

**IN THE HIGH COURT OF JUSTICE**

**CHANCERY DIVISION**

**INTELLECTUAL PROPERTY**

**BEFORE THE RIGHT HONOURABLE LORD JUSTICE FLOYD, SITTING AS A  
JUDGE OF THE HIGH COURT, CHANCERY DIVISION**

**Monday 7<sup>th</sup> October 2013**



- (1) ITV BROADCASTING LIMITED
- (2) ITV2 LIMITED
- (3) ITV DIGITAL CHANNELS LIMITED
- (4) CHANNEL 4 TELEVISION CORPORATION
- (5) 4 VENTURES LIMITED
- (6) CHANNEL 5 BROADCASTING LIMITED
- (7) ITV STUDIOS LIMITED

**Claimants**

and

**TVCATCHUP LIMITED**

**Defendant**

**THE SECRETARY OF STATE FOR BUSINESS,  
INNOVATION AND SKILLS**

**Intervenor**

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**ORDER**

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**UPON THIS ACTION** being tried before this Court on 13, 15-17 June 2011

**AND UPON** hearing Counsel for the Intervenor on 13<sup>th</sup> June 2011, and Counsel for the Claimants and Counsel for the Defendants

**AND UPON** the Court giving a first judgment on 18 July 2011, in which the Court dismissed the Defendant's challenge to the *vires* of section 20(1)(c) of the Copyright Designs and Patents Act 1988

**AND UPON** the Court giving a further judgment on 14 November 2011 after further argument on 21 October 2011

**AND UPON** the Court referring certain questions concerning the interpretation of European law to the Court of Justice of the European Union to give a preliminary ruling thereon

**AND UPON** the Court of Justice of the European Union giving a preliminary ruling by its judgment dated 7 March 2013

**AND UPON** the Claimants by their Counsel undertaking pending judgment on the Defendant's Appeal the subject of permission to appeal granted at Paragraph 16 below or further Order in the meantime that if, on appeal, it is found that the declaration at paragraph 2(b) below, and that part of the injunction made consistent with that declaration, that any streams of ITV, Channel 4 and/or Channel 5 to mobile devices via any mobile telephone network are acts of infringement of the Claimants' film and broadcast copyrights has caused the Defendant loss because such acts do not involve infringement of the Claimants' copyrights, and it appears that the Defendant should be compensated for that loss, the Claimants will comply with any order that the court or the Court of Appeal may make.

**IT IS DECLARED THAT:**

1. The Defendant's challenge to the *vires* of section 20(1)(c) of the Copyright, Designs and Patents Act 1988 fails.
2. The Defendant has infringed the Claimants' film and broadcast copyrights by streaming to members of the public via its service at [www.tvcatchup.com](http://www.tvcatchup.com):
  - (a) All and any streams of the following channels broadcast by one or more of the Claimants, namely: ITV+1, ITV2, ITV2+1, ITV3, ITV3+1, ITV4, ITV4+1, 4+1, E4 , E4+1, CITV, More4, More4+1, Film4, Film4+1, 4seven, 4music, 5+1, 5USA, 5USA+1, 5\*;
  - (b) Any streams of ITV, Channel 4 and/or Channel 5 to mobile devices via any mobile telephone network;
  - (c) Any streams of ITV, Channel 4 and/or Channel 5 to users situated out of the region to which the original broadcast was made.
3. To the extent that the Defendant has streamed ITV, Channel 4 and/or Channel 5 to members of the public by cable (which includes transmission via the internet but does not include transmission to mobile devices via any mobile telephone network)

and to users situated in the region to which the original broadcasts were made, it has not infringed the Claimants' copyright by reason of the defence in section 73 of the Copyright Designs and Patents Act 1988 ("the Defence").

4. It is not possible to interpret section 73 of the Copyright Designs and Patents Act 1988 so as to be compatible with Article 5(3)(o) of Directive 2001/29 of the European Parliament and of the Council of 22<sup>nd</sup> May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

**AND IT IS ORDERED THAT:**

**Injunction**

5. The Defendant is restrained, whether acting by itself its directors, employees, officers, agents or otherwise howsoever, from doing any of the following acts without the licence of the respective Claimant, that is to say:
  - (a) Communicating to the public, whether via [www.tvcatchup.com](http://www.tvcatchup.com) or otherwise, broadcasts made by the Claimants and each or any of them, save for any broadcasts to which the Defence applies.
  - (b) Making transient copies in the buffers of the Defendant's servers of films made by the Claimants, save for any films included in broadcasts to which the Defence applies.
  - (c) Authorising any of the acts aforesaid.

**Damages Enquiry/Account or profits**

6. There shall be an inquiry as to the damage caused by the Defendant's acts of copyright infringement or at the Claimants' option an account of profits. The parties have permission to apply for further directions in relation to the inquiry or account.
7. The Defendant must pay to the Claimants such sums as may be found due upon taking such inquiry or account together with interest thereon at such rate and for such period as the court hearing the inquiry or account shall consider appropriate.
8. The costs of the inquiry or account shall be reserved to the court hearing the inquiry or account.

9. On or before 4pm on Monday 4 November 2013 the Defendant must make and serve on the Claimants a witness statement setting out the following information, for each year since the inception of its service:
- (a) the total revenue generated by the Defendant since its incorporation;
  - (b) the total costs incurred by the Defendant in operating its service (and excluding its costs in these proceedings) broken down as far as possible by reference to categories including wages, consultancy fees, licence fees, online services, premises and equipment;
  - (c) BARB monthly figures showing (inter alia) the percentage share of total viewing of each of the channels included in the Defendant's service.
  - (d) Such Google analytics figures as are available for the Defendant's website at www.tvcatchup.com, since the incorporation of the Defendant.
10. After provision of the information set out in the aforesaid paragraph, the Claimants have permission to apply for further information reasonably necessary to enable them to determine whether to elect for an inquiry as to damages or an account of profits.
11. The Claimants shall within 28 days after the provision of the information set out in paragraph 9 above or any further information provided pursuant to paragraph 10 above, give notice to the Defendant as to their election between an inquiry as to damages or an account of profits.

#### **Publication and Dissemination**

12. For the period of 6 months from 7<sup>th</sup> October 2013 the parties shall publish in the press release section of their respective websites at www.tvcatchup.com, www.itv.com, www.channel4.com and www.channel5.com a statement that the outcome of this litigation has been embodied in a Court Order, and provide the text of or a link to a copy of this Order and avoid any further comment or discussion on their respective website when providing the text of or the link to the copy of this Order.

### **Costs**

13. The Defendant must pay to the Claimants' 80% of their costs of this Action on the standard basis, such costs to be assessed if not agreed.
14. The Defendant shall by 4pm on Monday 4<sup>th</sup> November 2013 make an interim payment on account of those costs to the Claimants solicitors in the sum of £200,000.
15. Interest shall be payable on costs as follows:
  - (a) Insofar as any payments on account of those costs or any of them have been made by the Claimants to their solicitors prior to the date of this Order, then at a rate of 1% over base rate from the date such payments were made until the date of this Order; and
  - (b) On all costs from the date of this Order, at the judgment rate.

### **Permission to Appeal**

16. The Defendant has permission to appeal that part of the declaration at paragraph 2(b) above, and the injunction made consistent with that declaration, that any streams of ITV, Channel 4 and/or Channel 5 to mobile devices via any mobile telephone network are acts of infringement of the Claimants' film and broadcast copyrights.
17. The Claimants have permission to appeal that part of the declaration at paragraph 3 above which declares that the defence in section 73 of the Copyright Designs and Patents Act 1988 applies to the Defendant's streams of ITV, Channel 4 and/or Channel 5 to members of the public over the internet.

**Claim No HC10C01057**  
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**ORDER**

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