

## **Illicit IPTV streaming devices call for views: Motion Picture Association supplementary submission**

### **Summary**

This submission is supplementary to the response the Motion Picture Association (MPA) has already provided to the Intellectual Property Office call for views on Illicit IPTV streaming devices. It outlines relevant considerations that have been raised following the verdict from the Court of Justice of the European Union (CJEU) in the case of *Stichting Brein v Jack Frederik Wullems*, hereafter referred to as 'Filmspeler'.

The Filmspeler judgement included several welcome elements that could be helpful in relation to enforcement activity in the UK regarding copyright infringement facilitated by illicit media devices. However, this judgement on its own does not constitute a silver bullet and does not obviate the need for a new, specific statutory offence to be introduced via primary legislation.

### **Filmspeler: key findings**

The key finding in the Filmspeler judgement was that the seller of a multimedia player that is modified (by the installation of add-ons) to enable access to infringing content through hyperlinks to freely accessible websites is illegally communicating to the public and therefore infringing copyright.

The judgement stated that the concept of 'communication to the public' required:

- That the intervention of the defendant was made in the *"full knowledge of the consequences of his action, to give access to a protected work to his customers and does so, in particular, where, in the absence of that intervention, its customers would not, in principle, be able to enjoy the broadcast work."*

In arriving at its conclusion the CJEU:

- differentiated the facts of Filmspeler from the *"mere provision of physical facilities"* on the basis that the defendant pre-installed add-ons onto the filmspeler device which specifically enabled purchasers to access and view unauthorised copyright works published on third party streaming sites *"with full knowledge of the consequences of his conduct"*;
- considered that by pre-installing the add-ons, the defendant had intervened to enable a *"direct link"* to be established between the third party streaming sites and the purchasers of the multimedia player *"without which the purchasers would have found it difficult to benefit from the copyright-protected works"*;
- acknowledged that the Filmspeler player was sold by the defendant *"in full knowledge"* of the fact that the pre-installed add-ons contained hyperlinks that *"gave access to works published illegally on the internet"* and was supplied with a view to making profit.

The judgement also importantly confirmed that the act of streaming infringing content – which involves the creation of temporary copies made on multimedia players such as the filmspeler device – do not benefit from the temporary copying exception under Article 5(1) of the Information Society Directive and can therefore constitute copyright infringement.

### **Implications for enforcement activity in the UK**

The Filmspeler judgement importantly provides a clear precedent for establishing that sellers of a pre-loaded device that provide direct access to unauthorised content constitute a communication to the public within the meaning of section 107(2A) of the Copyright Designs and Patents Act (CDPA); the section of the Act which contains the relevant criminal offence under UK law. In short, the judgement provides important guidance that could facilitate criminal prosecutions in this area.

There are also elements in the judgement that could help potential future action against the developers of illegal add-ons, particularly the CJEU's findings that these add-ons establish a "direct link" between the streaming sites and the user. However, there are still several important reasons why a new statutory offence is needed to properly address this issue.

### **Continuing requirement for a statutory offence**

As noted in the MPA's initial submission, this is a complex issue and the individual devices themselves are just the end-point of a complicated, commercially-driven eco-system that facilitates access to infringing material in this manner. The evolving nature of this eco-system helps explain why Filmspeler is not a silver bullet.

The concept of communication to the public is not straightforward and its application is subject to an individual assessment in each case. While Filmspeler establishes important precedents, there are likely to be many cases where the specific facts of the case are not completely analogous.

In particular, given the emphasis on the add-ons that had been pre-installed onto the filmspeler device, establishing criminal liability is likely to be less straightforward where devices are not pre-loaded, and where the necessary components are provided by a number of parties. The issue will then be which of the various parties communicates to the public.

Our experience is that cases of this nature are common. There are services where the relevant devices are provided in an unaltered format by a party with separate instructions for loading them with infringing add-ons. The ultimate effect is still clearly designed to facilitate copyright infringement but the less centralised nature of the service could make it harder to apply the precedents provided by Filmspeler.

Furthermore, the Filmspeler judgement may be less applicable in relation to some OTT subscription providers which provide their subscribers with access to illicit TV channels (as outlined in our previous submission). In particular, it will be more difficult to use the Filmspeler precedents when the principal function of the provider is to process subscription payments and to supply instruction on how to activate the infringing element of the service.

Importantly, these potential gaps in the coverage of the Filmspeler judgement could become more significant as the nature of these illegal services evolve. We have previously seen operators of pirate services deliberately mutate their business models to take into account changing jurisprudence and laws and it is possible that they will do so again in reaction to this verdict.

To be clear, we are not suggesting that the sale of any device that is not pre-loaded with infringing add-ons infringes copyright. Rather it is the additional hand holding or gatekeeping measures that a party takes with "*full knowledge of the consequences of his action*" that should be considered.

Another consideration is that the concept of communication to the public is not straightforward. There is a risk that juries or magistrates who are unfamiliar with the complexities of copyright law in this area may struggle to apply the relevant precedents in future cases, particularly where the facts differ



from those in Filmspeler. A dedicated statutory offence would be much more straightforward for magistrates and juries to understand and apply.

In summary, a specific statutory offence, as outlined in the MPA's previous submission, that is directed at these associated components (rather than the communication of infringing works) should still be an important component in tackling this issue. Such an offence would be a more appropriate and effective mechanism for addressing the types of cases outlined above that may not benefit fully from the Filmspeler judgement. Most importantly, it would also be a more future-proofed approach that would be less susceptible to the potential changes of approach from illegal service providers.