

IN THE WESTMINSTER MAGISTRATES' COURT
THE GOVERNMENT OF THE UNITED STATES OF AMERICA

- V -

RICHARD O'DWYER

Ruling of District Judge Purdy dated 13th January 2012. Extradition Act 2003. Issues: (i) Extradition offence/dual criminality see S.78 (4) (b)/137 (ii) passage of time: S.82 (iii) Human Rights: disproportionate: Article 8 ECHR/forum? Section 87(2).

Advocates: Pros: J. Jones
Def: B. Cooper

1. Background.

Richard O'Dwyer is a Requested Person by virtue of a U.S. Government extradition Request, seeking a trial for alleged criminal **copyright infringement**, dated 4th March 2011 and certified (pursuant to section 70 Extradition Act 2003) by the Secretary of State on 15th March 2011. He is a U.K. citizen, now 23 years old, born on 5th May 1988. A warrant for his arrest was granted by this court (section 71, by District Judge Evans) upon which he was arrested on 23rd May 2011 being brought before District Judge Zani that same day. All procedural requirements of the Initial hearing were resolved, unchallenged, in favour of the U.S.A.. Consent was not forthcoming. Conditional bail has been enjoyed throughout these extradition proceedings. Complaint is made of the operation by Richard O'Dwyer of a website "**TVShack.net**" by which, in essence, he is said to have enabled the web surfing public free access to copyrighted feature films/ "movies" and TV programmes earning "**over \$230,000 in advertising revenue**". The complaint runs from about December 2007 to 29th June 2010 when a U.S. "**seizure warrant**" seized the domain name "**TVShack.net**". However, the U.S.A. complains that "**within one day**" Richard O'Dwyer and co conspirators switched to a new identity "**TVShack.cc**" and carried on as before.

2. Hearing Chronology.

Following the Initial hearing the case came before Deputy Senior District Judge Wickham on 13th June 2011. The matter was opened. A statement of issues was served. An opening note was ordered by 24th June, Defence evidence by 31st July any further U.S. evidence by 9th September with a review hearing on 12th September 2011. The case then came before me for the full extradition hearing on 3rd November being adjourned part heard until 22nd November 2011 and then to today for this ruling.

3. Issues/Challenges.

Mr Ben Cooper for Richard O'Dwyer pursues **three identified challenges** to an order for extradition. **Firstly** that this Request is **not an extradition** offence(s) per **S.78(4)(b) Ex Act 2003** i.e. the complaints do not meet the dual criminality requirement of the conduct being, if committed in this jurisdiction, an offence(s) here as well as in the U.S.A. **Secondly** that it would be *“unjust or oppressive”* by virtue of the **passage of time** from the alleged offences to extradite for trial per **S.82 Ex Act 2003**. **Thirdly** that it would be *disproportionate* to order extradition and thus breach his **Article 8 ECHR** (family life) Convention rights as enshrined in the Human Rights Act 1998 and per **S. 87(2) Ex Act 2003**. A material gloss, if I may so term it, on this third challenge is a submission that if any offence(s) is/are to be prosecuted such can/should take place in this jurisdiction, the so called forum issue. To all these matters I will return.

4. Procedural Formalities.

Mr Cooper helpfully indicates he limits his challenges as I have outlined. Accordingly Mr John Jones for the U.S.A. invites me to find in favour of the prosecution on **all other unchallenged procedural requirements**. For the avoidance of doubt I do. The relevant documents have all been served in the approved way and are in order. Identity is clear. The request is *“to stand trial”* for offences (subject to the dual criminality challenge) which carry in excess of the required minimum 12 months imprisonment (see S.137 (2)). The prosecution contend the comparable offence in this jurisdiction carries 2 years contrary to **S.107 (2A) Copyright, Designs and Patents Act 1988**. There is no dispute the U.S. Request identifies the relevant provisions of US federal (criminal) law. The U.S.A. is a category 2 territory in Part 2 Ex Act 2003 being one (of many) jurisdictions that do not have to furnish a *prima facie* case being a **“Designated”** territory by the Secretary of State. I observe the U.S. procedure seems to involve that any extradition request follows a decision that *“probable cause”* exists evidentially, a concept very akin to a *prima facie* case although not for decision here.

5. Complaint.

For completeness I set out the particulars alleged in the instant Request from the affidavit of John M. Reh being, since August 2010, a Special Assistant U.S. Attorney in the U.S. Attorney's Office for the Southern District of New York, sworn on 23rd February 2011 in New York.

Under **“Summary of the Facts of the Case”** paragraphs 5-9:

5. *Many websites involved in the illegal distribution of copyright-protected content over the Internet maybe divided into two classes: “linking” websites and “cyberlocker” websites. “Linking” websites generally collect and catalog links to files on third party websites that contain illegal copies of copyrighted content, including movies, television programs and music. Linking websites organise these links by movie title or genre, among other ways, to make them easily accessible. Users simply click on a link to begin the process of downloading or streaming to their own computer an illegal*

copy of a movie, television programs or music file from the third party website. The third party websites on which the illegal copies of movies and television programs are stored for later downloading or streaming are sometimes referred to as “cyberlocker” websites. Cyberlocker websites enable users to upload infringing content and often feature high-capacity data connections that allow users to download or stream that content relatively quickly.

- 6. Beginning in or about December 2007, O’Dwyer, a citizen of the United Kingdom who resides in the United Kingdom, owned and operated a linking website that offered to the public free downloading and/or streaming of thousands of copyrighted movies and television programs, without authorisation from the copyright holders. The original website was named TVShack.net. The TVShack.net website was hosted on a computer assigned the Internet Protocol (“IP”) address 84.22.98.3, which was located at an Internet Service Provider (“ISP”) in the Netherlands. TVShack.net contained links to third party websites that hosted thousands of movies and television programs from which copyrighted first run and other movies and television programs could be downloaded or streamed. For example, on June 15, 2010, at approximately 1.37 pm, TVShack.net’s homepage listed seven movies as the “Most Popular Movies Today”, all of which were available for downloading or streaming through TVShack.net. Each of them had been viewed thousands or tens of thousands of times by individuals throughout the world, including the United States. As of that date, all seven movies were playing in the theatres, all were copyrighted, and the copyright holders had not authorised the movies for third party distribution over the Internet by TVShack.net or any other website.*
- 7. When a user clicked on a movie or television show title on the TVShack.net website, the user was directed to a cyberlocker from which the movie or television program could be downloaded or streamed. Often the TVShack.net website provided links to more than one cyberlocker to increase the chances that a user could reliably download or stream the content that they have selected. In a “Site News and Announcements” section of the TVShack.net website, postings dated April 19 2010, May 4 2010 and May 7 2010, announced that TVShack.net supported links from popular cyberlocker websites, including DivxDen.com, NovaMov.com and VideoWeed.com.*
- 8. TVShack.net also encouraged its users to add links to infringing content. A step by step guide called “How to Add a Link to TVShack” was included in a portion of the site called “Site Help Rules”. The guide instructed users that “only full movies and full TV episodes are accepted”. The website did not accept trailers or promotional material.*
- 9. Further the “FAQ” or “Frequently Asked Questions” portion of the TVShack.net website contained an admonishment to users who complained about delays downloading or streaming content from a popular cyberlocker website linked to TVShack.net. Specifically, TVShack.net reminded its users about the amount of money that they were saving by viewing the movies and television programs via the TVShack.net website. In particular, TVShack.net reminded its users: “you’re saving quite a lot of money (especially when putting several visits to the theatre or seasons together) by*

having to wait a little bit of time” to access infringing content through the website.”

Mr Reh deals with the provisions of U.S. law and the procedural history leading to this Request. He states (@ para 28) **“over \$230,000 in payments”** from advertising has been identified. Additionally Richard O’Dwyer was traced through I.S.P. enquiries and identified as living in Bolsover, Chesterfield and a Sheffield Hallam University student studying **“games software development and interactive media”** (see para 30). The complaint states (@ para 11) **“O’Dwyer did not charge users of TVShack.net to download or stream content. Instead he earned money from hosting advertisements on various portions of the TVShack.net website. The more popular or frequently visited a website is, the higher the advertising fee it can command. According to Alexa.com, an organisation that ranks website popularity based on frequency of visits, as of on or about June 28, 2010, TVShack.net was the 1779th most popular website in the world and the 1419th in the United States”**. Following seizure of the original domain name on 29th June 2010 **“within one day O’Dwyer and one of his co conspirators... registered a new domain name, TVShack.net to TVShack.cc which was hosted on a server located at an ISP either in Germany or the Netherlands. O’Dwyer and the co conspirator knew that TVShack.net had been seized by law enforcement authorities in the United States. TVShack.cc continued to offer copyrighted movies and television programs under the new domain name without authorisation from the copyright holders...Also posted on the homepage of this new website was the photograph of a rap music group and the title of one of their songs “F*ck the Police”** (see para 12). Alexa.com on 28th October 2010 placed TVShack.cc as 3900th most popular website in the U.S.A. and 3400th in the world with **“visitors”** to TVShack.cc going from 10,290 per month at the end of June 2010 to 185,400 by September 2010 (see para 14).

On 29th November 2010 City of London Police arrested Richard O’Dwyer, seizing two computers. In interview, relied on in the U.S. Request, he is said to have accepted owning TVShack.net and TVShack.cc **“earning approximately £15,000 per month”** from online advertisements hosted on those sites. He also said that TVShack.cc was not receiving as much traffic as TVShack.net, but was **“slowly rebuilding its popularity”** (see para 16).

In summary, therefore, it is clear the U.S. Request identifies Richard O’Dwyer as operating, while physically in the U.K., but earning fairly substantial sums from persons in the U.S.A. from advertisements, websites enabling (exactly how is said to be crucial to this Request) films (movies) and T.V. programmes to be downloaded in breach of U.S. copyright law.

6. Additional Evidence.

The Defence have served a significant bundle of documents upon the prosecution and the court. This material includes statements from Richard O’Dwyer himself, both parents, his sister and staff at Sheffield Hallam University. **All** has been considered. The family statements, if I may so term them, stress their entirely understandable anxiety at the prospect of Richard O’Dwyer being extradited, their fears for him and envisaged difficulties in visiting the U.S.A. following an extradition order. Dr Peter O’Dwyer is a retired general practitioner and Richard’s father. He says (statement

11th October 2011) *“I would worry about Richard’s emotional health if he was forced to go to the U.S.A. as he is a quiet introspective, vulnerable personality”*. Richard O’Dwyer’s statement of 13th October 2011 says *“I am not guilty of these charges. I have not downloaded films, documentaries or programmes onto my server”*. He maintains TVShack *“worked exactly like the Google search engine... (it)... directed users through the use of searches to websites... at no point was there any infringing material, such as movies or programmes on my server. It just directed users to other websites by providing the link”*. Christopher Bates a senior lecturer in software engineering at Sheffield Hallam University (statement 11th October 2011) says of his student *“If Richard is to achieve his potential then it is vital that he completes his current placement year and that he returns to university in the next academic year to complete his degree”*. I have also considered an affidavit dated 25th August 2011 from a defence attorney Joshua Dratel who practices law in New York State and has done since 1982. His affidavit, which runs to 29 pages, addresses bail issues, pre trial confinement the *“projected sentence”* faced and the *“nature of any post conviction and post sentencing confinement Mr O’Dwyer might be subject to in the U.S. federal prison system”*. In his opinion *“if convicted on both counts”* sentence *“would be limited to a maximum 120 months imprisonment”* (see para 55) applying guidelines and local U.S. sentencing law and practice. Reference is made (para 67) to the fact parole was abolished in the U.S. federal criminal justice system in 1984 meaning *“inmates invariably serve 85% of their sentences”* which leads to overcrowding and all the associated issues involved therewith. He contends there are *“multifaceted implications for ECHR Article 3”* (para 68). Additionally some diagrams seeking to illustrate that which is said to have occurred have been produced and provided. I stress again **all of that provided has been considered** albeit, in my judgement, the relevance and/or weight this, an extradition, court can/should attach to some aspects of the material is necessarily more restrictive. By way of (hopefully) obvious example the family’s heartfelt concern cannot sway the court but is only relevant to a factual assessment of Article 8 – family life – considerations. Similarly Richard O’Dwyer’s denial of wrong doing is not for this, an extradition not trial, court to determine any more than if the U.S. court considered a U.K. Request.

7. Extradition – Offence/Dual Criminality.

S.78 (4)(b) Ex Act 2003 requires this court to be satisfied the conduct involved if committed in the U.K. would be an offence against the criminal law. Specifically **S.137 (2) (b)** requires:

“the conduct would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment for a term of 12 months or a greater punishment”.

Mr Jones contends the substantive offence would be one contrary to **107(2A) Copyright, Designs and Patents Act 1988:**

“A person who infringes copyright in a work by communicating the work in public
(a) in the course of business, or
(b) otherwise than in the course of business but to such an extent as to affect prejudicially the owner of the copyright commits an offence if he knows or has reason to believe that, by doing so he is infringing copyright in that work”.

The excitingly named **Electronic Commerce (E.C. Directive) Regulations 2002** (S.I. 2002 No 2013) provides in Regulation 17 (headed “*mere conduit*”) exemption from “*any criminal sanction*” anyone who does not “*initiate*” a transmission does not “*select the receiver*” or “*select or modify the information contained in the transmission*”. The only reported decision in this jurisdiction is a first instance case. **R v Rock & Overton** at the Crown Court in Gloucester (T20097013) decided by His Honour Judge Ticehurst on 6th February 2010 and provided to me in the form of a 34 page copy of the learned judge’s ruling. A submission for dismissal of various counts contrary to **S.107 (2A)** was upheld and (following guidance from Lord Bingham in **R v Rimmington & Goldstein** [2005] UKHL 631) the Crown did not seek to pursue the count of conspiracy to defraud. The learned judge found the Reg. 17 defence applied. While both counsel acknowledge some uncertainty if **Rock & Overton** has any binding affect in these proceedings it is clearly persuasive and instructive on the application of S.107 (2A). I also observe the decision was not taken on appeal by the Crown. I have also had cited the Australian case **Universal Music Australia Pty Ltd v Cooper** [2005] FCA 972 being the judgement of Tamberlin, J in the Federal Court of Australia cited by HHJ Ticehurst. Those decisions are most helpful. I say now, however, that I am not assisted, despite Mr Cooper’s doggy pursuit of the point, by a **BBC** press report dated 24th February 2011 reporting “no evidence” being offered at the Crown Court in Bristol involving Messrs Lanning and Cartledge as defendants alleged infringement of “*American films*” as being a helpful aid to construing this area of the law. An associated report from the **Daily Telegraph** (24/2/11) says “A CPS spokeswoman said the Crown Prosecution Service advised the Court today that it is neither necessary nor appropriate to continue to pursue this matter in a criminal court”. Mr Cooper argues the CPS as a body must be taken to concede no offence exists. Not only is a press report, however reputable the source, of limited depth but no such view can properly be inferred from the quotation just cited. More weight must be given to observations from the civil courts as to the general desirability of that which can become highly technical evidence in a specialist field of law being heard before a High Court Judge skilled in such patent/copyright matters rather than a jury. However, wise though such entreaties plainly are, Parliament has made conduct found to be contrary to S.107 (2A) criminal. No court can change the statutory offence. The issue is whether the conduct actually alleged falls foul of S.107 (2A) not, as I fear Mr Cooper was urging, that no offence in law actually exists. It does exist unless or until S.107 (2A) is amended or repealed.

I am grateful to both learned counsel for their original and additional written submissions as well as oral argument. Without, I hope, discourtesy the lengthy submissions come to a comparatively narrow dispute. Mr Cooper argues nothing in the instant Request amounts to a basis for saying Richard O’Dwyer “*made available*” copyright material that came from remote websites not the two domain names operated by Richard O’Dwyer. Reliance is placed on HHJ Ticehurst’s adopting of Tamberlin, J’s approach in the Australian case of **Cooper supra**. At para 48 HHJ Ticehurst found “*no recordings were actually stored on the defendant’s website*” and that, adopting Tamberlin, J’s words “*it is the remote websites which make available the sound recordings*”, hence his Honour’s upholding of the “*mere conduit*” defence. Mr Jones stopped short – perhaps only just – of arguing **Rock & Overton** is wrongly decided although he submits it is overly restrictive. Instead he contends **S.107 (2A)** is properly reflective of Richard O’Dwyer’s conduct which can be distinguished from **Rock & Overton**. Firstly both **TVShack** websites were entirely

in the hands of Richard O'Dwyer and his co conspirators requiring third parties to sign up to TVShack and be vetted before going further. Secondly he argues, unlike **Rock & Overton**, there was no attempt to protect copyright, he, Richard O'Dwyer, knew materials were subject to copyright and actively taunted already cited efforts in June 2010 to seize **TVShack.net**. Accordingly Mr Jones argues (@ para 15 of his written submissions of 31st October 2011) "*O'Dwyer would not be able to avail himself of the "mere conduit" defence enumerated in Regulation 17 because he was intimately involved in deciding who was allowed to post links on the TVShack websites, which links would be posted...*" (etc) & (para 16 continues) "... a plain reading of the phrase "make available" in this context makes clear O'Dwyer "made available copyrighted material". HHJ Ticehurst (@ para 71) in **Rock & Overton** held "*make available should bear its ordinary and natural meaning*". He distinguished between providing money "*directly to*" another as opposed to a financial adviser who may "*point*" another to a bank meaning the bank alone "*makes available the money*".

I have endeavoured to weigh these subtle distinctions. The diagrams of how as a matter of electronic mechanics (if I may term it) the TVShack websites actually operated favour HHJ Ticehurst's restrictive construction. To my mind there is much in the distinction factually, always remembering these matters are allegations of conduct which a trial court alone can resolve – that Mr Jones contends between the instant matter and **Rock & Overton**. I also have in mind the mischief Parliament had in mind. Accordingly in my judgement I am satisfied the conduct alleged in the instant request meets the dual criminality test and would be an offence in this jurisdiction.

8. Passage of Time.

S.82 Ex Act 2003 requires this court to discharge a Request if it would be "*unjust or oppressive*" due to the passage of time from the alleged offence to order extradition. Mr Cooper complains that Richard O'Dwyer having been arrested by City of London police on 29th September 2010 and interviewed should, if there be a case, have been charged and prosecuted in this jurisdiction. Instead the U.S. extradition relies in part on the evidence obtained following that arrest. Upon answering police bail on 23rd May 2011 at Snow Hill Police Station in the City of London was "released" from the U.K. enquiry and duly arrested in these extradition proceedings.

At para 2.1 (Defence submissions 13th November 2011) the position is put as follows:

"... he is prejudiced by the timing of his prosecution in the wrong forum. It is understood that the U.S. has delayed his prosecution in order to obtain evidence from cooperating witnesses, such as to create an unlevel playing field at trial. The Defendant would have lost any benefit he might have gained if he was in a position to cooperate with the prosecution himself. Further prejudice derives from the quality of evidence from cooperating a witness who has been offered incentives (of avoiding prosecution altogether) to implicate an accused".

Mr Cooper claims it is "*oppressive*" due to "*the tactical delay*" by the US prosecutors given the inevitable disruption to his university education if extradited.

I have squarely in mind the case law in particular *Gomes & Goodyer v Government of Trinidad & Tobago* [2009] UKHL 21. The House of Lords stressed regard being had to weighing the gravity of the offence and that “*hardship, a comparatively common place consequence of an order for extradition, is not enough*” (see para 31). The test is “*would it be unjust or oppressive to extradite*” (@ para 29) considering fair trial “*...the presumption should be that justice will be done despite the passage of time and the burden should be on the accused to establish the contrary*” (@ para 36)

The prospect of a serious criminal trial for anyone (presumed, as they are, innocent until the contrary be proved) is obviously alarming. That trial abroad in any foreign land is, plainly, even more daunting. However, enforcement of cross border criminal justice is intended, in part at least, to ensure (alleged) victims of crime and the wider public confidence in criminal justice is not thwarted by national borders. The instant complaints are 2007-2010. The evidence is all available. Changes in the prosecution or defence position in terms of evidence or witness availability frequently occurs and does not mean a fair trial is thereby denied. I can find no tenable basis for holding a fair trial, with all appropriate trial safeguards, cannot take place in the instant case. Accordingly I reject the challenge pursuant to S.82 Ex Act 2003.

9. Human Rights/Article 8/Forum: S.87 (2) Ex Act.

An extradition Request must be discharged if any Convention rights is/are not safeguarded to the court’s satisfaction. I reiterate that already set out as to the acknowledged hardship, the law of extradition accepts, follows from an order for extradition. Personal, family, friends and employment/educational aspects are inevitably disrupted, sometimes with little serious prospect of future repair. Enforcement of cross border criminal justice also, as just stated, cannot be lightly thwarted by a person staying or being in another jurisdiction especially so in the modern world with ease of movement not only of persons and tangible property but via all manner of web based activities. Richard O’Dwyer is young – 23 years – and embarked on a degree course with his immediate family and social network near or relatively near in and around his part of England. Mr Cooper argues trial in the U.S.A. “*would expose him to trial in an inappropriate forum and be disproportionate*” (@ para 4.1 – submissions 13th November 2011). He contends a violation of Articles 5 & 6. Reliance is placed on observations on Article 8 in *Birmingham & others v U.S.A.* [2007] 2 W.L.R. 635 although extradition was, I note, ordered in that case. The high point for the Defence in *Birmingham* is Laws, LJ @ para 121:

“I do not accept (the U.S.) submission that the possibility of trial in the United Kingdom is legally irrelevant. There might be an instance in which such a possibility could tip the balance of judgement in favour of a conclusion that a Defendant’s extradition would amount to a disproportionate interference with his Article 8 rights.”

Such a finding would not lead to a U.K. trial but a discharge because Article 8 is breached. I respectfully endorse Maurice Kay, LJ in *Onwuzulike v USA* [2009] EWHC 1395 reviewing *Birmingham supra* and issues concerning forum being “*a proper matter for consideration on an extradition hearing... what it does not and*

could not do is raise any presumption or give any steer in relation to a particular case. I do not consider that it sheds any new light on what we have to decide” (@ para 32). Very powerful observations do come from Lord Phillips, PSC in *Norris v USA* [2010] UKSC 9 (@ para 67) disapproving of such general considerations albeit accepting, as the *ratio* of *Norris* does, the exceptional circumstances in which Article 8 will lead to a discharge of an otherwise perfectly proper extradition request. His Lordship said “*extradition proceedings should not become the occasion for a debate about the most convenient forum for criminal proceedings...Unless the judge reaches the conclusion that the scales are finely balanced he should not enter into any enquiry as to the possibility of prosecution in this country.*” I am well aware of HM Attorney General’s guidelines on USA extradition Requests and- produced by the Defence- those adopted by **Eurojust** in seeking to resolve an appropriate jurisdiction in a cross border investigations within the E.U.

Mr Jones argues any Article 5/6 point is “*unarguable*”. He submits there is no evidence that any prosecuting authority in the U.K. has any intention or wish to charge Richard O’Dwyer. Contrary to Mr Cooper’s written submissions he has **not** been charged in the U.K. but was on police bail. Reliance is placed on the fact **S.83A Ex Act 2003** has not been brought into force requiring/permitting consideration of a forum argument. The **Extradition Review Panel (2011)** have recommended against implementation. In any event such is for Parliament and Mr Cooper’s purported Article 8 argument is really based on **S.83A** being in force, which it is not.

I accept Mr Cooper’s contention video link facilities and the like *potentially* permit hearing a criminal case in the U.K., calling US witnesses via video link and procedurally all material evidence could, in theory, be adduced for consideration. The court regularly assists overseas jurisdictions in such cases from court 3 in this building pursuant to the **Crime (International Cooperation) Act 2003**. None of that means I should discharge this request. There are said to be direct consequences of criminal activity by Richard O’Dwyer in the U.S.A. albeit by him never leaving the north of England. Such a state of affairs does not demand a trial here if the competent U.K. authorities decline to act and does, in my judgement, permit one in the U.S.A.

10. Conclusion.

This has necessarily been a lengthy ruling given the arguments and material put forward. A dispassionate appraisal of all matters is the essential function of any court. I acknowledge the endeavours of both learned counsel. I repeat again **all** matters have been considered even if not expanded upon or cited directly here. That said, for the reasons given, I reject all challenges advanced to this Request. No bars or other challenge being raised or found I **send the case to the Secretary of State** (for her consideration of the statutory criteria) pursuant to **Section 87(3) Ex Act 2003**. Richard O’Dwyer has the right to pursue an appeal to the High Court so long as it is submitted in time and in proper form (**s 103 Ex Act 2003**) but cannot be heard until after the Secretary of State has confirmed an order for extradition.