



Wiggin Secures BPI Victory over CD-WOW Imports

The BPI, represented by Wiggin LLP and suing on behalf of six claimants and representing other members of the British Phonographic Industry Limited and Phonographic Performance Limited, has achieved an important success for the industry in respect of the parallel import of CDs into the UK.

CD-WOW were active selling CDs on-line and were the second largest Internet importer of CD and related products into the UK. In 2002, the BPI commenced proceedings against the businesses behind CD WOW and one of its directors and shareholders, alleging that CD-WOW's importing of CDs to UK consumers infringed copyright. Subsequently, in 2004, the case was settled weeks before trial. The settlement involved CD-WOW giving undertakings to the Court that it would not despatch CDs and music DVDs to the UK market where those CDs and music DVDs had not been first placed on the market with the consent of an EEA copyright owner. However, as a result of the case settling, there was no ruling from the Court on the copyright issues involved.

Despite the undertaking being clear and one would assume relatively straightforward in terms of its application, CD-WOW did not comply as agreed and continued to supply non-compliant CDs in the UK. In September 2005, a claim for damages resulting from the breach of contract, in this instance the settlement agreement, was commenced.

In determining CD-WOW to be in breach of the terms of the Settlement Agreement, Mr Justice Evans-Lombe stated, "CD-WOW were ... in substantial breach of the Court's order."

Mr Justice Evans-Lombe "unhesitatingly rejected" the retailer's claims that it was simply human error that led to the illegal importation of these CDs to the and ruled that the company was in contempt of court and had "no tenable grounds of defence to the Claimants' copyright rights."

Simon Baggs, acting for the BPI stated, "This finding of contempt is a very significant step in the litigation in that it has finally revealed that the breaches by CD-WOW were not inadvertent but instead were very significant."

Justice Evans-Lombe pointed to "strong evidence that CD-WOW was committing widespread breach of the undertakings ... when the contempt application was launched" and that "CD-WOW had taken no effective steps to ensure compliance with the undertakings even after an application for contempt had been served".

Simon Baggs stated "Of even greater significance is that the Court went on to conclude that the result of establishing breach of the Court's Order was that the Claimants had also established breach of copyright and thus were entitled to damages. This finding of breach of copyright means that the Court has now made a clear finding that the operation of an internet retail business that sells "grey goods" that are first placed on the market outside the EEA infringes UK copyright even if that business is based outside the EEA - for example in Hong Kong."

Commentators have noted that the ruling has tightened UK rules on parallel importing, where goods are imported from outside the EU and sold cheaply in the region without the copyright owner's permission.

BPI General Counsel Roz Groome said: "The court has delivered a clear message to all companies engaged in importing music CDs and DVDs into the UK from outside Europe without consent - such conduct is clearly and unequivocally a breach of copyright."

On the question of liability for the breach of copyright, the Court noted that the "Claimants' principal case for infringement of copyright was one of primary infringement under Sections 16 and 18 of the CDPA and found that "on the facts ... CD-WOW has "no tenable ground of defence" to the Claimants' claim for damages for primary infringement of the Claimants' copyright rights under sections 16 and 18 of the CDPA".

Simon Baggs stated "This decision therefore rejects contentions that Internet businesses can base themselves offshore and avoid liability for infringement of UK copyright."

The claimants sought an enquiry as to damages for infringement of copyright and, the court found they were entitled to that relief. The question, however, arose as to the width of that enquiry. As the court noted, it has no accurate idea of the scale of the breaches (although it envisaged that they are likely to be substantial) until a detailed inquiry has taken place. That inquiry is listed for 2 July 2007.

The team representing the UK record industry and instructed by the BPI were:

- Richard Spearman QC - Counsel - 4-5 Gray's Inn Square
- Mark Vanhegan - Counsel - 11 South Square
- Simon Baggs - Partner - Wiggin LLP
- Neil Parkes - Solicitor - Wiggin LLP
- Ruth Clark - Solicitor - Wiggin LLP
- Alexis De Vere - Paralegal - Wiggin LLP

For more information see the BPI Press Releases, 23 February 2007 and 20 March 2007; "Wiggin secures BPI victory on parallel imports" The Lawyer, 21 March 2007; "BPI triumphs in CD Wow court case" Music Week, 20 March 2007; "Record companies win victory on parallel imports" 4-5 News Release, 20 March 2007; for access to the High Court judgment see <http://www.bailii.org/ew/cases/EWHC/Ch/2007/533.html>