performance Limited (“PPL”). BPI is co-ordinating these proceedings on behalf of the Claimants. BPI is itself a member of the International Federation of the Phonographic Industry (“IFPI”), an international record industry body.
2. The Claimants seek an order pursuant to section 97A of the Copyright, Designs and Patents Act 1988 (“the Act”) against the Defendant internet access providers (often referred to as internet service providers (“ISPs”)) requiring them to take measures to block their subscribers’ access to the website currently known as nitroflare.com (“Nitroflare” or “the Site”). The Claimants contend that the Site is being used to infringe Members’ copyrights on a large scale.
3. The Claimants call Nitroflare a cyberlocker site: that is a file storage site which makes available unlicensed commercial content, including music files, by allowing users to upload and download unlicensed content to and from its servers. As the Claimants accept, the cyberlocker tag is pejorative and potentially tendentious. I shall therefore look beyond the label and consider the substance of how the Site operates and the services it offers to users.
4. Arnold J helpfully set out the legal framework for website blocking orders in *Dramatico Entertainment Ltd v British Sky Broadcasting* [2012] EWHC 268 (Ch) (“Dramatico”) at [30]-[38]. That jurisdiction has been further explained and developed in *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch); *The Football Association Premier League Limited v British Sky Broadcasting* [2013] EWHC 2058 (Ch); *Paramount Home Entertainment International Limited v British Sky Broadcasting* [2013] EWHC 3479 (Ch) (“Paramount”); *1967 Ltd v British*

Sky Broadcasting [2014] EWHC 3444 (Ch) (“1967 Ltd”); *Twentieth Century Fox Film Corp v Sky UK Ltd* [2015] EWHC 1082 (Ch) (“Popcorn Time”); *Football Association Premier League Limited v British Telecommunications Plc* [2017] EWHC 480 (Ch); *Nintendo Co Ltd v Sky UK Ltd* [2019] EWHC 2376 (Ch) (“Nintendo”); and *Matchroom Boxing Ltd v BT Plc* [2020] EWHC 2868 (Ch) (“Matchroom”).

5. The Claimants contend that the Court has jurisdiction in the present case to make the blocking order because: (i) each of the Defendants is a service provider within the meaning of section 97A, (ii) the users and/or operators of the Site infringe the Claimants’ and Members’ copyrights, (iii) the users and/or operators of the Site use the Defendants’ services to do so and (iv) the Defendants have actual knowledge of this. The Claimants further submit that it is just and proportionate for the Court in its discretion to make the order sought in respect of the Site.
6. The claim was issued and served on the ISPs with the evidence on 21 December 2018. Supplemental evidence updating the factual position was served in December 2020 and on 3 February 2021. The Claimants explain the delay since December 2018 as follows. Website blocking orders are complex and require careful identification of the technical steps to be taken by the ISPs. ISPs do not usually consent to their being made but are usually prepared to agree the terms of an order which they will not then oppose, leaving the decision to the Court. Since December 2018 the Claimants have had long-running open and without prejudice negotiations with the Defendants about the form of the order. On the date of the hearing before me the ISPs confirmed that they had agreed the form of the order with the Claimants. They did not oppose the making of the order in principle.
7. It appears from the researches of the Claimants and their counsel that this is the first application for a blocking order in respect of a site of the present kind. In light of the comments of Birss J in *Popcorn Time* at [5]-[15], I decided that there should be a hearing rather than dealing with the application on paper.

The evidence and factual background

8. I have considered and relied on the following evidence: (a) the first, second and third statements of Mr Kiaron Whitehead, General Counsel of BPI. He is responsible for the overall co-ordination of the proceedings on behalf of the Claimants; (b) the first and second statements of Mr Michael Walsh, an IT specialist who acts as a consultant for the BPI. He has acted for BPI in an expert capacity in a number of previous applications pursuant to s. 97A. Mr Walsh’s first statement analyses the Site, including: (i) how it is organised to facilitate the uploading and distribution of copyright content; (ii) the percentage of content on the Site for which the Copyrights are owned by the Members; (iii) its likely annual revenues; (iv) the information BPI has on its operator and hosting provider; (v) the process by which IFPI identifies and monitors infringing content on the Site; and (vi) Mr Walsh’s recommendations as to the most effective technical means by which to block access to the Site. He has updated his evidence in his second statement, in which he concludes that there has been no substantive change to the Site and its functionality since the date of issue of the Application.

9. In this section I summarise the Claimants' evidence. I have drawn heavily on the Claimants' helpful skeleton argument (having satisfied myself that it faithfully reflects the underlying evidence).

The Claimants' copyright works

10. Each of the Claimants is in the business of making, owning and exploiting sound recordings of musical compositions. For the purposes of these proceedings, particular recordings have been selected as sample works (the "Claimants' Recordings"). All of the Claimants' Recordings were available on the Site when a check was carried out in March and October 2018. Each of the Claimants either owns or is the exclusive licensee of the UK copyright in the relevant Claimants' Recording; none of the Claimants has licensed the Site.
11. The Claimants' Recordings represent a minute fraction of the sound recording copyrights held by the Claimants and the Members on whose behalf these proceedings are brought. Mr Whitehead explains that the Members together hold the UK rights for approximately 99% of all sound recordings legally consumed in the UK, and that no Member has granted a licence to the Site or its users. The updated evidence from Mr Walsh shows that since December 2018 Members' recordings have continued to be made available on the Site in large numbers.

The Site

12. The Claimants' case is that the Site is deliberately designed to encourage the uploading and downloading of copyright material. They say that it is different from legitimate file storage or file sharing sites. This is why they use the cyberlocker tag. As I said at the outset, the court needs to look beyond the labels and consider the substance of the services offered by the Site.
13. I shall turn to specific features of the Site in a moment but, in general terms, the Site encourages the sharing of links which it has generated and the downloading of content which it stores. It does this by allowing users to upload content to the Site's servers for free. Downloads can then be made for free by the Site's 'premium' and 'non-premium' users, with download speeds being faster if a user pays for a premium account. The Site also offers an 'Affiliate Programme' which rewards users who upload content. It enables those users to earn money each time their uploaded content is downloaded by another user.
14. Mr Walsh refers to a number of features of the Site. He says that these indicia show that the Site is not offering a genuine file storage, or file sharing, service but is instead in the business of enabling users to share popular content with members of the public.
15. The Claimants' evidence establishes to the civil standard that the Site has the following features:
- i) The Site allows users to upload and download files.
 - ii) The Site has a policy whereby uploaded files which are not downloaded by anyone for a period of 90 days will be removed (this was previously 30 days). This avoids storage space being taken up by files which no-one wishes to

download. It makes the Site unsuitable for the storage of files which the user wishes to retain.

- iii) The Site operates an affiliate programme whereby uploaders earn money from the Site on the basis of (a) the number of downloads of files uploaded by them and (b) the number of sales of premium accounts originating from links from their uploaded content pages. This encourages users to upload material they believe will be popular.
- iv) When a file is uploaded, the user is provided with URL links for sharing. These give access to the file to enable it to be downloaded. Access to the uploaded files can only thereafter be obtained via these links: the uploader has no privileged right of access. The default position is that the file is then accessible by anyone. There is no ability to limit access to, e.g., only the uploader or only users to whom a password is supplied (a feature found with legitimate file-sharing sites). The only ability to control access is that an uploader can stipulate that the file should only be accessible by the Site's premium users (which will benefit the Site by promoting sales of subscriptions). If the uploader does not do so, the file will be accessible to everyone.
- v) The links to files are widely disseminated on so-called referral sites (which may use the Site as a back-end storage resource). These referral sites are often specialists in aggregating links to music or other copyright-controlled content.
- vi) The Site offers large limits on storage capacity – much larger than that typically offered as the basic free tier by legitimate cloud storage services.
- vii) The Site does not routinely encrypt users' data when it is being transmitted.
- viii) The Site does not provide any facilities to integrate and synchronise between different devices.
- ix) The ownership of the Site and the identity of those operating it is opaque. The evidence shows the following:
 - a) The Site does not identify the name or address of its operator. It merely invites correspondence to support@nitroflare.com.
 - b) The domain registrant is concealed behind a domain privacy service based in Panama ("WhoisGuard Inc").
 - c) IFPI took action in 2017 to get WhoisGuard to disclose the identity of the registrant. The information disclosed was that the registrant was a "Jonnie Edhardy", with an apparently false address in the Seychelles and a false telephone number, who was said to be CEO of "NitrobSolutions Ltd".
 - d) Nitrobsolutions Limited has a website in which it identifies itself as a hosting provider based in the Seychelles. The telephone number given on the website is again false.

- e) BPI has identified that payments to the Site were made via a UK registered company called "Nitroflare Limited". Its directors were a management services company called Northwestern Management Services Limited (which appears to be part of a group based in the Seychelles) and an individual called Roger Stuart Poppleton with an address in Devon. Mr Poppleton seems to be a director of numerous companies. There are indications that Mr Poppleton may use a number of aliases.
 - f) On 30 October 2021 Mr Whitehead learnt that Nitroflare Limited was dissolved on 13 January 2020 following an application for voluntary strike off dated 14 July 2020 and that Mr Poppleton ceased to be a director and shareholder of the company on 18 November 2019.
16. The Claimants' evidence also shows that unlicensed file-sharing takes place via the Site on a very large scale. Mr Walsh has analysed (i) the number of monthly visitors to the Site; and (ii) the number of files listed on the Site and the proportion of those that are files for commercially available music or other copyright controlled content. Based on data for the 12-month period May 2017 to April 2018 inclusive, SimilarWeb (a website analyst) recorded 190 million visits to the Nitroflare website, 4.7% of which were from users in the UK. The number of monthly unique visitors to the Nitroflare sites was 6.69 million worldwide and 234,583 from the UK. The equivalent figures for the period June 2019 to November 2020 are: 191.9m visits of which 5.787m were from the UK and 4.3m monthly unique visitors of whom 122,699 were from the UK.
17. Mr Walsh explains in his statements that he took a representative sample of files and examined whether the content was commercially available (this being a strong indication that the content is copyright-protected). It was not possible to establish how many files are hosted by Nitroflare, but it appeared from his analysis that the Site had in excess of 11 million links to content available for download. That analysis shows that 80.3% of the files were commercially available, with a further 11% assessed as likely to be commercially available, giving a total of 91.3% of the files that were likely to be protected by copyright. When this analysis was carried out in relation to music files only on the Site (which comprise 9.72% of the Site's contents), Mr Walsh found that over 98% of music files on Nitroflare were commercially available.
18. The percentage of commercially available recordings is to my mind indicative of large scale online infringement of the Members' UK copyrights.

Are the Defendants service providers within the meaning of s. 97A?

19. The Defendants are service providers within the meaning of regulation 2 of the Electronic Commerce (EC Directive) Regulation 2002 (SI 2002/2013) and hence within the meaning of section 97A of the Act: *Dramatico v Sky (No 2)*, *EMI v Sky*. The Defendants have not suggested otherwise.
20. The Defendants are the six largest ISPs in the UK, which between them share approximately 91% of the fixed line broadband market. The Claimants have not joined the ISPs making up the remaining 9% of the fixed broadband market in the interests of proportionality.

Has there been infringement of the Claimants' copyrights?

21. The Claimants contend that there have been various infringing acts of the operators and the users of the Site. In particular they allege infringements:
 - i) By the operators of the Site in communicating works to the public within s.20 of the Act; and/or in authorising or acting as joint tortfeasor with the users of the Site in their commission of infringing acts as described below.
 - ii) By the users of the Site in the UK by downloading users, in making copies of works within s.17 of the Act; and/or by uploading users, in communicating works to the public.

Infringement by the operators: communication to the public

22. In *Warner Music UK Ltd v TuneIn Inc* [2019] EWHC 2923 (Ch) ("TuneIn") Birss J reviewed the authorities concerning communication to the public (including *Paramount*). Having considered that helpful guidance, it seems to me that, for present purposes, there are three main questions. (a) Is there a communication of copyright works by way of electronic transmission? (b) Is the communication to the public? (c) Does the act of communication to the public take place in the UK? If the communication originates from outside the UK, that depends on whether it is targeted at the public in the UK.
23. As to the first question, the essential test formulated by the CJEU is whether the Site intervenes to give access to a protected work: "[A] user makes an act of communication when he intervenes, in full knowledge of the consequences of his action, to give his customers access to a protected work, particularly where, in the absence of that intervention, those customers would not be able to enjoy the broadcast work, or would be able to do so only with difficulty": *Stichting Brein v Ziggo BV and others* (Case C-610/15) at [26]. (Though the court referred in that passage to a user, its guidance covers what I am calling a site operator in this judgment.)
24. In the present case I am satisfied that the operator of the Site makes such an intervention. It is responsible for the transmission of the files to the downloading user. Thus, the Site is therefore responsible for the communication of the Claimants' Recordings (and other copyright content) to the public by electronic transmission. The intervention is not passive; the Site gives access to copyright works to the Site's users. I have described some of the key features of the Site above. It is set up and exists to enable users to access and to download content (uploaded by others) in an easy and convenient way and the Site encourages such downloading.
25. A further relevant factor identified in *Paramount* at [12(13)] is that the communication involves a profit-making activity. The Site is monetised through advertising and subscriptions. Mr Walsh has estimated the likely range of annual revenue for the Site based on user figures available to him at the time of his first statement in the range of £559,119 to £1,830,320 (with a median of £1,220,214) worldwide, and £28,239 to £97,790 (with a median of £65,193) from the UK. Figures for UK use of the site in the period from June 2019 to November 2020 were lower but were of a similar magnitude to that used by Mr Walsh in his calculations.

26. My attention was properly drawn to the Advocate-General (“A-G”)’s opinion in Joined Cases C-682/18 and 693/18 *Peterson v Google LLC* (“*Peterson*”). At [75], [86] and [93], the A-G expressed the view that a cyberlocker operator (“Cyando”) did not communicate the works stored on its server (to which it provided links) to the public. That was because it did not actively intervene by selecting the content transmitted, did not determine that content and did not in some other way present it as its own. However, the A-G recognised at [94]-[99] and [104] that his views depart from three earlier CJEU copyright decisions, including *Brein*. Since the A-G expressed his Opinion, *Brein* has been approved by the CJEU in *BY v CX* (Case C-637/19) at [23]. I accept the Claimants’ submission that the Opinion (which of course does not represent the law) is therefore unlikely to be followed.
27. I accept the Claimants’ submission that the CJEU’s present position (illustrated by *Brein*) is that deliberate facilitation of a communication is sufficient to establish an act of communication and that this is shown if the operator had an intention when providing the service to facilitate infringements. I am satisfied that this requirement has been established here. The operator of the Site must know that much of the content on the Site comprises commercially released music and videos and that this is protected by copyright. It must be obvious to the operator that the download and copying of commercially released music requires a licence. Its revenue is derived from advertising and the more downloading takes place, the greater its advertising revenue. The clear inference is that the operator intends to facilitate infringement of copyright. In this regard I also consider that it is telling that the operator of the Site has sought to conceal its identity and has thereby shielded itself from legal process. This adds to the inference that it knows that that the Site is being used to infringe and (given the business structure) intends that it be so used.
28. It also appears to me that there is no evidence of any serious attempt by the Site operator to take steps to combat illegal uses. I address the evidence on this point further below (when dealing with the issue of authorisation). The conclusions reached in that passage are to be treated as applying here too.
29. The second requirement for liability for communication to the public is that the works be communicated to the public. This has two aspects. First the works must be made accessible to a sufficiently large number of people. That is satisfied here as they are made available to the entire internet public. Second the works must be made accessible either to a new public (i.e., a public which was not considered by the authors concerned when they authorised the original communication: see *Paramount* at [12(15)]) or by a different technical means from the original communication: see *Paramount* at [12(18)].
30. The present case is not like the situation in some of the authorities, where a site is used to make an onward transmission or provides a link to another site. Here the content is uploaded to the site by users and downloaded by others. Hence there is no question of the use of another technical means to make available some original communication. Further, the need to show that the communication is to a “new public” does not arise. But if it does, it is satisfied since there is no prior authorisation of any “original communication”. The way the Site works (and is designed to work) is that recordings are made freely available without any licence from the Claimants to all the users of the Site, a large and indeterminate class of people, without the users having to purchase them from authorised sources: see *1967 Limited* at [20].

31. The third question relates to whether the Site targets members of the public in the UK (since the servers for the Site are based outside the UK). I gratefully adopt Birss J's helpful summary in *TuneIn* at [16] and [17]:

“16. The legal principles are:

- i) The mere existence of a website and its accessibility by local consumers is never enough to establish a territorial link, see Kitchin LJ in *Merck v Merck* [2017] EWCA 1834 para 168 and *L'Oreal v eBay* para 64.
- ii) The issue of targeting is to be considered from the perspective of the public in the relevant state (i.e. the UK), see *Merck v Merck* para 169 and *L'Oreal v eBay* para 65. The trade mark cases refer to consumers or average consumers because that is the relevant person in trade mark law. For cases about communication to the public, the question focusses on the public, see *EMI v BskyB* and my decision in *OmniBill v EGPSXXX* [2014] EWHC 3762 (IPEC).
- iii) The test is objective in the sense that a party's subjective intention cannot turn a website or page which is objectively not targeted at the UK into one which is (*Argos v Argos* [2018] EWCA Civ 2211 para 51). However that does not mean evidence of intention is irrelevant. On the contrary such evidence is relevant and possibly determinative in an appropriate case (*Merck v Merck* paras 169-170 and *Argos v Argos* para 51).
- iv) The court must carry out an evaluation of all the relevant circumstances, see *Merck v Merck* para 169 and *L'Oreal v eBay* para 65.
- v) It may be appropriate to treat a website as a whole, but in another case it may be appropriate to conduct a more fine grained analysis. Depending on how a website is organised, not all pages are necessarily targeted at the same place(s), see *Argos v Argos* para 51 and *OmniBill* para 15.

17. The following is a non-exhaustive summary of factors which may be considered, the weight they bear necessarily varying from case to case:

- i) The appearance of the web pages themselves, which can include explicit statements of an intention to provide goods or services to the public in the UK and the highlighting of the UK in lists or maps.
- ii) Other aspects of the web pages such as language(s), currency(ies), telephone numbers, and the use of national top level domain names.
- iii) The nature and size of the service provider's business, the characteristics of the goods or services offered and provided, and the number of visits made by the public from the UK.”

32. It is perhaps worth adding the obvious but important point that a website may be targeted at the public in the UK and other territories at the same time.

33. As this guidance shows the question requires an evaluation of all the circumstances. These include the fact that the Site's users appear to be spread across many territories and that (for instance) it is possible to make payments in a number of currencies. There are a number of features of the Site which (taken together) lead me to conclude that it is targeted at the UK. First, the Site is in the English language. While it may be said that it may have users in other English language countries (and in others where users are sufficiently fluent in English) this is a pointer (taken with other factors) towards the UK. Second, there are large numbers of UK visitors to the Sites (as explained above). Third, the Site allows payment for premium service in GBP. It also allows for payment in several other currencies, but as already explained, the issue is targeting, not exclusive targeting. Fourth, advertising on the Site is in many instances for UK retailers or services.

34. I am satisfied that this head of infringement has been made out.

Infringement by uploading users

35. The Claimants submit that the same analysis applies equally to users who upload works to the Site.
36. I accept this submission. When users upload content to the Site, it is in the knowledge and with the intention that it will be downloaded by other users. Uploading users are encouraged to provide links to potential downloading users and are offered financial incentives for encouraging other users to download the content they have uploaded. Uploading users have no privileged or controlled access to the content they have uploaded. The Site is structured to make that content generally available to all internet users. I consider that Users who upload copyright content are making a communication to the public because they knowingly and intentionally intervene to give access to the uploaded works to the public. Since the Site is (as I have found) targeted at the UK public, by using the Site (with its UK-targeting features), uploading users target the public in the UK with the communication.

37. I am therefore satisfied that this head of infringement is established too.

Infringement by downloading users: copying

38. The Claimants next allege infringement by downloading users under s.17 of the Act.
39. The Claimants' case is simple and straightforward: when a user of the Site clicks on a link in order to obtain a copy of particular content and downloads the content, the user copies the content contained in those files on his or her computer. If the content comprises a copyright work and the user does not have the licence of the copyright owner, he or she infringes copyright.
40. I am satisfied that this simple, straightforward, case is established on the evidence. First, the Site has a large number of UK users (see above). Second, the Site hosts a large number of files for commercially available music (again, see above). Third, links for all of the Claimants' Recordings were available on the Site when inspected by Mr Walsh and BPI's Content Protection Team. Fourth, substantial numbers of take-down notices have had to be sent to the Site on behalf of Members.

41. In my judgment the Claimants have established that UK users of the Site use it to download and make copies of the Claimants' Recordings and other recordings in which the copyright is owned by or exclusively licensed to the Claimants or the Members. Since these acts of copying (and the other acts identified below) took place in the UK without the licence of the Claimants or the Members, they constituted infringements of UK copyright.

The Site's authorisation of users' infringements

42. The Claimants rely on s.16 of the Act which says that copyright in a work is infringed by a person who without the licence of the copyright owner authorises another to do any of the acts restricted by the copyright.
43. In *Twentieth Century Fox v Newzbin* [2010] EWHC 608 (Ch) Kitchin J explained in [90] that to authorise means the grant or purported grant of the right to do the act complained of and does not extend to merely enabling, assisting or even encouraging the act. He went on to say this:

“...The grant or purported grant to do the relevant act may be express or implied from all the relevant circumstances. In a case which involves an allegation of authorisation by supply, these circumstances may include the nature of the relationship between the alleged authoriser and the primary infringer, whether the equipment or other material supplied constitutes the means used to infringe, whether it is inevitable it will be used to infringe, the degree of control which the supplier retains and whether he has taken any steps to prevent infringement. These are matters to be taken into account and may or may not be determinative depending upon all the other circumstances”.

44. I shall consider these various features under a number of headings.
45. First, there is the nature of the relationship. The Site provides a user-friendly environment in which its users are able to upload and download locate content. Specifically: Nitroflare enables users to upload content and obtain a link for use in sharing it with other users. They can do so free of charge, anonymously and in a number of different ways. Alternatively, users can register to the Affiliate Program and earn revenue based on the number of times their files are downloaded. Users are able to gain access to content by use of a link provided by the Site, with a simple and efficient means of downloading. They can upgrade to a premium account for faster and easier downloads.
46. Moreover, the Site's content is largely made available through referrer sites, who drive a large amount of traffic to the Site. In that way, Nitroflare's relationship extends (indirectly) through those arrangements to users of the referrer sites concerned.
47. There are also features of the Site which show that it is designed for the sharing of commercial content rather than mere storage or lawful sharing of files. These include the automatic deletion policy, the lack of any control over uploaded content (such as password protection), fast free upload speeds, the ability to earn revenue from downloads and the absence of limits on file size.

48. Second, there are the means used to infringe. Nitroflare stores infringing content and provides links by which it may be accessed and downloaded. It is also likely to have fostered symbiotic arrangements with referrer sites. These facilities constitute the means by which users are able to infringe the Members' copyrights by use of the Site.
49. Third, there is probability, indeed inevitability of infringement. Infringement is the inevitable consequence of the service provided by the Site. Its users share content which infringes copyright, and the Site provides links for users to download and make illegal copies.
50. Fourth there is the degree of control that the operator has over the means of infringement. The Site operator is able to control the use of the Site and the content which is stored on its servers by its users. The operator has set up and administers the Site.
51. The Site also carries conditions which make clear that certain types of content will be deemed unacceptable and there will be automated filtering of that content. However, despite that claim, I am satisfied that the evidence shows that the Site does not in fact do anything effective to filter out the upload/download of infringing content.
52. It is also clear that the Site has the capacity to remove particular links, not least from the fact that it offers a "takedown" facility where rights holders identify specific infringing links.
53. Fifth, there is the evidence about steps taken by the Site to prevent infringement, or their absence.
54. The Site purports to operate a content removal policy on a link by link basis, but the evidence shows that the policy has not prevented the large scale copyright infringement in which the Site is engaged.
55. Arnold J considered such a policy in *EMI v Sky* at [68] (basing himself on the evidence which is in substance given again in this case). He noted the following shortcomings:
 - i) Requesting the takedown of individual files or links is overly burdensome and renders it impractical significantly to reduce the number of files illegally available on the Site in relation to any given piece of content.
 - ii) There are often multiple links for each recording. As a means of trying to prevent infringement of one particular work, the "provision of links" policy would therefore be impractical and ineffective.
 - iii) Things are made worse by the fact that constant additions are made to the files and links being offered.
 - iv) To seek to police against infringing activity for a particular copyrighted work, a rights holder (even assuming 100% compliance by the operator of the Site with takedown requests) would have to monitor the Site on a continuous and ongoing basis.

- v) A “provision of link” policy might work for a website which generally hosts legal content, but which suffers from isolated instances of infringement. It does not work where (as here) there is a constantly replenished stock of infringing content.
- 56. Each of these features applies to the Site in the present case. The evidence establishes that the Claimants have attempted to use the notice and takedown policy to have infringing content removed from the Site. They do this through IFPI, which detects content hosted on the Site and sends a take-down notice. This requires IFPI to undertake very substantial efforts, using crawling technology that obtains links both directly and indirectly. This has resulted in the sending of a large number of takedown notices.
- 57. These efforts have had very limited effect for several reasons. First, there may be a significant delay between infringing content being uploaded and it being identified by IFPI’s searches. The list ofreferrer sites monitored by IFPI can change at any time and will be incomplete, so there is a significant likelihood of infringing content being available on Nitroflare for some time before it may be detected, and a takedown notice sent.
- 58. Second, there is a risk that infringing content may not be detected by IFPI’s searches at all.
- 59. Third, there is a significant delay in the response time to notifications and, even then, not all notifications are acted upon. Between 1 January 2016 and 28 March 2018, IFPI notified 61,233 links to the Site for takedown. It ought to be possible to remove infringing content within minutes of a notification. However, on an analysis of those links with complete data, 31.3% remained active on the Site for at least 30 days after the notification (and may not have been removed at all). This percentage was 21.9% for notifications made between 1 January and 14 September 2020. However, the Site’s overall responsiveness to notifications was significantly lower during this more recent period (see below).
- 60. Fourth, even where links were removed, for notifications made between 1 January 2016 and 28 March 2018 removal generally took more than 36 hours (and often considerably longer). For notifications between 1 January and 14 September 2020, that remained the case. During this more recent period, the number of links being removed 97 hours or more after notification went up from 10% to 28.42%. Delays of this kind are highly damaging because the period immediately after a recording is uploaded is likely to be the period of greatest downloading activity. This is particularly so with recordings that are uploaded before or at the time of their commercial release.
- 61. Fifth, it is evident that the Site does not operate an automated takedown process which could enable takedowns to be effected within minutes of notification.
- 62. Sixth, where notifications of infringing content are given, the Site does not take down, or prevent future upload of, other copies of the same content. Nor does it disable duplicate links to the notified content which have been created by the Site.

63. I have considered the various factors enumerated by Kitchin J in *Newzbin* and summarised my conclusions about the evidence above. I am satisfied that the Claimants have made out their authorisation case.

The Site's joint tortfeasorship with users

64. The final way the Claimants put their case is that the operators are jointly liable as tortfeasors. The principles were helpfully summarised at by Arnold J in *EMI v Sky* at [71]-[73].
65. Many of the same factual conclusions that I have set out above are material in this context. I can therefore be brief in enumerating the key features of the Site which are relevant to joint wrongdoing. First, the Site has features which show that it is deliberately structured for the purpose of inducing users to upload commercial content. Users are offered a financial incentive to upload popular content which large numbers of other users are likely to wish to download. This is most likely to consist of commercial content and that in turn is likely to be subject to copyright. Second, the service is provided in a user-friendly fashion. It is free of charge; allows effectively unlimited capacity; and gives uploading users the ability to promote their own uploads by providing them with links which they can supply to others. Third, once content has been uploaded it is freely available to users. There is no restriction (say by password protection) on site-users' access. Fourth, the reach of the Site is amplified by the referrer sites. Fifth, the evidence summarised earlier shows that very large amounts of protected content is available for download from the Site; and that commercial material accounts for the vast preponderance of the content on the Site. This is not accidental: the Site is, for the reasons already given, designed and structured to facilitate the sharing of commercial (and therefore, probably protected) content. Sixth, the greater the amount of popular, commercial, content on the Site available for downloading, the greater the prospects of profits for the operator (through advertising and subscriptions). Seventh, the steps taken by the Site to remove infringing content are, as already explained, wholly inadequate. The operator has clearly not adopted an effective policy to remove copyright protected content. The reasonable inference is that it would be contrary to the operator's financial interests to do so (see the sixth point above). The Site does not merely make available the means of infringement; it thrives on infringement. This explains the incentives given to users to upload popular content.
66. I am satisfied, applying the relevant principles, that the operators of the Site have induced, incited or procured users of the Site to commit infringements of copyright (profiting from so doing) and that they and the users act pursuant to a common design to infringe. The operators are therefore jointly liable for the infringements committed by users.

The safe harbour

67. The Claimants referred to the hosting safe harbour under the Electronic Commerce (EC Directive) Regulations 2002 at [19]. I shall not lengthen this judgment by addressing those Regulations as they do not prevent the grant of injunctive relief.

Use of the Defendants' services to infringe

68. It is clear that both users and operators of the Site use the services of the Defendant ISPs to infringe the Claimants' copyrights: see *Cartier International AG v BSkyB* [2016] EWCA Civ 658 at [86]-[97].

The Defendants' actual knowledge of infringement

69. The Claimants informed the ISPs of the activities on the Site in July 2018. On 19 December 2018 the Claimants wrote again to all of the ISPs to notify them of the intention to make the application. The Defendants have been served with the evidence in support of the Application. This is sufficient to establish their actual knowledge of the contents of that evidence: cf. *EMI v Sky* at [89].

Proportionality and discretion

70. The Court must be satisfied that the order sought is proportionate. The relevant legal principles were analysed in *EMI v Sky* at [91]ff and *Cartier International AG v BSkyB* (CA) (which, although not a section 97A case, applied similar principles) at [100]-[128]. The principles were summarised in *Nintendo* at [41] as follows: "The injunction must be (i) necessary, (ii) effective, (iii) dissuasive, (iv) not unduly costly or complicated, (v) avoid barriers to legitimate trade, (vi) a fair balance between the fundamental rights engaged, (vii) proportionate and (viii) safeguarded against abuse."
71. The order sought by the Claimants is largely modelled on that approved by Arnold J in *Cartier International AG v BSkyB* [2014] EWHC 3354 (Ch).
72. I consider that the order sought is proportionate for the following reasons.
73. First, the Defendants do not oppose the making of the order. It can therefore be taken that it is proportionate as between the parties.
74. Second, I am satisfied that the order is necessary to protect the rights of the Claimants and the other record company Members of BPI and PPL. The Site is being used to infringe those rights on a large scale (see above).
75. Third, the Claimants' Recordings and more generally the copyright recordings of the Members are available to be enjoyed by ISP subscribers using legal digital music services.
76. Fourth, the Site is not only being used to infringe the copyrights in music recordings (and the musical and literary copyrights embodied in them). Mr Walsh's evidence shows that over 90% of the links on the Site are to content which is likely to be copyright-controlled.
77. On the other hand, it is possible that the Site could be used for some legitimate storage purposes, which will be adversely affected by any blocking order. However I am satisfied that users are highly unlikely to be using the Site in this way on a significant scale. There are a number of features including the automatic deletion policy and the lack of password protection, encryption or syncing functions, which render the Site unsuitable for cloud storage. I therefore consider that the risk of interfering with legitimate storage of data is negligible.

78. Fifth, the Order has been carefully drafted (following judicial guidance in earlier authorities) so as to ensure that it does the minimum necessary to achieve its objective.
79. Sixth, as the Courts have repeatedly noted in the cases I have already referred to, such orders are effective. The evidence shows that blocking orders have proved effective, notwithstanding attempts to circumvent them: following the making of previous blocking orders on the application of BPI, UK visitors to those websites have been drastically reduced. For the 38 websites for which data was available in the month prior to their being blocked, the data shows an average reduction of UK visitors of 98%.
80. Seventh, to the extent that rights of users or operators of the Site are engaged, given my conclusions on infringement, their interests are outweighed by the interests of the Claimants and of the Members in enforcing their copyrights: cf. *FAPL v Sky* at [59].

Conclusion

81. I shall make the order sought by the Claimants.